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Sally J. Cummins
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Preface

I am very pleased to welcome this latest annual edition of the *Digest of United States Practice in International Law* for the calendar year 2004. It is my hope that practitioners and scholars will find this new edition, tracking developments in international law during an eventful year, to be useful. We look forward to the imminent publication of the next volume, for the calendar year 2005, and to presenting as well editions for every subsequent year.

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

Don Wallace, Jr.
Chairman
International Law Institute

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Introduction

I am pleased to introduce the annual edition of the *Digest of U.S. Practice in International Law* for 2004. This volume covers the period just prior to my becoming Legal Adviser and follows the recent release of the two-volume *Digest 1991–1999*. I believe you will find this volume a timely and useful resource, reflecting the work of the office under the leadership of my predecessor, William H. Taft, IV.

Significant legal issues arose throughout 2004 related to the response to international terrorism, compliance with international human rights and humanitarian law, and arms control and nonproliferation throughout the world, including Iraq and Afghanistan, Israel, Gaza and the West Bank, North Korea, Iran, Libya and Sudan. To provide but a few examples, the United States entered into the first agreements under the Proliferation Security Initiative, Secretary Powell testified to the commission of genocide in Darfur, and the U.S. Supreme Court issued two decisions relating to detention of enemy combatants.

The United States also continued to be actively engaged, through negotiation of treaties, arbitrations, diplomatic initiatives, and domestic litigation, in legal issues related to global challenges including international criminal law, the law of the sea, environment, trade and investment, consular functions, privileges and immunities, international claims and state responsibility, commercial and family law, treaty practice, cultural property, and sanctions. In 2004, among other things, the United States undertook to implement a judgment of the International Court of Justice in *Avena and other Mexican Nationals (Mexico v. United States)* concerning U.S. violations of Article 36 of the Vienna Convention on Consular Relations, and the U.S. Supreme Court issued opinions concerning retroactivity of the Foreign Sovereign Immunities Act and

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international law violations providing a cause of action under the Alien Tort Statute.

The *Digest* remains, in the truest sense, a collaborative undertaking involving the sustained effort of many dedicated members of the Office of the Legal Adviser. For 2004 I want especially to thank Nicole Thornton for taking on the major task of drafting Chapter 18 and Lee Caplan and Marguerite Taylor for drafting Chapter 15. Among the many volunteers whose significant contributions to the current volume deserve to be acknowledged are Gilda Brancato, Matthew Burton, James Filippatos, Katherine Gorove, Duncan Hollis, Andrew Keller, Steve McCreary, Mary McLeod, David Newman, Ash Roach, Heather Schildge, and Wynne Teel. Once again, a very special note of thanks goes to the Department's Senior Reference Librarian, Legal, Joan Sherer, whose technical assistance is invaluable. Assistance from student interns Brett Watkins and Patrick Dennis was essential. Finally, I thank the editor of the Digest Sally Cummins without whom the volume would not exist.

We continue to value our rewarding collaboration with the International Law Institute. The Institute's Director Professor Don Wallace and editor William Mays again have our sincere thanks for their superb support and guidance.

Comments and suggestions from readers are always welcome.

John B. Bellinger, III
The Legal Adviser
Department of State

Note from the Editor

With this *Digest of United States Practice in International Law* for calendar year 2004, I am pleased to publish the eighth volume in the series since the Office of the Legal Adviser resumed publication with *Digest 2000*. As this volume goes to press, the two-volume *Digest 1991–1999* has just been released, the result of a major commitment of time and resources by the Office. While those volumes were also the last in which David Stewart served as co-editor, the *Digest* continues to benefit from his significant contributions.

I want to add my thanks to those of the Legal Adviser for the assistance of everyone in the Office and from other offices and departments in the U.S. Government who made this cooperative venture possible. The assistance of several attorneys in the Office who undertook the drafting of specific chapters—Chapter 15 by Lee Caplan and Marguerite Walter and Chapter 18 by Nicole Thornton—was key to its successful completion. As always, I thank our colleagues at the International Law Institute, Director Professor Don Wallace, Jr., and editor William Mays for their valuable support and guidance.

The 2004 volume continues the organization and general approach adopted for Digest 2000. In order to provide broad coverage of significant developments as soon as possible after the end of the covered year, we rely in most cases on the text of relevant documents introduced by relatively brief explanatory commentary to place the document in context. Each year we refine the organization and presentation based both on the nature of the materials to be covered in the volume and on experience from the previous year. Our general practice is to limit entries in each annual

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Digest to material from the relevant year, leaving it to the reader to check for updates, particularly in court cases.

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 decision by the United Nations to make its Official Document System available to the public without charge provides a welcome source for UN-related documents of all types, available at *http://documents.un.org/*. The UN's home page at *www.un.org* remains a valuable quick source for basic documents such as Security Council and General Assembly resolutions.

A number of U.S. government publications, including the Federal Register, Congressional Record, U.S. Code, Code of Federal Regulations, and Weekly Compilation of Presidential Documents, as well as congressional documents and reports and public laws, are available at *www.access.gpo.gov*. Two particularly useful resources for treaty issues are: Senate Treaty Documents, containing 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, containing 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 Library of Congress provides extensive legislative information at *http://thomas.loc.gov*. The U.S. government's official web portal is *www.firstgov.gov*, with links to a wide range of government agencies and other sites; the State Department's home page is *www.state.gov*.

While court opinions are most readily available through commercial online services and bound volumes, some materials are available through links to individual federal court web sites

provided at *www.uscourts.gov/links.html*. The official Supreme Court web site is maintained at *www.supremecourtus.gov*. Briefs filed by the Solicitor General are available at *www.usdoj.gov/osg*.

Selections of material in this volume were made based on judgments about the significance of the issues, their possible relevance for future situations, and their likely interest to scholars and other academics, government lawyers, and private practitioners.

As always, suggestions from readers and users are welcomed.

Sally J. Cummins

CHAPTER 1

Nationality, Citizenship and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Revocation of U.S. Citizenship

On April 30, 2004, the U.S. Court of Appeals for the Sixth Circuit affirmed a lower court ruling revoking the U.S. citizenship of John Demjanjuk. *U.S. v. Demjanjuk*, 367 F.3d 623 (6th Cir. 2004), *reh'g denied*, *U.S. v. Demjanjuk*, 2004 U.S. App. LEXIS 14442 (6th Cir. 2004), *cert. denied, Demjanjuk v. U.S.*, 125 S. Ct. 429 (2004). The district court based its revocation on a finding that Demjanjuk had willfully misrepresented material facts concerning his involvement in Nazi persecutions to gain admission to the United States. *U.S. v. Demjanjuk*, 2002 U.S. Dist. LEXIS 6999 and U.S. Dist. LEXIS 6991 (N.D. Ohio 2002). *See Digest 2002* at 5–8, which includes a brief summary of the lengthy proceedings against Demjanjuk, including an earlier denaturalization that was set aside. Excerpts below from the Sixth Circuit opinion provide the factual background for the denaturalization case and the legal basis for the decision.

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* * * *

In *Demjanjuk [v. Petrovsky]*, 776 F.2d 571, 575, this Court set forth the factual background for the various cases involving Defendant. We therefore recite only those facts most relevant to the appeal before us. John Demjanjuk is a native of the Ukraine,

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a republic of the former Soviet Union. Demjanjuk was conscripted into the Soviet Army in 1940 and then captured by the Germans, during WWII, in 1942. Later that year, after short stays in several German POW camps and a probable tour at the Trawniki SS training camp in Poland, Demjanjuk became a guard at the Treblinka concentration camp in Poland. Demjanjuk was admitted to the United States in 1952 under the Displaced Persons Act of 1948 and became a naturalized United States citizen in 1958. Defendant denied that he was a Ukrainian guard at Treblinka who was known as "Ivan or Iwan Grozny," that is, "Ivan the Terrible." He has resided in the Cleveland, Ohio area since his arrival in this country.

In the current proceeding, the Government alleges that Mr. Demjanjuk persecuted civilians at Trawniki, L.G. Oksow, Majdanek, Sobibor and Flossenburg Concentration Camps, but not Treblinka, as alleged in earlier denaturalization proceedings. Defendant was identified, in previous proceedings, as well as in the current one, by the Trawniki Camp's Identification Card which contained Defendant's picture. The Trawniki Card, the Government's exhibit # 3, is a German *Dienstausweis* or Service Identity Card, identifying the holder as guard number 1393.

One of the main issues before this Court is whether Demjanjuk was Guard 1393. . . .

* * * *

An individual seeking to enter the United States under the [Displaced Persons Act of 1948 ("DPA")] first must qualify as a refugee or displaced person with the International Refugee Organization ("IRO"). *United States v. Fedorenko*, 449 U.S. 490, 496, 66 L.Ed.2d 686, 101 S. Ct. 737 (1981). The IRO's Constitution identified categories of people who were not eligible for refugee or displaced person status, including, "any . . . persons who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries." *Id.* at 496, n.4. Citizenship may be deemed illegally procured if, during naturalization, an applicant failed to strictly comply with a statutory prerequisite, such as lawful admittance as a permanent resident. *Id.* at 514, n.36 (citing 8 U.S.C. § 1427(a)(1)). In a denaturalization proceeding,

the government must prove its case by evidence that is clear, convincing, and unequivocal, *Kungys v. United States*, 485 U.S. 759, 772, 99 L.Ed.2d 839, 108 S. Ct. 1537 (1988), because United States citizenship is revocable when found to be illegally procured. *Fedorenko*, 449 U.S. at 506 (citing 8 U.S.C. § 1451(a)).

The district court below issued findings of fact and conclusions of law determining that the Government sustained its burden of proving that the Trawniki service pass identifying Defendant's presence at the Nazi training camp was [authentic and admissible]. Under such proof, Defendant's service as a guard at a Nazi training camp, and subsequent concentration camps, would make him ineligible for a visa under the DPA §§ 10 and 13, and therefore, unlawfully admitted, rendering his citizenship illegally procured and subject to revocation under 8 U.S.C. § 1451.

* * * *

This Court reviews questions of law *de novo*. . . .

As previously stated, the Immigration and Nationality Act provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation. 8 U.S.C. § 1451(a); *see also United States v. Fedorenko*, 449 U.S. at 506 (citing 8 U.S.C. § 1451(a)). Citizenship is illegally procured if, during naturalization, an applicant failed to strictly comply with a statutory prerequisite, such as lawful admittance as a permanent resident. *Id.* at 514, n.36 (citing 8 U.S.C. § 1427(a)(1)). Lawful admission for permanent residence requires that the applicant enter the United States pursuant to a valid immigrant visa. *United States v. Dailide*, 316 F.3d 611, 618 (6th Cir. 2003). Therefore, entry in the United States under an invalid visa is a failure to comply with congressionally imposed statutory prerequisites to citizenship which renders any certificate of citizenship revocable as illegally procured under § 1451 (a). *Id.*

Under a Section 10 violation of the DPA, the government must establish that an applicant's willful misrepresentation was material, i.e., that it had a natural tendency to influence the relevant

decision-maker's decision. *Kungys*, 485 U.S. at 771. Although the government must prove its case by evidence that is clear, convincing and unequivocal, it is not necessary for the government to prove that the defendant would not have received a visa if he had not made the misrepresentation. *Id*.

The district court correctly ruled that voluntariness is not an element of an assistance-in-persecution charge under the DPA. The Supreme Court has previously ruled that "an individual's service as a concentration camp armed guard—whether voluntary or not—made him ineligible for a visa." *Fedorenko*, 449 U.S. at 512. Additionally, a defendant need not engage in "personal acts" of persecution in order to be held ineligible for a visa, because an individual's service in a unit dedicated to exploiting and exterminating civilians on the basis of race or religion constitutes assistance in persecution within the meaning of the DPA. *United States v. Dailide*, 227 F.3d 385, 390–91 (6th Cir. 2000).

Furthermore, . . . [i]f Defendant had disclosed the information regarding his service in the Austrian and German armies during his application process, the immigration officials would have naturally been influenced in their decision, because service in such armies leaves applicants ineligible under the DPA. Therefore, upon signing his Application for Immigration Visa, Defendant knowingly misrepresented material facts, leaving his entry to the United States unlawful and naturalization illegally procured.

* * * *

2. Citizenship of Child of Foreign Head of State, Born in the United States

On August 27, 2004, the Department of State advised that a child born in Washington, D.C., when her mother was on a non-official visit to the United States, and whose father was a foreign head of state, could not claim U.S. citizenship because the child was not subject to the jurisdiction of the United States when born here. Her parents had requested a

U.S. passport for her, which was denied. Excerpts from a telegram relaying the Department's conclusion on this case are set forth below.

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* * * *

. . . It is the Department's legal conclusion that [the child] was not born subject to U.S. jurisdiction within the meaning of the Fourteenth Amendment to the U.S. Constitution and Section 301(a) of the Immigration and Nationality Act, and accordingly did not acquire U.S. citizenship as a result of her birth in the United States. Absent some other basis for U.S. citizenship, her passport application must therefore be denied.

* * * *

[The] Supreme Court, in describing the scope of the U.S. Constitution's citizenship clause, has stated that birth to a foreign sovereign (like birth to a foreign diplomat) is one of the exceptions to the general rule of U.S. citizenship for children born in the United States [*United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)]. This is because such a child, due to the parent's official position, is not born subject to U.S. jurisdiction.

. . . The primary purposes for [the exemption from local jurisdiction of a foreign head of state] are to preserve the dignity of the office of the head of state and of the state of which he is sovereign, and to permit the head of state to perform his duties effectively wherever he may be. Considering [the] child to be "subject to U.S. jurisdiction" would be incompatible with both purposes. For example, U.S. citizens are subject to U.S. laws that restrict their activities with respect to certain countries or entities and are subject to U.S. tax obligations. The imposition of such restrictions on [the] child could embarrass both [the head of state] and [his country], and interfere with [the foreign country's] foreign policy objectives.

* * * *

B. PASSPORTS

1. Revocation of Passport Restrictions

Effective February 23, 2004, Secretary of State Colin L. Powell revoked the restriction on the use of U.S. passports for travel to, in, or through Libya, as set forth in Public Notice 4542 of November 24, 2003 (68 Fed. Reg. 65,981). *See* 69 Fed. Reg. 10,806 (Mar. 8, 2004).

2. Revoked, Lost or Stolen Passports

a. Invalidation of certain passports

On March 26, 2004, the Department of State published an interim final rule in the Federal Register amending its passport regulations at 22 CFR Part 51. The amendment clarified, among other things, that passports that are reported lost or stolen are invalid once the Department has registered the reported loss, and that revoked passports are invalidated by the revocation. 69 Fed. Reg.15,669 (Mar. 26, 2004). The Department noted in the Federal Register that "[t]his means that whenever a person has reported to the Department that his or her passport is lost or stolen, and the Department has registered the passport as invalid, the passport will not be usable for travel purposes if it is later recovered. The Department considers the promulgation of this regulatory provision as a matter of urgency to bolster border security by preventing the misuse of a lost or stolen United States passport."

b. Reporting of data on lost or stolen passports

The Department of State announced a new program in association with the U.S. National Central Bureau of Interpol and the Interpol General Secretariat in Lyon, France, to improve "worldwide travel document security and our ability

to impede the movement of terrorists and other criminals." The announcement, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2004/32273.htm.*

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* * * *

. . . [T]he United States is joining other countries in providing current information on issued passports that have been reported lost or stolen to the Interpol's lost and stolen document database, which is available to border authorities worldwide.

. . . Only the passport number, country of issuance and document type will be provided to Interpol. To protect the passport holder's privacy, the name and biographical data from the passport will not be given to Interpol. Should a hit occur against the Interpol database, the hit will be verified with U.S. authorities before action is taken against the bearer of such a passport.

We believe this is a significant step toward curbing not only terrorism but also crimes of many types including identity theft.

3. Passports Issued to Minors

The rule discussed in B.2. *supra* also required the personal appearance of minors under age 14 for all passport applications, with limited exceptions. In addition, during 2004 the Department of State continued to implement the requirement that both parents consent to issuance of a passport to a child. Effective November 1, 2004, an amendment to the two-parent passport consent rule required that the statement of consent from a parent not appearing in person be notarized. *See* 69 Fed. Reg. 60,811 (Oct. 13, 2004), as corrected in 69 Fed. Reg. 61,597 (Oct. 20, 2004). As explained in the Federal Register,

> [t]he purpose of this change is to prevent forgery and to ensure that the individual signing the consent statement submitted with the passport application has been properly identified. This change will substantially reduce

the possibility of the submission of false statements of consent. This rule needs to be implemented immediately to strengthen fraud prevention to avoid further instances of the applying parent submitting a false statement of consent and to reduce the possibility of a U.S. passport being used in an effort to interfere with the custodial rights of the non-applying parent.

Guidance provided to all diplomatic and consular posts in a telegram from the Department of State on implementing the new rule stressed that the personal appearance of both parents is still preferable. The rule also continued to provide that "[i]f the person executing the application in person has documentary evidence that he/she has sole custody of the child (e.g., custody order or death certificate) or demonstrates that there are exigent/special family circumstances, then only one parent is necessary to execute the application." The full text of the telegram is available at *www.state.gov/sl/c8183.htm*.

C. IMMIGRATION AND VISAS

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

a. Petitions and applications concerning transsexual individuals

On April 16, 2004, a memorandum from William R. Yates, Associate Director for Operations to Regional Directors, Service Center Directors, and District Directors in the Bureau of U.S. Citizenship and Immigration Services ("BCIS" or "CIS"), Department of Homeland Security ("DHS"), provided guidance related to the adjudication of petitions and applications filed by or on behalf of, or document requests by, transsexual individuals, including those who have either undergone sex reassignment surgery, or are in the process of doing so. The guidance reiterated existing policy that CIS personnel are not to recognize claims based on

marital relationship where either individual claims to be a transsexual, but also instructs that where gender is not pertinent to the underlying application or petition, CIS personnel are to consider the merits of the application without regard to an applicant's transsexuality.

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

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III. Background

No Federal statute or regulation addresses specifically the question of whether someone born a man or a woman can surgically change his or her sex. Transsexualism is a condition in which a person feels persistently uncomfortable about his or her anatomical sex, and often seeks medical treatment, including hormonal therapy and "sex reassignment surgery." The former Immigration and Naturalization Service (INS) generally took the position that absent specific statutory authority recognizing sex changes for purposes of Federal immigration law, it could not recognize that a person can change his or her sex. In arriving at this conclusion, the INS stressed the following. First, whether a "marriage" qualifies for immigration purposes is a matter of Federal, not State or foreign, law. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.1981). It is well settled that, in enacting immigration and nationality laws, Congress intended the terms "spouse" and "marriage" to include only the partners to a legal, monogamous marriage between one man and one woman. *Howerton, supra*. Moreover, the 1996 Defense of Marriage Act (DOMA), 1 U.S.C. § 7, bans any Federal recognition of same-sex marriages for immigration purposes, and defines marriage as an institution involving a "man" and a "woman". The legislative history of the DOMA also clearly supports a traditional view of marriage, especially one that ties its basic character and importance to children, even though the marriage laws do not require that a couple be physically or mentally ready and able to procreate. *See*, H.Rep. 104–664, reprinted in 1996 U.S. Code Cong. & Admin. News 2905, 2916–19. For all of these

reasons, the former INS maintained, and its successor U.S. Citizenship and Immigration Services (CIS) agrees, that no legal authority permits recognition of homosexual relationships as "marriages" for purposes of immigration and nationality laws, regardless of whether the relationship may be recognized as a "marriage" under the law where the relationship came into existence.

However, neither the DOMA nor any other Federal statute addresses whether a marriage between (for example) a man and a person born a man who has undergone surgery to become a woman should be recognized for immigration purposes or considered invalid as a same-sex marriage. . . .

Current CIS policy disallows recognition of a change of sex so that a marriage between two persons born of the same sex can be considered bona fide for the purpose of spousal immigrant petitions. W. Yates, Memorandum for Regional Directors et al, Spousal Immigrant Visa Petitions (AFM Update AD 2–16) (March 20, 2003). . . .

IV. Guidance

A. Spousal and Fiancé(e) Petitions

To ensure consistency with the legislative intent reflected in the DOMA, and to reiterate existing CIS policy, CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so. For example, a Form I-130, Petition for Alien Relative, or Form I-129F, Petition for Alien Fiancé(e), cannot be approved if one or both of the parties to the petition was born a sex other than what they claim to be at the time of filing. This same policy applies to any immigration benefit that is granted based on a marital relationship. For example, an individual shall not be approved for H-4 status based on a marriage to a principal alien if either the principal alien or the potential H-4 beneficiary was born a sex other than what they claim to be at the time of filing.

* * * *

B. Other Petitions or Applications

In instances where an individual claims to be a transsexual, but the gender of the individual is not pertinent to the underlying application or petition, CIS personnel shall consider the merits of the application without regard to the applicant's transsexuality. Any documentation (whether original or replacement) issued as the result of the adjudication shall reflect the outward, claimed and otherwise documented sex of the applicant at the time of CIS document issuance. For example, an alien with an approved Form I-140, Immigrant Petition for Alien Worker, and Form I-485, Application to Register Permanent Residence or Adjust Status, who underwent sex reassignment surgery shall be issued a Form I-551, Permanent Resident Card, reflecting the claimed sex of the alien at the time of issuance (provided, of course, that the alien submits appropriate medical and other documentation establishing the alien's new claimed gender and legal name). It is important to note that applicants are no longer required, as previously indicated in the I-90 Replacement National SOP at 6–22, to present a Federal court order directing the agency to change its records where such an individual indicates or claims a different gender than the one he or she was born with as reflected in his or her A-file.

* * * *

b. Role of acceptance by foreign country of alien to be removed from United States

On July 19, 2004, Secretary of Homeland Security Tom Ridge and Attorney General John Ashcroft jointly published a notice of proposed rulemaking in the Federal Register to amend regulations implemented by the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") "[i]n light of a conflict among the U.S. courts of appeals over whether a foreign country must commit to accept an alien ordered removed from the United States before the alien may be removed to such a country." 69 Fed. Reg. 42,901 (July 19, 2004). Excerpts below from the Federal Register explain the need for and effect of the new amendments to

establish, among other things, that no such acceptance is legally required.

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The Department of Homeland Security proposes to amend its rules to establish that acceptance by a country is not required under specific provisions of section 241(b) of the Immigration and Nationality Act (Act) in order to remove an alien to that country, and that a "country" for the purpose of removal is not premised on the existence or functionality of a government in that country. This rule clarifies the countries to which an alien may be removed and the situations in which the Secretary of Homeland Security will remove an alien to an alternative or additional country. The Department of Homeland Security proposed rule also makes technical changes. . . .

The Department of Justice proposed rule clarifies the procedure for an alien to designate the country to which he would prefer to be removed, provides that the immigration judge shall inform any alien making such a designation that the alien may be removed to another country under section 241(b) of the Act in the discretion of the Secretary of Homeland Security in effecting the foreign policy of the United States, and clarifies the effect of an identification of a country for removal in an immigration judge's order of removal from the United States. The rule clarifies that acceptance by a country is not a factor to be considered by the immigration judge in identifying a country or countries of removal in the administrative order of removal. The Department of Justice proposed rule also makes technical changes . . .

* * * *

C. Effectuation of Orders and Warrants of Removal

Once an alien receives a final order of removal, the Department of Homeland Security issues a Warrant of Removal, and the process of returning that alien begins. A valid travel document may consist of a passport from that country (and even an expired passport in certain cases), a laissez passer, or other evidence that the

Department of State and DHS believe is sufficient to authorize the alien's international travel, depending on the country involved and the specific relations with that country and any intervening transit countries. In some cases, no travel document is used in the repatriation.

* * * *

As a matter of historical practice, ICE has not attempted with any frequency to remove aliens to a particular foreign country if the country has a functioning central government and that government objects to the alien's entry. As a practical matter, removal to a country with a functioning central government is very unlikely to occur unless that government at least implicitly "accepts" the alien.

Also, there are a variety of ways in which foreign governments have manifested their willingness to "accept" a removed alien. Acceptance has not always been expressed through any formal declaration or documentation, and it has not always been specific to an individual alien—an established, agreed-upon practice for dealing with a particular class of aliens has been sufficient. . . .

* * * *

The proposed rules also address whether an alien may be removed to a country where there is no functioning "government." With respect to the countries determined pursuant to sections 241(b)(1)(C)(i)–(iii) and (2)(E)(i)–(vi) of the Act, the proposed rules each provide that the absence of a "government" in the receiving country does not preclude the Secretary from removing the alien to that country. This situation is not entirely uncommon. In a number of transitory periods, a specific "country" may not have a "government" or its government may not be recognized by the United States Government, the United Nations, or other foreign states or international bodies. Whether a country has a government is not a question that can be defined by statute or regulation. It does not follow, however, that the removal of aliens to the territory of such a receiving country must cease until a "government" is organized, or until that government is recognized. Likewise, it

is unnecessary to obtain a commitment of acceptance by the receiving country before travel arrangements are made and the alien is transported. Such a commitment is desirable, but national security concerns, including foreign policy concerns, as well as other Executive Branch interests might deem removal appropriate even in the absence of acceptance. Thus, where it is not possible for the United States Government to request the government of a receiving country to accept these aliens through the normal diplomatic channels, the DHS proposed rule provides that the Secretary can designate a country previously identified in section 241(b)(2)(A)–(D) of the Act when selecting an additional removal country pursuant to clause (E)(i)–(vi), if the Secretary determines the designation is in the best interests of the United States.

The discussion in these proposed rules relates only to the determination of the country of removal for purposes of section 241(b) of the Immigration and Nationality Act, and does not address the broader issues relating to what constitutes a government and when a government is recognized by the United States, the latter being a foreign policy responsibility carried out by the Secretary of State.

D. The Act and Legislative Policy Concerning "Acceptance"

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. . . Sections 241(b)(2)(A) through (C) of the Act address removal to a country designated by the alien. In pertinent part, those provisions state that the Secretary "shall remove" an alien to the country designated by the alien (section 241(b)(2)(A)(ii)), but that the Secretary "may disregard a designation" if, among other things, "the government of the country is not willing to accept the alien into the country" (section 241(b)(2)(C)(iii)) or the Secretary "decides that removing the alien to the country is prejudicial to the United States" (section 241(b)(2)(C)(iv)). These provisions do not prohibit removal without acceptance: If acceptance is provided, they require removal to the country designated by the alien (unless the Secretary makes a highly discretionary determination that such removal is against the national interest), and if acceptance is not provided, they permit the Secretary not to

remove the alien to the country designated by the alien. In no circumstances do these provisions affirmatively prohibit removal without acceptance to the designated country.

Section 241(b)(2)(D) of the Act addresses removal to a country of which the alien is a subject, national, or citizen. In pertinent part, it states that the Secretary "shall remove" the alien to such a country, unless the country "is not willing to accept the alien." However, that provision also does not affirmatively prohibit removal to such countries without acceptance. Instead, it states a general rule requiring removal with acceptance to any country of which the alien is a national or citizen; and it contains an exception, which permits the Secretary not to remove the alien to such countries without acceptance.

Finally, section 241(b)(2)(E) of the Act specifies "[a]dditional" removal countries if an alien is "not removed to a country" under the prior subsections. The Secretary "shall remove" the alien to any of seven specified countries or categories of countries. The first six of these countries or categories of countries, defined without reference to acceptance, describe countries with some preexisting connection to the alien, e.g., "[t]he country in which the alien was born," in section 241(b)(2)(E)(iv). The final provision, section 241(b)(2)(E)(vii), states: "If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country." The "acceptance clause" of this final provision expands the countries to which the Secretary may physically remove the alien to include any country that will accept the alien. This "acceptance clause" is discrete to the final clause (vii) of subparagraph (E) and does not apply to the previous clauses (i) through (vi) of subparagraph (E).

Various structural considerations reinforce the conclusion that acceptance is not required. . . .

* * * *

A construction of the Act that maximizes the government's removal options is consistent with the dominant goals and objectives of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, section 305(a)(3),

110 Stat. 3009-597 (1996) ("IIRIRA"). As the Supreme Court has explained, "many provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 486 (1999) (emphasis in original). IIRIRA also sought to facilitate the removal of aliens, *see Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. at 481–87, and to enact "wholesale reform[s]" to protect the public against rapidly "increasing rates of criminal activity by aliens," *Demore v. Kim*, 538 U.S. 510, 518, 123 S. Ct. 1708, 1714–16 (2003).

An interpretation of the current statutory and regulatory environment contrary to that set forth in these rules would erect a de facto amnesty program for aliens from countries that lack an effective "functioning government." Such a regime would effectively apply to all such aliens who cannot practicably be removed to an alternative removal country. For example, in the case of Somalia alone, where there is no functioning government recognized by the United States, the Department of Homeland Security estimates that this includes approximately 8,000 Somali nationals currently subject either to final orders of removal or to pending removal proceedings. Moreover, countries without an effective government are likely to present terrorism concerns, as demonstrated by the present situation in Somalia. *See, e.g., United Nations, Report of the Panel of Experts in Somalia Pursuant to Security Council Resolution 1474* (Oct. 29, 2003) (describing activities of international terrorists in Somalia); U.S. Department of State, Patterns of Global Terrorism-2002, Africa Overview at 6 (same) (April 20, 2003) (available at *http://www.state.gov/s/ct/rls/pgtrpt/2002/pdf/*) (last accessed on May 4, 2004); Congressional Research Service, Report For Congress, Africa and the War on Terrorism, at 16–17 (same) (Jan. 17, 2002). The consequence of a theory that the Executive Branch cannot remove aliens who fail to qualify for asylum, withholding of removal, or temporary protected status, and whom no other country is willing to accept, is not only that such aliens may remain in the United States for the indefinite future, but also that they must be released wholesale from immigration detention absent special circumstances.

See Zadvydas v. Davis, 533 U.S. 678 (2001). This is clearly not the intent of Congress in enacting IIRIRA, and that approach would impair implementation of the foreign policy of the United States.

* * * *

E. Removal to a Country and the Foreign Relations of the United States

Foreign policy considerations confirm that the provisions of the Act at issue here should not be read to require acceptance. As the Supreme Court has stressed repeatedly, the right of the Executive Branch to remove aliens "stems not alone from legislative power but 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). *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("power to expel or exclude aliens" is "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control") (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). These considerations apply with special force to immigration issues arising under the Act involving foreign countries that are either hostile, dysfunctional, or lack the capacity to exercise their sovereign authority. In particular, in exercising authority to remove aliens under the Act, the Executive Branch has the responsibility to assess the foreign policy considerations that are presented by a foreign country that has no functioning government to accept its nationals. The Secretary, after consultation with the Secretary of State and other appropriate agencies, may assess such foreign policy considerations on a country-by-country basis.

The actual removal of an alien, even more than the designation of a country of removal by the alien or the identification of a country of removal in an immigration judge's order, "is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Hrisiades v. Shaughnessy*, 342 U.S. 580, 588–589 (1952). Accordingly, while there may be judicial inquiry into the legal efficacy of the

immigration judge's order, and habeas corpus may be sought to challenge the lawfulness of detention or restraint, the actual issues of to what "country" an alien may be removed and whether that country "accepts" the alien necessarily raise concerns for the separation of powers in trenching on matters committed to the Executive Branch. *See Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("[F]oreign policy [is] the province and responsibility of the Executive") (citation and quotation omitted); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial").

The proposed rule of the Department of Justice amends 8 CFR 1240.10(f) and 1240.12 to clarify the distinction between the administrative adjudication and the effectuation of the alien's removal, which implicates the foreign relations of the United States. The designation by the alien, under section 241(b)(2)(A)(ii) of the Act, and the identification in the immigration judge's order of removal are subject to judicial review. However, the actual removal of the alien to a foreign state pursuant to the Act is an exercise of the Executive Branch's foreign policy function. The Secretary will consult as appropriate with the Secretary of State in carrying out these functions.

Finally, the provisions relating to the removal of an alien to a foreign country (in contrast to orders of removal from the United States) are not for the benefit of the alien, but as a protection for the lawful foreign policy prerogatives of the United States. This is exemplified in section 241(h) of the Act (8 U.S.C. 1231(h)), which provides a rule of construction that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States. * * *" . . . This provision has rarely been construed, and there is no legislative history explicating Congressional purpose or intent. As the Supreme Court has noted, this provision is one of several statutory provisions that limit the circumstances in which judicial review of deportation decisions is available. *Zadvydas v. Davis*, 533 U.S. 678, 687–88 (2001).

A similar provision barred an alien's claim to compel initiation of deportation or removal proceedings, or provide damages for

failure to initiate proceedings and effect removal in a timely fashion. Of particular note is that after an intercircuit conflict had developed in the early 1990s over whether mandamus would lie to compel the former INS to commence deportation proceedings, Congress intervened by enacting the same "no substantive or procedural rights" provision in 1994, and the courts conceded that aliens were no longer within the "zone of interest" of the statute.

G. Clarifying the Immigration Judge's Order of Removal from the United States

* * * *

. . . [T]he identification of a country in an order of removal does not override the prerogatives of the Secretary in effectuating or executing a removal order and warrant of removal under the statute, as is currently recognized in 8 CFR 1240.10(g). The proposed rule clarifies that identification of a country or countries for removal in the immigration judge's order of removal from the United States does not limit the lawful discretion of the Department of Homeland Security in determining the country to which the alien should be removed, consistent with the requirements of section 241(b) of the Act.

* * * *

The two conflicting cases referred to above were described in the Federal Register as follows. At the end of 2004 *Jama* remained pending in the Supreme Court and *Ali* in the Ninth Circuit.

In *Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), *cert. granted*, 124 S. Ct. 1407 (2004), the Eighth Circuit concluded that the plain language of section 241(b)(2)(E) of the Act permits removal to an alien's country of birth and does not require that this country "accept" the alien's return. The court explained that "as [a] matter of simple statutory syntax and geometry, the acceptance requirement [in section 241(b)(2)(E)] is confined to clause (vii), and does not apply to clauses (i) through (vi)." 329 F.3d at 634. This syntactic

and geometric structure distinguished when acceptance is required and when acceptance is not required, but provides no guidance as to what constitutes "acceptance." The court rejected the alien's contention that its interpretation of section 241(b)(2)(E) of the Act "nullifies" the provision for acceptance as a condition of removal to the country of which the alien is a subject, national, or citizen, pursuant to section 241(b)(2)(D) of the Act. The court explained that an alien born in the country to which he or she is to be removed under section 241(b)(2)(E)(iv) of the Act "is not always a subject, national or citizen" of that country, so section 241(b)(2)(D) of the Act may not apply to the alien at all. Id. The court also observed that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first"—i.e., to attempt consensual removal under section 241(b)(2)(D)—"and then to act anyway if the request is refused." Id. The court concluded that its interpretation of section 241(b)(2) does not conflict with any "settled judicial construction" of former section 243(a) of the Act (8 U.S.C. 1253 (1994)), id., and that the administrative decision cited by petitioner, *Matter of Linnas, supra*, did not overrule the earlier decision in *Matter of Niesel, supra*, that rejected an acceptance requirement. Id. at 635. These proposed rules are consistent with the court's decision in *Jama*.

In *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003), *petition for reh'g pending* (No. 03-35096, 9th Cir.), the Ninth Circuit found that the United States cannot remove aliens to a country that does not have a functioning government to accept them. The court of appeals did not provide any analysis of what a "functioning government" might be or how that might be determined—which only begs the question of which governments the United States will recognize and treat and which it will not. The Second Circuit addressed the essentially identical provisions of prior law in *Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959), concluding that deportation under any of the subclauses now found in section 241(b)(2)(E) of the Act was subject to the condition that the country be willing to accept the alien. However, as the statute provides no such definition, the courts in these cases have essentially created their own definition.

The sum of these cases lies in the statutory terms of "accept" and "country," neither of which are defined in the Act. What constitutes "acceptance" by a "functioning government" of a "country" clearly lies "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, [where] the President alone has the power to speak or listen as a representative of the nation." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Accordingly, the Department of Homeland Security proposes to amend its regulations by recognizing that the terms "acceptance" and "country" are defined, not by the Act or by the courts, but by the Executive Branch, consistent with the foreign policy of the United States.

* * * *

2. Canada-U.S. Understanding Concerning Deportation

Maher Arar, a dual Canadian-Syrian citizen, was detained at JFK Airport in September 2002 in transit from Tunisia to Montreal. Acting in accordance with U.S. law, the United States removed Arar. Subsequently, Arar claimed that he was tortured while he was held in Syria. Because of his Canadian citizenship, questions were raised concerning the removal of Arar to a country other than Canada, and about Canada's involvement in or knowledge of Arar's removal.

On January 13, 2004, the United States and Canada reached a non-binding understanding, recorded in an exchange of letters, concerning the removal of citizens of each country from the territory of the other to third countries, except in cases of extradition. The Canadian letter, which set forth the substance of the understanding, is excerpted below. In its reply, the United States stated that it "accepts your proposal that your letter and this reply constitute an Understanding between our two Governments on the procedures to be followed in such circumstances" and reiterated that "this Understanding is not intended to create binding obligations under international law for either government, nor to create or otherwise alter rights or privileges for private parties."

The full texts of the two letters are available at *www.state.gov/s/l/c8183.htm.*

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* * * *

The [Vienna Convention on Consular Relations] recognizes that consular functions include issuing passports and travel documents to nationals of the sending state and otherwise helping and assisting nationals of the sending state who are in the receiving state. Both Canada and the United States share an interest in helping and assisting their respective nationals when they travel abroad.

In light of our mutual interest, when a known United States national is to be subject to involuntary removal from Canada to a country other than the United States, except in cases of extradition, Canada undertakes to advise the American principal point of contact of the intended removal.

Similarly, when a known Canadian national is to be subject to involuntary removal from the United States to a country other than Canada, except in cases of extradition, the United States undertakes to advise the Canadian principal point of contact of the intended removal.

Canada and the United States also undertake to consult expeditiously upon request by either country concerning any such case of removal that may arise in the future.

* * * *

I have the honour to propose that this letter and your reply constitute an Understanding between our two Governments on the procedures to be followed in the above circumstances. This understanding is not intended to create or otherwise alter treaty or other legal obligations for either Government nor to create or otherwise alter rights or privileges for private parties.

On January 22, 2004, Arar filed suit in the U.S. District Court for the Eastern District of New York under, *inter alia*, the Torture Victims Protection Act, 28 U.S.C. § 1350 note, against Attorney General John Ashcroft, Secretary

of Homeland Security Tom Ridge, FBI Director Robert Mueller, and others. *Arar v. Ashcroft*, Case No. 1:04-cv-00249-DGT-VVP (E.D.N.Y. 2004). The case was pending at the end of 2004.

On January 28, 2004, Canada announced that Justice Dennis R. O'Connor would undertake a public inquiry into the actions of Canadian officials in relation to Arar. On September 10, 2004, William H. Taft, IV, Legal Adviser of the Department of State, responded to a request from the Canadian Commission of Inquiry, as excerpted below. The full text of Mr. Taft's letter is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

Mr. Arar's name was placed on a United States terrorist lookout list based on information received as part of an ongoing general sharing of information between the Governments of the United States and Canada. The RCMP was advised of Mr. Arar's detention through law enforcement channels and a Canadian consular official was granted access to Mr. Arar.

The United States did not seek the Government of Canada's approval or consent prior to removing Mr. Arar from the United States. This decision was made by U.S. government officials based on our own assessment of the security threat to the United States posed by Mr. Arar. We believe that Mr. Arar's removal was in the best interests of the United States. Questions regarding the role of Canadian officials in the imprisonment and treatment of Mr. Arar in Syria and his return to Canada should be directed to the appropriate Canadian authorities.

The United States Government declines to provide documents in response to your request, or to provide statements by individuals involved in this case, or to facilitate witnesses appearing before the commission. We would note that as your inquiries focus on the actions of Canadian authorities, many of these questions should best be directed to the Government of Canada, rather than to the United States Government.

3. Suspension of Entry: Corruption

On January 12, 2004, President George W. Bush issued Proclamation 7750 "To Suspend Entry as Immigrants or Nonimmigrants of Persons Engaged in or Benefiting from Corruption." 69 Fed. Reg. 2287 (Jan. 14, 2004). Excerpts below from the proclamation explain the basis for the suspension.

In light of the importance of legitimate and transparent public institutions to world stability, peace, and development, and the serious negative effects that corruption of public institutions has on the United States efforts to promote security and to strengthen democratic institutions and free market systems, and in light of the importance to the United States and the international community of fighting corruption, as evidenced by the Third Global Forum on Fighting Corruption and Safeguarding Integrity and other intergovernmental efforts, I have determined that it is in the interests of the United States to take action to restrict the international travel and to suspend the entry into the United States, as immigrants or nonimmigrants, of certain persons who have committed, participated in, or are beneficiaries of corruption in the performance of public functions where that corruption has serious adverse effects on international activity of U.S. businesses, U.S. foreign assistance goals, the security of the United States against transnational crime and terrorism, or the stability of democratic institutions and nations.

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

I therefore hereby proclaim that:

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

(a) Public officials or former public officials whose solicitation or acceptance of any article of monetary value, or other benefit, in exchange for any act or omission in the performance of their public functions has or had serious adverse effects on the national interests of the United States.

(b) Persons whose provision of or offer to provide any article of monetary value or other benefit to any public official in exchange for any act or omission in the performance of such official's public functions has or had serious adverse effects on the national interests of the United States.

(c) Public officials or former public officials whose misappropriation of public funds or interference with the judicial, electoral, or other public processes has or had serious adverse effects on the national interests of the United States.

(d) The spouses, children, and dependent household members of persons described in paragraphs (a), (b), and (c) above, who are beneficiaries of any articles of monetary value or other benefits obtained by such persons.

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

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

* * * *

Sec. 5. Nothing in this proclamation shall be construed to derogate from United States Government obligations under applicable international agreements.

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4. Pilot Program for Voluntary Interior Repatriation of Mexicans

On June 29, 2004, DHS announced that it had reached agreement with Mexico for a new pilot program for voluntary repatriation of Mexicans to their place of origin in the interior of Mexico when apprehended for illegal entry in the Arizona-Sonora region. Asa Hutchinson, Homeland Security Under Secretary for Border and Transportation Security, described the goal of the program as being "to save lives by safely returning Mexican nationals to their homes, away from the dangers of the Arizona-Sonora desert where smugglers and the harsh summer climate contribute to the deaths and injuries of illegal border crossers." A press release describing the agreement is excerpted below.

The full text of the release concerning this non-binding agreement is available at *www.dhs.gov/dhspublic display?content=3796.*

In an effort to reduce the cycle of illegal border crossing and the violence associated with human smuggling, the U.S. Department of Homeland Security today announced a bilateral agreement between the United States and Mexico establishing principles for a voluntary repatriation program. Under this interior repatriation pilot program, Mexican nationals will be given the option of returning to their place of origin when apprehended for illegal entry.

Beginning in July, illegal Mexican migrants may volunteer for the program, returning home via charter aircraft from Tucson, Arizona to either Mexico City or Guadalajara. Bus transportation will then be provided to their final destination.

* * * *

The Mexican government will support these life-saving efforts by increasing its consular presence in Arizona. It will be administered by officers of the U.S. Customs and Border Protection (CBP) and the U.S. Immigration and Customs Enforcement (ICE). The U.S. consul in Nogales, Mexico, will coordinate repatriation requirements with the Mexican consul in Nogales, Arizona.

The key elements of the agreements are:

- The program will observe the applicable laws of both countries as well as international conventions and will ensure that Mexican nationals will be repatriated in a safe, humane and dignified manner.
- The program is available only to Mexican nationals. Migrants charged with a crime (other than illegal entry) are not eligible for the program.
- A migrant who expresses his or her willingness to be repatriated to their place of origin in the interior of Mexico to CBP officers or ICE agents will be referred to the Mexican Consul.
- The Mexican Consul will interview the person and confirm that he or she wants to be returned home to the interior of Mexico.
- Those migrants who decline repatriation to their place of origin in the interior of Mexico will be repatriated to the northern border of Mexico through regular means.
- Department of Homeland Security officers will not handcuff nor restrain Mexican nationals repatriated under this program unless exceptional safety conditions warrant it in an individual case.
- The program will be limited to the Arizona-Sonora region.
- The program will end no later than September 30. At its conclusion, the two governments will evaluate the repatriation program and recommend future plans.

5. Use of Biometric Identifiers

a. US-VISIT Program for fingerprinting arriving aliens

On January 5, 2004, DHS announced that biometric identifiers would be required at entry for most foreign visitors traveling to the United States on a visa. Excerpts below from a press release of that date describe the new program. Secretary Tom Ridge described US-VISIT as "an important new element

in the global war against terrorism [that] will serve as a catalyst in the growing international use of biometrics to expedite processing of travelers."

The full text of the press release is available at *www.dhs.gov/dhspublic/display?content=3043. See also* US-VISIT Fact Sheet and related documents available at *www.dhs.gov/us-visit*

The U.S. Department of Homeland Security today launched US-VISIT, a new program to enhance the nation's security while facilitating legitimate travel and trade through our borders. New entry procedures took effect today for most foreign visitors with non-immigrant visas at 115 airports and cruise ship terminals at 14 seaports. The system utilizes biometrics, which are physical characteristics unique to each individual, to verify identity. Biometric technologies are the basis of an extensive array of highly secure identification and personal verification solutions.

* * * *

US-VISIT requires that most foreign visitors traveling to the U.S. on a visa have their two index fingers scanned and a digital photograph taken to verify their identity at the port of entry. The US-VISIT program will enhance the security of U.S. citizens and visitors by verifying the identity of visitors with visas. At the same time, it facilitates legitimate travel and trade by leveraging technology and the evolving use of biometrics to expedite processing at our borders.

* * * *

The Department of Homeland Security today also began a pilot test of exit procedures for departing passengers holding visas. A departure confirmation program using automated kiosks is being tested at Baltimore-Washington International Airport and at selected Miami Seaport cruise line terminals. Foreign visitors exiting the United States from those locations will be required to confirm their departure at the kiosk. US-VISIT officials will evaluate the tests and consider alternatives to the automated kiosks for departure confirmation throughout 2004.

Congress has mandated that an automated entry-exit program be implemented at the 50 busiest land ports of entry by December 31, 2004, and at all land ports by December 31, 2005. . . .

b. Discontinuation of reissuance of nonimmigrant visas in the United States

On June 10, 2004, the Department of State issued Public Notice 4747, announcing the discontinuation of the domestic visa reissuance service for certain nonimmigrant visas in the United States. 69 Fed. Reg. 35,121 (June 24, 2004). The change was the result of new regulations requiring that U.S. visas issued after October 26, 2004, include biometric identifiers. As explained in the Public Notice, it was not feasible for the United States to collect biometric identifiers for business-related visas and for other individuals not qualified as diplomatic or official visitors. The notice made clear that the Department would continue accepting applications for reissuance of qualifying diplomatic and official (A, G, and NATO) visas in Washington, D.C., because the United States does not collect biometric data from those individuals.

c. Visa waiver program countries

On August 9, 2004, President Bush signed H.R. 4417 to postpone for one year the requirement for visa waiver program countries to include biometrics in passports. A requirement that such passports be machine readable came into effect on October 26, 2004. As explained in a press statement released August 10 by Adam Ereli, Deputy Spokesman, U.S. Department of State, the "extension was necessary to avoid potential disruption of international travel and provide the international community adequate time to develop viable programs for producing a more secure, biometrically enabled passport."

The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2004/35066.htm.*

d. Elimination of crew list visas

By final rule adopted July 21, 2004, the Department of State eliminated crew list visas, previously issued pursuant to INA §§ 101(a)(15)(D)(exempting aliens serving in good faith as crewmen on board a vessel or aircraft from being deemed immigrants) and 221(f)(permitting an alien to enter the United States on the basis of such a visaed crew manifest but not requiring a consular officer to visa a crew list and authorizing the officer to deny admission to any individual alien on a visaed crew list). 8 U.S.C. §§ 1101(a)(15)(D) and 1201(f). 69 Fed. Reg. 43,515 (July 21, 2004). As explained in the Federal Register, the elimination of crew list visas, for security reasons, "will ensure that each crewmember entering the United States is required to complete the nonimmigrant visa application forms, submit a valid passport and undergo an interview and background checks." Furthermore, it noted that the crew list visas would necessarily have to be eliminated by October 26, 2004, when the requirement for biometric identifiers took effect.

6. Cuban Migration

In October 2004 the Department of State submitted its annual report on Cuban Compliance with the Migration Accords pursuant to § 2245 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, 112 Stat. 2681, covering the period April 2004 through October 2004. *See Cumulative Digest 1991–1999* at 59–68. As in prior years, the report concluded that "Cuba is clearly not in full compliance with its commitments under the September 9, 1994, 'Joint Communiqué' and the May 2, 1995, 'Joint Statement,' otherwise known as the 'Migration Accords,' although it continues to enforce emigration policies that are partly consistent with those documents."

The full text of the 2004 report is available at *www.state.gov/s/l/c8183.htm*.

7. LIBERTAD Act

In the spring of 2004 the Secretary of State determined that a foreign company was trafficking in confiscated property in Cuba in violation of the provisions of Title IV of the Cuban Liberty and Democratic Solidarity ("LIBERTAD") Act of 1996 (Public Law 104–114, 110 Stat. 785, codified as amended at 22 U.S.C. § 6021 note). The term "trafficking" refers to any person who "knowingly and intentionally" enters into a commercial arrangement using or otherwise benefiting from confiscated property, a claim to which is owned by a U.S. national. Under Title IV, corporate officers, principals, shareholders with a controlling interest and their spouses, minor children, and agents of the company would be subject to exclusion from the United States. *See Cumulative Digest 1991–1999* at 94–102.

Once such a determination is made under Title IV, the Department sends determination letters to the affected individuals, notifying them that their names will be entered into the "visa lookout system" 45 days after the date appearing on the letter. In response to such notification in this case, the company divested its interest in the property at issue and the sanctions were not imposed. The names of the company and individuals involved were not released publicly.

D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES

1. Temporary Protected Status: Termination of Designation of Montserrat

Section 244A of the INA, 8 U.S.C. § 1254a authorizes the Secretary of the Department of Homeland Security to grant temporary protected status ("TPS") in the United States to eligible nationals of designated foreign states. *Digest 1989–90* at 39–40 and *Cumulative Digest 1991–1999* at 240–47. After consultation with appropriate agencies, the Attorney

General may designate a state (or any part thereof) after finding that (1) there was an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state had requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that rendered the state temporarily unable to handle the return of its nationals; or (3) there were other extraordinary and temporary conditions in the state that prevented nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States.

On July 6, 2004, the Department of Homeland Security published a termination of the TPS designation of Montserrat, effective February 27, 2005. 69 Fed. Reg. 40,642 (July 6, 2004). Excerpts below describe the basis for the designation in 1997 and its termination.

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* * * *

On August 28, 1997, the Attorney General published a notice in the Federal Register designating Montserrat under the TPS program based upon volcanic eruptions causing a substantial, but temporary, disruption to living conditions that rendered Montserrat unable, temporarily, to adequately handle the return of its nationals. 62 FR 45685, 45686 (August 28, 1997). The Attorney General also designated Montserrat for TPS due to extraordinary and temporary conditions that prevented Montserratians from safely returning to Montserrat. Id. Since then, the TPS designation of Montserrat has been extended six times, in each instance based upon a determination that the conditions warranting the designation continued to be met. See 68 FR 39106 (July 1, 2003); 67 FR 47002 (July 17, 2002); 66 FR 40834 (August 3, 2001); 65 FR 58806 (October 2, 2000); 64 FR 48190 (September 2, 1999); 63 FR 45864 (August 27, 1998).

* * * *

. . . Although the conditions in Montserrat continue to warrant concern, the Secretary has determined that the volcanic eruptions

can no longer be considered temporary in nature. Scientists say that eruptions of the type that have occurred at Soufriere Hills generally last 20 years, but the volcano could continue to erupt sporadically for decades. [BCIS Resource Information Center] Report (May 2004).

* * * *

Based upon this review, the Secretary of DHS, after consultation with appropriate government agencies, finds that Montserrat no longer continues to meet the conditions for designation under the TPS program. 8 U.S.C. 1254a(b)(3)(A). Because the volcanic eruptions are unlikely to cease in the foreseeable future, they can no longer be considered "temporary" as required by Congress when it enacted the TPS statute. 8 U.S.C. 1254a(b)(1)(B) and (C). Therefore, the Secretary of DHS is terminating the TPS designation for Montserrat effective February 27, 2005. 8 U.S.C. 1254a(b)(3)(B).

To provide for an orderly transition, nationals of Montserrat (and aliens having no nationality who last habitually resided in Montserrat) who have been granted TPS will automatically retain TPS and have their current [Employment Authorization Documents] extended until the termination date. 8 U.S.C. 1254a(a)(2) and (d)(3). These persons are urged to use the time before termination of their TPS to prepare for and arrange their departure from the United States or, in the alternative, apply for other immigration benefits for which they are eligible.

Temporary Protected Status was extended for certain other designated countries during 2004. *See*, e.g., 18-month extensions of designations for Nicaragua and Honduras, both due to the devastation resulting from Hurricane Mitch in 1999; *see* 69 Fed. Reg. 64,088 (Nov. 3, 2004) and 69 Fed. Reg. 64,084 (Nov. 3, 2004) respectively.

2. Implementation of United States-Canada Agreement on Refugee Status Claims

On December 5, 2002, the United States and Canada signed the Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. The

agreement provides that each country may return to the other country individuals claiming refugee status at a land border port of entry. *See Digest 2002* at 31–35. On March 8, 2004, the Department of Homeland Security and the Department of Justice Executive Office for Immigration Review issued proposed rules in the Federal Register to implement the agreement. 69 Fed. Reg. 10,620 and 69 Fed. Reg. 10,627 (Mar. 8, 2004), respectively.

The Federal Register summary of the Department of Justice rule provided an explanation of the agreement and its implementation, as excerpted below.

The recent Safe Third Country Agreement between the United States and Canada provides new procedures for dealing with certain categories of aliens crossing at land border ports-of-entry between the United States and Canada, or in transit from Canada or the United States, and who express a fear of persecution or torture if returned to the country of their nationality or habitual residence. The Agreement recognizes that the United States and Canada are safe third countries, each of which offers full procedures for nationals of other countries to seek asylum or other protection. Accordingly, subject to several specific exceptions, the Agreement provides for the United States to return such arriving aliens to Canada, the country of last presence, to seek protection under Canadian law, rather than applying for asylum in the United States. Subject to the stated exceptions, such aliens attempting to travel from Canada to the United States, or vice versa, will be allowed to seek asylum or other protection in one country or the other, but not in both.

* * * *

3. Haitian Migration Policy

In April 2004 Secretary of State Colin L. Powell responded to a letter from Bishop Griswold of the Episcopal Church in the United States. Bishop Griswold's letter noted the dire

circumstances that still exist for many Haitians and advocated a stronger peacekeeping operation, resources for rebuilding, and more lenient policies toward Haitians who have fled the country. Secretary Powell's response outlined U.S. commitment to Haiti, including economic assistance and involvement in the Multinational Interim Force authorized under UN Security Council Resolution 1529 of February 29, 2004, discussed in Chapter 17.A.1. As to migration, his letter stated:

> It is a national priority for the United States to deter illegal mass migration by sea, which leads to needless loss of life. Timely repatriation of illegal Haitian immigrants has been an essential factor in preventing the loss of life and property at sea, deterring additional surges of unsafe and illegal migration, and staving off dangerous and destabilizing mass migrations such as those which occurrred in 1991 and 1994. It is a longstanding U.S. policy to provide all interdicted migrants with a meaningful opportunity to seek and receive protection against persecution or torture.

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

Cross-references

Terrorist exclusion list, **Chapter 3.B.2.f.(1)**.
Citizenship of Northern Mariana Islands residents, **Chapter 5.B.1**.
Executive branch authority over foreign state recognition and passports, **Chapter 9.B**.

CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS AND ASSISTANCE

1. Consular Notification: *Avena and other Mexican Nationals (Mexico v. United States of America)*

On March 31, 2004, the International Court of Justice delivered its judgment in *Avena and other Mexican Nationals (Mexico v. United States)*, available at *www.icj-cij.org/icjwww/idocket/imus/imusframe.htm*. In that case Mexico alleged violations of the Vienna Convention on Consular Relations ("Vienna Convention" or "VCCR") with respect to 54* Mexican nationals facing the death penalty. In response to a request from Mexico, the ICJ issued an order indicating provisional measures on February 5, 2003.

The United States argued that the ICJ lacked jurisdiction to decide many of Mexico's claims; that the ICJ should find significant aspects of Mexico's application and submission inadmissible; that the ICJ's judgment in *LaGrand (Germany v. United States of America)* set forth the principles applicable to the *Avena* case; that the United States provides the "review and reconsideration" required under *LaGrand* in its criminal justice system and through executive clemency proceedings; that the ICJ should not find violations in any of the 52 cases

* Mexico withdrew two of the cases, reducing the number to 52.

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because Mexico had failed to meet its burden of proof regarding them; and that if the ICJ found a breach of Article 36(1) of the Convention, it should apply the review and reconsideration remedy it ordered in *LaGrand* and should not grant Mexico's request for *vacatur*, exclusion, orders of cessation, and guarantees of non-repetition. *See Digest 2003* at 43–103.

In paragraph 153 of its judgment, the ICJ decided as excerpted below. Paragraph 106, referred to in subparagraphs 153(4)–(7), specifies the Mexican nationals covered by each aspect of the Court's conclusions as to U.S. breaches of its VCCR obligations.

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* * * *

(4) By fourteen votes to one,
Finds that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106(1) above of their rights under Article 36, paragraph 1(*b*), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph;

* * * *

(5) By fourteen votes to one,
Finds that, by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals referred to in paragraph 106(2) above and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1(*b*);

* * * *

(6) By fourteen votes to one,
Finds that, in relation to the 49 Mexican nationals referred to in paragraph 106(3) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit

them in detention, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1(*a*) and (*c*), of the Convention;

* * * *

(7) By fourteen votes to one,
Finds that, in relation to the 34 Mexican nationals referred to in paragraph 106(4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1(*c*), of the Convention;

* * * *

(8) By fourteen votes to one,
Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention;

* * * *

(9) By fourteen votes to one,
Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment;

* * * *

(10) Unanimously,
Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(*b*),

of the Vienna Convention; and *finds* that this commitment must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

(11) Unanimously,
Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(*b*), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment.

In the paragraphs referenced in subparagraphs 153(9) and (11) above, the ICJ said, in paragraph 138, that the review and reconsideration should "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process . . . [which should] be of the sentence and of the conviction." In paragraph 139, the Court stated that "[t]he rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law . . . [and] what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention." The ICJ specified in paragraph 140 that it "considers that it is the judicial process that is suited to this task."

In addition, although paragraph 153(9) and (11) provided for the United States to provide review and reconsideration "by means of its own choosing" and referenced only paragraphs 138 to 141, the Court discussed review and reconsideration elsewhere in the opinion. In paragraph 121, the ICJ made clear that it did not prescribe a particular outcome for the review and reconsideration, but instead specified

that it was for the United States to determine in each case whether the violation of Article 36 "caused actual prejudice to the defendant in the process of administration of criminal justice." In paragraph 143, the ICJ said "that the clemency process, as currently practiced within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of 'review and reconsideration' as envisaged by the Court." The ICJ also stated in paragraph 143 "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. . . ."

On the issue of notification "without delay," the Court rejected the argument of Mexico that "without delay" required the United States to inform the alien of his or her right to consular notification immediately upon arrest and before interrogation, as excerpted below.

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* * * *

63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1(*b*), information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. The United States Department of State booklet, *Consular Notification and Access—Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, issued to federal, state and local authorities in order to promote compliance with Article 36 of the Vienna Convention points out in such cases that: "most, but not all, persons born outside the United States are not [citizens]. Unfamiliarity with English may also indicate foreign nationality." The Court notes that when an arrested person himself claims to be of United States nationality, the realization by

the authorities that he is not in fact a United States national, or grounds for that realization, is likely to come somewhat later in time.

* * * *

87. The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1(*b*), that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, "without delay" as regards the duty to inform an individual under Article 36, paragraph 1(*b*), is not to be understood as necessarily meaning "immediately upon arrest", there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

* * * *

The Court also rejected Mexico's argument that the "U.S. was obligated to exclude statements and confessions given to law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceeding against them." In paragraph 127, the Court stated: "The issue raised by Mexico . . . relates to the question of what legal consequences flow from the breach of the obligations under Article 36, paragraph 1. . . . The Court is of the view that this question is one which has to be explained under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration."

The Court did not decide whether the right to consular notification is a "human right" as urged by Mexico but commented as follows:

> 124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this right, as such, is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard.

2. Aftermath of *Avena*

a. State court: Torres v. Oklahoma

On April 29, 2004, Osvaldo Torres, one of the Mexican nationals named in *Avena*, filed a Subsequent Application for Post-Conviction Relief in the Court of Criminal Appeals of the State of Oklahoma. Torres was indicted in 1993 and convicted of first degree murder and other charges, and received the death penalty in the Oklahoma County District Court, Case No. CF-1993-4302. Following denial of applications for post-conviction relief and for federal habeas corpus, his execution date had been set for May 18, 2004.

On May 13, 2004, the Court of Criminal Appeals of the State of Oklahoma ordered a stay of execution and remanded

the case to the District Court of Oklahoma County for an evidentiary hearing. *Torres v. State*, Case No. PCD-04-442 (2004). In its order, the court specified the issues to be addressed in the evidentiary hearing: "(a) whether Torres was prejudiced by the State's violation of his Vienna Convention [on Consular Relations] rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate; and (b) ineffective assistance of counsel." The hearing was conducted on November 29, 2004. After hearing testimony from several witnesses, the hearing was technically continued until December 20, 2004, to allow the maximum amount of time for preparation of the Court's order; however, no additional testimony was taken. *See also* denial of petition for habeas corpus by U.S. Court of Appeals for the Tenth Circuit in *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003), *cert. denied*, 540 U.S. 1035 (2003) (with dissenting opinion by Justice Breyer).

Also on May 13, 2004, the same day as the order remanding for an evidentiary hearing, Oklahoma Governor Brad Henry granted Torres clemency and commuted Torres' death sentences to life without the possibility of parole.

b. U.S. federal courts

(1) Medellin v. Dretke

On May 20, 2004, the U.S. Court of Appeals for the Fifth Circuit denied an application for a certificate of appealability ("COA") from a district court order denying a petition for a writ of habeas corpus brought by Jose Ernesto Medellin, a citizen of Mexico who was also named in *Avena*. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). Medellin, the petitioner in the case, was convicted of capital murder in Texas state court for a crime committed in 1993 and sentenced to death. In the court of appeals, Medellin relied primarily on claims related to ineffective counsel, and also alleged that "the state violated his rights as a foreign national to consular access

under the Vienna Convention." As the court explained, U.S. law requires a petitioner to obtain a COA in order to appeal from denial of a petition for habeas corpus; "a COA will be granted if the petitioner makes 'a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2)."

Excerpts below from the Fifth Circuit opinion address Medellin's claims under the Vienna Convention, concluding that it is bound by prior decisions of the Supreme Court and the Fifth Circuit regardless of any possible relevance of ICJ opinions in *LaGrand* and *Avena*. On December 10, 2004, the Supreme Court granted certiorari. *Medellin v. Dretke*, 125 S. Ct. 686 (2004).

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* * * *

. . . Per Article 36 [of the Vienna Convention], "the treaty requires an arresting government to notify a foreign national of his right to contact his consul." . . . The state concedes that Petitioner was not notified of his right to contact the Mexican consul.

Petitioner's claim fails for two reasons: 1) it is procedurally defaulted, and 2) even if it were not procedurally defaulted, the Vienna Convention, as interpreted by this Court in the past, does not confer an individually enforceable right.

1. Procedural default

The district court held that Petitioner's Vienna Convention claim was procedurally defaulted. Petitioner all but concedes that, under Texas law, he did procedurally default on his Vienna Convention claim by not raising the issue at the trial stage. *See Fisher v. Texas*, 169 F.3d 295, 300–01 (5th Cir. 1999). Petitioner argues, however, that the state's application of the procedural default rule in this case violates the Vienna Convention. To support this conclusion, Petitioner relies on the *LaGrand Case* ((*Germany v. United States of America*), 2001 ICJ 104 (Judgment of June 27) ("*LaGrand*")). In *LaGrand*, the International Court of Justice held that procedural default rules cannot bar review of a petitioner's claim. *LaGrand* at PP 90–91. We note that the International Court of Justice adhered to this position again in *Avena and Other*

Mexican Nationals (*Mexico v. United States of America*), a case brought by Mexico on behalf of Petitioner and others. *See* 2004 ICJ 128 (Judgment of March 31) ("*Avena*") at PP 110–13, 153.

The Supreme Court, prior to the *Avena* and *LaGrand* decisions, however, ruled that Vienna Convention claims, like Constitutional claims, can be procedurally defaulted, even in a death penalty case. *Breard v. Greene*, 523 U.S. 371, 375, 140 L.Ed.2d 529, 118 S. Ct. 1352 (1998). Though *Avena* and *LaGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims. "If a precedent of [the Supreme Court] has direct application in a case [. . .], the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 104 L.Ed.2d 526, 109 S. Ct. 1917 (1989). That is, only the Supreme Court may overrule a Supreme Court decision. The Supreme Court has not overruled *Breard*. We are bound to follow the precedent until taught otherwise by the Supreme Court.

2. No individually enforceable right under Article 36 of the Vienna Convention

Even if Petitioner were not procedurally barred from making his Vienna Convention claim, the case law of our Court precludes success on this claim. In making his Vienna Convention claim, Petitioner necessarily also argues that Article 36 creates an individually enforceable right. For this proposition, Petitioner again relies on *LaGrand*. The International Court of Justice held in *LaGrand* that Article 36 did create personal rights. *LaGrand* at P 77. Again, we note that the International Court of Justice adhered to this position in *Avena*. *See Avena* at P 40.

A prior panel of this Court, however, held that Article 36 of the Vienna Convention does not create an individually enforceable right. *Jimenez-Nava*, 243 F.3d at 198 ("The sum of [petitioner's] arguments fails to lead to an ineluctable conclusion that Article 36 creates judicially enforceable rights of consultation between a detained foreign national and his consular office. Thus, the

presumption against such rights ought to be conclusive."). Despite minor differences in this case and that presented in *Jimenez-Nava*, the Court's holding in *Jimenez-Nava* is inescapable. We are bound to apply this holding, the subsequent decision in *LaGrand* notwithstanding, until either the Court sitting *en banc* or the Supreme Court say otherwise. "No panel is empowered to hold that a prior decision applies only on the limited facts set forth in that opinion." *United States v. Smith*, 354 F.3d 390, 399 (5th Cir. 2003). Accordingly, we deny a COA on this issue.

* * * *

(2) Plata v. Dretke

On August 16, 2004, a different panel of the Fifth Circuit denied relief in a case involving Daniel Angel Plata, a Mexican citizen sentenced to death who was also named in *Avena*. *Plata v. Dretke*, 111 Fed. Appx. 213 (2004). Plata sought a COA from the district court's denial of his petition for habeas corpus on two grounds, including the state's failure to advise him of his right to consular assistance under the Vienna Convention. The court concluded that Plata's claim under the Vienna Convention was barred because he had not raised it earlier. The court indicated further that even if his claim were not barred, Plata would still have to show that the VCCR violation had some effect on his trial and had failed to do so. The court's opinion on these points is excerpted below.

As a general rule, new constitutional rules of criminal procedure are not applied retroactively to cases that became final before that decision was announced. *Teague v. Lane*, 489 U.S. 288, 310, 103 L.Ed.2d 334, 109 S. Ct. 1060 (1989). . . .

* * * *

The district court determined that (1) Plata had procedurally defaulted his VCCR claim in the state court; (2) alternatively assuming arguendo that his claim was not procedurally defaulted,

it was barred by *Teague*, because recognizing that the VCCR created personally-enforceable rights would create a new rule of law; and (3) even if his VCCR claim had been properly raised and he had a personally-enforceable right under the VCCR, the state court's rulings that Plata needed to show prejudice from the VCCR violation and that he failed to show such prejudice were not contrary to or an unreasonable application of clearly established law under § 2254(d)(1).

* * * *

Plata argues in his COA application that the district court's denial of his VCCR claim ignored the International Court of Justice's (ICJ) interpretation of Article 36 of the VCCR in the *LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. Rep. 104 (Judgment of June 27, 2001). Plata did not present the *LaGrand* case or any argument stemming from that opinion to the district court, so we need not consider it. . . .

Furthermore, even if we were to address the *Teague* arguments raised in Plata's reply brief, he has not shown that the district court's denial of his VCCR claim as *Teague*-barred is debatable. *See Breard v. Greene*, 523 U.S. 371, 377, 140 L.Ed.2d 529, 118 S. Ct. 1352 (1998); *Flores v. Johnson*, 210 F.3d 456, 456–57 (5th Cir. 2000). In addition, even if Plata's VCCR claim were not procedurally defaulted and even if it were not barred by *Teague*, he still would have to show that the VCCR violation had some effect on his trial. *See Breard*, 523 U.S. at 377; *Avena and other Mexican Nationals* (*Mexico v. United States*), 2004 I.C.J. Rep., 6 121. Plata asserts that he was prejudiced by the lack of consular assistance because he did not understand why, under the Texas legal system, it would have benefited him to plead guilty, and because the consul would have litigated the inequality of the prosecution's grant of favorable plea deals to his co-conspirators. He insists that consular assistance would have aided him in finding medical documents to show that he was injured at birth and that he was physically abused by his father while he lived in Mexico; that the consul could have obtained Plata's educational records from Mexico; and that the consul could have traveled to Mexico and conducted interviews with his relatives there, which in turn could

have assisted the defense in confirming the diagnosis suggested by Plata's MMPI scores, i.e., that he suffered from schizophrenia.

Plata's argument regarding prejudice suffered at trial because he did not understand the benefit of pleading guilty before trial does not make the district court's denial of his VCCR claim debatable, as trial counsel's affidavit in the state habeas proceedings stated [that] he explained to Plata the consequences of pleading guilty before trial and after the State presented its case. . . .

Although he argues that the Mexican consul could have obtained medical records to show that Plata suffered from oxygen deprivation at birth and that he was physically abused as a child, and despite the fact that he now has legal assistance from Mexican consul, Plata does not provide any evidence to support these claims. . . . Given the cumulative nature of any records regarding Plata's birth and physical abuse, Plata has not shown that the district court's alternative denial of his VCCR claim on prejudice grounds is debatable.

* * * *

3. Medical Health Care for Private American Citizens Living Abroad

In a letter of March 31, 2004, responding to inquiries from the Embassy of Japan in Washington, D.C., Edward Betancourt, Director, Office of Policy Review and Interagency Liaison, Bureau of Consular Affairs, U.S. Department of State, provided information regarding U.S. practices relating to medical health care for private American citizens living abroad.

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

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* * * *

I am writing in response to your letter of March 13, 2003. The following is intended to address your request for information regarding United States practices relating to medical health care for private American citizens living abroad.

In response to your question about the "limit or capacity and the type of medical services that the doctors can provide to U.S. citizens living abroad," the United States government does not provide overseas medical services for private American citizens, i.e. American citizens who are not employees of the U.S. Government. Therefore, it is the responsibility of private American citizens to pay for all medical expenses incurred overseas.

The United States government does not assume any responsibility for medical expenses incurred by private U.S. citizens. In addition, U.S. embassy medical staff (Regional Medical Officer, nurse practitioners, etc.) generally cannot provide medical services to non-official American citizens, although there are rare circumstances in which they may do so if no other care provider is available. Only under certain limited circumstances is a consular post authorized to approve payment of certain emergency medical expenditures, which would require the Department of State's approval and would be subject to repayment by the person treated.

In addition, you mentioned several services that are provided for Japanese nationals living abroad. The U.S. government does not have any similar programs; rather, the United States government policy is directed toward the role of U.S. consular officers and the responsibilities of private American citizens in relation to medical and mental health care abroad.

The following is a brief synopsis of the United State Government's policy in relation to medical and mental health care overseas.

Medical Care:

* * * *

3. Every U.S. embassy and consulate is required to maintain an up-to-date list of doctors, dentists, and hospital facilities from which an inquirer can seek medical assistance. The list also notes the areas of specialization and the level of English language ability. We are not permitted to recommend a specific doctor or hospital since post may then be held responsible by the patient if any problems arise.

Mental Health Care:

4. A consular officer cannot repatriate the mentally ill unless they wish to return to the United States. They also cannot force an American citizen to enter a hospital, submit to medical or psychiatric care or return to the United States for treatment. A consular officer cannot serve as the legal guardian of an American declared mentally incompetent in the host country.

5. When a formal declaration of incompetence or statement from an attending physician exists, American Citizens Services may arrange specific care and assistance for the citizen, including the arrangement of a special reception for the repatriated person in the United States. Responsibility vests with the host government to compel the individual to board a flight. The U.S. embassy or consulate will assist the family in identifying appropriate escorts.

6. In cases where there is no formal declaration of incompetence or statement from attending physician, responsibility for the individual rests with the host government until the U.S. citizen requests or accepts United States government help.

Loans:

7. When U.S. citizens request any type of emergency loan, their *ability* to repay the loan, however, is not evaluated. When a citizen receives a loan, the U.S. passport is limited for return to the U.S. and the name is entered in the name check system. Before a loan is issued, contact is made with family, friends, employers, etc. for formal assistance.

* * * *

Prisoners:

11. Consular officers are responsible for making sure that prisoners receive appropriate medical care. Protection of prisoners from mistreatment is a top priority. An examination by an independent physician may also provide confirmation of the mistreatment by a third party.

12. In instances when a U.S. citizen prisoner suffers from a medical ailment while incarcerated, a U.S. consular officer will insist that the prisoner receive appropriate medical attention or if needed, be treated by a competent medical practitioner from outside the prison.

13. U.S. citizen prisoners are eligible for EMDA loans and provided with vitamin supplements where permissible.

Disposition of Remains:

14. There are no U.S. Government funds to cover preparation or disposition of remains of deceased American citizens. The next of kin is responsible for any costs associated with disposition of the remains.

* * * *

B. CHILDREN

International Child Abduction

In April 2004 the Department of State transmitted its statutorily mandated annual report on partner country compliance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, 1980 U.S.T. 130 ("Hague Abduction Convention"). Excerpts below from the 2004 report, which covers the period from October 1, 2002, to September 30, 2003, identify those countries found to be less than fully compliant with their obligations under the convention.

The full text of the report is available at *www.travel.state.gov/family/abduction/hague_issues/hague_issues_568.html.*

As mandated by Section 2803 of Public Law 105–277, (the Foreign Affairs Reform and Restructuring Act of 1998), as amended by Section 202 of Public Law 106–113 (the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act for Fiscal Years 2000 and 2001) and Section 212 of the Foreign Relations Authorization Act for Fiscal Year 2003, the Department of State submits this report on compliance with the Convention by other party countries. Previous such reports were completed in April 1999, September 2000, April 2001 and January 2003. The individual cases covered in Attachment A of the present report remained unresolved as of September 30, 2003.

This report identifies those countries in which implementation of the Convention is incomplete or in which a particular country's judicial or executive authorities fail properly to apply the Convention's requirements, for reasons specific to each country and to varying degrees. The report also discusses unresolved applications for the return of children to the United States that have been filed through the Department of State, which serves as the U.S. Central Authority for the Convention.

* * * *

Section 2803 (a)(3) requests "a list of countries that have demonstrated a pattern of noncompliance with the obligations of the Convention with respect to the applications for the return of children, access to children, or both, submitted by applicants in the United States to the Central Authority of the United States."

There are many factors relevant to evaluating whether a country has properly implemented and is effectively applying the Convention, not least because the executive, legislative and judicial branches of each party country have important and varying roles. A country may thus perform well in some areas and poorly in others. The Department of State, building on the recommendations of an inter-agency working group on international parental child abduction, has identified certain elements of overall performance relating to the Convention's most important requirements and has used these as factors to evaluate each country's compliance.

These elements are: the existence and effectiveness of implementing legislation; Central Authority performance; judicial performance; and enforcement of orders. "Implementing legislation" can be evaluated as to whether, after ratification of the Convention, the Convention is given the force of law within the domestic legal system of the country concerned, enabling the executive and judicial branches to carry out the country's Convention responsibilities. "Central Authority performance" involves the speed of processing applications; the existence of and adherence to procedures for assisting left-behind parents in obtaining knowledgeable, affordable legal assistance; the availability of judicial education or resource programs; responsiveness to inquiries by the U.S. Central Authority and left-behind parents; and success in promptly locating abducted

children. "Judicial performance" comprises the timeliness of first hearing and subsequent appeals of applications under the Convention and whether courts apply the law of the Convention appropriately. "Enforcement of orders" involves the prompt enforcement of civil court or other relevant orders issued pursuant to applications under the Convention by administrative or law enforcement authorities and the existence and effectiveness of mechanisms to compel compliance with such orders. Countries in which failure to enforce orders is a particular problem are addressed in the passages concerning Section (a)(6) below.

This report identifies those countries that the Department of State has found to have demonstrated a pattern of noncompliance or that, despite a small number of cases, have such systemic problems that the Department believes a larger volume of cases would demonstrate continued noncompliance constituting a pattern. In addition, the Department recognizes that countries may demonstrate varying levels of commitment to and effort in meeting their obligations under the Convention. The Department considers that countries listed as noncompliant are not taking effective steps to address serious deficiencies.

Applying the criteria identified above, and as discussed further below, the Department of State considers Austria, Colombia, Ecuador, Honduras, Mauritius, Mexico, and Turkey to be "Noncompliant" and Romania and Switzerland to be "Not Fully Compliant" with their obligations under the Convention. The Department of State has also identified several "Countries of Concern" that have inadequately addressed significant aspects of their obligations under the Convention. These countries are Greece, Hungary, Israel, Panama, Poland, and The Bahamas.

* * * *

a. Ne exeat *clause*

On March 10, 2004, the U.S. Court of Appeals for the Eleventh Circuit granted plaintiff's petition seeking return of his daughter to Norway from Georgia where she was living with her mother, holding that his rights under Norwegian

law entitled him to the return of his child under the terms of the Hague Abduction Convention. *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), *reh'g en banc* denied 107 Fed. Appx. 186, 2004 U.S. App. LEXIS 19651 (2004), *cert. denied* 2004 U.S. LEXIS 7413. The child (Jessica) was born in 1996 in Norway and resided there with both parents until they separated in January 1998. Although the father (Furnes) was originally awarded custody of Jessica, the mother (Reeves) appealed that judgment and in 2001 the parties reached an agreement regarding custody that was approved by the Norwegian Gulating Court of Appeals. As summarized in the Fifth Circuit opinion,

> [p]ursuant to the agreement the parties would maintain "joint parental responsibility" for their daughter under Norwegian law; Jessica would live with her mother; and her father would have access to their daughter on certain days and at certain times. . . . [In addition,] the term "joint parental responsibility" has a designated meaning under Norwegian law. . . . [U]nder § 30 [of Norway's Act No. 7 of 8 April 1981 relating to Children and Parents (the "Children Act")], a parent with joint "parental responsibility" has the right, albeit a shared right, "to make decisions for the child in personal matters." . . . [W]hile the parent with whom the child resides has the authority . . . to determine where the child will live within Norway, § 43 of the Children Act grants a parent with joint parental responsibility . . . decision-making authority over whether the child lives outside Norway. Specifically, § 43 provides that both parents must consent to the child moving abroad . . . Consequently, Plaintiff Furnes's joint parental responsibility effectively gave him the right, generally referred to as a "*ne exeat*" right, to determine whether Jessica can live outside of Norway with her mother.

The district court denied Furnes' petition under the International Child Abduction Remedies Act, Pub. L. No. 100–300, 102 Stat. 437 (codified as amended at 42 U.S.C. §§ 11601–11611) (1988) ("ICARA"), for return of Jessica to

Norway, finding that Furnes was exercising only access rights coupled with a *ne exeat* right under Norwegian law at the time of removal. Concluding that these did not constitute "custody rights," the court denied the petition on the ground that it was not authorized to order the return of the child pursuant to the Convention and ICARA. As discussed in the Eleventh Circuit opinion, following this district court decision, Furnes sought a clarification of his rights from the Bergen City Recorder, a judge on the Bergen City court. In a ruling issued March 11, 2003, the Bergen City Recorder clarified that "Defendant Reeves's emigration with her daughter violated Furnes's 'right of codetermination with regard to the child'" under Norwegian law. The district court denied Furnes's motion for reconsideration based on this ruling and Furnes appealed.

Excerpts below from the Eleventh Circuit opinion provide its reasons, based in part on cases from foreign courts, for concluding that the father was entitled to return of the child because the *ne exeat* right he held under Norwegian law, especially in the context of his retained rights to make "decisions for the child in personal matters," "constitutes a 'right of custody' as defined in the Convention." (Footnotes have been omitted from the excerpts that follow.)

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Plaintiff Furnes seeks return of his daughter to Norway pursuant to the Hague Convention, as adopted in the United States in ICARA. See 42 U.S.C. §§ 11601–11611. The paramount issue in this case is whether Plaintiff Furnes's rights to his daughter under Norwegian law are the type of rights that entitle him to the return of his child under the express terms of the Hague Convention. We conclude that they are.

* * * *

The Hague Convention was created in 1980 with the stated purpose "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish

procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Convention, intro. The Hague Convention specifies that its objects are: "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Convention, Art. 1.

* * * *

In sum, the Hague Convention provides that the removal or detention of a child from his or her State of habitual residence is wrongful if the petitioner establishes by a preponderance of the evidence that: (1) the child has been removed or retained in violation of the petitioner's "rights of custody," i.e., "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence," either jointly or alone; and (2) "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." Convention, Arts. 3, 5; 42 U.S.C. § 11603(e)(1)(A); *see Lops*, 140 F.3d at 936. Once the petitioner satisfies this burden, the child must be returned to her State of habitual residence unless the respondent establishes one of these affirmative defenses: (1) that the petition for return was filed more than one year from the removal or retention and the child is well-settled in her new environment,** or (2) that the petitioner "was not actually exercising the custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention." Convention, Arts. 12, 13; 42 U.S.C. § 11603(e)(2)(B).

* * * *

** Editor's Note: The Eleventh Circuit upheld the district court finding that although this case was filed more than one year after Jessica's removal to the United States, the limitation period was "equitably tolled until Plaintiff Furnes located" Jessica despite efforts to conceal her location by the mother.

D. Furnes's *Ne Exeat* Right Under § 43

Section 43 of the Norwegian Children Act provides that if both parents have joint parental responsibility, both of them must consent to the child leaving Norway and living abroad. We conclude that this *ne exeat* right grants Plaintiff Furnes a right of custody under the Hague Convention. Our conclusion turns on the definition of "rights of custody" in the Convention, but it is further supported by the history and purposes of the Convention and the decisions of courts in our sister signatories.

Article 5 of the Hague Convention defines "rights of custody" to include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention, Art. 5. The question, then, is whether the *ne exeat* right amounts to "the right to determine the child's place of residence." We conclude that it does.

In analyzing whether a parent has custodial rights under the Hague Convention, it is crucial to note that the violation of a single custody right suffices to make removal of a child wrongful. That is, a parent need not have "custody" of the child to be entitled to return of his child under the Convention; rather, he need only have one right of custody. Further, he need not have a sole or even primary right of custody. Article 3 of the Convention specifies that the removal or retention of a child is wrongful if it is in breach of "rights of custody attributed to a person . . . either jointly or alone." Id. Art. 3(a). . . . Accordingly, if Plaintiff Furnes shares with Defendant Reeves a joint right to determine Jessica's place of residence, he has a right of custody under the Hague Convention.

Under Norwegian law, the right to determine the child's place of residence is divided, with different rules governing the decision of where to live within Norway on the one hand and the decision to live outside Norway on the other. Defendant Reeves is entitled to decide where Jessica will live within the borders of Norway and Plaintiff Furnes cannot object. . . .

Plaintiff Furnes does, however, have the right to decide whether or not Jessica can move outside Norway with her mother, and thereby has the joint right to decide whether Jessica's place of residence will be outside or within Norway.

The Convention does not explicitly define the term "place of residence." . . . The Hague Convention was designed to provide a remedy not for whether Jessica should live in Bergen or Oslo within Norway (Reeves's right), but for whether Reeves should be able to take Jessica across international borders. Thus, in our view, the only logical construction of the term "place of residence" in the Convention would necessarily encompass decisions regarding whether Jessica may live outside of Norway. . . . Given that the goal of the Hague Convention is to deter international abduction, we readily interpret the *ne exeat* right as including the right to determine the child's place of residence because the *ne exeat* right provides a parent with decision-making authority regarding the child's international relocation.

* * * *

Further, even if Plaintiff Furnes's *ne exeat* right is (we believe incorrectly) viewed as a mere "veto right" or limitation on Defendant Reeves's right to determine Jessica's place of residence, we nevertheless believe that the *ne exeat* right under Norwegian law is a right of custody under the Convention. . . . [E]ven assuming arguendo that Plaintiff Furnes does not have the right to determine Jessica's place of residence, he has at the very least a veto right relating to the determination of her place of residence—that is, a right "relating to the care of the person" of Jessica. Convention, Art. 5. As such, the *ne exeat* right in § 43 provides Furnes with a right of custody over Jessica as defined by the Hague Convention.

Finally, Plaintiff Furnes's *ne exeat* right endows him with significant decision-making authority over the child's care. By requiring that Jessica remain in Norway, Furnes can ensure that Jessica will speak Norwegian, participate in Norwegian culture, enroll in the Norwegian school system, and have Norwegian friends. That is, Plaintiff Furnes effectively can decide that Jessica will be Norwegian. The right to determine a child's language, nationality, and cultural identity is plainly a right "relating to the care of the person of the child" within the meaning of the Convention.

* * * *

F. International Cases

The United States Supreme Court has established that in interpreting the language of treaties, "we find the opinions of our sister signatories to be entitled to considerable weight." Air France v. Saks, 470 U.S. 392, 404, 105 S. Ct. 1338, 1345, 84 L.Ed.2d 289 (1985) (internal quotation marks and citations omitted). Although the decisions of foreign courts are not essential to our analysis, our reasoning and conclusions are in harmony with the majority of the courts of our sister signatories that have addressed this treaty issue.

Specifically, courts in the United Kingdom, Australia, South Africa, and Israel have adopted a broad view of "rights of custody," and ordered return under the Hague Convention where a child is removed in violation of a *ne exeat* right. Those courts have stressed the need for enforcement of custody orders (including *ne exeat* clauses), the spirit of the Convention, and the desirability of uniformity in ordering the return of children removed in violation of a *ne exeat* provision. See C. v. C., 1 W.L.R. 654, 658 (Eng. C.A. 1989) (holding that a *ne exeat* right provided the father with a measure of control over the child's place of residence sufficient to create a right of custody under the Hague Convention); In the Marriage of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife, [No. 52] (1991) (Austl. Fam.), P 26 (adopting the approach of C. v. C. based on (1) the desirability of uniformity among common law countries, and (2) its view that return of a child removed in violation of a *ne exeat* order is the "result which is in conformity with the spirit of the Convention which is to ensure that children who are taken from one country to another wrongfully, in the sense of breach of court orders or understood legal rights, are promptly returned to their country so that their future can properly be determined within that society"); Sonderup v. Tondelli, 2000(1) Constitutional Court of South Africa 1171, P 25 (CC) (holding that the mother, who had custody under a British Colombia order, was effectively entitled to exercise her custody rights only in British Colombia (save an authorized period), and her failure to return the child to British Colombia as required under the order was

a breach of the conditions of her custody as well as the father's rights); C.C. (T.A.) 2898/92, Foxman v. Foxman, 1992 (H.C.) (Isr.) (concluding that the term "custodial rights" under the Hague Convention should be broadly construed to include cases in which parental consent is required to remove a child from the country of residence).

The English Court of Appeal has also suggested that under some circumstances a court entering the custody order in the child's country of habitual residence may itself have custody rights that are violated by the removal of the child without the court's consent. B. v. B., 3 W.L.R. 865 (Eng. C.A. 1993). All E.R. 144 (C.A.) (Eng.) (noting that under Article 3 an "institution or other body" may hold custody rights, and determining that removal of the child from a court's jurisdiction could violate the court's custody rights).

We acknowledge that foreign courts have not unanimously agreed with our decision here. Canadian and French courts have taken the opposite position, concluding that removal of a child in violation of a *ne exeat* right does not constitute wrongful removal under the Hague Convention. However, the decisions of the English, Australian, South African, and Israeli courts cited above resonate more richly than those of the French and Canadian courts, due to their more persuasive reasoning as well as their stronger numbers. . . .

G. Other Circuits

Our conclusion today diverges from those of the Second, Fourth, and Ninth Circuits. The seminal United States Circuit Court case on the issue is Croll v. Croll, 229 F.3d 133 (2d Cir. 2000). The Fourth and Ninth Circuits essentially adopted the Croll majority's reasoning, as did the district court in this case . . .

* * * *

Our case involves Norwegian law and is different from Croll because Plaintiff Furnes's ne exeat right must be considered in the context of his additional decision-making rights by virtue of his joint "parental responsibility" under Norwegian law. In any event,

we believe the Croll majority's analysis of the ne exeat right is flawed. . . .

b. American military base: Habitual residence

In 2004 the U.S. Court of Appeals for the Ninth Circuit addressed what it described as a matter of first impression, "whether a family's short-term residence on an American military base in Germany renders Germany the children's habitual residence" under the Hague Convention. *Holder v. Holder,* 392 F.3d 1009 (9th Cir. 2004). The court concluded that "in light of the parents' failure to share a settled intention to abandon the United States as the children's habitual residence and the children's lack of acclimatization to the family's new location, the district court did not err in concluding that the children's habitual residence remained the United States throughout their time in Germany." Thus, the mother's retention of the children in the United States was "not wrongful under the Convention." Excerpts below from the Ninth Circuit opinion (footnotes omitted) address the habitual residence issue.

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* * * *

This case presents a somewhat unusual set of facts. Jeremiah was stationed at Sembach Air Force Base in Germany. He was accompanied by his wife, Carla, and their two children. The Holders were in Germany for only eight months in 1999 and early 2000 before Carla returned to the United States with the children. Soon after Carla's return, Jeremiah filed for divorce and filed a petition under the Convention in federal court alleging that Carla had wrongfully retained the children.

* * * *

As a threshold issue, the duty to return a child arises only if the removal or retention was "wrongful" . . .

Here, the crux of the issue is whether the children's habitual residence was Germany immediately prior to the alleged wrongful

retention. If the children's habitual residence was the United States, then the Convention would not compel the children's return to Germany because they were neither "removed" from the state of habitual residence nor "retained" in another state. *See* Pérez-Vera Report, *supra*, ¶ 58 (clarifying that the scope of the Convention is limited "to those children who, while being habitually resident in one of the Contracting States, are removed to or retained in, the territory of another Contracting State"). On the other hand, if Germany were the habitual residence, then the protections of the Convention would kick in and the children would be returned to Germany.

The term "habitual residence" was intentionally left undefined in the Convention. *Id.* ¶ 53; *cf.* Paul Lagarde, Explanatory Report ¶ 40, *in* 2 Hague Conference on Private International Law, Proceedings of the Eighteenth Session 534 (1996) (reporting in the context of the 1996 Hague Child Protection Convention that a proposal to insert a definition of habitual residence "went against the Conference's tradition and received no support"). This omission has helped courts avoid formalistic determinations but also has caused considerable confusion as to how courts should interpret "habitual residence."

In hopes of providing "intelligibility and consistency" in the determination of children's habitual residences, we set out an analytical framework in *Mozes v. Mozes*, 239 F.3d 1067, 1071–73 (9th Cir. 2001). First, in order to acquire a new habitual residence, there must be a "settled intention to abandon the one left behind." *Id.* at 1075. This is a question of fact to which this court grants deference to the district court. *Id.* at 1075–76. Second, there must be (A) an "actual 'change in geography,' " *id.* at 1078 (quoting *Friedrich v. Friedrich*, 983 F.2d 1396, 1402 (6th Cir. 1993)), combined with (B) the "passage of 'an appreciable period of time.' " *Mozes*, 239 F.3d at 1078 (quoting *C v. S*, 2 Eng. Rep. 961, 965 (Eng. H.L. 1990)). This period of time must be "sufficient for acclimatization." *Mozes*, 239 F.3d at 1078 (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3rd Cir. 1995)).

* * * *

Despite the factual focus of our inquiry, ultimately our conclusion rests on a legal determination: After scrutinizing the circumstances of a particular case, we must determine whether the discrete facts add up to a showing of habitual residence. . . . In making this determination, we heed the statutory requirement that Jeremiah—as the party seeking return of the children—establish by a preponderance of the evidence that the children have been wrongfully retained. *See* 42 U.S.C. § 11603(e)(1).

We emphasize that courts must consider the unique circumstances of each case when inquiring into a child's habitual residence. Thus, for example, no per se rule dictates that children of U.S. military personnel remain habitually resident in the United States when joining their parents at overseas posts.

To the contrary, fact patterns vary considerably within the limited universe of Convention cases involving military personnel. . . .

I. SETTLED INTENTION

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In analyzing Carla's and Jeremiah's intent, we do not lose sight of the fundamental inquiry: the *children's* habitual residence. Parental intent acts as a surrogate for that of children who have not yet reached a stage in their development where they are deemed capable of making autonomous decisions as to their residence. *Id.* at 1076. . . .

* * * *

The cases under the Convention tend to break down along a continuum:

> On one side are cases where the court finds that the family as a unit has manifested a settled purpose to change habitual residence, despite the fact that one parent may have had qualms about the move. Most commonly, this occurs when both parents and the child translocate together under circumstances suggesting that they intend to make their home in the new country. When courts find that a family has jointly taken all the steps associated with abandoning habitual residence in one country to take it up in another, they are generally unwilling to let one parent's

> alleged reservations about the move stand in the way of finding a shared and settled purpose.

Mozes at 1076–77 (footnotes omitted). On the other end of the spectrum "are cases where the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period. In these cases, courts have generally refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence." *Id.* at 1077. In the middle rest cases where a parent "had earlier consented to let the child stay abroad for some period of ambiguous duration." *Id.* The Holders' case presents yet another marker on the continuum.

This case falls closer to the end of the continuum marked by moves for "specific, delimited" periods of time, *id.*, such as sabbaticals and other conditional stays. . . .

The conditional move to Germany stands in contrast to situations in which the family definitively left the old residence and reestablished residence in a new location. . . .

We acknowledge that this is a close case. The move to Germany was no mere vacation. The Holders' stay might have been "intended to be of a specific, delimited period," *Mozes*, 239 F.3d at 1077, but it was for a period of four years. Mindful of our caution in *Mozes* that being "settled" somewhere "need not mean that's where you plan to leave your bones," *id.* at 1074, our review of the evidence persuades us that the district court did not err in finding that Jeremiah and Carla lacked a shared intention to abandon the United States as the children's habitual residence and shift it to Germany. . . .

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II. ACCLIMATIZATION

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Simply stated, neither child had developed deep-rooted ties to the family's new location. This conclusion comports with the spirit of the Convention, which aims "to secure the immediate reintegration of the child into its habitual environment." Pérez-Vera Report, *supra*, ¶ 25.

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C. JUDICIAL ASSISTANCE

1. Hague Legalization Convention

a. Use of electronic records and formality of apostille

In a letter dated July 9, 2004, Edward A. Betancourt, Director, Office of Policy Review and Inter-Agency Liaison, Overseas Citizens Services, Bureau of Consular Affairs, Department of State provided information for the National Association of [state level] Secretaries of State and Notary Public Administrators concerning U.S. treaty obligations under the Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents, Oct. 5, 1960, 527 U.N.T.S. 189 ("Hague Legalization Convention"). The letter noted that when the United States became a party to the Hague Legalization Convention in 1980, it informed the official depository that

> documents issued by Federal agencies would be affixed with the Apostille certificate by the U.S. Department of State Authentications Office. Clerks and deputy clerks of U.S. Federal courts would affix Apostilles on documents issued by federal courts. Documents originating in the states, territories and other jurisdictions of the United States, and the District of Columbia would be affixed with the Apostille by a designated official, generally the Secretary of State of the individual U.S. state or other jurisdiction.

Among other things, the letter provided the following guidance on maintenance of electronic records and issues of form and affixation of an apostille.

The full text of the letter is available at *www.state.gov/s/l/c8183.htm*. For further information on the Special Commission of the Hague Conference on Private International Law, held October 28–November 4, 2003, to review the Hague Service, Evidence, and Legalization Conventions, *see Digest 2003* at 859–63.

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Article 7 of the Convention provides that each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued . . .

The Convention also states that at the request of any interested person, the authority which has issued the Apostille certificate shall verify whether the particulars in the certificate correspond with those in the register or card index. These provisions were written when the Convention was concluded October 5, 1961, and we appreciate that most U.S. states or other jurisdictions now maintain electronic records. The Special Commission of the Hague Conference specifically approved the use of electronic registries in its conclusions of November 4, 2003:

"The Special Commission emphasized that the use of information technology (IT) could have a positive impact on the operation of the Convention, in particular through lowering costs and increasing the efficiency of the creation and registration of Apostilles."

The Special Commission recommended that Apostilles conform as closely as possible to the Model Certificate (available at *http://www.hcch.net/e/conventions/text12e.html*). This is particularly important where electronically or non-manually reproduced signatures are used. In this respect, the Special Commission underlined the important role that the register could play in resolving any doubt concerning the authenticity of an Apostille.

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Form of an Apostille and how to Affix it

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The Special Commission noted the variety of means for affixing Apostilles to the public document. . . . The Special Commission stressed that Apostilles may not be refused in a State of production on the grounds that they do not comply with that State's national formalities and modes of issuance.

Nevertheless, we must stress for you that as a practical matter, many foreign courts expect to see Apostilles attached with a fair degree of formality. To the extent that pre-printed Apostille allonges are used, it is essential that you consider using special anti-fraud

watermarked paper, stick-on gold seals, and/or wet signatures, and that you employ a staple or grommet system that is fraud-resistant. All Apostilles and allonges should be permanently affixed to the public document by the state issuing authority and not by the customer.

* * * *

One practice of some U.S. states concerning numbering of Apostilles has led to serious problems. The Convention requires that all Apostilles must be numbered consecutively, with individual numbers applied for each apostille issued. Group or bulk numbers per customer rather than per document are not acceptable, and will be rejected by many countries. Russia, in particular, has notified the U.S. Department of State that it will not accept Apostilles that are not individually numbered.

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A message from Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, responding to an inquiry from a secretary of state of a state of the United States concerning technical issues and retention period is excerpted below. The full text of Mr. Kovar's message is available at *www.state.gov/s/l/c8183.htm.*

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In our experience, preparing the Apostille in the form of a square at least 9 centimeters on each side, with each of the 10 specific elements fully filled out, should suffice.

We have found that U.S. states often have very different approaches to preparing the Apostille. Many have had difficulties with foreign officials rejecting their Apostilles—often because they have not securely fastened the Apostille, or because they use laser-printed seals and signatures, or do not otherwise use the traditional square-sided box Apostille. While the Department has sought and received official assurances from other Hague member states that variations of these kinds do not violate the Convention and should be permissible, the fact is that foreign officials are more likely to

reject Apostilles as unfamiliar or potentially fraudulent the more they diverge from the model. . . .

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. . . We recommend that states all establish regular retention periods of at least a few years, consistent with their other record retention policies. Remember that the purpose of the retention is to be able to respond to foreign officials if they query whether an Apostille was actually issued for a particular document. We understand that most U.S. states now use an electronic registry, and this has been declared to be consistent with the Convention. Article 7 of the convention requires the record to include "a) the number and date of the certificate, b) the name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp."

b. Propriety of authenticating or legalizing certain documents

In a letter of July 8, 2004, Mr. Betancourt responded to questions from state officials concerning "the propriety of authenticating or legalizing certain notarized documents related to citizenship, passports, immunity and allegiance," as excerpted below.

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

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Interpretation of the Hague Legalization Convention and U.S. obligations under that treaty:

The Apostille does not provide any form of immunity. It is inappropriate to place the Apostille certificate on a document that suggests that the Apostille has such an effect. Moreover, the Apostille should not be placed on any document by state Secretaries of State or Notary Public Administrators if the document is intended for use in the United States or in a country not party to the Hague Legalization Convention. . . .

Citizenship, Allegiance and Sovereignty-related documents:

Documents concerning U.S. citizenship, allegiance to the United States or any U.S. state or other jurisdiction, sovereignty, Actual Notice of In Itinere Status and World Service Authority (or similar) so called "citizenship" documents, have no force or validity, and could be used for fraudulent purposes. Accordingly, the U.S. Department of State Authentications Office and U.S. embassies and consulates abroad have been instructed to refuse to provide authentication or notarial services for such documents under the refusal authority provided in 22 CFR 92.9 and 22 CFR 131.2. The Department of State recommends that state Secretaries of State and Notary Public Administrators refuse to notarize, authenticate, or affix the Hague Apostille to such documents.

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2. Hague Service Convention

By letter of March 12, 2004, Robert M. Hollis, Director, Office of International Judicial Assistance, Civil Division, U.S. Department of Justice, provided the views of the United States on Article 3 of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention."). The letter, responding to a request from the Ministry of Justice of the Republic of Slovenia, addressed specifically "the competence of private attorneys under U.S. domestic law to forward service requests under this Convention to Central Authorities of party states."

* * * *

Article 3 of the Hague Service Convention provides that a request for service should be transmitted to the Central Authority of the state addressed by the "authority or judicial officer competent under the law of the State in which the documents originate." Under the domestic law of the United States this provision is interpreted as authorizing an attorney as an officer of the court to

execute the request. *See* Epstein & Snyder, *International Litigation: A Guide to Jurisdiction, Practice & Strategy*, Sec. 4.04[1] (1994 Supp.). Specifically, the Federal Rules of Civil Procedure, which govern procedural aspects of litigation within our federal courts, provide in Rule 4(c), first, that "[t]he plaintiff is responsible for service of a summons and complaint . . ." and second, that such service "may be effected by any person who is not a party and who is at least 18 years of age." Rule 4(c) has been interpreted as authorizing attorneys to forward service under Article 3 of the Hague Service Convention. *FRC International, Inc., v. Taifun Feuerloschgeratebau und Vertriebs GmbH*, 2002 WL 31086104 at 9 (N.D. Ohio, 2002); *Marshhauser v. The Travellers Indemnity Co.*, 145 F.R.D. 605 (S.D. Fla. 1992). In addition, many state courts have similar provisions which make clear that attorneys are competent to provide service in litigation. Beyond that, in the United States attorneys representing parties in litigation are deemed to be officers of the court, *Holloway v. Arkansas*, 435 U.S. 475 (1978), and, as such, come within the terms of Article 3. That attorneys are authorized to forward requests for service under the Hague Service Convention, is made further clear by Rule 4(h)(1) of the Federal Rules of Civil Procedures, which specifically provides, in part, that service upon individuals in a foreign country may be effected "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. . . ."

Cross-references

International enforcement of child maintenance, **Chapter 15.B.**
Judicial assistance, **Chapter 15.C.**

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE TREATIES AND RELATED ISSUES

1. U.S.-EU

On June 25, 2003, the United States and the European Union signed agreements on extradition and mutual legal assistance in criminal matters. *See Digest 2003* at 135–38. Those agreements have not yet been transmitted for advice and consent to ratification pending completion of negotiations to bring bilateral extradition treaties and mutual legal assistance treaties ("MLATs") with affected countries into conformity with the U.S-EU agreements. As of the end of 2004, implementing instruments for both extradition treaties and MLATs had been signed with the following countries: the Netherlands (Sept. 29, 2004); France (Sept. 30, 2004); Sweden (Dec. 16, 2004); Finland (Dec. 16, 2004); Belgium (Dec. 16, 2004); United Kingdom (Dec. 16, 2004); and Spain (Dec. 17, 2004). It is anticipated that the implementing instruments will be transmitted to the Senate for advice and consent to ratification at the same time as the U.S.-EU agreements.

2. U.S.-UK Extradition Treaty

On April 19, 2004, President Bush transmitted to the Senate for advice and consent to ratification the Extradition Treaty

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Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, and related Exchanges of Letters, signed at Washington on March 31, 2003. S. Treaty Doc. No. 108–23 (2004). Once ratified, the Treaty will replace both the 1972 Extradition Treaty and the 1985 Supplementary Treaty between the two countries. A fact sheet prepared by the Department of State described the new treaty and responded to questions raised about the effect of certain changes.

The fact sheet, dated August 3, 2004, and excerpted below, is available at *www.state.gov/p/eur/rls/fs/34885.htm*.

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Article 2

Extraditable Offenses. Article 2(1) defines an offense as an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty. Use of a pure "dual criminality" clause, rather than categories of offenses listed in the Treaty plus other offenses that are listed in relevant U.K. extradition law and are considered felonies under U.S. law, as in the 1972 Extradition Treaty, obviates the need to renegotiate or supplement the Treaty as additional offenses become punishable under the laws in both States. Under the 1972 Extradition Treaty, extradition is to be granted for offenses contained in an annex to the Treaty. In addition, an offense is an extraditable offense if the offense is defined as extraditable under U.K. law and as a felony under U.S. law, and if the offense is punishable by imprisonment or other form of detention for more than one year or by the death penalty. As the old Treaty does, Article 2(2) of the new Treaty further defines an extraditable offense as including an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any offense described in paragraph 1 of Article 2.

Regarding extraditable offenses, additional flexibility is provided by Article 2(3), which provides that an offense shall be

an extraditable offense (a) whether or not the laws in the Requesting and Requested States place the offense within the same category of offenses or describe the offense by the same terminology; or (b) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being jurisdictional only. Regarding offenses committed outside the territory of the Requesting State, Article 2(4) provides that extradition shall be granted in accordance with the provisions of the Treaty if the laws in the Requested State provide for the punishment of such conduct committed outside its territory in similar circumstances. If the laws in the Requested State do not provide for the punishment of such conduct committed outside of its territory in similar circumstances, the executive authority of the Requested State, in its discretion, may grant extradition provided that all other requirements of the Treaty are met.

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Some critics have argued that the Treaty could interfere with the ability of Americans to exercise their First Amendment constitutional rights. In fact, a suspect can only be extradited if the offense for which he is sought by the United Kingdom is an offense punishable by one year or more (or by a more severe penalty) under United States law. Assuming the hypothetical activity is protected by the First Amendment, the U.S. would be unable to extradite a fugitive sought by the U.K. because the dual criminality requirement of the Treaty would not be met.

* * * *

Article 4

Political and Military Offenses. This article sets forth bases for the denial of extradition. As is customary in extradition treaties, paragraph 1 provides that extradition shall not be granted if the offense for which extradition is requested constitutes a political offense.

Article 4(2) specifies seven categories of offenses that shall not be considered to be political offenses: (a) an offense for which

both Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; (b) a murder or other violent crime against the person of a Head of State of one of the Parties, or of a member of the Head of State's family; (c) murder, manslaughter, malicious wounding, or inflicting grievous bodily harm; (d) an offense involving kidnapping, abduction, or any form of unlawful detention, including the taking of a hostage; (e) placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage; (f) possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage; and (g) an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any of the foregoing offenses.

Article 4(3) requires that, notwithstanding the terms of paragraph 2, extradition shall not be granted if the competent authority of the Requested State determines that the request is politically motivated. In the United States, the executive branch is the competent authority for the purposes of the Article. Under the 1985 Supplementary Treaty, the judicial branch has the authority to consider whether an extradition request is motivated by a desire to punish the person sought on account of race, religion, nationality, or political opinions, or if the person sought would be subject to unfair treatment in U.K. courts or prisons after extradition. Like all other modern extradition treaties, the new Treaty grants the executive branch rather than the judiciary the authority to determine whether a request is politically motivated.

Article 4(4) provides that the competent authority of the Requested State may also refuse extradition for offenses under military law that are not offenses under ordinary criminal law (e.g., desertion). In the United States, the executive branch is the competent authority for the purposes of the Article.

Critics have claimed the new Treaty threatens the due process rights of Americans by eliminating the role of the courts in

reviewing whether extradition should be denied because the offense for which the fugitive is sought is a political offense. This criticism confuses the "political offense" and "political motivation" provisions in that Treaty. Under the new Treaty, as under the existing treaty, U.S. courts will continue to assess whether an offense for which extradition has been requested is a political offense. This inquiry is undertaken when determining whether the offense for which a Requesting State has sought a fugitive's extradition is an extraditable offense. In contrast, under the new Treaty, the Executive Branch would determine whether an extradition request is politically motivated.

This change makes the new treaty consistent with U.S. practice with every other country around the world with which we have an extradition treaty.

* * * *

Article 6

Statute of Limitations. Article 6 provides that the decision by the Requested State whether to grant the request for extradition shall be made without regard to any statute of limitations in either State.

Some critics have suggested that the language of this provision effectively eliminates any statute of limitations. This is untrue; the new Treaty does not eliminate the application of the statute of limitations, for either the U.S. or the U.K. It does reserve determination on the issue of the statute of limitations to the courts of the country where the criminal charges are pending. There is nothing novel about this provision, which is found in several of our other modern treaties: it states that the decision by the Requested State whether to grant the request shall be made without regard to the statute of limitations in either State. See, for example, U.S. extradition treaties with Sri Lanka (Article 6); Cyprus (Article 7); and the Eastern Caribbean States (Article 8).

A person extradited from the U.S. to the U.K. or to any of our other treaty partners can always seek to have his or her prosecution dismissed on the basis that it is time-barred in the state in which he or she is being tried. The treaty does not change this right in any respect.

This kind of statute of limitations provision makes good sense for U.S. law enforcement officials. The U.S. has experienced difficulties with a provision in certain of our other extradition treaties that permits the Requested State's courts to consider the Requesting State's law regarding statutes of limitations. It generally is very difficult for foreign courts to accurately analyze and apply another country's statutes of limitations.

* * * *

Article 12

Provisional Arrest. Article 12 sets forth procedures and describes the information that is required for the provisional arrest and detention of the person sought, in an urgent situation, pending presentation of the formal request for extradition. In particular, Article 12(4) provides that if the Requested State's executive authority has not received the extradition request and supporting documents required by Article 8 within sixty (60) days from the date of provisional arrest, the person may be discharged from custody. Article 12(5) explicitly provides that such a discharge from custody shall not prejudice the subsequent re-arrest and extradition of that person if the extradition request and supporting documents are delivered at a later date.

Some individuals have expressed concern about this article. However, provisional arrest under the new Treaty is no different than the analogous provision in the existing Treaty or in any of our other extradition treaties; all contemplate the use of "provisional arrest" for no longer than 60 days, so that the Requesting State can prepare a full extradition package.

Further, this provision is consistent with the U.S. Constitution. A foreign country seeking a fugitive's arrest must, through its documentation, demonstrate probable cause that the fugitive has committed the offense for which he is sought before a U.S. court may issue an arrest warrant for that fugitive.

* * * *

Article 16

Seizure and Surrender of Property. Article 16 provides that the Requested State may, to the extent permitted under its law,

seize and surrender to the Requesting State all items and assets, including proceeds, that are connected with the offense in respect of which extradition is granted. Such items and assets may be surrendered even if the extradition cannot be carried out due to the death, disappearance, or escape of the person sought. The Requested State may condition the surrender of the items upon satisfactory assurances that the property will be returned to the Requested State as soon as practicable. The Requested State may also defer the surrender of such items if they are needed as evidence in the Requested State.

Critics have suggested this article would permit the unconstitutional seizure and transfer of assets to the United Kingdom. In fact, there is nothing novel about this provision; it refers to the Requested State's ability to seize items and assets that are connected with the offense for which the fugitive is sought and transfer them to the Requesting State. This same concept is contained in the existing Treaty and virtually all U.S. extradition treaties. It is useful to law enforcement officials in some cases in securing evidence related to the offense for which the fugitive is sought.

* * * *

Article 18

Rule of Specialty. Paragraph 1 provides, subject to specific exceptions set forth in paragraph 3, that a person extradited under the Treaty may not be detained, tried, or punished in the Requesting State except for: (a) Any offense for which extradition was granted, or a differently denominated offense based on the same facts as the offense for which extradition was granted, provided such offense is extraditable, or is a lesser included offense; (b) any offense committed after the extradition of the person; or (c) any offense for which the executive authority of the Requested State waives the rule of specialty and thereby consents to the person's detention, trial, or punishment. The treaty currently in force does not contain such a provision for waiver of the rule of specialty, and the preferred practice of States is not to waive the rule of specialty unless there is a treaty provision authorizing them to do so.

Article 18(2) provides that a person extradited under the Treaty may not be the subject of onward extradition or surrender for any offense committed prior to the extradition to the Requesting State unless the Requested State consents. The Treaty's use of the term "surrender" (the operable term in the Rome Statute of the International Criminal Court) makes explicit that the United Kingdom will not surrender to the ICC any person extradited by the United States. The United Kingdom has recorded in a separate letter its understanding that the Treaty continues the protection implicit in the current treaty against surrender to the ICC of fugitives extradited by the United States and states in its letter that it will contest any request from the ICC for such surrender as being inconsistent with Article 98(2) of the Rome Statute.

Under Article 18(3), these restrictions shall not prevent the detention, trial, or punishment of an extradited person, or the extradition of a person to a third State, if the extradited person leaves the territory of the Requesting State after extradition and voluntarily returns to it or fails to leave the territory of the Requesting State within twenty (20) days of being free to do so.

Some critics have suggested that this article eliminates, in all but name, the rule of specialty. In fact, the new Treaty's rule of specialty provisions are substantially the same as the parallel provision in all of our modern extradition treaties. Fugitives can only be tried for the charges for which they were extradited, absent specific consent by the State that has extradited the fugitive. See, for example, the United States's extradition treaties with Korea (Article 15); India (Article 17); and Poland (Article 19).

* * * *

Article 22

Application. Paragraph 1 makes the Treaty applicable to offenses committed before as well as after the date of entry into force. Under Article 22(2), the Treaty shall apply to the United States of America and, in relation to the United Kingdom, to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and to any territory for whose international relations the United Kingdom is responsible and to which the Treaty has been extended by agreement of the Parties. Article 22(3) provides that the

application of the Treaty to any territory in respect of which extension has been made in accordance with paragraph 2 may be terminated by either State giving six months' written notice to the other through the diplomatic channel.

Pursuant to Article 22(4), a request by the United States for the extradition of an offender who is found in any of the territories to which this Treaty applies in accordance with paragraph 2 of the Article may be made to the Governor or other competent authority of that territory. A request on the part of any of the territories to which this Treaty applies in accordance with paragraph 2 of the Article for the extradition of an offender who is found in the United States of America may be made to the Government of the United States by the Governor or other competent authority of that territory. This paragraph streamlines the extradition procedures regarding requests to and from U.K. territories, as such requests currently must go through the United Kingdom's central authority in London.

Contrary to the suggestion of some critics, there is nothing novel about this retroactivity provision. Both the existing Treaty (at Article XVI) and the new Treaty (at Article 22) permit extradition for offenses committed prior to the date of entry into force of the treaty. Indeed, this provision is contained in virtually all of our extradition treaties and is needed by the U.S. law enforcement community. See, for example, the United States's extradition treaties with Belgium (Article 20); Argentina (Article 22); and France (Article 24).

It should be noted that this provision does not in any way create criminal liability where none previously existed before and therefore raises no ex post facto problems. Extradition is made possible only for conduct that was criminalized at the time it was committed.

* * * *

Relationship of the New U.S.-U.K. Extradition Treaty to Other International Obligations of the United States

Certain groups have raised questions about whether the new U.S.-U.K. Extradition Treaty will place the United States in conflict with certain other of its international obligations: specifically, its

obligations under the International Convention on Civil and Political Rights (the "ICCPR") and the 1967 UN Refugees Protocol.

The ICCPR entered into force in late March 1976; both the U.S. and the U.K. are parties to the Convention. Some critics have suggested that, since the U.K. has derogated from its obligations under Article 9 of the ICCPR, the U.S. would not be in compliance with its ICCPR obligations if it extradited a fugitive to the U.K. This is incorrect. Article 4 of the ICCPR specifically contemplates derogation from obligations contained in the Treaty, with the exception of certain Articles from which a State cannot derogate; Article 9 of the ICCPR is not one of the Articles from which no derogation is permitted.

In 1988, the U.K. formally notified other States Parties to the ICCPR that, in accordance with Article 4(3), it found it necessary to take and continue measures derogating in certain respects from the U.K.'s obligations under Article 9(3) of the ICCPR. Further, following September 11, 2001, the U.K. enacted new legislation entitled the "Anti-Terrorism, Crime, and Security Act 2001," which addresses, among other issues, detentions. This new U.K. law permits the Home Secretary to authorize the indefinite detention without charge of suspected international terrorists. In short, U.K. law regarding the detention of those suspected of involvement in international terrorism has nothing to do with extradition or the treatment of a fugitive who might be returned from the U.S. to the U.K. to face trial or sentencing or to serve a sentence in the U.K. By definition, if the U.K. is seeking extradition of a fugitive, that person already has been charged with an offense in the U.K.

A second criticism that has been made regarding the new Treaty is that it allegedly violates the asylum and non-refoulement provisions of the 1967 UN Refugees Protocol, to which the U.S. is a party. This, too, is incorrect. U.S. courts have long recognized that asylum proceedings and extradition proceedings are two distinct proceedings; in fact, U.S. courts often suspend asylum proceedings until extradition proceedings are complete. The 1951 Convention Relating to the Status of Refugees (the "UN Refugee Convention"), as well as U.S. law, provide that an individual may be excluded when there is reason to believe that the individual has committed a serious, non-political offense. Therefore, if the United

States has decided to extradite to the U.K. a fugitive for whom the U.K. has made an extradition request, that individual will, by definition, be an individual reasonably suspected to have committed a serious, non-political offense.

3. Claimed Reviewability of Secretary of State's Extradition Decision

a. Cornejo-Barreto v. Seifert

In 1998 the U.S. District Court for the Central District of California denied a petition for habeas corpus alleging that an extradition magistrate's order certifying extraditability violated Article 3 of the Torture Convention. *Cornejo-Barreto v. Seifert*, SA CV-97-00843-AHS (C.D. Cal. Oct. 7, 1998). The district court found that Article 3 is not self-executing and therefore "does not give Cornejo-Barreto rights which are enforceable in a judicial proceeding." The court also found that "the rule of non-inquiry in extradition cases has historically precluded United States courts from inquiring into the possible treatment of a fugitive, such as Cornejo-Barreto, if he is returned to Mexico." On appeal the U.S. Court of Appeals for the Ninth Circuit affirmed denial of the petition but two of the judges on that panel indicated in dicta that Cornejo-Barreto could later seek review in federal district court if the Secretary did decide to extradite him, relying on recently-enacted legislation. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000). *See Digest 2001* at 70–87.

The district court denied a second petition for habeas corpus brought following the Secretary of State's signing of the surrender warrant, but stayed Cornejo-Barreto's extradition pending appeal, SA CV 01-662 AHS (C.D. Cal. July 10, 2002). The Ninth Circuit affirmed in an opinion of August 16, 2004, finding that the Secretary of State's determination was not subject to judicial review. 379 F.3d 1075 (9th Cir. 2004).

In October 2004 the United States for the first time learned of a possible statute of limitations problem with the

underlying prosecution of Cornejo-Barreto in Baja California Norte. In response to inquiries, on October 28, 2004, the U.S. Department of Justice attaché in Mexico City received a copy of an order dated September 24, 2004, issued by the First District Judge for Penal Matters for Tijuana, Baja California Norte, canceling the warrant and closing the case because the state statute of limitations had run. He was informed that no appeal of the dismissal of the arrest order was possible. Given these facts, Mexican government representatives indicated that the Government of Mexico would withdraw its request for extradition.

On November 10, 2004, the United States filed a motion with the Ninth Circuit to dismiss the case as moot and to preserve the panel opinion of August 16, 2004. On November 19, 2004, the Ninth Circuit, sitting *en banc*, granted the motion to dismiss the appeal as moot. 389 F.3d 1307 (9th Cir. 2004). As to the two Ninth Circuit panel opinions, however, the court vacated the opinion of August 16, 2004, but denied the request to vacate other published opinions in the case, thus leaving the opinion reported at 218 F.3d 1004 standing. At the end of 2004, the United States continued to seek a different resolution of the disposition of the two Ninth Circuit opinions.

Excerpts below from the brief filed by the United States in the Ninth Circuit on May 20, 2004, set forth its view that the Secretary of State's extradition determination is not judicially reviewable, a position with which the Ninth Circuit agreed in its August decision. The full text of the U.S. brief and the earlier U.S. supplemental brief filed with the Ninth Circuit panel on March 3, 2004, are available at *www.state.gov/s/l/c8183.htm.*

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This Court has directed the parties to file simultaneous briefs "setting forth their respective positions as to whether the case should be reheard en banc."

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Our short answer to the Court's question is that we continue to assert the position stated in our briefing: the panel to which this case is currently assigned can affirm the district court's judgment of dismissal in the Government's favor because petitioner's attack against the Secretary's decision to extradite him to Mexico as a murder suspect is not justiciable under the Rule of Non-Inquiry, a doctrine applied by this Court and its sister Circuits. The contrary discussion in a prior panel opinion from this Court is non-binding obiter dictum, and should not be adopted by the current panel. That dictum erroneously stated that, through the Foreign Affairs Reform and Restructuring Act of 1988 ("the FARR Act"), Congress for the first time provided that the courts can review extradition determinations made by the Secretary concerning the operation of foreign judicial systems, even though those decisions are inextricably interwoven with delicate foreign affairs considerations.

B. The Rule of Non-Inquiry for extradition cases is at the heart of this case. This doctrine stems from Supreme Court extradition precedent, is constitutionally based, and has been applied many times by this Court and its sister Circuits to deny habeas relief in attacks on extradition orders.

As this Court held in *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997), "under what is called the 'rule of non-inquiry' in extradition law, courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely." In *Lopez-Smith*, this Court refused to grant a habeas writ to stop an extradition, despite the petitioner's contention that the legal procedures and punishment he faced in Mexico after extradition were "antipathetic" to the Court's "sense of decency." *Id.* at 1326. Instead, this Court applied the principle that "an extraditing court will not inquire into the procedures or treatment awaiting a surrendered fugitive in the requesting country." *Ibid.*

The Court so ruled even though Lopez-Smith contended that he should not be extradited, despite the requisite judicial certification of probable cause, because the Mexican legal system was corrupt and would not treat him fairly. This Court firmly

rejected those arguments: "Extradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function." *Id.* at 1326.

This Court added that, once an extradition certificate issues from a judge, a fugitive could attempt to make a presentation to the Secretary as to why actual surrender should be denied. "As for whether the Secretary of State considers the material [showing corruption] against other considerations, that is a matter exclusively within the discretion of the executive branch and not subject to judicial review." *Id.* at 1326.

This holding in *Lopez-Smith* came against the backdrop of numerous rulings both by this Court and its sister Circuits denying habeas petitions in light of the Rule of Non-Inquiry as applied to extradition decisions by the Secretary. . . .

C. The Rule of Non-Inquiry ensures that the Judiciary and the Executive remain within their appropriate respective domains regarding extradition, a process fraught with foreign relations considerations. As the record here demonstrates, extradition determinations made by the Secretary in carrying out the FARR Act and the Torture Convention can depend on a host of factors, ranging from an evaluation of the requesting foreign state's government and its degree of control over the various actors within the foreign judicial system, to predictions about how the requesting state is likely to act in actual practice in light of its past assurances and behavior, and to assessments as to whether confidential diplomacy or public pronouncements will best protect the interests of the fugitive. These determinations are inherently discretionary and intrinsically within the power to engage in delicate foreign relations. Thus, the Secretary of State might decide to surrender a fugitive whom he concludes is not likely to be tortured, to deny surrender of a fugitive whom he thinks likely will be tortured, or to condition extradition on the requesting foreign state's provision of appropriate assurances. The decision to seek assurances is made by the State Department on a case-by-case basis. ER 182–86.

Not surprisingly, calculating the need for assurances, and the reliability of assurances obtained, can involve sensitive and complex judgments about the following: the identity, position, or other information relating to the foreign official relaying the assurances

to the State Department; political or legal developments in the requesting country that would provide the needed context for the assurances given; and the nature of diplomatic relations between the United States and the requesting foreign state at that moment. The State Department officials analyzing the relevant information may also make difficult predictions regarding the requesting state's incentives and capacities to fulfill assurances given. ER 183–84.

Under such circumstances, judicial review of a decision by the Secretary of State to extradite a particular individual would place the federal courts in an unfamiliar and obviously inappropriate position. For example, if the Secretary accepts the assurance of a foreign government that, despite a history of human rights abuses in that country, the person will not be tortured—thereby complying with the policy of the FARR Act and the Torture Convention—a district court or court of appeals could evaluate this decision only by second-guessing the expert opinion of the State Department that such an assurance can be trusted. It is difficult to contemplate how judges would make such a prediction, lacking any ability to communicate with the foreign state regarding subjects such as assurances, or to weigh the current situation within that country.

E. Nevertheless, based on the dictum by the prior panel of this Court, Cornejo-Barreto argues now that, in the FARR Act, Congress took a significant legal leap and abrogated the Rule of Non-Inquiry, thereby overriding that principle of law and substantially affecting the power of the Executive Branch in the foreign relations realm. The prior panel majority had stated that, if the Secretary later decided to proceed with Cornejo-Barreto's extradition, the latter could file a subsequent habeas action under the Administrative Procedure Act, and the district court would have jurisdiction over such a claim despite the Rule of Non-Inquiry. *Cornejo-Barreto*, 218 F.3d at 1012–17.

* * * *

F. Whether or not it is dictum, the opinion by the prior panel on the Rule of Non-Inquiry is mistaken because, far from demonstrating that Congress meant to accomplish a major upheaval in extradition law, the FARR Act states explicitly that it does ***not*** create new avenues of judicial review concerning

extradition decisions. Further, no other provision of the FARR Act can possibly be read to accomplish the legal revolution that Cornejo-Barreto says Congress wrought.

The relevant text of the FARR Act reads: "[N]otwithstanding any other provision of law * * * nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [Torture] Convention or this section * * * except as part of the review of a final order of removal [in immigration cases]." 8 U.S.C. § 1231 note, Sec. 2242(d).

This textual declaration establishes that Congress did not intend to change the law and establish through the FARR Act judicial review of extradition decisions. Accord H.R. Conf. Rep. No. 432, 105th Cong., 2nd Sess., at 150 ("The provision agreed to by the conferees does not permit for judicial review of the regulations or of most claims under the Convention"). And, neither Cornejo-Barreto nor the prior panel of this Court pointed to any other part of the statute that could possibly be seen as overruling the Rule of Non-Inquiry and the numerous precedents of the various Circuits applying it.

Furthermore, this Court ruled in *Lopez-Smith* that the courts cannot second-guess extradition determinations by the Secretary of State "except to the extent that the statute interposes a judicial function." 121 F.3d at 1326. Plainly, the FARR Act did not interpose any new judicial function for extradition cases.

The Torture Convention itself also cannot serve as the source of a cause of action for Cornejo-Barreto. See discussion at ER 40–44 (original district court decision denying habeas petition). The Senate expressly conditioned its consent to this treaty upon a declaration "that the provisions of Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. S17486-01, at S17492 (Oct. 27, 1990); S. Exec. Rep. No. 30, 101st Cong., 2d Sess., 31 (1990). Such a non-self-executing treaty does ***not*** confer any judicially enforceable rights upon a private party. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (if a treaty's "stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect").

Accordingly, the Senate's declaration that Article 3 of the Torture Convention was not "self-executing" establishes that, at

the time of ratification, the Senate did not intend to create any judicially enforceable rights.

G. As we have discussed, the Rule of Non-Inquiry is premised in large part on the Executive's exercise of its constitutional foreign affairs powers. Therefore, this Court should not conclude that Congress meant to supersede that legal principle in the absence of a clear legislative statement establishing such an intent.

* * * *

Our position here is in no way undermined by the fact that this Court has indicated that the Rule of Non-Inquiry might not apply if a fugitive would, upon extradition, "be subject to procedures or punishment so antipathetic to a federal court's sense of decency." *Arnbjornsdottir-Mendler*, 721 F.2d 679, 683 (9th Cir. 1983). In *Lopez-Smith*, 121 F.3d at 1326, this Court described this language as "frequently quoted (but not followed) dictum * * *."

Further, even if this were the law in this Circuit, it would not apply here because we are ***not*** arguing that the Secretary has the authority to extradite a fugitive who is likely to be tortured. Thus, this is not a situation in which the fugitive would likely be subject to procedures and punishment so antipathetic to the Court's sense of decency.

Excerpts from the U.S. submission of November 10, 2004, set forth below, explain its views that the Ninth Circuit opinion of August 16, 2004, holding that the Secretary of State's determination in an extradition case is not judicially reviewable, should be preserved.

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

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To our knowledge, this set of facts raises a unique circumstance in this Court's jurisprudence. A prior panel of this Court issued a published opinion in an earlier phase of the dispute, and another panel subsequently held in a published opinion that the prior

panel's analysis of future possible district court jurisdiction if the Secretary decided to extradite Cornejo-Barreto was dicta and was incorrect. The second panel ruled that there was no jurisdiction for a court to review the Secretary's decision to extradite. The full Court then decided to rehear the case *en banc*, and ordered that the second panel opinion could not be cited, pending further resolution of the case. Now, the case has become moot through the continuing actions of the petitioner/appellant Cornejo-Barreto and the operation of Mexican law.

In this circumstance, it would plainly be inequitable for the Court not to vacate its order barring citation of the second panel opinion. Otherwise, the matter will be left with the first published panel opinion, much of which has now been labeled as incorrect dicta, and no further rulings that can be cited. This situation would lead to the incorrect impression that this Court's precedent on the jurisdictional issue is settled in favor of district court jurisdiction.

Accordingly, this Court should enter a new order allowing for citation of the second published panel opinion, not as revealing the established law of the Circuit, but so that parties in later cases raising this issue will be able freely to describe the final outcome of this litigation, and the current status of the jurisdictional issue in this Circuit.

Alternatively, although we strongly favor the course of action just proposed, the *en banc* Court could order that neither of the prior published panel opinions can be cited, thereby leaving the jurisdictional issue where it was before this litigation began. Either of these options would be equitable and would avoid the misleading implication that the legal question of jurisdiction has been settled in this Court. Further, either option is in no way unfair to Cornejo-Barreto, given that he has no continuing interest in this matter. At present, there is no likelihood that he will be the subject of later extradition proceedings, and the issue of judicial power to review extradition determinations by the Secretary of State is therefore of no judicially cognizable interest to him.

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b. Mironescu v. Costner

In *Mironescu v. Costner*, 345 F. Supp. 2d 538 (M.D.N.C. 2004), a fugitive challenged a magistrate judge's certification of extraditability alleging a violation of Article 3 of the Torture Convention. The court agreed with the magistrate judge's finding that the certification for extradition was valid and that the extradition treaty between the United States and Romania applied. As to reviewability, the court accepted the magistrate judge's view that the case was not currently reviewable but rejected language concluding that Mironescu could refile his petition following action by the Secretary of State. Excerpts from the opinion follow (footnotes omitted).*

* * * *

* The magistrate judge also rejected Mironescu's arguments that he could not be extradited because he had been granted asylum, a question that the district court did not discuss. In addition to addressing specific references to asylum in the U.S.-Romania extradition treaty, the magistrate judge stated as follows concerning the relationship between asylum and extradition:

> [T]he language of the [Immigration and Naturalization Act ("INA")] does not, as Petitioner claims, bring Petitioner within the scope of its protection against deportation. . . . Applying this statute [8 U.S.C. § 1158] to prevent the extradition of Petitioner requires the understanding that an alien, once granted an asylum, can never be extradited—even if the crimes that he committed are not political in nature. This understanding is supported neither by case law nor by the practices of the United States. The statute clearly prevents the Attorney General from removing or returning an alien who has been granted an asylum: once granted an asylum, an alien is protected rather than sent back. This statute says nothing about extradition, which is based on criminal proceedings and governed by an entirely different set of rules and practice. It is entirely inapplicable. Individuals who have been granted an asylum are still eligible for extradition for non-political crimes, just as even United States citizens may be extradited for crimes committed in other countries with whom we have extradition treaties.

See 345 F. Supp. 2d 538 (Recommendation of magistrate judge); *see also Mironescu v. Costner*, 296 F. Supp. 2d 632, 638 n.6 (M.D.N.C. 2003).

. . . [T]he Court agrees that within the narrow habeas review allowed by the Fourth Circuit of extradition certification, no review is presently allowed to consider Petitioner's evidence of a violation of Article 3 of the United Nations Convention Against Torture. Rec. of U.S. Magistrate Judge Dixon at 8, citing to *Prushinowski v. Samples*, 734 F.2d 1016, 1018 (4th Cir. 1984). . . .

Furthermore, the Court disagrees with and hereby rejects the Magistrate Judge's Recommendation, in so far as it goes beyond the question presently before this Court, which is whether to accept the Magistrate Judge's certification of extradition. Magistrate Judge Dixon ruled that Petitioner would be able to re-file his habeas petition, after the Secretary of State makes a determination as to whether to extradite Petitioner, on the question of whether the Secretary's determination violates Article 3 of the Convention Against Torture. In making that recommendation, Magistrate Judge Dixon relied primarily on *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000), which was overturned by a panel of the Ninth Circuit on August 16, 2004. *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1088 (9th Cir. 2004) (holding that no habeas review after the Secretary's determination was allowable under the Rule of Non-Inquiry). However, the second *Cornejo-Barreto* case has now itself been vacated, as the Ninth Circuit has decided to take up the matter *en banc*. *Cornejo-Barreto v. Seifert*, 386 F.3d 938, 2004 WL 2377460 (9th Cir. 2004).

Additionally, Magistrate Judge Dixon also relied heavily on the case of *INS v. St. Cyr*, 533 U.S. 289, 150 L.Ed.2d 347, 121 S. Ct. 2271 (2001), for two other theories, constitutional avoidance and strict constructionalism, to help decide the question of whether the Secretary's determination would be reviewable by this Court as to Petitioner's claim under the Convention Against Torture. However, there is no authority that this Court could find that allows *St. Cyr* to be applied in the context of extradition, as opposed to deportation. . . . [T]he Court rejects that portion of Magistrate Judge Dixon's opinion that relies upon dicta from the first *Cornejo-Barreto*. 218 F.3d 1004 (9th Cir. 2000).

Petitioner will be able to bring his humanitarian concerns to the attention of the Secretary of State, who is charged with appropriately applying the Convention Against Torture, but this Court

declines at this time to decide whether Petitioner can appropriately seek habeas review after the Secretary's determination.

However, this Court will explicitly hold, as Magistrate Judge Dixon's opinion did not, that the Secretary of State must notify Petitioner of the issuance of the surrender warrant in order to give Petitioner adequate time to decide whether to seek additional habeas relief.

* * * *

4. Mutual Legal Assistance Treaties

The Treaty Between the United States of America and the Federal Republic of Germany on Mutual Legal Assistance in Criminal Matters, signed at Washington on October 14, 2003, with a related exchange of notes, was transmitted to the Senate for advice and consent to ratification on November 16, 2004. S. Treaty Doc. No. 108–27 (2004). The treaty is similar to a number of bilateral treaties for this purpose entered into by the United States in recent years. Excerpts below from the report of the Department of State dated June 14, 2004, submitting the treaty to the President for transmittal and included in S. Treaty Doc. No. 108–27, address two unique aspects of the treaty: special investigative techniques and conditions that accommodate German data protection law and a special regime for antitrust investigations. These provisions are similar to those subsequently adopted in the U.S.-EU Treaty on Mutual Legal Assistance in Criminal Matters.

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* * * *

The President: I have the honor to submit to you the Treaty Between the United States of America and the Federal Republic of Germany on Mutual Legal Assistance in Criminal Matters ("the Treaty"), signed at Washington on October 14, 2003, and a related exchange of notes. I recommend that the Treaty and exchange of notes be transmitted to the Senate for its advice and consent to ratification.

* * * *

Article 12 identifies three types of special investigative techniques which may be utilized by the Parties, within their possibilities and under the conditions prescribed by domestic law. These are: telecommunications surveillance, undercover investigations, and controlled deliveries. This MLAT marks the first occasion where such techniques have been specifically recognized by the United States as types of mutual legal assistance. The provision was included at the request of the Federal Republic of Germany.

* * * *

Article 15 addresses conditions in detail. Where the Requested State could refuse assistance but instead offers it subject to conditions that are accepted by the Requesting State, the latter is bound to comply with the conditions. This Article also requires the Requesting State not to use information or evidence obtained under the Treaty for any purposes other than those for which it was sought and granted, other than exceptions specified in paragraph 3, without the prior consent of the Requested State.

The circumstances under which evidence or information generally may be used without prior consent are: for other purposes within the scope of assistance under the Treaty; for prevention of a serious criminal offense; in non-criminal judicial or administrative proceedings related to criminal matters; and to avert substantial danger to public security. A Requested State may, however, specifically exclude use for one of these purposes in a particular case.

Article 15(4) permits a Requesting State to disclose to a defendant in a criminal proceeding evidence that may be exculpatory or that relates to the truth and veracity of a prosecution witness. The Requesting State is obliged to notify the Requested State in advance of any such proposed disclosure. In addition, Article 15(5) permits the use of information for any purpose once it has been made public in the normal course of a criminal proceeding in the Requesting State.

Article 16 provides a special rule for ensuring confidentiality in the Requesting State of information or evidence received in connection with an antitrust investigation or proceeding. Such information is to receive the same degree of protection as evidence obtained in the Requesting State itself, may be disclosed only to

persons or authorities competent for prosecuting antitrust offenses, and may be used only in public court proceedings or judicial decisions, absent consent to broader use.

* * * *

B. INTERNATIONAL CRIMES

1. Hearing on Relevant Treaties

On June 17, 2004, the Senate Foreign Relations Committee held a hearing on (1) the Inter-American Convention Against Terrorism, (2) the Council of Europe Convention on Cybercrime, (3) the United Nations Convention against Transnational Organized Crime, and Supplementary Protocols on Trafficking in Persons and Migrant Smuggling, and (4) the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures. Excerpts below from testimony by Samuel M. Witten, Deputy Legal Adviser, U.S. Department of State, address the first three of these. More detailed substantive information concerning the instruments is provided in discussion of transmittal documents in *Digest 2002* at 112–17 (Terrorism Convention (S. Treaty Doc. No. 107–18 (2002)); *Digest 2003* at 191–207 (Cybercrime Convention (S. Treaty Doc. No. 108–11 (2003)) and B.4. below (Transnational Organized Crime Convention and Protocols (S. Treaty Doc. No. 108–16 (2004)). The customs agreement is discussed in Chapter 11.E.3.

The full texts of Mr. Witten's testimony and the testimony of Bruce Swartz, Deputy Assistant Attorney General, Criminal Division, are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

In recent years, the world community as a whole has had to confront a rising tide of trans-border crime of many types. The multilateral law enforcement conventions before you today reflect that the United States has been working together with other

countries—indeed, leading efforts—at the United Nations as well as at regional organizations like the Council of Europe and the Organization of American States, to improve our collective abilities to prevent and punish terrorist crimes, computer crimes, and organized crimes such as those involving the exploitation of persons. They break new ground legally, and provide essential and practical tools for international cooperation.

These law enforcement instruments are innovative in containing definitions of certain serious crimes—computer crime and trafficking in persons, for example—on which there never previously had been an international consensus. Now we not only agree collectively on what constitutes such crimes, but also commit ourselves to punish them comparably and to extradite fugitives and otherwise assist in the investigation and prosecution of persons who commit them.

These instruments also contain breakthroughs in methods for providing and obtaining assistance to and from other countries. The investigation of computer crimes, for instance, requires real-time coordination in tracing electronic communications across borders, and the Cybercrime Convention commits parties to do just that. The Transnational Organized Crime Convention similarly details procedures for mutual legal assistance that will be able to function effectively without the need to resort solely to cumbersome domestic law processes. And to ensure that fugitive terrorists in our hemisphere are brought to justice, the OAS Terrorism Convention eliminates the possibility that they could hide behind assertions that their crimes are "political offenses."

* * * *

THE INTER-AMERICAN CONVENTION AGAINST TERRORISM

The Inter-American Convention Against Terrorism was negotiated as a direct response to the attacks on the United States of September 11, 2001. Within 10 days of the attacks, the foreign ministers of the OAS member states endorsed the negotiation of a regional convention against terrorism, and the resulting convention was adopted by the OAS General Assembly and opened for signature nine months later on June 3, 2002.

Thirty-three OAS member states have signed the Convention, which entered into force on July 10, 2003. As of last week, eight states are party to the Convention, including Canada, Mexico, Peru and Venezuela.

. . . Following the model of the 1999 International Convention for the Suppression of Financing of Terrorism, the Convention incorporates by reference the offenses set forth in ten counter-terrorism instruments listed in Article 2 of the Convention to which the United States is already a party. The cooperative measures set forth in the rest of the convention will thus be available for a wide-range of terrorism-related offenses, including hijackings, bombings, attacks on diplomats, and the financing of terrorism. . . .

Parties are required under the Convention to "endeavor to become a party" to these ten counter-terrorism instruments. In addition to facilitating the implementation of the Convention, this obligation also furthers the United States' interest in securing the broadest possible adherence to these instruments and advances implementation of United Nations Security Council Resolution 1373, which calls upon states to become parties to these instruments "as soon as possible."

* * * *

Existing Federal authority is sufficient to discharge our obligations under this Convention, so no implementing legislation is required. The State Department's report on the Convention recommended two Understandings, one relating to Article 10 and the other relating to Article 15. Upon further review, we have determined that the Understanding relating to Article 10 is unnecessary and we are therefore no longer recommending its inclusion in the Senate's resolution of advice and consent.

* * * *

COUNCIL OF EUROPE CONVENTION ON CYBERCRIME

The Committee also has before it the Council of Europe Convention on Cybercrime, the product of years of study and work by experts from a wide range of countries. Although it was negotiated in a European forum, the United States played a leading role in its development.

. . . The Convention was opened for signature—and was signed by the United States—on November 23, 2001. As of last week, 38 countries have signed the Convention, and six have also ratified it. The Convention will enter into force on July 1, 2004.

The Convention has three main parts, each of which provides important law enforcement benefits for the United States. First, it requires Parties to criminalize certain conduct related to computer systems. For example, Article 2 requires parties to criminalize "illegal access" into computer systems, including activities known as "hacking." By requiring Parties to establish these kinds of substantive offenses, the Convention will help deny safe havens to criminals, including terrorists, who can cause damage to U.S. interests from abroad using computer systems.

Second, it requires Parties to ensure that certain investigative procedures are available to enable their domestic law enforcement authorities to investigate cybercrime offenses effectively and obtain electronic evidence (such as computer data) of crime. In this way, the Convention will enhance the ability of foreign law enforcement authorities to investigate crimes effectively and expeditiously, including those committed by criminals against U.S. individuals, U.S. government agencies, and other U.S. institutions and interests.

Third, in a manner analogous to other law enforcement treaties to which the United States is a party, the Convention requires Parties to provide each other broad international cooperation in investigating computer-related crime and obtaining electronic evidence, in addition to assisting the extradition of fugitives sought for crimes identified under the Convention. It provides mechanisms for U.S. law enforcement authorities to work cooperatively with their foreign counterparts to trace the source of a computer attack and, most importantly, to do so immediately when necessary, 24 hours a day, 7 days a week. The Convention would therefore enhance the United States' ability to receive, as well as render, international cooperation in preventing, investigating, and prosecuting computer-related crime. Because such international cooperation is vitally important to our efforts to defend against cyber attacks and generally improve global cybersecurity, support for the Cybercrime Convention has been identified as a key initiative in the 2003 National Strategy to Secure Cyberspace.

The Convention would not require implementing legislation for the United States. As discussed at length in the Secretary of State's report accompanying the transmittal of the Convention, the Administration has recommended six reservations and four declarations, all envisaged by the Convention itself, in connection with this Convention. . . .

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The United Nations Convention against Transnational Organized Crime ("TOC Convention") is the first and only global instrument designed specifically to combat the dangerous contemporary phenomenon of criminal groups operating internationally. During the second half of the 1990's, the United States and its G-8 allies, concerned about the rapid spread of organized crime across borders no longer frozen by Cold War geopolitics, recognized the need for coordinated international action. The United Nations also embraced the idea, and negotiations on the Convention took place under UN auspices in 1999 and 2000. Developing and developed countries from all regions participated actively, reflecting their awareness of the serious threat transnational organized crime poses to the effectiveness of their governments.

. . . The Convention has been in force since September 29, 2003. On June 28, the Parties to the TOC Convention will meet collectively for the first time to elaborate procedures for promoting and reviewing its implementation. The United States will participate in this conference as a signatory but not yet a Party; the farther along we are on the road to ratification, the more effective we can be at the Conference of the Parties in ensuring that the Convention is implemented in ways consistent with our own anticrime philosophy and priorities.

The Convention focuses on the offenses that are characteristic of transnational organized crime and on the key methods of international cooperation for combating it. It is buttressed by three protocols concentrating on particularly problematic manifestations of transnational organized crime, all of which were negotiated simultaneously with the main Convention. Two of these protocols, on trafficking in persons and on alien smuggling, are before you

today. Adherence to each of the protocols is optional. States can only join the Protocols if they also join the main Convention, because the protocols rely directly upon the cooperation and other mechanisms set out in the Convention.

One of the Convention's key achievements is to require Parties to ensure that their national criminal laws meet the criteria set forth in the Convention with respect to four offenses characteristic of transnational organized crime—participation in an organized criminal group, laundering of the proceeds of serious crime, corruption of domestic public officials, and obstructing justice by intimidating witnesses and justice and law enforcement officials. Since the relevant U.S. criminal laws already provide for broad and effective application in these areas, we can comply with the Convention's criminalization obligations without need for new legislation. The value of these Convention provisions for the United States is that they oblige other countries that have been slower to react legislatively to the threat of transnational organized crime to adopt new criminal laws in harmony with ours.

. . . [A] second important feature of the Convention is that it provides a blueprint for international cooperation. Few global criminal law conventions are so detailed and precise in setting out mechanisms for extraditing fugitives and assisting foreign criminal investigations and prosecutions. Many countries, particularly in the developing world, lack existing bilateral extradition or mutual legal assistance treaty relationships with one another, but now will be able to rely on this Convention to fill that legal gap for many serious crimes.

For the United States, the Convention will not create entirely new extradition relationships, as we will continue to rely on our extensive web of bilateral treaties for that purpose, but it will broaden some of our older existing treaties by expanding their scope to include the offenses described above. By contrast, we will be able to use the Convention as a basis for new relationships with countries with which we lack bilateral mutual legal assistance treaties (MLATs), primarily those in parts of Asia, Africa, and the Middle East. The Convention fully incorporates all the safeguard provisions the U.S. insists upon in our bilateral MLATs, and thereby ensures that we may deny requests that are contrary to our essential interests or are improperly motivated.

Finally, the Convention is noteworthy for its capacity to adapt to the many faces of transnational organized crime. It enables and facilitates international cooperation not only for the specific offenses it identifies, but also for serious crime generally that is transnational in nature and involves an organized group. Such groups operate for financial benefit, of course, but not always exclusively. Terrorist groups are known to finance their activities through the commission of offenses such as kidnapping, extortion, and trafficking in persons or commodities. The TOC Convention thus can open doors for the United States in securing the help of other countries in investigating and prosecuting terrorist crimes.

The Administration has proposed several reservations and understandings to the Convention and its two Protocols. With these reservations and understandings, the Convention and the Protocols will not require implementing legislation for the United States.

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The Committee is considering two protocols to the Transnational Organized Crime Convention as well. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, originally proposed and drafted by the United States, has the potential to be a powerful international law enforcement instrument, requiring countries to criminalize trafficking and providing a broad framework for international cooperation to prosecute traffickers, prevent trafficking, and protect trafficking victims. . . . The Trafficking Protocol has been in force since December 25, 2003.

. . . [T]he Trafficking Protocol, the first binding international instrument to define the term "trafficking in persons," creates obligations to make certain acts criminal. It also contains provisions designed to protect the victims of trafficking and addressing prevention, cooperation, and other measures.

I want to highlight some of the groundbreaking victim protection provisions in this Protocol, which recognizes that

protection of victims is as important as prosecuting traffickers. In addition to requiring that victims are offered the possibility of obtaining compensation, and that Parties facilitate and accept the return of their nationals and permanent residents who are trafficking victims, the Protocol calls on Parties to make available to trafficking victims certain protections and assistance, including protection of their privacy and physical safety, as well as provisions for their physical, psychological, and social recovery. Similarly, States Parties are to consider providing temporary or permanent residency to victims of trafficking in appropriate cases. In recognition of the fact that legal systems and available resources will affect how States Parties implement these particular measures, the Protocol includes language providing appropriate discretion and flexibility.

* * * *

With the reservations and understandings that have been proposed by the Administration, the Protocol will not require implementing legislation for the United States. In this connection, the Trafficking Victims Protection Act of 2000 ("TVPA") sets out a comprehensive framework for protecting victims of trafficking and combating trafficking in persons domestically and abroad. A Cabinet-level interagency task force, chaired by the Secretary of State, ensures the appropriate coordination and implementation of the Administration's anti-trafficking efforts.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The second protocol supplementing the Transnational Organized Crime Convention is the Protocol against the Smuggling of Migrants by Land, Sea and Air. The purposes of this protocol are to prevent and combat the smuggling of migrants, and to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants. . . . The Migrant Smuggling Protocol has been in force since January 28, 2004.

In the Migrant Smuggling Protocol, the Parties designed an instrument that balances law enforcement provisions with appropriate protection of the rights of smuggled migrants. . . .

* * * *

Finally, the Migrant Smuggling Protocol encourages States Parties to conclude bilateral or regional agreements or arrangements to implement the Protocol. This was an important Article to the United States, as we have bilateral migration agreements with a number of countries.

2. Terrorism

a. State sponsors of terrorism

On October 7, 2004, Secretary of State Colin L. Powell rescinded the designation of Iraq as a sponsor of terrorism, as set forth below. Department of State Public Notice 4863, 69 Fed. Reg. 61,702 (Oct. 20, 2004). The six countries that continue to be designated as state sponsors of terrorism under § 6(j) of the Export Administration Act of 1979 (50 U.S.C. app. § 2405(j)) or § 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371) and thus subject to sanctions including prohibition of most foreign assistance are Cuba, Iran, Libya, North Korea, Sudan, and Syria. *See also* c. below.

In accordance with Section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), I hereby rescind the Determination of September 13, 1990 (Public Notice 1264) that Iraq is a country which has repeatedly provided support for acts of international terrorism. This action is a further step to cement the partnership of the United States and Iraq in combating acts of international terrorism, and is an act of symbolic importance to the new Iraqi government. This rescission is appropriate although nearly all the restrictions applicable to countries that have

supported terrorism, including the application of 22 U.S.C. 1605(a)(7), were made inapplicable with respect to Iraq permanently in Presidential Directive No. 2003–23 of May 7, 2003, pursuant to sec. 1503 of Pub. L. 108–11, and as affirmed in the Conference Report for Pub. L. 108–106.

This rescission shall also satisfy the provisions of section 620A(c)(1) of the Foreign Assistance Act of 1961, Pub. L. 87–195, as amended, and section 40(f)(1)(A) of the Arms Export Control Act, Pub. L. 90–629, as amended.

On September 24, 2004, President Bush had issued Presidential Determination No. 2004–52 as a Memorandum for the Secretary of State, "Certification Permitting Rescission of Iraq as a Sponsor of Terrorism." 69 Fed. Reg. 58,793 (Sept. 30, 2004). President Bush certified:

> (1) There has been a fundamental change in the leadership and policies of the Government of Iraq;
> (2) Iraq's government is not supporting acts of international terrorism; and
> (3) Iraq's government has provided assurances that it will not support acts of international terrorism in the future.

b. Security Council Resolution 1566

On October 8, 2004, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1566. In Resolution 1566, the Security Council, among other things:

> 1. *Condemns* in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security;
>
> 2. *Calls upon* States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice,

> on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens;
>
> 3. *Recalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

In a statement to the Security Council, Ambassador John C. Danforth, U.S. Representative to the United Nations, explained the impetus for Resolution 1566 and the U.S. vote in support of the resolution as well as consideration of the possibility of drawing up a comprehensive list of terrorists, as set forth below. The United States does not regard Resolution 1566 as establishing a definition of terrorism. Ambassador Danforth's statement is available at *www.un.int/usa/04_185.htm.*

Here is the state of the world today.

Early last month, masked gunmen seized a school in Beslan, Russia. They forced over a thousand children and their teachers into a sweltering gymnasium with virtually no food or water. They wired the gym with explosives. They terrorized the children, shooting those who disobeyed them. After 52 hours, the terrorists

detonated explosives. They shot children in the back who tried to run away. In a ruthlessly executed operation, the terrorists murdered more than 300 people, most of whom were children.

On September 30, in Baghdad, children gathered near the ceremony for the opening of a water treatment plant. They were bunched together to get candy soldiers were handing out. Seeing them bunched together, terrorists drove two explosive laden cars into the midst of the children, detonated the cars and deliberately murdered 34 children and seven adults. One hundred and thirty other people, many of them children, were injured.

On October 1, in Pakistan a bombing at a Shiite mosque killed dozens of worshippers. Just yesterday three terrorist bombs exploded at tourist resorts in Egypt killing at least 35 people and injuring 100. These people were on vacation. Rescuers are still pulling them out of the rubble as I speak here today.

In each case, the terrorists believed they were acting in the service of a cause. These were not random acts of violence. These were cause driven acts of violence. Some say that such murders of children are justified by quote, "root causes."

Supporters of the murder of civilians sometimes say that these are justifiable acts of national liberation or of self-determination. Some claim that exploding bombs in the midst of children is in the service of God. That is the ultimate blasphemy.

Mr. President, the most significant paragraph in the resolution before us is paragraph 3. It states quite clearly, that the intentional targeting of civilians for death or serious bodily injury are criminal and never justifiable. It calls for states to punish those who target civilians. We do this through our courts or pursuant to extradition treaties. The resolution states that these acts of terror are never justifiable, not by political or philosophical, or ideological, or racial, or ethnic or religious reasons.

We emphasize that in addition to the acts described in paragraph 3, there are other acts also terrorist acts that cannot be justified by political, philosophical, ideological, racial, religious, ethnic or similar considerations. Nothing in there should be construed as creating any indication to the contrary. For example there are terrorist acts covered by the existing terrorism conventions, for which an element of intent is not required.

Let me emphasize the precise issue by which we decided by our vote, because for some there is an alternative to the principle set forth in the resolution. The alternative position is that while the deliberate massacre of innocents might often not be justifiable, sometimes it is. The alternative position is that some quote "root causes" may, from time to time, justify terrorists in detonating bombs in crowds of children. The alternative position to the resolution before us is to say that circumstances may be sufficient to justify such terrorism. Such justification, the theory goes, might include self-determination, national liberation or one's own perception of the will of God.

The resolution, which we have adopted, states very simply that the deliberate massacre of innocents is never justifiable in any cause. Never.

Mr. President, either the terrorism is never justifiable or it is sometimes justifiable. Either the massacre of innocents always deserves punishment, or it is sometimes absolved from punishment.

Believing that the murder of civilians can never be justified, we also agree that the working group should consider the possibility of drawing up a comprehensive list of terrorists.

I congratulate the Russian Federation for putting this fundamental question of principle so squarely before the Council. We have decided this question by our unanimous vote.

See also discussion of Resolution 1540, S/RES/1540 (2004), in Chapter 18.C.3., in which the Security Council stated that it was "[g]ravely concerned by the threat of terrorism and the risk that non-State actors . . . may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery. . . ."

c. Countries not cooperating fully

On May 12, 2004, Secretary of State Colin L. Powell determined and certified to Congress, pursuant to section 40A of the Arms Export Control Act (22 U.S.C. § 2781), and Executive Order 11958, that five countries were not

cooperating fully with U.S. antiterrorism efforts: Cuba, Iran, Libya, North Korea, and Syria. 69 Fed. Reg. 28,185 (May 18, 2004). Sudan, which had been determined previously to be not cooperating fully, was not so determined in 2004, although sanctions remain by virtue of its designation as a state sponsor of terrorism. Secretary Powell stated further:

> I hereby notify that the decision to retain Libya on the list of countries not fully cooperating with U.S. antiterrorism efforts comes in the context of an on-going and comprehensive review of Libya's record of support for terrorism. While this process is not complete, Libya has taken significant steps to repudiate its past support for terrorism. When our review of Libya's overall record is complete, we will be pleased to consult with the Congress further.

See discussion of easing sanctions against Libya in Chapter 16.B.1.

d. International cooperation

(1) Access to airline passenger name record data

The Bureau of Customs and Border Protection ("CBP") of the U.S. Department of Homeland Security ("DHS") is authorized under Pub. L. No. 107–71 to secure access to certain foreign passenger name record ("PNR") data originally collected by airlines and airline reservation systems for commercial purposes. Background information in the Federal Register accompanying an interim implementing rule described the relevant statutory requirements as follows:

> On November 19, 2001, the President signed into law the Aviation and Transportation Security Act (Act), Public Law 107–71. Section 115 of that law amended 49 U.S.C. § 44909, to add a new paragraph (c) in order to provide, in part, that, not later than 60 days after the

> date of enactment of the Act, each air carrier, foreign and domestic, operating a passenger flight in foreign air transportation to the United States must electronically transmit to [CBP], in advance of the arrival of the flight, a related passenger manifest and a crew manifest containing certain required information pertaining to the passengers and crew on the flight (49 U.S.C. § 44909(c)(1), (c)(2) and (c)(4)). Furthermore, pursuant to 49 U.S.C. § 44909(c)(3), these carriers are also required to make Passenger Name Record information available to [CBP] upon request. The availability of PNR information to [CBP] is necessary for purposes of ensuring aviation safety and protecting national security.

67 Fed. Reg. 42,710 (June 25, 2002).

In order to obtain access to PNR data from flights originating within the European Union, the United States and the EC reached a non-binding interim arrangement in February 2003. This arrangement allowed CBP to access certain PNR data collected by airlines subject to the EU Data Protection Directive which, in the view of the EU, was applicable to U.S. airlines operating in Europe as well as EU-based carriers.

During 2004 the United States and the EC took further steps to formalize this arrangement. The resulting instruments include: (1) Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection Regarding the Handling of Passenger Name Record Data ("Undertakings"); (2) European Commission Decision of May 17, 2004, on the adequate protection of personal data contained in the PNR of air passengers transferred to the United States' Bureau of Customs and Border Protection, 2004 O.J. (L 183) 84; and (3) Agreement Between the United States of America and the European Community on the Processing and Transfer of PNR Data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (signed May 28, 2004).

The Federal Register notice publishing the text of the Undertakings explained the relationship of the three instruments as set forth below. 69 Fed. Reg. 41,543 (July 9, 2004).

On May 11, 2004, the Department of Homeland Security (DHS), Customs and Border Protection (CBP) issued to the European Union (EU) the document set forth below (the "Undertakings"). These Undertakings contain a set of representations regarding the manner in which CBP will handle certain Passenger Name Record (PNR) data relating to flights between the United States and EU member states, access to which is required under U.S. law (49 U.S.C. 44909) and the implementing regulations (19 CFR 122.49b). These Undertakings provide the framework within which the EU was able to approve several measures which the EU requires to permit the transfer of such PNR data to CBP, consistent with EU law. On May 17, 2004, the European Commission announced that it had issued an "adequacy finding" for the transfer of such PNR data to CBP, and a related international agreement was also approved for execution by the European Council. DHS wishes to provide the public with notice of the issuance of this document upon which the EU has based these very important decisions.

* * * *

Excerpts from the Undertakings follow
(most footnotes omitted).

In support of the plan of the European Commission (Commission) to exercise the powers conferred on it by Article 25(6) of Directive 95/46/EC (the Directive) and to adopt a decision recognizing the Department of Homeland Security Bureau of Customs and Border Protection (CBP) as providing adequate protection for the purposes of air carrier transfers of Passenger[1] Name Record (PNR) data

[1] For the purposes of these Undertakings, the terms "passenger" and "passengers" shall include crew members.

which may fall within the scope of the Directive, CBP undertakes as follows:

* * * *

Use of PNR Data by CBP

(2) Most data elements contained in PNR data can be obtained by CBP upon examining a data subject's airline ticket and other travel documents pursuant to its normal border control authority, but the ability to receive this data electronically will significantly enhance CBP's ability to facilitate bona fide travel and conduct efficient and effective advance risk assessment of passengers.

(3) PNR data is used by CBP strictly for purposes of preventing and combating: (1) Terrorism and related crimes; (2) other serious crimes, including organized crime, that are transnational in nature; and (3) flight from warrants or custody for the crimes described above. Use of PNR data for these purposes permits CBP to focus its resources on high risk concerns, thereby facilitating and safeguarding bona fide travel.

* * * *

Treatment of "Sensitive" Data

(9) CBP will not use "sensitive" data (i.e., personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning the health or sex life of the individual) from the PNR, as described below.

(10) CBP will implement, with the least possible delay, an automated system which filters and deletes certain "sensitive" PNR codes and terms which CBP has identified in consultation with the European Commission.

(11) Until such automated filters can be implemented CBP represents that it does not and will not use "sensitive" PNR data and will undertake to delete "sensitive" data from any discretionary disclosure of PNR under paragraphs 28–34. (fn. omitted)

Method of Accessing PNR Data

(12) With regard to the PNR data which CBP accesses (or receives) directly from the air carrier's reservation systems for purposes of identifying potential subjects for border examination,

CBP personnel will only access (or receive) and use PNR data concerning persons whose travel includes a flight into or out of[4] the United States.

* * * *

CBP Treatment and Protection of PNR Data

(24) CBP treats PNR information regarding persons of any nationality or country of residence as law enforcement sensitive, confidential personal information of the data subject, and confidential commercial information of the air carrier, and, therefore, would not make disclosures of such data to the public, except as in accordance with these Undertakings or as otherwise required by law.

(25) Public disclosure of PNR data is generally governed by the Freedom of Information Act (FOIA) (title 5, United States Code, section 552) which permits any person (regardless of nationality or country of residence) access to a U.S. Federal agency's records, except to the extent such records (or a portion thereof) are protected from public disclosure by an applicable exemption under the FOIA. Among its exemptions, the FOIA permits an agency to withhold a record (or a portion thereof) from disclosure where the information is confidential commercial information, where disclosure of the information would constitute a clearly unwarranted invasion of personal privacy, or where the information is compiled for law enforcement purposes, to the extent that disclosure may reasonably be expected to constitute an unwarranted invasion of personal privacy (title 5, United States Code, sections 552(b)(4), (6), (7)(C)).

(26) CBP regulations (title 19, Code of Federal Regulations, § 103.12), which govern the processing of requests for information (such as PNR data) pursuant to the FOIA, specifically provide that (subject to certain limited exceptions in the case of requests by the data subject) the disclosure requirements of the FOIA are not applicable to CBP records relating to: (1) Confidential commercial information; (2) material involving personal privacy where

[4] This would include persons transiting through the United States.

the disclosure would constitute a clearly unwarranted invasion of personal privacy; and (3) information compiled for law enforcement purposes, where disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.[9]

(27) CBP will take the position in connection with any administrative or judicial proceeding arising out of a FOIA request for PNR information accessed from air carriers, that such records are exempt from disclosure under the FOIA.

Transfer of PNR Data to Other Government Authorities

(28) With the exception of transfers between CBP and TSA pursuant to paragraph 8 herein, Department of Homeland Security (DHS) components will be treated as "third agencies", subject to the same rules and conditions for sharing of PNR data as other government authorities outside DHS.

* * * *

(33) Persons employed by such Designated Authorities who without appropriate authorization disclose PNR data, may be liable for criminal sanctions (title 18, United States Code, sections 641, 1030, 1905).

(34) No statement herein shall impede the use or disclosure of PNR data to relevant government authorities, where such disclosure is necessary for the protection of the vital interests of the data subject or of other persons, in particular as regards significant health risks. Disclosures for these purposes will be subject to the same conditions for transfers set forth in paragraphs 31 and 32 of these Undertakings.

(35) No statement in these Undertakings shall impede the use or disclosure of PNR data in any criminal judicial proceedings or as otherwise required by law. CBP will advise the European Commission regarding the passage of any U.S. legislation which materially affects the statements made in these Undertakings.

Notice, Access and Opportunities for Redress for PNR Data Subjects

[9] CBP would invoke these exemptions uniformly, without regard to the nationality or country of residence of the subject of the data.

(36) CBP will provide information to the traveling public regarding the PNR requirement and the issues associated with its use (i.e., general information regarding the authority under which the data is collected, the purpose for the collection, protection of the data, data sharing, the identity of the responsible official, procedures available for redress and contact information for persons with questions or concerns, etc., for posting on CBP's Web site, in travel pamphlets, etc.).

(37) Requests by the data subject (also known as "first party requesters") to receive a copy of PNR data contained in CBP databases regarding the data subject are processed under the Freedom of Information Act (FOIA). . . .

* * * *

Compliance Issues

(43) CBP, in conjunction with DHS, undertakes to conduct once a year, or more often if agreed by the parties, a joint review with the European Commission assisted as appropriate by representatives of European law enforcement authorities and/or authorities of the Member States of the European Union, (fn. omitted) on the implementation of these Undertakings, with a view to mutually contributing to the effective operation of the processes described in these Undertakings.

(44) CBP will issue regulations, directives or other policy documents incorporating the statements herein, to ensure compliance with these Undertakings by CBP officers, employees and contractors. As indicated herein, failure of CBP officers, employees and contractors to abide by CBP's policies incorporated therein may result in strict disciplinary measures being taken, and criminal sanctions, as applicable.

Reciprocity

(45) In the event that an airline passenger identification system is implemented in the European Union which requires air carriers to provide authorities with access to PNR data for persons whose current travel itinerary includes a flight to or from the European Union, CBP shall, strictly on the basis of reciprocity, encourage U.S.-based airlines to cooperate.

Review and Termination of Undertakings

(46) These Undertakings shall apply for a term of three years and six months (3.5 years), beginning on the date upon which an agreement enters into force between the United States and the European Community, authorizing the processing of PNR data by air carriers for purposes of transferring such data to CBP, in accordance with the Directive. After these Undertakings have been in effect for two years and six months (2.5 years), CBP, in conjunction with DHS, will initiate discussions with the Commission with the goal of extending the Undertakings and any supporting arrangements, upon mutually acceptable terms. If no mutually acceptable arrangement can be concluded prior to the expiration date of these Undertakings, the Undertakings will cease to be in effect.

No Private Right or Precedent Created

(47) These Undertakings do not create or confer any right or benefit on any person or party, private or public.

(48) The provisions of these Undertakings shall not constitute a precedent for any future discussions with the European Commission, the European Union, any related entity, or any third State regarding the transfer of any form of data.

The EC Decision of May 17, 2004, concluded that "[f]or the purposes of Article 25(2) of Directive 95/46/EC [relating to data protection], the United States' Bureau of Customs and Border Protection (CBP) is considered as providing an adequate level of protection for PNR data transferred from the Community concerning flights to or from the U.S., in accordance with the Undertakings set out in Annex I."

The Agreement Between the United States of America and the European Community on the Processing and Transfer of PNR Data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection provides the EC with the legal basis to authorize airlines and reservation systems to collect and process PNR data for the purpose of providing it to U.S. agencies, and to authorize U.S. access to such data when located within EU territory. It was signed for the United States by Secretary of Homeland

Security Tom Ridge on May 28, 2004. The text of the agreement, which is an executive agreement effective upon signature, is available at *www.state.gov/s/l/c8183.htm*.

(2) U.S.-EU Summit

On June 26, meeting at Dromoland Castle in Shannon, Ireland, President Bush, Prime Minister of Ireland Bertie Ahern, and President of the European Commission Romano Prodi, issued the U.S.-EU Declaration on Combating Terrorism. Excerpts below include two of the seven articles of the declaration.

The full text of the declaration is available at *www.whitehouse.gov/news/releases/2004/06/20040626-5.html*. *See also* fact sheet issued by the White House on the same date at *www.whitehouse.gov/news/releases/2004/06/20040626-13.html*.

Since the attacks of 11 September 2001, the United States and the European Union have been working together closely to combat the threat of terrorism. In the aftermath of the attacks on Madrid on 11 March 2004, the European Council adopted a Declaration on Combating Terrorism, reinforcing its determination to prevent and fight terrorism. Today we have renewed our commitment to further developing our cooperation against terrorism within the framework of the New Transatlantic Agenda, while recognising the contributions of the G-8 Secure and Facilitated International Travel Initiative.

We remain determined to work together to combat terrorism while sharing a commitment to protect and respect human rights, fundamental freedoms, and the rule of law on which our societies are founded and which terrorism seeks to destroy.

On that basis, the U.S., the EU, and, as appropriate, its Member States, will take forward work on counterterrorism, in keeping with the following objectives, through dialogue and action at all levels:

1. We will work together to deepen the international consensus and enhance international efforts to combat terrorism.

1.1 We will support the key role of the United Nations, its General Assembly, and the work of the Security Council. We will work closely with the UN Counter-Terrorism Committee (CTC). We will also contribute to the Global Programme of the United Nations on Drugs and Crime.

1.2 We will work to ensure universal adherence to, and full implementation of, the United Nations Conventions on terrorism. Likewise, we will press for full implementation by all U.N. Member States of all relevant U.N. Resolutions, including 1373 and 1267 and all subsequent amending Resolutions.

2. We reaffirm our total commitment to prevent access by terrorists to financial and other economic resources.

2.1 We will actively support the work of the Financial Action Task Force (FATF) on all issues regarding the financing of terrorism. In particular, we will work to ensure that EU and national legal frameworks are fully adapted to the FATF's eight special recommendations and Interpretive Notes on terrorist financing.

2.2 We will ensure the effectiveness of our asset freezing and transaction blocking laws and regulations, by implementing concrete steps to ensure full and effective implementation of all relevant provisions of UNSCR Resolution 1373.

2.3 We will ensure that internal processes are in place for reviewing proposals for designation, based on thorough and timely consideration of serious and credible evidence, providing a reasonable basis to indicate that such entities or individuals are supporting or financing terrorist activity or a previously designated entity or individual.

2.4 We will strengthen measures to protect against the abuse of formal and informal financial institutions, including through the regulation of alternative remittance systems, wire transfers, and cash couriers, as well as of trans-border cash movements. We will review the regulation of the non-profit sector to ensure that it cannot be misused by terrorist organisations or those who seek to finance such organisations. We will keep these questions under active review.

2.5 We will take the necessary steps, in accordance with appropriate procedures and criteria, to ensure that terrorist groups cannot evade the consequences of designation by renaming themselves or hiding behind front organisations.

2.6 We will work to ensure effective implementation of our respective criminal legislation and relevant provisions outlawing the support to designated names.

2.7 We will provide public access to consolidated lists in our respective jurisdictions of all persons and entities subject to asset freezing mechanisms of the EU and the U.S. We will also promote awareness within the financial sector, the non-profit sector and the general public of the threat posed by terrorist financing and of responsibilities under relevant anti-terrorist financing legislation and regulation.

2.8 We will seek ways to identify adequate national coordination mechanisms to respond to queries on asset freezing regimes.

2.9 We will work to promote safe harbour provisions at a national level to protect government or private sector employees from personal liability for reporting, in good faith, suspicious transactions linked to terrorist financing.

2.10 Once we have designated an organisation, we will ensure that appropriate enforcement agencies or bodies analyse transactions of all accounts of the organisation. We will explore mechanisms for sharing the results of our analysis.

2.11 We will have a regular dialogue on Terrorist Financing.

* * * *

(3) UN terrorism committees

(i) Counter-Terrorism Committee

On July 19, 2004, John C. Danforth, U.S. Permanent Representative to the United Nations, addressed a meeting of the Security Council concerning the work as well as restructuring of the Counter-Terrorism Committee ("CTC"), established by UN Security Resolution 1373 (2001). In

commenting on a newly-created Counter-Terrorism Executive Directorate ("CTED"), Ambassador Danforth stated:

> The Council established the CTED to strengthen the CTC and provide it with additional tools and resources. Now we must work to ensure that the CTED becomes operational as quickly as possible. The CTED will enable the CTC to be more proactive, to reach out in different ways to States and organizations and to encourage more of them to become full partners on the counter-terrorism team. Through field visits to different States, it will be able to help the CTC assess on-the-ground efforts to implement the provisions of resolution 1373 (2001), thus moving beyond the current focus on written reports. This is essential if the CTC eventually hopes to gather enough information to determine which States are in compliance with the resolution.

Ambassador Danforth's statement is available at *www.un.int/usa/04_133.htm* [and in U.N. Doc. S/PV.5006 at 5].

On October 19, 2004, Nicholas Rostow, U.S. Legal Counselor, U.S. Mission to the United Nations, addressed the Security Council on the work of the CTC. As to the recent restructuring efforts, Mr. Rostow stated:

> The United States is pleased to see that the revitalization of the CTC is nearing its final stages. . . . An effective Executive Directorate lies at the heart of improving the CTC's ability to monitor States' efforts to implement their obligations under Security Council resolution 1373, to identify gaps in States' capacities, and to work with assistance providers to fill these gaps. We encourage States to take advantage of this opportunity and to reach out and invite Executive Director [of the new Counter-Terrorism Executive Directorate] Rupérez and his colleagues to visit.

Mr. Rostow also stressed the importance of international cooperation in the fight against terrorism consistent with Resolution 1566, as excerpted below.

The full text of Mr. Rostow's remarks is available at *www.un.int/usa/04_197.htm. See also* press statement by Department of State Spokesman Richard Boucher, released March 29, 2004, concerning U.S. support for UNSCR 1535 authorizing the restructuring of the UN Counter-Terrorism Committee's staff, available at *www.state.gov/r/pa/prs/ps/2004/30899.htm*, and statement by Susan Moore, U.S. Senior Adviser, October 19, 2004, available at *www.un.int/usa/04_199.htm.*

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* * * *

Strong UN resolutions and statements from the floor condemning terrorism and pledging action are meaningful only if they are followed up with action by all States. Only through concerted and coordinated action will we win the war on terrorism. To this end, my delegation calls upon all States and organizations to look at what they have done to contribute to the fight against terrorism and see where they can do more. The Counter-Terrorism Committee must do the same. . . .

Despite the repeated calls by the General Assembly and the Security Council for States to join the 12 international terrorism instruments, only 57 States are parties to all 12 and 47 are parties to six or fewer of these instruments. Given that these conventions help facilitate cooperation among States to fight terrorism, no one should be satisfied with the current participation levels. We can and must do better. Resources exist to help. We encourage States to take advantage of these resources, including the facilities of the Terrorism Prevention Branch in Vienna. For those States that are party to a regional terrorism convention but not yet parties to all of the 12 international instruments, we reiterate what the Council said in resolution 1566: joining regional conventions cannot be viewed as an alternative to joining the international ones.

Some regional conventions would seem to justify attacks against civilians, depending on the political, philosophical, ideological, racial, or ethnic motivation of the perpetrators. This is not only contrary to the text and spirit of resolution 1566, but also to the work of the Counter-Terrorism Committee as well. In Resolution

1566, this Council unanimously endorsed the proposition that the deliberate targeting of civilians is simply unjustifiable in any cause. Until everyone accepts this proposition, we shall not see truly universal collaboration against terrorism. Indeed, we shall not see the end of terrorism.

* * * *

(ii) 1267 Committee

On December 17, 2004, Stuart W. Holliday, Alternate U.S. Representative in the United Nations for Special Political Affairs, addressed the Security Council on the work of the committee established pursuant to Resolution 1267 (1999) ("1267 Committee"). Ambassador Holliday's remarks, excerpted below, are available in full at *www.un.int/usa/04_288.htm* and in U.N.Doc. S/PV.5104 at 14; *see also* U.N. Doc. S PV.4892 at 7 and S/PV.4976 at 9.

* * * *

Identifying, tracing and freezing Al Qaeda assets is not going to get easier. Existing measures contained in resolution 1526 (2004) must be strengthened, tightened and further refined. Resolution 1526 (2004), in paragraph 1, targets those associated with Al Qaeda and the Taliban. Member States' efforts need to be redoubled to identify those associations and, quite simply, to bring more nominations for listing before the Committee.

My Government has another concern that has been raised before in this forum. When this solemn body invokes Chapter VII of the Charter in response to threats against international peace and security, there can be no satisfactory outcome by member States other than complete compliance in implementing the measures authorized by the Security Council. The monitoring team's analytic efforts continue to show that not all States are fulfilling their obligations under resolution 1526 (2004), nor are they adhering to mandated reporting requirements. In addition, the team has noted that the quality of reports is wide-ranging and, in the most extreme cases, unhelpful.

In cases in which States are capable of but appear to be unwilling to press the fight and cause discomfort to Al Qaeda, further Committee investigation and, quite possibly, Council action are warranted. I am referring to cases in which States are both non-compliant or insufficiently compliant with resolution 1455 (2003) and are also listed by the Organisation for Economic Cooperation and Development's Financial Action Task Force as being non-cooperative. While those are not the only candidates for further careful review by the Committee, they represent an obvious focus for additional attention. To get that far in deliberations, however, we will need even more work from the Monitoring Team and very clear outcomes from its analysis. Additional intensified Committee efforts need to move in that direction. The delegation of the United States is committed to achieving concrete results.

* * * *

e. U.S. actions against terrorist financing

(1) Terrorist Exclusion List

On April 29, 2004, Secretary of State Colin L. Powell designated ten additional groups as terrorist organizations for immigration purposes and thereby added them to the so-called Terrorist Exclusion List ("TEL"). A press release of that date explaining the designations and their effect is excerpted below.

As part of ongoing U.S. efforts against terrorism, Secretary of State Colin L. Powell has designated ten additional groups as terrorist organizations for immigration purposes, thus placing them on the so-called terrorist exclusion list. He made these designations, which take effect today, pursuant to the authority of section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act, and in consultation with the Attorney General and the Secretary of Homeland Security.

As a result of these designations, the U.S. Government excludes members and those providing material support to such entities from the United States. These designations will also facilitate U.S. fulfillment of its United Nations obligation under UN Security Council Resolution 1373 to prevent the movement of terrorists or terrorist groups by effective border controls.

* * * *

All these organizations previously had been designated by the Secretary or Deputy Secretary under Executive Order 13224 (on terrorist financing). The intention of the TEL designations was to complement with travel restrictions the assets freeze imposed on these organizations as a result of their designations pursuant to E.O. 13224.

The full text of the press release, including the names of the ten new designees as well as the addition of aliases for certain groups already designated, is available at *www.state.gov/r/pa/prs/ps/2004/31943.htm. See* updated fact sheet issued by the Department of State on December 29, 2004, explaining the function and effect of the TEL, and listing organizations designated as of that date, available at *www.state.gov/s/ct/rls/fs/2004/32678.htm; see also Digest 2002* at 102–04.

(2) Legislative amendments and related litigation

The Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108–458, 118 Stat. 3638, enacted December 17, 2004, among other things amended provisions criminalizing the provision of material support to terrorists and terrorist organizations, 18 U.S.C. §§ 2339A and 2339B (originally enacted in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Section 2339A criminalizes the provision of material support or resources knowing or intending that they are to be used in connection with a violation of specified crimes of terrorism, such as a bombing plot, while

§ 2339B criminalizes the knowing provision of material support or resources to a foreign terrorist organization such as al Qaeda or Hamas that has been designated as such under 8 U.S.C. § 1189. The amendments expire as of December 31, 2006.

Section 6603(b) of the IRTPA amended § 2339A(b) to expand the definition of "material support or resources." That definition also now specifies that the provision of "personnel" includes providing oneself, and definitions of "training" and "expert advice and or assistance" were added. As amended, § 2339A(b) provides:

> (1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;
>
> (2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and
>
> (3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

Section 2339B was amended in several ways. First, as amended, § 2339B(a)(1) now provides that in order to satisfy the statute's knowledge requirement, a person may either have knowledge (as provided under the statute in the past) that the organization is a designated terrorist organization or (as provided by the amendment) that the organization has engaged or engages in terrorism. Second, the jurisdictional basis for material support charges was expanded by adding a new subsection (1) to § 2339B(d), as follows:

> (d) Extraterritorial jurisdiction.

(1) In general. There is jurisdiction over an offense under subsection (a) if—

(A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)));

(B) an offender is a stateless person whose habitual residence is in the United States;

(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(D) the offense occurs in whole or in part within the United States;

(E) the offense occurs in or affects interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

In addition, § 6602 of the IRTPA created a new § 2339D, which criminalizes the act of "receiv[ing] military-type training from or on behalf of any organization designated at the time of the training . . . as a foreign terrorist organization" under certain circumstances.

Several of these amendments were tailored to address aspects of the statute that had been found unconstitutional by certain U.S. courts. In *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), the Ninth Circuit had upheld a district court decision finding that "two of the components included within the definition of material support, 'training' and 'personnel,' were impermissibly vague" and were thus void for vagueness under the First and Fifth Amendments. The court "enjoined the prosecution of any of the plaintiffs' members

for activities covered by these terms." The district court issued an order on the basis of this decision on October 2, 2001.

On appeal of that order, the Ninth Circuit found that *Humanitarian Law Project v. Reno* was the law of the case on training and personnel. *Humanitarian Law Project v. U.S. Department of Justice*, 352 F.3d 382 (9th Cir. 2003). In addition, the Ninth Circuit held that language in § 2339B providing criminal penalties for "knowingly providing material support or resources" to a designated organization must be construed "to require the government to prove that a person acted with knowledge of an organization's designation as a 'foreign terrorist organization' or knowledge of the unlawful activities that caused the organization to be so designated." The Ninth Circuit agreed to rehear this 2003 decision *en banc*. *Humanitarian Law Project v. U.S. Department of State*, 382 F.3d 1154 (9th Cir. 2004).

Following enactment of the amendments to §§ 2339A and 2339B discussed above, the Ninth Circuit *en banc* vacated its 2003 decision. The court stated:

> With respect to the appellants' First Amendment challenge to sections 302 and 303 of [the AEDPA], we affirm the district court's order dated October 2, 2001 [denying relief on that basis], for the reasons set out in *Humanitarian Law Project v. Reno*. . . . In light of Congress's recent amendment to the challenged statute . . . , we affirm the judgment in part, as set forth above, vacate the judgment and injunction regarding the terms "personnel" and "training," and remand to the district court for further proceedings, if any, as appropriate.

Humanitarian Law Project v. Ashcroft, 393 F.3d 902 (9th Cir. 2004). The court declined to reach any other issue in the case.

(3) Other constitutional challenges

The Fourth Circuit *en banc* rejected an attack based on the argument that 8 U.S.C. § 1189 denies defendants their constitutional rights by prohibiting them from attacking the

designation of a foreign terrorist organization (Hizbollah) and dismissed claims based on violation of First Amendment right to free association. *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004). Section 1189 of Title 8 of the U.S. Code, which provides the basis for designating terrorist organizations, states in part:

> (a) Designation.
>
> * * * *
>
> (8) Use of designation in trial or hearing. If a designation under this subsection has become effective under paragraph (2)(B) a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.
>
> * * * *
>
> (c) Judicial review of designation.
>
> (1) In general. Not later than 30 days after publication in the Federal Register of a designation, an amended designation, or a determination in response to a petition for revocation, the designated organization may seek judicial review in the United States Court of Appeals for the District of Columbia Circuit.
>
> * * * *

The court rejected Hammoud's arguments as follows:

> Hammoud primarily argues that § 1189(a)(8) deprives him of his constitutional right to a jury determination of guilt on every element of the charged offense. . . . This right has not been violated, however. "In determining what facts must be proved beyond a reasonable doubt the . . . legislature's definition of the elements of the offense is usually dispositive. . . ." McMillan v. Pennsylvania, 477 U.S. 79 . . . (1986). Here, Congress has provided that the fact of an organization's designation as an FTO is an element of § 2339B, but the validity of the designation is

> not. Therefore, Hammoud's inability to challenge the designation is not a violation of his constitutional rights. . . .
>
> Hammoud next argues that § 1889(a) violates the nondelegation doctrine because the designation of an organization as an FTO is not subject to judicial review. In the first place, it is not clear whether the nondelegation doctrine requires any form of judicial review. . . . In any event, an FTO designation is subject to judicial review—the designation may be challenged by the organization itself, *see* 8 U.S.C. § 1189[c].

The Fourth Circuit also dismissed Hammoud's constitutional challenges to § 2339B based on right of free association and overbreadth. The court found no overbreadth and as to the right of free association, concluded that "§ 2339B does not prohibit mere association; it prohibits the conduct of providing material support to a designated FTO." Furthermore, "the prohibition on material support is adequately tailored to the interest served and does not suppress more speech than is necessary to further the Government's legitimate goal." Finally, the court rejected Hammoud's argument that the term "material support" was unconstitutionally vague, finding nothing vague in the charges against him of providing material support in the form of currency.

3. Genocide, War Crimes, and Crimes Against Humanity

a. Genocide

(1) Sudan

See Chapter 6.A.5.

(2) Rwanda

On April 7, 2004, in a statement released in commemoration of the beginning of the genocide in Rwanda in 1994, President Bush stated:

> The United States supports the people of Rwanda as they commemorate this horrific chapter in history. We urge all states, particularly those in the region, to work with Rwanda and the International Criminal Tribunal for Rwanda to bring to justice those responsible for the genocide and to repatriate the thousands of displaced Rwandans. We also urge the international community to assist the survivors of that great crime as they continue to heal. The United States will continue to assist Rwanda in the unification of families, the providing of scholarships, the combating of HIV/AIDS, and the promotion of the rule of law.

See www.state.gov/s/wci/rm/31350.htm.

b. Confronting, ending, and preventing war crimes in Africa

On June 24, 2004, Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, testified before the U.S. House of Representatives International Relations Committee, Subcommittee on Africa. The focus of his remarks, excerpted below, was the challenge of addressing war crimes on the continent of Africa.

The full text of Ambassador Prosper's remarks is available at *www.state.gov/s/wci/rm/33934.htm. See also* Ambassador Prosper's address to the Stockholm International Forum 2004: Preventing Genocide: Threats and Responsibilities, January 26, 2004, *available at www.state.gov/s/wci/rm/28722.htm* and remarks following the Stockholm forum, January 28, 2004, available at *www.state.gov/s/wci/rm/29508.htm.*

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* * * *

Mr. Chairman, when there are outbreaks of atrocities and other abuses, neighbors, regional and international institutions, and the international community must be prepared to take steps to prevent further atrocities and to stop genocide. All countries no matter how big or small have a role to play. They must determine what

tools may be deployed: contributing soldiers, providing logistical support, or helping with political and financial assistance for the preventive effort. The burden to act should not fall on one country, and no country is immune from this responsibility. At the 10th anniversary commemoration of the Rwanda Genocide in Kigali, regional heads of state and the African Union (AU) called on African states to be prepared to act to stop war crimes and genocide when it is occurring on the continent. The United States supports this view and is prepared to help develop such capacity.

But while efforts may cure an immediate problem, we must focus on lasting initiatives, especially securing the rule of law. It is our view that we must encourage and support states in pursuing accountability and credible justice. We must not tolerate abdication of this responsibility by a particular government, society, or the international community, nor should that responsibility be taken away. It is important to achieve justice that touches the grass roots of a society and that has the acceptance of the community for it to change cultures of impunity. As a result, domestic ownership is vital. But for this to work, we must create, encourage, and strengthen political will in each country to combat and punish these abuses domestically.

Sierra Leone

Sierra Leone is one such place where justice is being served. The United States is a leading supporter of the Special Court for Sierra Leone, which is achieving a strong impact. This hybrid court has current indictments against eleven of those most responsible for atrocities in Sierra Leone, nine of whom are in custody. And as we saw on June 3, trials have begun. We deem this Court to be succeeding. But justice there will not be complete until Charles Taylor finds his way to the Court. Mr. Chairman, it is U.S. policy that Taylor must be held accountable and must appear before the Court. I personally have shared this policy with President Obasanjo and Chairman Bryant and have asked them for action on this matter. While we understand the need to maintain stability in Liberia, the goal of the United States is to work with Nigeria and Liberia to pursue a strategy that will see Taylor face justice before the Court. . . .

Democratic Republic of the Congo

While Sierra Leone is a symbol of justice moving forward, the Democratic Republic of the Congo (DRC) is not. The DRC has faced atrocities on a wide scale. Reliable estimates associate over three million deaths with the conflict since 1998, with possibly 350,000 of those directly due to violence. We continue to monitor the situation in eastern Congo and remain deeply concerned about the build-up of forces and reliable reports of atrocities there. The United States continues to support the transitional government of the Democratic Republic of the Congo and the goal of an integrated army supporting that government. We are calling on the transitional government, and local authorities to use their power to stop abuses, to investigate atrocities in Bukavu and elsewhere, and to hold the perpetrators accountable. . . .

We are also deeply concerned by the role that the media, particularly radio, has played in inciting ethnic hatred and deepening ethnic divisions among the people of eastern Congo and in the region. And we have intervened on the matter. We believe that there are appropriate ways to interrupt and end such communications before they lead to widespread violence.

As the Bush Administration continues to work to end conflict in the DRC, we also are promoting accountability. The transitional national government (TNG) will have a nationwide, albeit very weak, judiciary which could participate in investigating war crimes. The TNG constitution also calls for a truth and reconciliation commission (TRC). But these efforts are not enough. We will look to create increased international support for domestic-based mechanisms that specifically address war crimes accountability. . . .

International Criminal Tribunal for Rwanda

Mr. Chairman, we have seen the benefit of accountability in the Great Lakes region of Africa. Following the Rwanda genocide, the United States led the efforts to establish the UN International Criminal Tribunal for Rwanda (ICTR). This was the right thing to do. The United States supports the work of the ICTR and hopes that it will successfully conclude its mandate within the coming years. While the ICTR suffered in the past from inefficiency and mismanagement, today with its new leadership it is now having

the desired impact. To date, eighteen of the leaders most responsible for the Rwandan genocide have been convicted and three individuals have been acquitted. Twenty-three others are currently on trial with another twenty-six indictees in the pre-trial phase. Under this Administration, we launched a Rewards for Justice program that has resulted in many of these top genocidaires having been brought to justice before the ICTR. The end result has been that negative forces who fueled ongoing conflict in the region have been taken off the streets and are being held accountable.

Sudan

Mr. Chairman, allow me to spend some time and talk about an issue of great importance: Sudan. We are deeply troubled by the events in Darfur and the role of the government and militias. It is a catastrophic situation that will only worsen if efforts to remedy the conditions continue to be obstructed.

Today we know that an estimated one million people are internally displaced in Darfur, and there are approximately 200,000 Sudanese refugees in neighboring Chad. There are reports of widespread sexual violence, killings, torture, rape, theft and detention of persons in addition to destruction of homes and villages as a means of warfare. These attacks are ethnically based. . . .

The militias who are reported to be responsible are known as Jingaweit. Despite an April 8 ceasefire agreement, attacks by the Jingaweit on the innocent civilian population have continued, and we also continue to hear reports of aerial bombings by the Government of Sudan (GOS).

* * * *

The key to ending impunity in Africa is to work towards having each and every state fully exercise its responsibility to ensure the rule of law is upheld. In our efforts to end cycles of violence by ensuring accountability for past crimes, we should work as closely with the affected populations and governments as possible. Only then will the foundation of democracy begin to take shape. With our collective effort we can change the environment. It will not be easy, however. But for the sake of Africa and all of humanity, it must be done.

4. Narcotrafficking

On March 1, 2004, the Department of State submitted the annual International Narcotics Control Strategy Report for 2003 to Congress, available at *www.state.gov/p/inl/rls/nrcrpt/2003/*. As explained in the Introduction to Part I of the report:

> The Department of State's International Narcotics Control Strategy Report (INCSR) has been prepared in accordance with section 489 of the Foreign Assistance Act of 1961, as amended (the "FAA," 22 U.S.C. § 2291). The 2004 INCSR, published in March 2004, covers the year January 1 to December 31, 2003 and is published in two Parts, the second of which covers money laundering and financial crimes. It is the 18th annual report prepared pursuant to the FAA. In addition to addressing the reporting requirements of section 489 of the FAA (as well as sections 481(d)(2) and 484(c) of the FAA and section 804 of the Narcotics Control Trade Act of 1974, as amended), the INCSR provides the factual basis for the designations contained in the President's report to Congress on the major drug-transit or major illicit drug producing countries initially set forth in section 591 of the Kenneth M. Ludden Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002 (P.L. 107–115) (the "FOAA"), and now made permanent pursuant to section 706 of the Foreign Relations Authorization Act, Fiscal Year 2003 (P.L. 107–228) (the "FRAA").

On September 15, 2004, President Bush issued a Memorandum for the Secretary of State to be transmitted to Congress, "Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for FY05." As provided in section 706(1) of the Foreign Relations Authorization Act ("FRAA"), Fiscal Year 2003, Pub. L. No. 107–228, 116 Stat. 1350 (2002), President Bush identified 22 countries as major drug-transit or major illicit drug producing countries ("majors list"): Afghanistan, The Bahamas, Bolivia, Brazil, Burma, China, Colombia, Dominican

Republic, Ecuador, Guatemala, Haiti, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, Venezuela, and Vietnam. The President removed Thailand from the majors list, stating:

> Thailand's opium poppy cultivation is well below the levels specified in the FRAA; no heroin processing laboratories have been found in Thailand for several years, and Thailand is no longer a significant direct source of illicit narcotic or psychotropic drugs or other controlled substances significantly affecting the United States; nor is it a country through which such drugs or substances are transported.

Pursuant to § 706(2)(A) of the FRAA, the President designated Burma "as a country that has failed demonstrably during the previous 12 months to adhere to its obligations under international counternarcotics agreements and take the measures set forth in section 489(a)(1) of the FAA." The President did not so designate Haiti as he had in 2003, stating:

> In contrast to the Government of Haiti's dismal performance last year under the Aristide regime, the new Interim Government of Haiti (IGOH), headed by Prime Minister Latortue, has taken substantive—if limited—counternarcotics actions in the few months it has been in office. Nevertheless, we remain deeply concerned about the ability of Haitian law enforcement to reorganize and restructure sufficiently to carry out sustained counternarcotics efforts.

The full text of the President's memorandum, which also discusses concerns with issues relating to other countries, some of which are not on the majors list, is available at 69 Fed. Reg. 57,809 (Sept. 28, 2004). *See also* Robert Charles, Assistant Secretary for International Narcotics and Law Enforcement Affairs, "Statement on Narcotics Certification", available at *www.state.gov/p/inl/rls/rm/36249.htm*.

5. Money Laundering

a. Identification of major money laundering countries

Part II of the annual International Narcotics Control Strategy Report for 2003, *supra,* available at *www.state.gov/p/inl/rls/nrcrpt/2003/*, addresses money laundering and financial crimes and identifies major money laundering countries. As described in the Legislative Basis section of Part II:

> A major money laundering country is defined by statute as one "whose financial institutions engage in currency transactions involving significant amounts of proceeds from international narcotics trafficking" (FAA § 481(e)(7)). However, the complex nature of money laundering transactions today makes it difficult in many cases to distinguish the proceeds of narcotics trafficking from the proceeds of other serious crime. Moreover, financial institutions engaging in transactions involving significant amounts of proceeds of other serious crime are vulnerable to narcotics-related money laundering. This year's list of major money laundering countries recognizes this relationship by including all countries and other jurisdictions, whose financial institutions engage in transactions involving significant amounts of proceeds from all serious crime. The following countries/jurisdictions have been identified this year in this category:
>
> Major Money Laundering Countries in 2003: Antigua and Barbuda, Australia, Austria, Bahamas, Bosnia and Herzegovina, Brazil, Burma, Canada, Cayman Islands, China, Colombia, Costa Rica, Cyprus, Dominican Republic, France, Germany, Greece, Guernsey, Haiti, Hong Kong, Hungary, India, Indonesia, Isle of Man, Israel, Italy, Japan, Jersey, Latvia, Lebanon, Liechtenstein, Luxembourg, Macau, Mexico, Nauru, Netherlands, Nigeria, Pakistan, Panama, Paraguay, Philippines, Russia, Singapore, Spain, Switzerland, Taiwan, Thailand, Turkey, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, and Venezuela.

b. Imposition of sanctions

On April 12, 2004, the U.S. Department of the Treasury issued final rules pursuant to § 311 of the USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272, 31 U.S.C. § 5318A (2002), requiring certain U.S. financial institutions to take special measures against Burma and against two financial institutions, Myanmar Mayflower Bank and Asia Wealth Bank. 69 Fed. Reg. 19,093 and 69 Fed. Reg. 19,098 (both Apr. 12, 2004). That statute authorizes the Secretary of the Treasury to designate a foreign jurisdiction, financial institution operating outside the United States, class of transactions, or type of account as being of "primary money laundering concern" and to impose one or more of five "special measures" with respect to such jurisdiction, institution, class of transactions, or type of account, in consultation with, among others, the Secretary of State and the Attorney General. Burma is also subject to sanctions under the Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108–61, 117 Stat. 864 (2003) and Executive Order 13310, 68 Fed. Reg. 44,583 (July 28, 2003). Excerpts below from the Federal Register notice describe the background and imposition of the special measures against Burma. Further information concerning Burma and the legal and factual context is available at 69 Fed. Reg. 19,093; additional information concerning the Myanmar Mayflower Bank and Asia Wealth Bank is available at 69 Fed. Reg. 19,098.

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* * * *

The Secretary [of the Treasury] has designated Burma as a jurisdiction of primary money laundering concern under 31 U.S.C. 5318A, as added by section 311(a) of the USA PATRIOT Act (Pub. L. 107–56) (the Act). [*See* 68 Fed. Reg. 66,299 (Nov. 25, 2003).] To protect the U.S. financial system against the money laundering risk posed by Burma, [Financial Crimes Enforcement Network, Department of the Treasury ("FinCEN")] is imposing a special measure authorized by section 5318A(b)(5). The special measure imposed under this section will generally prohibit certain

U.S. financial institutions from establishing, maintaining, administering, or managing correspondent or payable-through accounts in the United States for, or on behalf of, Burmese banking institutions, unless (as explained below) operation of those accounts is not prohibited by Executive Order 13310 of July 28, 2003, and the Burma-related activities of such accounts are solely to effect transactions that are exempt from, or licensed pursuant to, Executive Order 13310. This prohibition extends to correspondent or payable-through accounts maintained for other foreign banks when such accounts are used by the foreign bank to provide financial services to a Burmese banking institution indirectly.

Additionally, by separate notice, FinCEN is announcing concurrently the imposition of the fifth special measure against two Burmese banking institutions, Myanmar Mayflower Bank and Asia Wealth Bank. This special measure prohibits certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent or payable-through accounts for, or on behalf of, Myanmar Mayflower Bank or Asia Wealth Bank, notwithstanding any exemption from, or license issued pursuant to, Executive Order 13310.

* * * *

II. Imposition of Special Measures

As a result of the designation of Burma as a jurisdiction of primary money laundering concern, and based upon consultations and the consideration of all relevant factors, the Secretary has determined that grounds exist for the imposition of the special measures authorized by section 5318A(b)(5). Thus, the final rule prohibits covered financial institutions from establishing, maintaining, administering, or managing in the United States any correspondent or payable-through account for, or on behalf of, a Burmese banking institution. This prohibition extends to any correspondent or payable-through account maintained in the United States for any foreign bank if the account is used by the foreign bank to provide banking services indirectly to a Burmese banking institution. Financial institutions covered by this rule that obtain knowledge that this is occurring are required to ensure that any such account no longer is used to provide such services, including,

where necessary, terminating the correspondent relationship in the manner set forth in this rulemaking. Other than with respect to Myanmar Mayflower Bank and Asia Wealth Bank, the rule does, however, allow U.S. financial institutions to maintain correspondent accounts otherwise prohibited by this rule if such accounts are permitted to be maintained pursuant to Executive Order 13310 and the Burma-related activity of those accounts is solely for the purpose of conducting transactions that are exempt from, or authorized by regulation, order, directive, or license issued pursuant to, Executive Order 13310.

In imposing this special measure, the Secretary has considered [as one of several factors] the following pursuant to section 5318A(a)(4)(b):

1. Similar Actions Have Been or Will Be Taken by Other Nations or Multilateral Groups Against Burma Generally.

In June 2001, the FATF designated Burma as an NCCT, resulting in FATF members issuing advisories to their financial sectors recommending enhanced scrutiny of transactions involving Burma. In April 2002 FinCEN issued an advisory notifying U.S. financial institutions that they should accord enhanced scrutiny with respect to transactions and accounts involving Burma. In October 2003, FATF called upon its 33 members to take additional countermeasures with respect to Burma as of November 3, 2003. Imposition of the fifth special measure on Burma is consistent with this call for additional countermeasures and forms part of an international effort to protect the financial system. Based on informal discussions and the past practices of the FATF membership, the majority of FATF members are expected to take countermeasures, including all of the Group of Seven countries. The countermeasures imposed by such FATF members will likely include imposition of additional reporting requirements, issuance of additional advisories, shifting the burden for reporting obligations, and/or restrictions on the licensing of Burmese financial institutions.

* * * *

Also in 2004, the Department of the Treasury issued several notices of proposed rulemakings to designate private financial institutions as primary money-laundering concerns,

and to propose imposition of special measures against them, pursuant to § 311 of the USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272, 31 U.S.C. § 5318A (2002). The financial institutions included: Commercial Bank of Syria and subsidiary, Syrian Lebanese Commercial Bank, 69 Fed. Reg. 28,098 (May 18, 2004); First Merchant Bank OSH, Ltd. and subsidiaries, of the "Turkish Republic of North Cyprus,"* 69 Fed. Reg. 51,979 (Aug. 24, 2004); and Infobank, a Belarusian company, 69 Fed. Reg. 51,973 (Aug. 24, 2004).

6. Corruption

a. Inter-American Convention Against Corruption

On April 1, 2004, President Bush submitted a report to Congress pursuant to the Senate Resolution of Advice and Consent to Ratification of the Inter-American Convention Against Corruption ("IACAC"), signed by the United States June 2, 1996, entered into force for the United States September 15, 2000 (*see* 146 CONG. REC. S7809 (July 27, 2000)).

The full text of the report, excerpted below, is available at *www.state.gov/s/l/c8183.htm*. *See also* U.S. response to Committee questionnaire referred to below, available at *www.oas.org/juridico/spanish/usa_res1.htm*.

* * * *

States Parties to the IACAC continue, with assistance from the Organization of American States (OAS), to conduct formal monitoring of the IACAC's implementation. The Committee of Experts ("Committee") for the Follow-Up Mechanism ("Mechanism") has finalized eight country assessments. Seven of the eight states have authorized

* Editor's note: As explained in the Federal Register, "[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."

publication of the final assessment reports on the OAS web site. The Committee's assessments contain specific recommendations for additional legislation, regulations, or actions where necessary to implement the IACAC. The recommendations also address the need for strengthening the administration, transparency, and other anticorruption efforts to enhance and measure the effectiveness of anticorruption laws and mechanisms.

* * * *

The Committee and the evaluation process have taken important steps in completing and publishing the first assessment reports. The States Parties—the subjects of these reports—now need to take prompt action to acknowledge receipt of the recommendations and take steps to consider and implement the recommendations . . . The evaluation process calls for dissemination of the report to the public and to the appropriate civil society organizations, with proposals on how the State Party intends to involve civil society in the implementation of the recommendations. . . .

* * * *

b. Asset sharing

A fact sheet released by the Department of State on January 12, 2004, announced an agreement with Peru providing for the sharing of assets forfeited in the United States derived from corrupt acts in the Peruvian Government.

The fact sheet, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2004/28114.htm*.

. . . A key element of the U.S. efforts is to deny safe haven to corrupt officials, those who corrupt them, and their assets.

During the Special Summit [of the Americas], Secretary of State Powell showed the results of hemispheric cooperation to fight corruption by signing an agreement with Peruvian Foreign

Minister Manuel Rodriguez, in the presence of President Alejandro Toledo, authorizing the transfer to the Government of Peru of $20,275,911.88 in funds forfeited by the U.S. Department of Justice and derived from corrupt acts during the Fujimori Government committed by presidential advisor Vladimir Montesinos and his associates. . . . The agreement provides for transparency and gives special consideration to compensating victims of the corruption and to supporting Peruvian anti-corruption efforts.

The U.S. Attorney's Office for the Southern District of Florida and the FBI, with assistance from the Criminal Division of the Justice Department, forfeited these funds based on violations of U.S. criminal law (illegal transportation across a federal or state boundary of property stolen, taken or converted by fraud, wire fraud, and related money laundering). Forfeiture is a legal proceeding through which the government confiscates property that a criminal obtains or uses as a result of a criminal act. Peruvian prosecutors and investigators provided . . . critical evidence of the underlying criminal conduct. . . .

U.S. turnover to Peru of all of the net forfeited property in this case recognizes the importance of close international law enforcement cooperation. The transfer is to the Fondo Especial de Administración del Dinero Obtenido Ilicitamente en Perjuicio del Estado (FEDADOI), which Peru established in 2001 in order to administer returned assets that had been misappropriated during the Fujimori years. Under the agreement, Peru also agrees to ensure public notice and a public comment period on the proposed use of the funds and to give priority consideration to using the funds to compensate victims of the underlying crimes and to support anti-corruption initiatives and institutions in Peru.

7. Transnational Organized Crime, Trafficking in Persons, and Smuggling of Migrants

a. Transnational organized crime convention with protocols

On February 23, 2004, President Bush transmitted to the Senate for advice and consent to ratification the United

Nations Convention Against Transnational Organized Crime ("TOC Convention") as well as two supplementary protocols: (1) the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children ("Trafficking Protocol"), and (2) the Protocol Against Smuggling of Migrants by Land, Sea and Air ("Migrant Smuggling Protocol"), which were adopted by the UN General Assembly on November 15, 2000. The United States signed all three instruments on December 13, 2000, at Palermo, Italy. Excerpts below from the accompanying report of the Department of State address issues on which the United States had particular comments. S. Treaty Doc. No. 108–16 (2004). *See also* B.1. *supra.*

Article 1 ("Statement of Purpose") states that the Convention is intended to promote cooperation to prevent and combat transnational organized crime more effectively. Article 2 ("Use of terms") defines ten key concepts utilized in the Convention. In particular, the defined terms "organized criminal group", "serious crime", and "structured group" are crucial to understanding the scope of the Convention.

An "organized criminal group" means a "structured group" of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit. The requirement that the group's purpose be financial or other material gain encompasses, for example, groups which trade in child pornography materials. A terrorist group would fall within the scope of this definition if it acts in part for a financial or other material benefit. A "structured group" is a group that is not randomly formed for the immediate commission of an offense; it need not have formally defined roles for its members, continuity of membership, or a developed structure. This definition is flexible enough to accommodate the ever-evolving forms that organized criminal groups take. "Serious crime" is any offense punishable by at least four years' imprisonment.

* * * *

Article 4 ("Protection of Sovereignty") sets forth two standard provisions in United Nations instruments stating that States Parties respect each other's sovereign equality and territorial integrity and providing that the Convention does not authorize a Party to undertake in another State's territory the exercise of jurisdiction and performance of functions reserved for the authorities of that State by its domestic law.

With respect to the articles of the Convention which require the establishment of criminal offenses (5, 6, 8, and 23), it should be noted preliminarily that these obligations apply at the national level, as is customary in international agreements. However, existing U.S. federal criminal law has limited scope, generally covering conduct involving interstate or foreign commerce or another important federal interest. Under our fundamental principles of federalism, offenses of a local character are generally within the domain of the states, but not all forms of conduct proscribed by the Convention are criminalized by all U.S. states (for example, a few states have extremely limited conspiracy laws). Thus, in the absence of a reservation, there would be a narrow category of such conduct that the United States would be obliged under the Convention to criminalize, although under our federal system such obligations would generally be met by state governments rather than the federal government. In order to avoid such obligations, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America reserves the right to assume obligations under this Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, serves as the principal legal regime within the United States for combating organized crime, and is broadly effective for this purpose. Federal criminal law does not apply in the rare case where such criminal conduct does not so involve

> interstate or foreign commerce, or another federal interest. There are a small number of conceivable situations involving such rare offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Convention. The Government of the United States of America therefore reserves to the obligations set forth in the Convention to the extent they address conduct which would fall within this narrow category of highly localized activity. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other Parties as contemplated in the Convention.

Furthermore, in connection with this reservation, I recommend that the Senate include the following understanding in its resolution of advice and consent:

> The United States understands that, in view of its federalism reservation, the Convention does not warrant the enactment of any legislative or other measures; instead, the United States will rely on existing federal law and applicable state law to meet its obligations under the Convention.

Article 5 ("Criminalization of participation in an organized criminal group") is the first of four articles that require States Parties to adopt criminal legislation regarding specified offenses. . . .

. . . [T]he United States, as a State Party that requires in many instances an act in furtherance of the conspiracy as a prerequisite to criminal liability, is obliged under Article 5, paragraph 3, to notify the Secretary-General of the United Nations of this requirement. Accordingly, upon U.S. ratification of the Convention, the Department of State will, by diplomatic note, provide the depositary with the following notification:

> Pursuant to Article 5, paragraph 3, the Government of the United States of America informs the Secretary-General of the United Nations that, in order to establish criminal

> liability under United States law with respect to the offense described in Article 5, paragraph 1(a)(i), the commission of an overt act in furtherance of the agreement is generally required.

A second criminalization obligation follows in Article 6 ("Criminalization of the laundering of proceeds of crime"). This provision mandates the adoption of criminal law provisions, in accordance with the fundamental principles of a Party's domestic law, punishing the conversion, transfer, concealment or disguise of property with knowledge that it is the proceeds of crime. . . .

The predicate offenses for money laundering must include, in the case of a country such as the United States whose laws enumerate them by list, a comprehensive range of offenses associated with organized criminal groups. . . . Article 6 is of crucial importance to global anti-money-laundering efforts because it for the first time imposes an international obligation on States Parties to expand the reach of their laundering laws to predicate offenses associated with organized criminal activities other than those related to narcotics trafficking that are addressed in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. As noted above, it is recommended that the United States take a partial reservation to this obligation to enable its implementation consistent with the existing distribution of criminal jurisdiction under our federal system.

* * * *

Article 8 ("Criminalization of corruption") requires a State Party to have in place laws criminalizing the giving or receipt of bribes by its domestic public officials, along with participation as an accomplice in such offices, and to consider criminalizing such conduct when it involves a foreign public official or an international civil servant. The former provision is mandatory because corruption of domestic public officials was regarded as a core activity of organized criminal groups. The latter, however, was treated as a recommendation in deference to the separate United Nations Convention Against Corruption, which focuses on corruption generally rather than solely as it relates to organized crime. As

noted above, it is recommended that the United States take a partial reservation to this obligation to enable its implementation consistent with the current distribution of criminal jurisdiction under our federal system.

* * * *

Article 15 ("Jurisdiction") lays out the jurisdictional principles governing the Convention's four criminalization provisions generally. A State Party must establish jurisdiction in respect of offenses established under the Convention when committed in its territory or on board a vessel flying its flag or an aircraft registered under its laws. The latter jurisdiction (i.e., on board a vessel or aircraft) is not expressly extended under current U.S. law to these four offenses—participation in an organized criminal group, money laundering, corruption of domestic public officials, and obstruction of justice—although certain cases can be pursued on other jurisdictional bases. For example, in some situations, U.S. federal jurisdiction may extend over such offenses occurring outside the United States, either through an express statutory grant of authority (e.g., Title 18, United States Code, Section 1512(g)), or through application of principles of statutory interpretation. However, since under current U.S. law we cannot always ensure our ability to exercise jurisdiction over these offenses if they take place outside our territory on such vessels or aircraft, a reservation will be required for those cases in which such jurisdiction is not available. Accordingly, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America reserves the right not to apply in part the obligation set forth in Article 15, paragraph 1(b) with respect to the offenses established in the Convention. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. Accordingly, the United States shall

> implement paragraph 1(b) to the extent provided for under its federal law.

A State Party is permitted, but not required, to establish jurisdiction over these four offenses when committed against one of its nationals, or by one of its nationals or residents. (Nationality and passive personality jurisdiction is limited under United States' laws, but common in European countries and other civil law jurisdictions.) Permissive jurisdiction is likewise envisioned over the offenses of participation in an organized criminal group or money laundering, as defined in the Convention, where they are committed outside a State's territory with a view to the commission of certain offenses within its territory.

* * * *

Article 16 ("Extradition") elaborates a regime for extradition of persons for offenses criminalized under the Convention, and for serious crimes generally which involve an organized criminal group, so long as the offense is criminal under the laws of the requesting and the requested State Party. For the United States, the principal legal effect of this Article would be to deem the offenses covered by the Convention to be extraditable offenses under U.S. bilateral extradition treaties. The result would be to expand the scope of older treaties which list extraditable offenses and were concluded at a time when offenses such as money laundering did not yet exist.

Thus, for the United States, the Convention does not provide a substitute international legal basis for extradition, which will continue to be governed by U.S. domestic law and applicable bilateral extradition treaties, including their grounds for refusal. As such a state the United States is obliged by Article 16(5) to so notify the UN Secretary-General. Accordingly, upon ratification of the Convention, the Department of State will, by diplomatic note, provide the depositary with the following notification:

> Pursuant to Article 16, paragraph 5, the United States of America informs the Secretary-General of the United Nations that it will not apply Article 16, paragraph 4.

For numerous other States Parties that do not make extradition conditional on the existence of a separate extradition treaty, however, the Convention can, with regard to the offenses it covers, afford that international legal basis inter se.

* * * *

The fourth and final criminalization obligation established by the Convention—obstruction of justice in criminal proceedings within the scope of the Convention—appears in Article 23 ("Criminalization of obstruction of justice"). . . . As noted above, it is recommended that the United States take a partial reservation to this obligation to enable its implementation consistent with the current distribution of criminal jurisdiction under our federal system.

* * * *

Article 35 ("Settlement of Disputes") establishes a mechanism for States Parties to settle disputes concerning the interpretation or application of the Convention. If a dispute cannot be settled within a reasonable time through negotiation, a State Party may refer it to arbitration, or to the International Court of Justice if the Parties are unable to agree on the organization of the arbitration. A State Party may, however, opt out of dispute settlement mechanisms other than negotiation by making a declaration to that effect. In keeping with recent practice, the United States should do so. Accordingly, I recommend that the following reservation be included in the U.S. instrument of ratification:

> In accordance with Article 35, paragraph 3, the Government of the United States of America declares that it does not consider itself bound by the obligation set forth in Article 35, paragraph 2.

Articles 36–41 contain the final clauses. Article 36 ("Signature, ratification, acceptance, approval and accession") provides that the Convention is open for signature by all states, and by regional economic integration organizations (REIOs) such as the European Union where at least one of its member states has signed. REIOs

which become party to the Convention also are required to declare the extent of their competence with respect to matters covered by the Convention. . . .

* * * *

Finally, the terms of the Convention, with the suggested reservations and understandings, are consonant with U.S. law. To clarify that the provisions of the Convention, with the exceptions of Articles 16 and 18, are not self executing, I recommend that the Senate include the following declaration in its resolution of advice and consent:

> The United States declares that the provisions of the Convention (with the exception of Articles 16 and 18) are non-self-executing.

Article 16 and Article 18 of the Convention contain detailed provisions on extradition and legal assistance that would be considered self-executing in the context of normal bilateral extradition practice. It is therefore appropriate to except those provisions from the general understanding that the provisions of the Convention are non-self-executing.

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PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The Trafficking Protocol consists of a preamble and 20 articles, which are divided into four chapters: I ("General provisions"), II ("Protection of victims of trafficking in persons"), III ("Prevention, cooperation and other measures") and IV ("Final provisions"). To the extent practicable, the wording of key phrases and the structure of the Trafficking and Migrant Smuggling Protocols are consistent with each other and are modeled on the structure and wording of the Convention. As noted above, subject to the

reservations and understandings recommended herein, the Protocol would not require implementing legislation for the United States.

I. General provisions

Article 1 ("Relation with the United Nations Convention against Transnational Organized Crime") is structurally a key provision of the Trafficking Protocol. Rather than repeating in the Protocol every provision of the Convention that is also applicable to the Protocol, and rather than explicitly referencing every provision in the Convention that is also applicable to the Protocol, this Article provides that all provisions of the Convention shall apply, "mutatis mutandis," to the Protocol unless otherwise provided. The negotiating record to the Protocol explains that the phrase in quotations means "with such modifications as circumstances require" or "with the necessary modifications," and that the provisions of the Convention would thus be interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention. Article 1 further clarifies this concept by providing that the offences established in Article 5 of the Protocol (the criminalization article) shall be regarded as offences established in accordance with the Convention. Thus, wherever in the Convention it is stated that a particular provision applies to "offences established in accordance with the Convention," that provision will also apply, for States Parties to this Protocol, to the trafficking in persons offences established in accordance with Article 5 of the Protocol.

The obligations in the Convention that are to be applied to the offenses are all consistent with current U.S. law, with one exception. With respect to the obligation to establish criminal jurisdiction set forth in Article 15 of the Convention, a partial reservation will be required for Trafficking Protocol offenses committed outside the United States on board ships flying a U.S. flag or aircraft registered under U.S. law. I therefore recommend that the U.S. instrument of ratification include the [same reservation as set forth pertaining to Article 15(b) of the TOC Convention] with respect to the offenses established in the Trafficking Protocol. . . .

In addition, for clarity, an understanding is recommended with respect to the application of Article 6 of the Convention, regarding

criminalization of the laundering of proceeds of crime, to the Protocol offenses. Article 6(2)(b) of the Convention entitles States Parties to set out, in legislation, a list of money laundering predicate offenses, provided that the list includes a comprehensive range of offenses associated with organized criminal groups. Although current U.S. law does not designate all conduct punishable under the Protocol as money laundering predicate offenses, it so designates a comprehensive range of offenses associated with trafficking. To make clear that the U.S. understands its existing comprehensive list of money laundering predicate offenses as sufficient to implement the Article's obligation with respect to the Protocol offenses, I recommend that the following understanding be included in the U.S. instrument of ratification:

> The Government of the United States of America understands the obligation to establish the offenses in the Protocol as money laundering predicate offenses, in light of Article 6, paragraph 2(b) of the United Nations Convention against Transnational Organized Crime, as requiring States Parties whose money laundering legislation sets forth a list of specific predicate offenses to include in such list a comprehensive range of offenses associated with trafficking in persons.

Finally, it should be noted that the previously described notifications to be made by the United States with respect to Articles 16, 18, and 31 of the Convention also apply to the Protocol. No additional notification in this regard is necessary with respect to the Trafficking Protocol.

Article 2 ("Statement of purpose") describes the purposes of the Protocol, which are to prevent and combat trafficking in persons, particularly women and children, to protect and assist the victims of such trafficking, and to promote cooperation among States Parties to meet these objectives.

Article 3 ("Use of terms") defines "trafficking in persons" for the first time in a binding international instrument. This key definition may be divided into three components: conduct, means and purpose. The conduct covered by "trafficking in persons" is the

recruitment, transportation, transfer, harboring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation includes, at a minimum, exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs. Article 3 further provides that, once any of the means set forth above has been used, the consent of the victim to the intended exploitation is irrelevant. Finally, with respect to children, the Article makes it clear that any of the conduct set forth above, when committed for the purpose of exploitation constitutes "trafficking" even if none of the means set forth above are used.

It should be noted that the negotiating record sets forth six statements intended to assist in the interpretation of the definition of "trafficking in persons."* One of those statements makes clear that the Protocol is without prejudice to how States Parties address prostitution in their respective domestic laws.

* * * *

* Editor's Note: The *travaux préparatoires* was provided to the Senate with the Secretary of State's letter of submittal and the six statements were repeated in response to a question for the record from Senator Biden for Mr. Witten and Mr. Swartz, as follows. Questions and answers for the record are available at *www.state.gov/s/l/c8183.htm*.

Article 3: Use of terms
Subparagraph (a)

63. The travaux préparatoires should indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.

64. The travaux préparatoires should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the Protocol, which is therefore

Article 5 ("Criminalization") is modeled on the analogous articles in the Convention. Article 5(1) requires States Parties to criminalize the conduct defined in Article 3 of the Protocol as "trafficking in persons," when committed intentionally. Article 5(2) requires States Parties to criminalize, subject to basic concepts of their legal systems, attempts to commit the trafficking offenses described, and to criminalize participating as an accomplice and organizing or directing others to commit such conduct. As confirmed by Article 11(6) of the Convention, there is no requirement that the offenses under U.S. law implementing this obligation be identical to the text of the Protocol. As described in more detail below, existing federal statutes in Title 18, United States Code, Chapters 77, 110 and 117, combined with state laws, and general accessorial liability principles of U.S. law, are sufficient to implement the requirements of Article 5, provided that a

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without prejudice to how States Parties address prostitution in their respective domestic laws.

65. The travaux préparatoires should indicate that the removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons should not be considered exploitation.

66. The travaux préparatoires should indicate that where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, it will also fall within the scope of the Protocol.

Subparagraph (b)

67. The travaux préparatoires should indicate that this subparagraph should not be interpreted as restricting the application of mutual legal assistance in accordance with article 18 of the Convention.

68. The travaux préparatoires should indicate that subparagraph (b) should not be interpreted as imposing any restriction on the right of accused persons to a full defense and to the presumption of innocence. They should also indicate that it should not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law. Further, the travaux préparatoires will refer to article 11, paragraph 6, of the Convention, which preserves applicable legal defences and other related principles of the domestic law of States Parties.

reservation is deposited with respect to trafficking for the purpose of removal of organs, and certain attempted trafficking offenses. With this reservation, no new implementing legislation will be required for the United States.

With respect to the obligation to criminalize trafficking and attempted trafficking for the purpose of "forced labour or services, slavery or practices similar to slavery, servitude," current U.S. federal slavery, peonage, involuntary servitude and forced labor laws found in Chapter 77 of Title 18, which apply nationwide, are sufficient to implement the requirement to criminalize trafficking for these purposes, independent of state law.

It should also be noted, with respect to the obligation to criminalize trafficking for the purpose of "practices similar to slavery," that in the course of negotiations on the Protocol representatives of the United States and other countries stated, without dissent, that we understand this term to mean practices set forth in the 1956 UN Supplementary Convention on the Abolition of Slavery, to which the United States is a party without reservation. These practices include forced marriage, serfdom, debt bondage, and the delivery of a child for the purpose of exploitation. These practices are generally criminalized under U.S. law by prohibitions against forced labor and slavery (including forced marriage, which, as defined in the 1956 Convention, involves elements of ownership and control prohibited under the Thirteenth Amendment). With respect to the delivery of a child for the purpose of exploitation, the forms of exploitation for which U.S. law provides criminal sanction are slavery, peonage, forced labor, involuntary servitude and, as further described below, sexual exploitation.

With respect to the obligation to criminalize trafficking and attempted trafficking for the purpose of "the exploitation of the prostitution of others," U.S. federal law prohibits instances where a person is transported in interstate or foreign commerce, or induced or coerced to do so, with the intent that the person engage in prostitution, 49 states prohibit all prostitution, and Nevada prohibits prostitution derived from force, debt bondage, fraud, and deceit. While the Protocol requires criminalization of a range of conduct antecedent to the actual engaging in prostitution, this requirement is met by state procurement or promotion of

prostitution laws, or as in Nevada's case, the above-described trafficking law.

The Protocol also requires criminalization of trafficking for the purpose of "other forms of sexual exploitation" Federal law prohibits interstate travel or transportation of a person, and enticement or inducement for the purpose of committing any criminal sexual act. In addition, state laws proscribe a variety of forms of sexual abuse, as well as attempted commission of such offenses. These federal and state laws meet the obligation to criminalize trafficking in persons for the purpose of other forms of sexual exploitation.

With respect to the obligation to criminalize attempted trafficking for the purpose of other forms of sexual exploitation, the federal laws described above are consistent with this requirement. However, with respect to state laws, some forms of conduct that are required to be criminalized as attempts would be too remote from completion to be punished under the attempted sexual abuse laws of a particular state. To address that narrow range of attempted trafficking for sexual exploitation offenses that do not rise to the level of attempted sex abuse offenses under federal or state laws, it will be necessary to reserve the right to apply the obligation set forth in Article 5, Paragraph 2(a), of the Protocol only to the extent that such conduct is punishable by the laws of the state concerned.

In addition, the Protocol requires States Parties to prohibit trafficking and attempted trafficking in persons for the purpose of the removal of organs (which the negotiating record makes clear does not prohibit organ removal for legitimate medical reasons). The most closely analogous federal criminal statute, 42 U.S.C. 274e, penalizes only the sale of organs in interstate and foreign commerce. While that statute, along with federal fraud, kidnapping, aiding and abetting and conspiracy laws, likely covers most instances of such trafficking that could arise, the express obligation under the Protocol is nonetheless broader. Similarly, states generally do not have statutes specifically treating as crimes trafficking or attempted trafficking in persons for the purpose of the removal of organs, although in a manner similar to federal law, such conduct may be punishable as murder, assault, kidnapping, fraud or similar offenses, depending on the circumstances of the crime.

Accordingly, to avoid undertaking obligations with respect to the two areas discussed above, I recommend [inclusion of the same federalism reservation discussed in the context of Article 4 of the TOC Convention, with the addition of specific references to the "Thirteenth Amendment's prohibition of 'slavery' and 'involuntary servitude' "].

* * * *

I also recommend that the Senate include the [same understanding concerning reliance on existing federal and state law.]

II. Protection of victims of trafficking in persons

Article 6 ("Assistance to and protection of victims of trafficking in persons") recognizes that protection of victims is as important as prosecuting traffickers. It calls on States Parties to make available to victims of trafficking in persons certain protections and assistance. Among the protections included are protection of the privacy and identity of the victim by making legal proceedings confidential and protection of the physical safety of victims. The types of assistance to be offered include assistance during legal proceedings against the trafficker, and assistance to provide for victims' physical, psychological and social recovery. . . .

* * * *

Paragraph 1 of Article 8 ("Repatriation of victims of trafficking in persons") states that Parties must facilitate and accept the return of their nationals and permanent residents who are trafficking victims. This is consistent with the customary international law principle that a country is obligated to accept the return of any of its nationals. . . .

* * * *

IV. Final provisions

Article 14 ("Saving clause") is extremely important in setting appropriate balance in the Protocol between law enforcement and protection of victims. It reaffirms that the Protocol does not affect

rights, obligations, and responsibilities of States and individuals under international law, in particular international humanitarian law as well as the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein. (The negotiating record explicitly states that the Protocol does not deal one way or the other with the status of refugees.) Moreover, this Article provides that the Protocol must be applied in a way that does not discriminate against persons on the ground that they are victims of trafficking in persons and that the Protocol shall be interpreted and applied in a manner consistent with internationally recognized principles of non-discrimination (e.g., no distinction based on race, religion, nationality, membership in a particular social group or political opinion.)

* * * *

Finally, the terms of the Protocol, with the suggested reservations and understandings, are consonant with U.S. law. To clarify that the provisions of the Protocol, with the exceptions of those implemented through Articles 16 and 18 of the Convention, are not self-executing, I recommend that the Senate include the [same declaration reflecting this fact as in the TOC Convention] in its resolution of advice and consent. . . .

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The Migrant Smuggling Protocol consists of a preamble and 25 articles, which are divided into four chapters: I ("General provisions"), II ("Smuggling of migrants by sea"), III ("Prevention, cooperation and other measures") and IV ("Final provisions"). To the extent practicable, the wording of key phrases and the structure of the Trafficking and Migrant Smuggling Protocols are consistent with each other and are modeled on the structure and wording of the Convention. While there was never any concern, in the context of the Trafficking Protocol negotiations, that the Protocol might be used to punish the victims, there was great

concern, especially on the part of "sending" countries (i.e., states from which migrants are smuggled), that the "receiving" countries (i.e., states to which migrants are smuggled) might use the Migrant Smuggling Protocol to punish the smuggled migrants. It was necessary to address this concern, and develop a Protocol that balances law enforcement provisions with protection of the rights of smuggled migrants, in order to reach consensus. Thus, this Protocol contains a number of migrant-protection provisions. As noted above, subject to the reservations and understandings recommended herein, the Protocol would not require implementing legislation for the United States.

I. General provisions

Article 1 ("Relation with the United Nations Convention against Transnational Organized Crime") is structurally a key provision of the Migrant Smuggling Protocol. . . . [Like the Trafficking Protocol], this Article provides that all provisions of the Convention shall apply, "mutatis mutandis," to the Protocol unless otherwise provided. . . . Article 1 further clarifies this concept by providing that the offences established in Article 6 of the Protocol (the criminalization article) shall be regarded as offences established in accordance with the Convention. . . .

The obligations set forth in the Convention that are to be applied to offenses established in the Migrant Smuggling Protocol are all consistent with current U.S. law. In contrast to the Convention and the Trafficking Protocol, no reservation will be required with respect to the establishment of jurisdiction over Protocol offenses committed on board ships flying a U.S. flag or aircraft registered under U.S. law. This difference between the Migrant Smuggling Protocol and the other instruments arises because, as discussed further within, the Migrant Smuggling Protocol requires the United States to criminalize only the smuggling of migrants into the United States, and travel and identity document offenses in conjunction therewith. U.S. law provides for jurisdiction over such conduct occurring outside the United States, which would include on board ships flying a U.S. flag or aircraft registered under U.S. law.

Similarly, since U.S. federal law covers any migrant smuggling into United States territory, and travel and identity document offenses in conjunction therewith, a federalism reservation is not required.

As with respect to the Trafficking Protocol, to make clear that the U.S. understands its existing comprehensive list of money laundering predicate offenses as sufficient to implement the Article's obligation with respect to the Protocol offenses, I recommend that [the same understanding as with the Trafficking Protocol] be included in the U.S. instrument of ratification . . .

Finally, it should be noted that the previously described notifications to be made by the United States with respect to Articles 16, 18, and 31 of the Convention also apply to this Protocol. No additional notification in this regard is necessary with respect to the Migrant Smuggling Protocol.

Article 2 ("Statement of purpose") describes the purposes of the Protocol, which are to prevent and combat the smuggling of migrants, and to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Article 3 ("Use of terms") defines four terms used in the Protocol, including the key term "smuggling of migrants." "Smuggling of migrants" means "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident." The language that requires the purpose of the smuggling to be financial or other material gain is taken from the definition of "organized criminal group" in the main Convention. The negotiating record explains that the inclusion of this language was meant to emphasize that the Protocol did not cover the activities of those providing support to smuggled migrants for humanitarian reasons or on the basis of close family ties. . . .

* * * *

Article 5 ("Criminal liability of migrants") states that migrants must not be subject to criminal prosecution under the Protocol merely because they are the objects of conduct set forth in Article 6 (criminalization). This Article was the key to getting the support of the "sending" countries for this Protocol. It makes perfectly

clear that the Protocol does not call for the punishment of the migrant merely because he or she has been smuggled. However, as is made explicit later in the Protocol (Article 6(4)), nothing in Article 5 or anywhere else in the Protocol prevents a State Party from taking measures against a smuggled migrant under its domestic law. Also, Article 5 would not apply to a case where the smuggled migrant was also part of the organized criminal group that conducted the smuggling—in such a case the criminalization obligation of the Protocol would apply to the migrant not because of the migrant's status as a smuggled migrant, but because of his or her participation in the smuggling operation as a smuggler.

Article 6 ("Criminalization") was modeled on the analogous articles in the Convention. It requires States Parties to criminalize three distinct types of conduct: (1) "smuggling of migrants," (2) document fraud when committed for the purpose of enabling the smuggling of migrants, and (3) enabling a person to reside illegally in a State by means of document fraud or any other illegal means. As confirmed by Article 11(6) of the Convention, there is no requirement that the criminal offenses by which the U.S. will implement this obligation be denominated in terms identical to those used in the Protocol, provided the requisite conduct is a criminal offense under U.S. law.

With respect to the first category (smuggling of migrants), each State Party is obligated to criminalize the conduct described in the definition set forth in Article 3(a), i.e., "the procurement . . . of the illegal entry of a person into a State Party of which the person is not a national or permanent resident." This definition is consistent with the United States' interpretation that the Protocol requires the United States to criminalize the smuggling of migrants into its country, an obligation that can be implemented under current U.S. law.

Within the second category (document fraud enabling the smuggling of migrants), the Protocol requires Parties to criminalize producing, procuring, providing, or possessing fraudulent travel or identity documents. Although U.S. criminal statutes relating to false or fraudulent passports, visas, other travel documents, and identity documents are not couched in these precise terms, the

conduct that must be prohibited under the Protocol is covered, either through these statutes or through those prohibiting the inducement or encouragement of migrant smuggling. U.S. law relating to identity documents requires that the conduct covered be done with the intent to defraud the United States. Since, as noted above, the Protocol is understood by the United States to require it to criminalize smuggling into the United States, this intent requirement is consistent with our obligation under the Protocol.

The third type of offense (enabling illegal residence) requires some explanation. Until the last round of negotiations, the text of the entire Protocol was developed on the assumption that the definition of "smuggling of migrants" in Article 3 would cover both illegal entry and illegal residence. In other words, criminal groups that knowingly, intentionally and for profit, provided false documents, transportation, housing, etc. to persons who were present in a country illegally in order to enable those persons to continue to reside in the country, would be guilty of "smuggling of migrants," even if the group had nothing to do with the initial entry of the persons into the country, and even if the persons' initial entry was legal. The "sending" countries were concerned that this definition was too broad, and could cover the activities of family members or others who helped illegal migrants remain in a country for humanitarian reasons.

The eventual compromise was to limit the definition of "smuggling of migrants" to illegal entry, and to have a separate criminalization requirement for enabling illegal residence that was limited to false documents, and did not cover other support, such as transportation or housing, which might be given to illegal migrants to enable them to remain in a country. In any event, current U.S. law prohibiting the harboring of illegal aliens covers the obligation set forth in this category.

As with the Trafficking Protocol, Article 6 obliges States Parties to criminalize attempts to commit the offenses described in paragraph 1, subject to the basic concepts of their respective legal systems, as well as participation as an accomplice (subject to the basic concepts of their respective legal systems, with respect to procuring, providing, or possessing fraudulent travel or identity documents) or

organizing or directing others to commit the offenses. Participating as an accomplice and ordering or directing migrant smuggling offenses are criminalized under general accessorial liability principles of U.S. law. U.S. law prohibits most, but not all, attempts to engage in the described conduct. For example, U.S. law does not always criminalize attempted possession of fraudulent travel or identity documents. Accordingly, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The United States of America criminalizes most but not all forms of attempts to commit the offenses established in accordance with Article 6, paragraph 1 of this Protocol. With respect to the obligation under Article 6, Paragraph 2(a), the Government of the United States of America reserves the right to criminalize attempts to commit the conduct described in Article 6, paragraph 1(b), to the extent that under its laws such conduct relates to false or fraudulent passports and other specified identity documents, constitutes fraud or the making of a false statement, or constitutes attempted use of a false or fraudulent visa.

* * * *

Article 18 ("Return of smuggled migrants") is one of the key articles in the Protocol. Paragraph 1 requires a State Party to facilitate and accept the return of smuggled migrants who are its nationals or permanent residents at the time of return. The Protocol is the first binding international instrument to codify this customary international law principle. Paragraph 2 calls on a State Party to consider accepting the return of smuggled migrants who were permanent residents at the time they entered the receiving State. Thus paragraph 1 deals with cases where a person is a national or has the right of permanent residence at the time of return. Paragraph 2 is supplementary to paragraph 1 and deals with the case of a person who had the right of permanent residence at the time of entry, but no longer has it at the time of return. The remainder of the Article deals with means of facilitating and implementing the return of smuggled migrants. Some countries refuse to acknowledge that a person is their national or permanent

resident, or refuse to issue necessary travel documents to enable the smuggled migrant's return. This Article requires States Parties to do both. It also requires States Parties to carry out returns in an orderly manner with due regard for the safety and dignity of the person. This Article does not affect any rights afforded to smuggled migrants by the law of the receiving State Party (e.g., the right to seek asylum); nor does it affect obligations entered into any other applicable agreement or arrangement governing the return of smuggled migrants.

IV. Final provisions

Article 19 ("Saving clause") is extremely important in setting appropriate balance in the Protocol between law enforcement and protection of victims [like Article 14 of the Trafficking Protocol].

* * * *

Finally, the [same declaration that the provisions of the Protocol are non-self-executing (except for those implemented through Articles 16 and 18 of the Convention)] is recommended to be included in the resolution of advice and consent. . . .

b. Trafficking in persons

(1) Trafficking in Persons Report

On June 14, 2004, the Office to Monitor and Combat Trafficking in Persons, U.S. Department of State, released its fourth annual Trafficking in Persons Report, pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464, as amended ("TVPA").

The 2004 report and related material are available at *www.state.gov/g/tip/rls/tiprpt/2004/. See also* Department of State fact sheet, "Facts About Human Trafficking," available at *www.state.gov/r/pa/ei/rls/33109.htm.*

Section 110(c) of the TVPA, 22 U.S.C. § 7107 (2000), requires the President to submit a notification of one of four

specified determinations with respect to "each foreign country whose government, according to [the annual 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 September 10, 2004, President Bush issued Presidential Determination No. 2004–46 With Respect to Foreign Governments' Efforts Regarding Trafficking in Persons in a memorandum for the Secretary of State, excerpted below. 69 Fed. Reg. 56,155 (Sept. 20, 2004). 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/g/tip/rls/prsrl/36127.htm*.

Consistent with section 110 of the Trafficking Victims Protection Act of 2000 (Division A of Public Law 106–386), as amended, (the "Act"), I hereby:

Make the determination provided in section 110(d)(1)(A)(i) of the Act, with respect to Equatorial Guinea and Venezuela, not to provide certain funding for those countries' governments for fiscal year 2005, until such 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;

Make the determination provided in section 110(d)(1)(A)(ii) of the Act, with respect to Burma, Cuba, Sudan, and North Korea, not to provide certain funding for those countries' governments for fiscal year 2005, until such 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;

Make the determination provided in section 110(d)(3) of the Act, concerning the determinations of the Deputy Secretary of State with respect to Bangladesh, Ecuador, Guyana, and Sierra Leone;

Determine, consistent with section 110(d)(4) of the Act, with respect to Equatorial Guinea, for the implementation of programs, projects, or activities regarding police professionalization, business responsibility, and promotion of the rule of law, that provision to Equatorial Guinea of the assistance described in section 110(d)(1)(A)(i) of the Act for such programs, projects, or activities would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Sudan, for all programs, projects, or activities of assistance as may be necessary to implement a North/South peace accord and to address the crisis in Darfur, that provision to Sudan of the assistance described in section 110(d)(1)(B) of the Act for such programs, projects, or activities would promote the purposes of the Act or is otherwise in the national interest of the United States; and

Determine, consistent with section 110(d)(4) of the Act, with respect to Venezuela, for all programs, projects, or activities designed to strengthen the democratic process, including strengthening of political parties and supporting electoral observation and monitoring, that provision to Venezuela of the assistance described in sections 110(d)(1)(A)(i) and 110(d)(1)(B) of the Act for such programs, projects, or activities would promote the purposes of the Act or is otherwise in the national interest of the United States.

The certification required by section 110(e) of the Act is provided herewith.

(2) NATO policy

On June 28, 2004, at a NATO Summit meeting in Istanbul, Turkey, the United States and Norway proposed an initiative to help combat trafficking in persons. As described in a fact sheet issued by the White House Office of the Press Secretary on that date:

> At today's NATO Summit meeting, Allied leaders endorsed a "zero tolerance" policy for forces in NATO operations to help combat trafficking in persons. The

United States and Norway proposed this initiative, which was approved by the North Atlantic Council on June 9, 2004, and by all 46 members of the Euro-Atlantic Partnership Council on June 16, 2004.

* * * *

Through this new policy, NATO will develop specific provisions for NATO-led forces to support the efforts of local authorities to combat trafficking. NATO will develop methods to monitor progress on combating trafficking. In implementing this policy, the Alliance will work closely with local and international organizations that protect and house adult and child victims of trafficking. NATO will also work closely with the United Nations, the Organization for Security and Cooperation in Europe, the International Organization on Migration, and other multilateral organizations in this effort.

The fact sheet is available at *www.whitehouse.gov/news/releases/2004/06/20040628-1.html. See also* White House fact sheet on U.S. efforts to end human trafficking, available at *www.whitehouse.gov/news/releases/2004/03/20040318-8.html*

(3) UN response to gender-based violence in conflict and post-conflict situations

On October 28, 2004, Ambassador Anne Patterson, Deputy U.S. Representative to the United Nations, addressed the Security Council on the report of the Secretary-General entitled "Women and peace and security." S/2004/814 Ambassador Patterson's comments, excerpted below and available at *www.un.int/usa/04_213.htm*, focused on the challenge of combating trafficking in persons. The Department of Peacekeeping Operations ("DPKO") Best Practices Unit referred to in the text is available at *http://pbpu.unlb.org/PBPU/topic.aspx?classid=3&catid=35&objtype=2.*

* * * *

Mr. President, my delegation would like to thank Under Secretary General Guehenno for his candid introduction of the Secretary General's report [S/2004/814] as well as the reports of the High Commissioner for Humanitarian Affairs and Executive Director Obeid. . . . The United States agrees that the UN must strengthen its response to gender-based violence in both conflict and post-conflict situations. The U.S. delegation would like to focus its comments today on one element of the problem, namely trafficking in persons. This problem is often worsened by the upheaval of post-conflict situations, as Ms. Arbour said. Regrettably, it has also been associated with the presence of peacekeeping operations.

* * * *

Mr. President, the United States is deeply committed to ending the scourge of trafficking in persons that poses a security threat by lining the pockets of criminal groups, while grossly violating people's human rights and serving as a public health threat through the spread of sexually transmitted diseases. This also hampers readiness. This is an issue that is receiving increasing attention from the international community and from the United States. Last September, President Bush called on the international community to create clear standards and certainty of punishment for the crime of trafficking. Since 2000, the U.S. has given almost $300 million to support anti-trafficking in persons programs in more than 120 countries. In the past year, 24 nations enacted new laws to combat trafficking in persons while 32 other countries are currently drafting or passing such laws. As a result of these efforts, nearly 8,000 traffickers have been prosecuted worldwide while 2,800 have been convicted.

. . . Not surprisingly, UN peacekeeping missions mirror attitudes and problems found in the armed forces of the member states. As Security Council members, we should continue to support the efforts of UN leadership to effect change within UN missions. Trafficking in persons violations within UN missions needs continued high-level attention. In July 2004, the Under-Secretary-General Guehenno and the Secretary General officially approved an anti-trafficking policy for peacekeepers. This policy supplements a bulletin issued by the Secretary General in October

2003, which also established guidelines of acceptable conduct by UN peacekeepers. This bulletin prohibits acts of sexual exploitation and sexual abuse by UN staff or UN forces conducting operations under UN command, including the "exchange of money, employment, goods or services for sex" and sexual activity with persons under age 18.

However, a policy is only as good as its enforcement. We welcome Mr. Guehenno's statement that the UN will enforce a policy of zero-tolerance in sex trafficking at every UN mission. We must also enforce the same zero-tolerance policy with prostitution, as this fuels the demand for human trafficking victims by serving as a cover under which traffickers operate. We also seek to put in place trafficking in persons training for all UN peacekeepers, which would be mandatory prior to their deployment.

Mr. President, the U.S. commends the work of the DPKO Best Practices Unit to this end. . . . Mr. President, by definition, post-conflict societies are those which suffer from weak rule of law. United Nations peacekeeping missions need to be at the forefront of ensuring that gender based violence is eliminated and redressed. We can do this by creating concrete steps and actions to ensure compliance.

8. Extraterritorial Jurisdiction in U.S. Courts

a. Military Extraterritorial Jurisdiction Act of 2000

The Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"), Pub. L. No. 106–523 (2000), § 2(a), 114 Stat. 2488, 18 U.S.C. §§ 3261–3267, was enacted following a decision by the U.S. Court of Appeals for the Second Circuit, *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000), that highlighted a gap in jurisdiction over civilian personnel living abroad with the military. 18 U.S.C. § 3261 establishes federal criminal jurisdiction over "conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States [18 U.S.C. § 7]" if committed by a person "(1) while

employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces subject to chapter 47 [§ 801 et seq.] of title 10 (the Uniform Code of Military Justice) . . ."

Section 3261 provides further:

> (b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General. . . .
>
> (c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses. . . .
>
> (d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—
>
> (1) such member ceases to be subject to such chapter; or
>
> (2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

Section 3262 pertaining to arrest and commitment, provides for extraterritorial arrest and transfer to the United States under MEJA:

> a) The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest, in accordance with applicable international agreements, outside the United States any person described in section 3261(a) if there is probable cause to believe that such person violated section 3261(a).

> (b) Except as provided in sections 3263 and 3264, a person arrested under subsection (a) shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to conduct referred to in such subsection unless such person has had charges brought against him or her under chapter 47 of title 10 for such conduct.

Section 3263 authorizes delivery of a person described in § 3261(a) to authorities of a foreign country where the violation allegedly occurred if the authorities request the person for trial and such delivery is authorized by a treaty or other international agreement to which the United States is a party.

As originally enacted, § 3267 limited the defintion of "employed by the Armed Forces outside the United States" to cover civilian employees and contractors (including subcontractors at any tier) or employees of contractors of the Department Defense, who were not "national[s] of or ordinarily resident in the host nation" and were "present or residing outside the United States in connection with such employment." In 2004 the National Defense Authorization Act, Fiscal Year 2005, amended § 3267, expanding this definition to include employees and contractors that were not employed by the Department of Defense. As amended, § 3267 also covers employees, contractors or employees of a contractor (including a subcontractor at any tier) of "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas." Pub. L. No. 108–375, Div A, Title X, Subtitle I, § 1088, 118 Stat. 2066.

Under § 3266 of the act, the Secretary of Defense, in consultation with the Attorney General and the Secretary of State, is to publish regulations to implement the statute. On February 2, 2004, the Department of Defense published a proposed rule for that purpose in the Federal Register. 69 Fed. Reg. 4890 (Feb. 2, 2004). At the end of 2004 the final rule was being prepared for publication.

On May 30, 2003, Latasha Lorraine Arnt was indicted by a grand jury in the Central District of California for the murder of her husband on May 26, 2003, at Incirlik Air Base, Turkey, in violation of MEJA and 18 U.S.C. §§ 1111. Ms. Arnt was the dependent spouse of Mr. Arnt, who was a member of the U.S. Air Force assigned to Incirlik Air Base at the time of the murder. This was the first time that the statutory MEJA procedures were used to bring a defendant to trial for an offense over which the United States would not have had jurisdiction without MEJA. On October 8, 2004, Latasha Arnt was convicted of voluntary manslaughter.

b. Amendment to special maritime and territorial jurisdiction

Section 804 of the USA PATRIOT Act, Pub. L. No. 107–56 (2001) amended the definition of "special maritime and territorial jurisdiction of the United States ('SMTJ')" (18 U.S.C. § 7), to provide the basis for federal criminal jurisdiction over certain crimes committed on the premises of U.S. embassies and military and other U.S. facilities. The amendment added a new subsection (9) to § 7 to read as follows:

> The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:
>
> * * * *
>
> (9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—
>
> (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and
>
> (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or

> entities or used by United States personnel assigned to those missions or entities.
>
> Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in [MEJA].

In 2004 legislation was enacted to remedy the unintended consequence that § 7(9) in fact narrowed the reach of extraterritorial jurisdiction over the federal crime of torture under 18 U.S.C. §§ 2340 and 2340A. The federal crime only applies to torture committed "outside the United States." Section 2340(3) originally defined the term "United States" as including "all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title [18] and section 46501(2) of title 49." Thus, the locations described in § 7(9) were no longer "outside" the United States under that definition and no longer covered by the federal torture statute (although other federal crimes related to torture, such as murder, that apply within the SMTJ, would apply). Section 1089 of the National Defense Authorization Act, Fiscal Year 2005, Pub. L. No. 108–375, amended 18 U.S.C. § 2340(3) to read "'United States' means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." As a result, torture committed on those U.S. facilities covered by section 7(9) once again is covered by the federal torture statute.

C. INTERNATIONAL CRIMINAL TRIBUNALS

1. International Criminal Tribunal for the Former Yugoslavia

On December 16, 2004, the Department of State released a press statement by Spokesman Richard Boucher supporting actions against war crimes fugitives and their supporters by Paddy Ashdown, the High Representative for Bosnia and Herzegovina.

The statement, set forth below, is available at *www.state.gov/r/pa/prs/ps/2004/39891.htm.*

The United States strongly supports High Representative for Bosnia and Herzegovina Paddy Ashdown's actions of December 16 to reform institutions in the Republika Srpska that have obstructed full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and to remove individuals who have failed to uphold their responsibility to apprehend war crimes indictees.

In support of the High Representative's actions, the United States is freezing the assets of the Serb Democratic Party (SDS), as well as two Serbia and Montenegro companies that have provided financial support to Radovan Karadzic and several individuals indicted by the Tribunal. The United States is imposing travel restrictions that will prevent entry into the United States by the leadership of the main parties in the Republika Srpska government, the Serb Democratic Party and the Party for Democratic Progress (PDP). We also are reviewing ways to more directly assist those in the Republika Srpska who are working for a better future as part of Europe and to further isolate those who are holding Bosnia and Herzegovina back.

The United States remains committed to helping Bosnia and Herzegovina assume its rightful place as a full member of the Euro-Atlantic community. Elements within the Republika Srpska are impeding progress towards this goal. NATO foreign ministers on December 9 reiterated that "failure by the Republika Srpska to fulfill its obligations to bring war criminals to justice" is the obstacle preventing Bosnia and Herzegovina from joining NATO's Partnership for Peace program. In nine years the Republika Srpska has failed to arrest even a single Tribunal indictee. Its failure to cooperate fully with International Criminal Tribunal for the former Yugoslavia constitutes a fundamental breach of the Dayton Accords. It is clear that systemic changes to the Republika Srpska police and security structures are necessary to overcome this obstructionism.

On November 15, 2004, Susan Moore, Senior Advisor to the U.S. Mission to the United Nations addressed the UN

General Assembly on the need for international cooperation to ensure the successful operation and completion of the work of the ICTY, as excerpted below.

The full text of her statement is available at *www.state.gov/s/wci/ps/38478.htm*.

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* * * *

With regard to the ICTY, we must all work together to ensure success of the UN Security Council-endorsed Completion Strategy that seeks to conclude investigations by the end of 2004, trials by 2008, and all work by 2010. To fulfill this program, Serbia and Montenegro, Bosnia and Herzegovina, and Croatia must fulfill their legal obligations to cooperate fully with the ICTY. Such cooperation includes not only access to archives and witnesses, but also apprehending all fugitive indictees within their territory and transferring them to The Hague, most notably Ratko Mladic, Radovan Karadzic, and Ante Gotovina. In this regard, we note that the Republika Srpska has failed to render a single fugitive indictee to the Tribunal and Serbia and Montenegro's cooperation has deteriorated to a standstill in the past 12 months. The United States and others in the international community have made clear that upholding international obligations to the ICTY is a prerequisite for further integration into the Euro-Atlantic community.

Serbia and Montenegro's lack of cooperation with the ICTY also undermines the confidence of the international community that it is willing and able to prosecute fairly and effectively perpetrators of war crimes and crimes against humanity. Until Serbia meets its cooperation obligations, we do not see domestic trials of ICTY indictees as a realistic option. We call on all authorities in Serbia, especially the Prime Minister as head of the government, to act immediately to apprehend and render to The Hague all fugitives hiding in the country.

We continue to support efforts to help create the capacity for credible domestic trials of low and mid-level war crime cases throughout the region. We note the significant work being done in Sarajevo in this regard, and urge other states to contribute to

this court either through direct financial assistance or in kind contributions.

* * * *

See also remarks by Ambassador Prosper to the National Assembly of the Republika Sprska on March 4, 2004, available at *www.state.gov/s/wci/rm/30167.htm* and fact sheet entitled "At Large Persons Publicly Indicted for War Crimes in the Former Yugoslavia," available at *www.state.gov/s/wci/fs/27627.htm*.

2. International Criminal Tribunal for Rwanda

On May 10, 2004, the United States issued a statement commending the Government of the Democratic Republic of the Congo on the capture of Yusuf Munyakazi and his transfer to the International Criminal Tribunal for Rwanda. As explained in the statement, "Munyakazi is indicted for genocide for his alleged role as a leader of the Hutu extremist Interahamwe responsible for killing tens of thousands of Tutsis and moderate Hutus in Rwanda's Cyangugu prefecture during the genocide in 1994." The statement concluded: "The United States urges all governments in the region to vigorously pursue the apprehension of all persons indicted for genocide by the UN Tribunal who have gained refuge on their soil, in accordance with UN Security Council Resolution 1534 (2004)." *See www.state.gov/r/pa/prs/ps/2004/32341.htm. See also* B.3.b. *supra.*

3. International Criminal Court

a. Adoption of UN-ICC agreement

On September 13, 2004, the UN General Assembly adopted Resolution 58/318, U.N. Doc. A/RES/58/318, approving a negotiated agreement concerning the relationship between the United Nations and the International Criminal Court,

and decided to apply the agreement provisionally pending its formal entry into force. The agreement was initialed on June 7, 2004, and approved by the Assembly of States Parties to the Rome Statute on September 7, 2004. For the text of the agreement, *see* UN Doc. A/58/874, annex (Aug. 20, 2004). The United States disassociated itself from consensus on Resolution 58/318 and provided an explanation of its position as set forth in full below.

The reasons for U.S. opposition to the Rome Statute as finally adopted are well known. I shall restate the fundamental points today.

First, however, let me reiterate that the United States respects the right of states to become parties to the Rome Statute. At the same time, we expect similar respect for our decision not to become a party to the Rome Statute. We also wish to highlight relevant restrictions imposed by our domestic law, especially the American Servicemembers' Protection Act, which severely restricts U.S. interaction with the International Criminal Court.

Our position has three principal parts.

First, the United States is concerned by the potential of politically motivated prosecutions against U.S. elected leaders, servicemembers, and other citizens. Examples of investigations or prosecutions based on a political agenda, not evidence and neutral prosecutorial judgment, abound. The structure of the ICC makes such unacceptable proceedings possible. A prosecutor's office, housed in a democratically responsible political branch of government, perforce is democratically accountable in a system of checks and balances. The ICC does not have similar political accountability.

Second, the ICC has problems in the related areas of jurisdiction and due process. The power of this international tribunal is independent of consent. While sovereigns have the right to try non-citizens who have committed offenses against their citizens or on their territory, the United States has never recognized the right of an international organization, created by treaty, to do so absent consent or a UN Security Council mandate and Security

Council oversight. In addition, the Rome Statute raises, but does not satisfactorily address, due process concerns. These include issues of multiple jeopardy, definitions of crimes, and problems of evidence and testimony when the court has to harmonize various legal systems and languages.

Finally, the Rome Statute dilutes the authority of the UN Security Council and departs from the system that the framers of the UN Charter envisioned. For instance, the Assembly of states parties is wrestling with the definition of Aggression, a matter left to the Security Council by the UN Charter.

The ICC is not part of the UN Charter System, and the adoption of this resolution does not change that fact. The ICC and the UN are, as the Rome Statute and the relationship agreement state, independent of one another. We should not lose sight of the ICC's independent status as this agreement is implemented. In this regard, the United States is pleased that the resolution makes explicit that the established precedent of cost-neutral arrangements between the United Nations and other international organizations will be adhered to with regard to the ICC. Member states will not be financially responsible for the costs incurred to the UN for services, facilities, cooperation, assistance, or any other support provided to non-UN bodies. We expect the parties to this agreement to hold to the explicit language in the agreement that support will be provided on a reimbursable basis, and we expect any arrangement between the two bodies to conform to this principle.

Further, we are pleased by assurances that this agreement has no consequences under Rule 153 of the General Assembly Rules of Procedure, which otherwise requires the Secretariat to issue a program budget impact (PBI) whenever a resolution under discussion gives rise to financial implications.

Rule 153 says that "No resolution in respect of which expenditures are anticipated by the Secretary-General shall be voted by the General Assembly until the Fifth Committee has had an opportunity of stating the effect of the proposal upon the budget estimates of the United Nations." We are assured that the Secretariat has not produced a PBI for this resolution because there are no expenditures attached to it.

Because of our longstanding concerns with the ICC, some of which I articulated today, the United States cannot join consensus. Nonetheless, I want to reiterate the U.S. commitment to accountability for war crimes, genocide, and crimes against humanity. The United States has a record that is second to none in holding its own officials and citizens accountable for such crimes, as well as for supporting properly constituted international war crimes tribunals from Nuremberg to the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Properly understood, therefore, our decision not support the ICC reflects our commitment to the rule of law, not our opposition to it.

b. Report of the International Criminal Court

On November 19, 2004, Eric Rosand, Deputy Legal Adviser, U.S. Mission to the United Nations, addressed the Sixth Committee (Legal) on the adoption of a resolution concerning the Report of the International Criminal Court. A/C.6/59/L.25 and Corr.1. The draft resolution, among other things, "calls upon all States that are not yet parties to the Rome Statute of the International Criminal Court to consider ratifying or acceding to it without delay. . . ." Mr. Rosand's remarks explaining why the U.S. could not join consensus on the draft resolution reiterated many of the U.S. concerns set forth in a. *supra* and commented on U.S. efforts to address its concerns, as excerpted below.

The full text is available at *www.un.int/usa/04_257.htm*. The resolution was adopted by the General Assembly on December 16, 2004. U.N. Doc. A/RES/59/43.

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We are disappointed at the failure of the Security Council to renew a resolution requesting the ICC not to commence or proceed with the investigation or prosecution of personnel from non-parties to the Rome Statute with respect to acts or omissions connected with their participation in UN missions. The absence of successors

to Security Council Resolutions 1422 and 1487 reflects the demise of a compromise that respected the strongly held views of those who support the ICC and the equally strongly held views of those who do not.

One way we are addressing this issue, is through agreements recognized by Article 98 of the Rome Statute. To date, we have signed agreements with 96 nations that ensure against U.S. citizens and military personnel being surrendered to the ICC. We highlight these agreements to demonstrate our resolve to protect U.S. persons from the ICC's jurisdiction, and the growing consensus that Article 98 Agreements are an important mechanism to protect states not parties to the Rome Statute from the ICC's claims of jurisdiction. Indeed, just as many nations—97 including the United States—have signed Article 98 agreements as have taken the final step to join the ICC.

While we continue to respect the right of States to become parties to the Rome Statute, at the same time, we continue to ask that our decision not to be a party also be respected.

c. Organization of American States resolution

On June 8, 2004, the General Assembly of the Organization of American States, at its 34th regular session, adopted a resolution "Promotion of the International Criminal Court." AG/RES.2039 (XXXIV-0.04). At the request of the United States, the U.S. statement explaining that it could not "in good faith join in the consensus on an OAS resolution that promotes the Court", excerpted below, is appended to the resolution as an annex. The resolution and annex are available in the published Proceedings, Volume I, of the 34th session, OEA/Ser.P/XXXIV-0.2 (Nov. 30, 2004) at 286–89, *www.oas.org/juridico/english/ag02528e08.doc. See also* remarks to the press by Ambassador Prosper following the Stockholm Forum for the Prevention of Genocide that the "best approach is to encourage and support domestic prosecutions" as an alternative to the ICC. Ambassador Prosper's remarks are available at *www.state.gov/s/wci/rm/29508.htm.*

The United States has long been concerned about the persistent violations of international humanitarian law and international human rights law throughout the world. We stand for justice and the promotion of the rule of law. The United States will continue to be a forceful advocate for the principle of accountability for war crimes, genocide and crimes against humanity, but we cannot support the seriously flawed International Criminal Court. Our position is that states are primarily responsible for ensuring justice in the international system. We believe that the best way to combat these serious offenses is to build and strengthen domestic judicial systems and political will and, in appropriate circumstances, work through the United Nations Security Council to establish ad hoc tribunals as in Yugoslavia and Rwanda. Our position is that international practice should promote domestic accountability. The United States has concluded that the International Criminal Court does not advance these principles.

* * * *

The United States notes that in past decades several member states have reached national consensus for addressing historic conflicts and controversies as part of their successful and peaceful transition from authoritarian rule to representative democracy. Indeed, some of those sovereign governments, in light of new events, evolved public opinion, or stronger democratic institutions, have decided on their own and at a time of their choosing to reopen past controversies. These experiences provide compelling support for the argument that member states—particularly those with functioning democratic institutions and independent functioning judicial systems—should retain the sovereign discretion to decide as a result of democratic and legal processes whether to prosecute or to seek national reconciliation by other peaceful and effective means. The United States is concerned that the International Criminal Court has the potential to undermine the legitimate efforts of member states to achieve national reconciliation and domestic accountability by democratic means.

Our policy on the ICC is consistent with the history of our policies on human rights, the rule of law and the validity of democratic institutions. For example, we have been a major proponent of the Special Court for Sierra Leone because it is grounded in

sovereign consent, combines domestic and international participation in a manner that will generate a lasting benefit to the rule of law within Sierra Leone, and interfaces with the Truth and Reconciliation Commission to address accountability.

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In light of this position, the United States cannot in good faith join in the consensus on an OAS resolution that promotes the Court.

d. Resolutions of UN bodies

During 2004 the United States objected to certain language concerning the ICC in resolutions adopted in UN bodies. Examples follow.

(1) UN Commission on Human Rights ("UNCHR")

In Resolution 2004/46, "Violence Against Women," the United States proposed an amendment to delete from operative paragraph 18 the clause "and urges States to ratify or accede to the Rome Statute, which entered into force on 1 July 2002." The amendment was defeated and the United States joined consensus in adoption of the resolution on April 20, 2004. E/CN.4/RES/2004/46. *See also* discussion of second amendment in Chapter 6.D.5.

As to Resolution 2004/72, "Impunity," the United States offered an amendment relating to preambular paragraph ("PP") 8 and operative paragraph ("OP") 9. Those paragraphs provide that the Commission

> [PP] 8. *Acknowledges* the historic significance of the entry into force of the Rome Statute of the International Criminal Court (A/CONF.183/9) on 1 July 2002, recognizes that to date 92 States have ratified or acceded to the Rome Statute and calls upon all States that have not yet done so to consider ratifying or acceding to it;

* * * *

> [OP] 9. *Recognizes* the fundamental importance of the principle of complementarity in the Rome Statute and stresses the importance of the implementation by States parties of their obligations under the Statute;

The U.S. amendment would have deleted PP8 and replaced it with

> *Recognizing* that justice is best achieved through functioning national judicial systems that serve to bring alleged criminals to justice so as to end impunity

and would have replaced the words "the fundamental importance of" in OP9 with "that States parties have endorsed." The U.S. amendment was defeated and the resolution was adopted without a vote on April 20, 2004. E/CN.4/RES/2004/72.

On April 21, 2004, the United States offered an amendment to PP 10 and OP 2(b) in a resolution entitled "Protection of United Nations personnel." Those paragraphs provide in pertinent part:

> . . . [N]oting the role that the [International Criminal] Court can play in bringing to justice those responsible for serious violations of human rights and international humanitarian law, as a measure of preventing impunity."
>
> * * * *
>
> 2. *Calls upon all States*: . . . (b) To consider as a matter of priority becoming parties to the Rome Statute of the International Criminal Court.

The U.S. amendment would have replaced "the role that the Court can play in" with "the importance of" in PP8 and would have deleted OP 2(b). The amendment was defeated and the resolution was adopted without a vote. E/CN.4/RES/2004/77.

In Resolution 2004/82, "Advisory services and technical assistance in Burundi," the United States proposed an

amendment to change language encouraging Burundi to "ratify" the Rome Statute with "consider ratifying." The amendment was defeated and the resolution was adopted without a vote on April 21, 2004. E/CN.4/RES/2004/82.

In Resolution 2004/84, "Advisory services and technical assistance in the Democratic Republic of the Congo," the United States proposed to replace language calling upon the Government of National Unity and Transition "To cooperate with the International Criminal Court" in paragraph 5(*e*) with "To comply with its obligations as State party to the Rome Statute of the International Criminal Court, including with all the provisions obliging it to cooperate with the Court, as well as with the agreements concluded under article 98 of the Rome Statute." The amendment was defeated and the resolution was adopted without a vote on April 21, 2004. E/CN.4/RES/2004/84.

(2) *General Assembly and Third Committee*

The United States proposed similar amendments in the Third Committee to certain resolutions, including those on extrajudicial, summary or arbitrary executions, on enforced or involuntary disappearances, and on the situation of human rights in the Democratic Republic of the Congo. The U.S. proposals were rejected. On December 20, 2004, the resolutions were adopted by the General Assembly as A/RES/59/197 (by recorded vote), A/RES/59/200 (by consensus) and A/RES/207 (by recorded vote), respectively. Preceding adoption, the United States stated that it would not resubmit its amendments but that its position had not changed; nevertheless, the United States voted in favor of or joined consensus on all three resolutions. As to Resolutions 59/197 and 59/200, the United States explained that it "wishe[d] to underscore that the international community should use all available and appropriate international, regional and domestic judicial mechanisms." *See also* discussion of Resolution A/59/211 in Chapter 7.A.3.

e. Bilateral agreements under Article 98 of the Rome Statute

(1) General

On October 8, 2004, the United States exercised its right of reply at the Organization for Security and Co-operation in Europe ("OSCE") Human Dimension Implementation meeting in Warsaw on the issue of U.S. Article 98 agreements. The U.S. intervention is set forth below in full. *See also* 3.b. *supra* and *Digest 2002* at 165–68, *Digest 2003* at 234–37.

I would like to address the comments raised concerning Article 98 agreements. The United States has a unique role and responsibility to help preserve international peace and security. At any given time, U.S. forces are located in close to 100 nations around the world, for example, conducting peacekeeping and humanitarian operations and fighting inhumanity. We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations. Our country is committed to a robust engagement in the world to defend freedom and defeat terror; we cannot permit the ICC to disrupt that vital mission.

As a result, the United States is entering into legally binding, bilateral agreements that would prohibit the surrender of U.S. persons to the ICC without our consent. These agreements are specifically contemplated under Article 98 of the Rome Statute that created the ICC and provide U.S. persons with essential protection against the Court's purported jurisdictional claims. Thus far, the United States has concluded Article 98 agreements with 95 countries over the globe, 68 of whom are either states parties or signatories to the Rome Statute.

I should note that the U.S. decision to seek these bilateral agreements originated during the open debate in the U.N. Security Council on Resolution 1422. A number of ICC proponents, including European Union (EU) members, encouraged us not to resolve these issues in the Security Council, but rather to do so on a bilateral basis. Following this advice from our European friends, we began in the late summer of 2002 to seek Article 98 agreements

as an arrangement that would satisfy our concerns, but also fall within the Rome Statute provisions.

Ironically, the European Union subsequently rejected the advice of some of its own members, and established a coordinated position that has made it difficult for its member states to enter into acceptable Article 98 agreements with the United States. Moreover, the EU is also now putting pressure on EU aspirant countries and others to apply restrictive conditions on such agreements with us. Some EU officials have argued that the wording of Article 98 of the Rome Statute limits the categories of persons that may be covered by bilateral non-surrender agreements, and the EU has imposed guidelines to this effect. On the contrary, the Rome Statute does not impose any obligation on States Parties to refrain from entering into non-surrender agreements that cover all their persons, while those who insist upon a narrower interpretation must, in effect, read language into Article 98 (2) that is not contained within the text of that provision. From our perspective, the EU is imposing an unfair choice upon our friends and allies, particularly those countries seeking to join the EU. We hope that senior EU officials in Brussels will reconsider their insistence on attaching overly restrictive conditions to Article 98 agreements, given the wide support we are receiving on this issue elsewhere in the world. We also continue to discuss, on a bilateral basis with EU member states, our desire to enter into properly-crafted Article 98 agreements with them.

Increasingly, Article 98 agreements play an important role in U.S. bilateral relationships regardless of whether a State is a Party to the Rome Statute. The United States Government places great importance on these agreements in making decisions related to military cooperation relationships around the world. The American Servicemembers' Protection Act, which was enacted with strong bipartisan support by both houses of the Congress, prohibits military assistance to countries that are party to the Rome Statute. This prohibition may be waived with respect to those countries that have entered into Article 98 agreements with the United States.

Additionally, there are strong reasons for entering into these agreements with States that are not Party to the Rome Statute. First, a State not currently a Party to the Rome Statute may become one at any time. Second, the ICC may request that a non-Party

arrest and surrender to the Court a U.S. person on its territory. The Rome Statute contains no requirement for the State to notify the United States, or receive our consent, before such a surrender. Entering [into] an Article 98 agreement is thus important to future cooperation on a range of diplomatic, military, and security initiatives. It also sends an important political signal that American concerns are widely shared around the world.

It is a misconception that the United States wants to use these agreements to undermine the ICC. To the contrary, we are determined to be proper in our relations with the Court, proceeding in a manner specifically contemplated by the Rome Statute itself. Moreover, as a general rule, in these agreements, the United States makes clear its intention to bring to justice those who commit genocide, crimes against humanity and war crimes. This is the stated goal of ICC supporters, and a goal that the United States has and will maintain.

In matters of international justice, the United States has many foreign policy instruments to utilize that are fully consistent with our values and interests. We will continue to play a worldwide leadership role in strengthening domestic judicial systems and promoting freedom, transparency and the rule of law. We seek no immunity for our citizens, but only a simple, non-surrender agreement as contemplated in the Rome Statute. We fully commit ourselves, where appropriate, to investigate and prosecute serious, credible accusations of war crimes, crimes against humanity and genocide that have been made against any of our people.

(2) Provision of foreign assistance

(i) Economic Support Fund

Section 574 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act for FY 2005, as contained in Pub. L. 108–447, 118 Stat. 2809, signed into law December 8, 2004, added a new restriction on foreign assistance. It provided that "[n]one of the funds made

available in this Act . . . under the heading 'Economic Support Fund' may be used to provide assistance to the government of a country that is a party to the International Criminal Court and has not entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Court from proceeding against United States personnel present in such country." The President may waive the restriction on assistance with respect to a NATO member country, a major non-NATO ally, or Taiwan "if he determines and reports to the appropriate congressional committees that it is important to the national security interests of the United States to waive such prohibition." Subsection 574(d) makes the prohibition inapplicable to countries "otherwise eligible for assistance under the Millennium Challenge Act of 2003, notwithstanding section 606(a)(2)(B) of such Act."

(ii) Military assistance

During 2004 President Bush waived for eight countries application of the prohibition on military assistance to the government of a country that is a party to the Rome Statue, with certain exceptions, pursuant to § 2007 of the American Servicemembers' Protection Act of 2002, 22 U.S.C. § 7421 *et seq.* (*see Digest 2003* at 237–40). On November 29, 2004, President Bush determined that Burundi, Guyana, and Liberia had each entered into "an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against U.S. personnel present in such countries," and waived the prohibition in § 2007(a) "for as long as such agreement remains in force." 69 Fed. Reg. 74,931 (Dec. 14, 2004.) President Bush waived the prohibition on the same basis for the Republic of Congo, 69 Fed. Reg. 50,049 (Aug. 13, 2004), for Burkina Faso and Dominica, 69 Fed. Reg. 31,511 (June 4, 2004), and for the Central African Republic and Guinea, 69 Fed. Reg. 21,677 (Apr. 21, 2004).

(3) Participation in peacekeeping mission

On June 14, 2004, President Bush certified that

> members of the U.S. Armed Forces participating in the United Nations Stabilization Mission in Haiti (MINUSTAH) are without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because Haiti has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against members of the Armed Forces of the United States present in that country.

69 Fed. Reg. 34,043 (June 18, 2004). The certification was made "[c]onsistent with section 2005 of the American Servicemembers' Protection Act of 2002 . . . , concerning the participation of members of the Armed Forces of the United States in certain U.N. peacekeeping and peace enforcement operations." *See Digest* 2002 at 171–73.

As noted in C.3.b. *supra*, in prior years, but not in 2004, the UN Security Council had adopted resolutions providing for a twelve-month deferral, "consistent with the provisions of Article 16 of the Rome Statute" in investigation or prosecution of any case that "arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation." S/RES/1422 (2002) and S/RES/1487 (2003). *See Digest 2002* 157–65 and *Digest 2003* at 231–33. *See also* S/RES/1497 (2003), *Digest 2003* at 233–34.

Cross-references

Suspension of entry related to corruption, **Ch. 1.C.3.**
Terrorism exception to FSIA, **Chapter 10.A.2.d.(2).**
Cooperation with Colombia in counternarcotics and terrorism, **Chapter 6.A.4. and G.6.b.(1).**

Commission of genocide in Sudan, **Chapter 6.A.3.**
Case of Alvarez Machain, *rendition from Mexico*, **Chapter 6.G.6.a.(1).**
State sponsors of terrorism, **Chapters 7.A.1.; 11.6.4.a.; and 16.A.3.b. and B.1.**
Human rights and terrorism, **Chapter 6.J.**

CHAPTER 4

Treaty Affairs

A. CAPACITY TO MAKE

European Community

The issue of participation by the European Community as an observer or member in treaty negotiations and international organizations was addressed in a number of instances during 2004. In addition to the example below, *see* Chapter 3.B.5.a. (Convention on Transnational Organized Crime), Chapter 7.A.2. (UN-sponsored conferences) and 7.B.3. (International Coffee Organization), and Chapter 15.A.1 (private international law treaties).

As discussed in Chapter 12.B.2.a., on June 26, 2004, the United States and the European Community and its Member States initialed the Agreement on the Promotion, Provision and Use of Galileo and GPS Satellite Navigation Systems and Related Applications. By letter of May 10, 2004, to Heinz Hilbrecht of the European Commission, Ralph Braibanti, head of the U.S. delegation, stated the U.S. understanding regarding certain issues relating to the capacity of the European Community as party to the agreement. The May 10 letter is excerpted below. The texts of this and the two other letters referred to below are available at *www.state.gov/s/l/c8183.htm*.

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On behalf of the United States Government, I want to confirm several points made by the U.S. delegation during the discussion of a "mixed agreement" structure for the text. Although the U.S. Government is able to accept in this case use of a mixed format as proposed by the European Commission, we are able to do so only in light of the specific circumstances of this agreement. Thus, we do not view the provisions contained in this text as a precedent for future agreements between the United States and the European Community. The use of a mixed format in future agreements will have to be subject to case-by-case review.

In addition, as we have stated several times during the course of the negotiations, the United States views this as a multilateral agreement. The State Department will report it to Congress as such and will also list it as a multilateral treaty in official publications. In our view, the EC Member States, all of which will sign and ratify the agreement, have consented to be bound and thus, following the agreement's entry into force, will be individually responsible under international law to the United States for obligations within their competence.

Following signature of the agreement on June 26, 2004, Mr. Hilbrecht replied by letter dated June 29, 2004, noting the U.S. statements and commenting as excerpted below (brackets in the original).

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* * * *

I would only point out that the "mixed format" for agreements concluded by the Community and the Member States is a simple necessity in cases where the Community powers in the field of external relations do not fully correspond to the projected scope of the desired agreement. In such a situation it is unlikely that that there is really a choice that can be made: the Community and the Member States must pool their respective foreign relations powers in order to cover the subject matter of the agreement. Other treaty partners have always accepted the need for, and practicality of, this approach.

. . . What the US authorities need to report to Congress and how they list the Galileo/GPS agreement in internal publications is certainly important under US law, but in the view of the Commission of no consequence to the true nature of the agreement under international law. Under international law the agreement is "between the United States of the one part" and "[the Member States] and the European Community of the other part", as the heading of the agreement states.

Finally I take note of your statement that "the EC Member States . . . will be individually responsible under international law to the United States for obligations within their competence." This assertion can only be valid without prejudice to the provisions of Articles 18 and 19 of the agreement, and in particular it neglects Article 19(2) that provides for a procedure for determining who will be charged with responsibility for breach of different provisions of the agreement and to the bona fide application of which the Commission attaches great importance.

In a final letter, dated July 26, 2004, Mr. Braibanti responded as follows.

* * * *

We read with interest the comments in your letter concerning the "mixity" issue. Those comments do not, however, alter our views as set forth in my letter to you of May 10. In particular, I note that our views on the status of the Agreement as a multilateral instrument are based on international legal principles and not U.S. domestic law. In addition, our views on liability and responsibility of individual Member States, also based on international law and principles of treaty interpretation, take into account all provisions of the Agreement including Articles 18 and 19.

While this question will no doubt require discussion in the context of future negotiations of mixed agreements, I do not believe that it is necessary to address further the mixity issue in the context of this Agreement.

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

1. Memorandum of Understanding and US-UK chapeau agreement

In the early 1990s, it became clear, due to divergent views on the legal status of memoranda of understanding ("MOUs") expressed by the United States and the United Kingdom of Great Britain and Northern Ireland, that it was necessary to develop a new methodology for negotiating and concluding such instruments as between the two countries. The United Kingdom had made it clear that in its view MOUs represented significant political commitments, but were never legally binding. For the United States, the binding nature of the instrument was dependent upon the language used in the text. This divergence in views came to light in the context of the U.S.-U.K. arbitration concerning the Heathrow Airport User Charges, wherein the U.K., generally presuming MOUs to be non-binding, argued that the principal document at issue in the case, the U.S.-U.K. MOU of April 6, 1983, was not a legally binding international agreement. The United States, however, based on the language used in the document, argued that it was legally binding. *See, e.g.,* John H. McNeill, *International Agreements: Recent U.S.-U.K. Practice Concerning the Memorandum of Understanding*, 88 Am. J. Int'l L. 821 (October 1994). For a discussion of the Heathrow arbitration, see *Cumulative Digest 1991–1999*, at 1343–44.

Since then a mutually acceptable solution has evolved. If it is necessary to be able to enforce certain provisions in an MOU, a separate international agreement, known as a "chapeau agreement" is concluded, which covers those aspects of the MOU that are to be enforceable. The MOU is then made subordinate to the chapeau agreement and is accordingly referenced in the MOU. For example, in an effort to address this issue in the area of defense cooperation, the United States and the United Kingdom concluded the Agreement Concerning Defense Cooperation Arrangements

by an exchange of notes in 1993 ("1993 Agreement"), which covers such cooperation as logistical support, liability, and property rights, including intellectual property rights. Insofar as this chapeau agreement is invoked in subsequent MOUs, the MOUs are understood by both parties to be enforceable. This practice has expanded to Canada and Australia as well, as they also take the position that MOUs are not legally binding.

As a recent example of this practice, the U.S. Department of Defense concluded the Memorandum of Understanding with the Minister of Defense of the French Republic, the Federal Ministry of Defence of the Federal Republic of Germany, the Minister of Defence of the Italian Republic, and the Secretary of State for Defence of the United Kingdom of Great Britain and Northern Ireland for Aeronautical Cooperative Research and Technology Projects ("2004 MOU") under the auspices of the Air Senior National Representatives. The 2004 MOU is consistent with § 27 of the Arms Export Control Act, 22 U.S.C. § 2767, and serves as an umbrella agreement for cooperative project arrangements among the countries involved. Since the United Kingdom is a participant, the United States found it necessary to conclude a separate understanding with the United Kingdom, in order to invoke the appropriate chapeau agreement, providing specifically that

> the Agreement Concerning Defense Cooperation Arrangements of 27 May 1993 signed between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland will apply to [the 2004 MOU] upon [its] entry into effect.

This understanding was necessary in order to ensure that the MOU was enforceable in areas covered by the chapeau agreement. The separate understanding was used in this instance because the 2004 MOU is a multilateral instrument and the 1993 Agreement applies only as between the United States and the United Kingdom.

2. Reservations

a. Statement to Sixth Committee

On November 8, 2004, Eric Rosand, Deputy Legal Adviser, U.S. Mission to the United Nations, addressed the 24th meeting of the UN General Assembly Sixth Committee (Legal) on the Report of the International Law Commission (A/59/10) on the issue of reservations to treaties. The substantive paragraphs of Mr. Rosand's comments are set forth below and are summarized in U.N. Doc. A/C.6/59/SR.24, ¶ 9.

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* * * *

The Commission has said it would welcome comments from governments on the terminology to use in connection with situations in which a reservation is formulated that is not consistent with the criteria established in Article 19 of the Vienna Convention on the Law of Treaties. I shall try to limit my remarks to addressing this point.

As we have analyzed it, we are comfortable with the use of the concept of "validity" as a way to discuss such situations. Validity is a concept that is used on other articles of the Convention, and does not appear to have given rise to the disadvantages described in paragraph 35 of the Commission's report for other suggested terminology, such as "lawfulness" (which may to some suggest that it is referring to principles of state responsibility) or to "admissibility" or "permissibility".

As Professor Pellet has pointed out, an additional problem posed by the use of "admissibility" or "permissibility" is that the equivalent in French ("recevabilité") does not appear to be satisfactory.

* * * *

b. U.S. objection to Jordanian declaration as a reservation contrary to the object and purpose of the Terrorism Financing Convention

On August 28, 2003, Jordan submitted a declaration with its instrument of ratification to the 1999 International Convention for the Suppression of the Financing of Terrorism. The declaration asserted in part that "Jordan does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts" within the scope of Article 2(1)(b) of the convention.

On August 6, 2004, the Department of State presented a note to the United Nations, in its capacity as depositary for the Terrorism Financing Convention, setting forth the U.S. objection to the Jordanian declaration. At the time of the U.S. objection, ten countries had already objected to the Jordanian statement.

The operative paragraphs of the note are set forth below. The Jordanian statement and the U.S. objection are available at *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp.*

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* * * *

The Government of the United States of America, after careful review, considers the statement made by Jordan relating to paragraph 1(b) of Article 2 of the convention to be a reservation that seeks to limit the scope of the offense set forth in the convention on a unilateral basis. The declaration is contrary to the object and purpose of the convention, namely, the suppression of the financing of terrorist acts, irrespective of where they take place or who carries them out.

The Government of the United States also considers the declaration to be contrary to the terms of Article 6 of the convention, which provides: "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope

of this convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of the United States notes that, under established principles of international treaty law, as reflected in Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the United States therefore objects to the declaration relating to paragraph 1(b) of Article 2 made by the Government of Jordan upon ratification of the International Convention for the Suppression of the Financing of Terrorism. This objection does not, however, preclude the entry into force of the convention between the United States and Jordan.

3. Interpretation

a. Reliance on negotiators' testimony

On June 4, 2004, the United States filed a Reply Memorandum in support of its motion to dismiss or, in the alternative, for summary judgment in *Asociacion de Empleados del Area Canalera ("ASEDAC") v. The Panama Canal Commission ("PCC")*. In this case, plaintiffs, non-U.S.-citizen Panamanian nationals who were former employees of the PCC and/or any component of the U.S. Department of Defense, claimed that the United States had failed to provide them with certain employment benefits guaranteed under Panamanian law and that the United States was obligated to do so under the terms of the Panama Canal Treaty, September 7, 1977, U.S.-Panama, 33 U.S.T. 39 ("Treaty") and the Agreement in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, U.S.-Panama, 33 U.S.T. 141 ("Implementing Agreement").

The U.S. pleading summarized the issues as follows:

> The Panama Canal Treaty makes it clear that the United States was to determine the terms on which United States

> agencies hired employees in connection with its operation of the Panama Canal. Plaintiffs nevertheless assert that the United States was required to apply specific provisions of Panamanian law to pay for a thirteenth month in every year, retroactive to 1979, and to make severance payments merely for doing what the Treaty required—handing over the Canal to a Panamanian agency (which, without interruption in their service, hired the employees who had worked for the Panama Canal Commission). Plaintiffs fail to show why these extraordinary and belated demands are either properly before the Court or have any merit.

See also ASEDAC v. PCC, 329 F.3d 1235 (11th Cir. 2003).

In addition to its arguments that the action should be dismissed on several jurisdictional bases, the United States argued on the merits that neither the Treaty nor the Implementing Agreement entitled plaintiffs to the benefits claimed. Excerpts below address plaintiffs' reliance on statements by negotiators offered to interpret the treaty (footnotes omitted). The case was pending in the district court at the end of 2004.

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

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Plaintiffs argue that the Treaty is "[a]t the very least, ambiguous" and cannot therefore be interpreted without looking at "extrinsic evidence," from which it supposedly follows that the case cannot be decided on a motion to dismiss. . . . This argument is unpersuasive for several reasons. First, there is nothing ambiguous about the Treaty's conferring on the United States authority to regulate relations with its own employees, so no resort to "extrinsic evidence" is necessary. Second, just as a court may reference legislative history in construing an ambiguous statute on a motion to dismiss, the Court may likewise consider the legal question of a treaty's meaning on a motion to dismiss whether or not it considers such publicly available and judicially noticeable materials as the treaty's negotiating history, *see Menominee Indian Tribe v.*

Thompson, 161 F.3d 449, 456 (7th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999).

Plaintiffs also err in asserting that a declaration they submit from one negotiator, presenting a one-sided reading of the Treaty decades after the fact, and the far ranging deposition discovery they propose obtaining from other negotiators are the kinds of "extrinsic evidence" that a Court should consider. . . . Plaintiffs cite *Air France v. Saks*, 470 U.S. 392, 396 (1985), as the sole direct support for their assertion that "extrinsic evidence" that may be considered "includes drafts of the treaty, State Department briefing testimony, the *testimony* of negotiators, and the practical construction adopted by the parties." Pls' Mem. at 15 n.19 (emphasis supplied). What *Air France* actually says is that in construing an ambiguous treaty one may look at the "'history of the treaty, *the negotiations*, and the practical construction of the parties.'" 470 U.S. at 396, *quoting Choctaw Nation v. United States*, 318 U.S. 423, 431–32 (1943) (emphasis supplied). The history of the negotiations referred to by Air France does not include after-the-fact testimony or discovery from negotiators. This is evident from Air France's emphasis that "[i]n part *because* the 'travaux préparatoires' [negotiation history of the treaty] *are published and generally available to litigants*, courts frequently refer to these materials to resolve ambiguities in the text." 470 U.S. at 400 (emphasis supplied). That is hardly an authorization for plaintiffs' insistence that the Court must order broad ranging discovery of the treaty negotiators. *See also Arizona v. California*, 292 U.S. 341, 360 (1934)(in construing treaty courts may not consider alleged but not contemporaneously communicated "oral statements of negotiators"). The only other case plaintiffs cite (as *see also*) for the proposition that after-the-fact opinion testimony of negotiators concerning the meaning of treaties can be considered expressly declined to reach that very point. *Coplin v. United States*, 6 Cl. Ct. 115, 131 n.16 (1984).

When that same case (which dealt with an Agreement in Implementation of the Panama Canal Treaty) reached the Supreme Court, one point extrinsic to the language and one point only was given "great weight": the "consistent application of the Agreement by the Executive Branch." *O'Connor v. United States*, 479 U.S. 27,

34 (1986). Here too, the Executive Branch's consistent application would similarly be entitled to great weight if there were any ambiguity in the Treaty's provisions.

* * * *

b. Interpretive notes

As discussed in Chapter 3.B.5.a., on June 17, 2004, Samuel M. Witten, Deputy Legal Adviser, Department of State, and Bruce Swartz, Deputy Assistant Attorney General, Criminal Division, Department of Justice testified before the Senate Committee on Foreign Relations in support of advice and consent to ratification of the UN Convention Against Transnational Organized Crime and Protocols on Trafficking in Persons and Migrant Smuggling, S. Treaty Doc. No. 108–16. One of the questions submitted by Senator Joseph R. Biden, Jr. related to the role of the Interpretive Notes for the official record. The question and the answer submitted for the record by Mr. Witten and Mr. Swartz are set forth below.

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* * * *

3. What is the view of the Executive Branch of the authoritative nature of the Interpretive Notes for the official records (*travaux préparatoires*) of the negotiation of the Convention and the Protocols thereto (UN document A/55/383/Add.1, November 3, 2000)?

The Interpretive Notes for the official records (*travaux preparatoires*) serve to preserve certain points relating to articles of the instruments that are subsidiary to the text but nonetheless of potential interpretive importance. In accordance with customary international law, as reflected in Article 32 of the Vienna Convention on the Law of Treaties, preparatory work such as that memorialized in the Interpretive Notes may serve as a supplementary means of interpretation, if an interpretation of the treaty done

in good faith and in accordance with the ordinary meaning given to the terms of the treaty results in ambiguity or is manifestly absurd. Thus, the Interpretive Notes, while not binding as a matter of treaty law, could be important as a guide to the meaning of terms in the Convention and Protocols.

Cross-references

Status of European Community in treaties and international organizations, **Chapters 3.B.1. and 5.; 7.A.2.; 15.A.1**.

Reservations related to federalism issues, **Chapter 3.B.5.a**.

Pre-existing international agreement exception to FSIA, **Chapter 10.A.2.c**.

Treaty interpretation in ICJ case, **Chapter 2.A.l**.

Non self-executing treaties, **Chapters 3.A.3. and B.5.a. and 6.G.6.a.(1), (2)(i), and (3)**.

CHAPTER 5

Foreign Relations

A. FOREIGN RELATIONS LAW OF THE UNITED STATES

1. Role of Judiciary

a. Habeas corpus jurisdiction over U.S. citizen held in Saudi Arabia

On December 16, 2004, the U.S. District Court for the District of Columbia denied a motion to dismiss a petition for lack of habeas corpus jurisdiction in a case involving a U.S. citizen allegedly being held in Saudi Arabia "at the behest and ongoing supervision of the United States." *Omar Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004). In moving for dismissal for lack of jurisdiction, the United States did not address the alleged facts in the case, limiting its response at that stage of the proceedings to its argument that, as characterized in the district court opinion, "a federal district court has no jurisdiction to consider the habeas petition of a United States citizen if he is in the hands of a foreign state." The district court examined in turn the statutory and constitutional bases as well as judicial precedent for the right of the "Great Writ of habeas corpus" in the United States; arguments raised by the United States concerning the act of state, separation of powers and political question doctrines; and U.S. objections to the request that the court issue a writ of mandamus.

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In its opinion, excerpted below, the court denied the U.S. motion to dismiss (except as to the writ of mandamus), allowing the case to proceed "for the purpose of discovery." Authorized discovery on jurisdictional issues would be "expeditious but cautious, consistent with the substantial and delicate interests of foreign relations potentially involved." At the end of 2004 Abu Ali had been charged and was in custody in the United States.

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. . . The United States does not offer any facts [to rebut the plaintiff's allegations.]. Instead, it insists that a federal district court has no jurisdiction to consider the habeas petition of a United States citizen if he is in the hands of a foreign state, and it asks this Court to dismiss the petition forthwith. The position advanced by the United States is sweeping. The authority sought would permit the executive, at his discretion, to deliver a United States citizen to a foreign country to avoid constitutional scrutiny, or, as is alleged and to some degree substantiated here, work through the intermediary of a foreign country to detain a United States citizen abroad.

The Court concludes that a citizen cannot be so easily separated from his constitutional rights. Earlier this year, the Supreme Court confirmed the fundamental right of a citizen to be free from involuntary, indefinite confinement by his government without due process. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647 (2004); *id.* at 2661 (Scalia, J., dissenting); *see also Rasul v. Bush*, 124 S. Ct. 2686, 2692 (2004). Abu Ali was not captured on a battlefield or in a zone of hostilities—rather, he was arrested in a university classroom while taking an exam. The United States has therefore not invoked the executive's broad authority to conduct the foreign affairs of the country as a basis to insulate Abu Ali's detention from judicial scrutiny. There are, to be sure, considerable and delicate principles of separation of powers that dictate caution and will narrow the inquiry in this case. Such principles, however, have never been read to extinguish the fundamental due process rights of a citizen of the United States to freedom from arbitrary

detention at the will of the executive, and to access to the courts through the Great Writ of habeas corpus to challenge the legality of that detention.

The present posture of this case requires this Court to accept petitioners' well-supported allegations, to which the United States has not responded. The United States' broad assertion of authority, and corresponding contention that this Court lacks jurisdiction, cannot withstand petitioners' assertions at this time. The Court will accordingly authorize expeditious jurisdictional discovery in this matter to further explore those contentions. . . .

* * * *

To briefly summarize its conclusions here, . . . the Court holds that the United States may not avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen. The instances where the United States is correctly deemed to be operating through a foreign ally as an intermediary for purposes of habeas jurisdiction will be exceptional, and a federal court's inquiry in such cases will be substantially circumscribed by the separation of the powers. Nonetheless, the executive's authority over foreign relations has never in our nation's history been deemed to override entirely the most fundamental rights of a United States citizen—the right to challenge as arbitrary and unlawful his detention allegedly at the will of the executive. This authority likewise has never been held to eliminate the essential remedy against such unlawful detentions—the Great Writ of habeas corpus.

* * * *

The evidence in the record at this stage certainly is not sufficient for this Court to deny habeas jurisdiction, but neither is it sufficient conclusively to find habeas jurisdiction in the circumstances of this case. The jurisdiction of this Court requires a finding that Abu Ali is in the actual or constructive custody of the United States. The case law indicates that this inquiry will entail a consideration of several factors, including whether: (i) Abu Ali was detained at the behest of United States officials; (ii) his ongoing detention is at the direction of the United States enlisting a foreign

state as an agent or intermediary who is indifferent to the detention of the prisoner; (iii) he is being detained in the foreign state to deny him an opportunity to assert his rights in a United States tribunal; and (iv) he would be released upon nothing more than a request by the United States.

Any one of these factors may not be sufficient to establish jurisdiction. . . . Where all of these factors are present, however, it blinks reality to conclude that the detainee is anything other than in the custody of the United States for purposes of habeas jurisdiction.

* * * *

b. No jurisdiction over Presidential power to designate enemy property

On August 11, 2004, the U.S. Court of Appeals for the Federal Circuit upheld the dismissal of a suit seeking compensation for the destruction of a manufacturing facility in Sudan by the armed forces of the United States. *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004). The court rejected appellants' allegation "that destruction of the appellants' facility constituted a taking of private property for pubic use within the meaning of the Fifth Amendment to the United States Constitution," holding that "appellants failed to allege a valid takings claim."

The manufacturing facility at issue ("the Plant") was destroyed on August 20, 1998, in strikes ordered by President William J. Clinton after the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were bombed on August 7, 1998, in attacks linked to Osama bin Ladin and al-Qaida. As explained in the court's opinion, the stated purpose of the strikes was to "destroy, in Sudan, [a] factory with which bin Ladin's network is associated, which was producing an ingredient essential for nerve gas." *See also Cumulative Digest 1991–1999* at 2133–35.

The appellate court concluded that "the Constitution, in its text and by its structure, commits to the President the

power to make extraterritorial enemy property designations such as the one made regarding the appellants' Plant." The court noted that appellants did not and could not contend "that the Takings Clause can be successfully invoked against all military conduct that results in the appropriation or destruction of private property." At the same time, "it is equally true that the government does not avoid the Takings Clause by simply using its military forces as cover for activities that would otherwise be actionable if performed by one of its civilian agencies."

After reviewing the precedents in this area, the court noted the distinction in the question presented in *El-Shifa* and concluded that judicial review of the President's designation of the Plant as enemy property was barred by the political question doctrine, as excerpted below.

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The role of the judiciary in much of our precedent in the area of military takings . . . has been to draw a "thin line . . . between sovereign immunity and governmental liability." *Nat'l Bd. of YMCAs*, 396 F.2d at 472. The instant case is unique however in military takings jurisprudence, in that we are not asked to determine on which side of that line the governmental conduct at issue falls. Indeed, under our precedent, if it were actually true in 1998, as the government then maintained, that the nation's terrorist enemies were using the Plant to manufacture chemical weapons destined for use against American citizens and interests around the globe, then the appellants' property loss would be subsumed by the enemy property doctrine, and that would be the end of it. Accordingly, today, we need not further sharpen the line that separates private property lost to the "fortunes of war" from that the military takes pursuant to the state's power of eminent domain.

This case asks us to draw a line of a different sort. The complaint filed by the appellants challenges the government's designation of the Plant as enemy property by, inter alia, suggesting that the President relied on flawed intelligence in targeting it for destruction. It is replete with allegations contradicting the

government's, indeed the President's, determination that the Plant was part of Osama bin Laden's array of weapons deployed against Americans at home and abroad. For the reasons set forth more fully below, we think the power set forth in Article III, section 1 of the Constitution does not encompass judicial supervision over the President's designation as enemy property the private property belonging to aliens located outside the territory of the United States.

* * * *

In *Baker v. Carr*, 369 U.S. 186 . . . (1962), the Supreme Court set forth six tests for the presence of a nonjusticiable political question: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; . . .

* * * *

The "issue" presented here, for purposes of deciding whether there is "a textually demonstrable commitment of the issue to a coordinate political department," is the inherent power *vel non* of the President to designate as enemy property the private property of an alien that is situated on foreign soil. Whatever inherent power the President may have to make such designations must emanate from the Constitution. *See Ex parte Quirin*, 317 U.S. 1, 25–26, 87 L.Ed. 3, 63 S. Ct. 2 (1942) ("Congress and the President, like the courts possess no power not derived from the Constitution."). The Constitution grants to the President the "executive Power," see U.S. Const. art. II, § 1, cl. 1, and requires that he "take Care that the Laws be faithfully executed," *Id.*, art. II, § 3. The President is "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States." *Id.*, art. II, § 2, cl. 1.

The appellants take these passages of the Constitution at face value and find lacking in them a "textually demonstrable commitment in the Constitution of the question of the enemy status of property under the Takings Clause to the Executive Branch." . . . Apparently, the appellants' understanding of the Court's political question doctrine demands from the Constitution an *in haec verba* commitment of the issue in order for a nonjusticiable political question to be present.

The appellants' understanding is flawed for several reasons. . . . Once duly exercised, the [President's designation] power transforms private property into enemy property and precludes recovery of just compensation from the government as a result of its destruction. Finally, and more fundamentally, the appellants' argument on this point ignores what the Supreme Court and our predecessor court, have had to say regarding the President's inherent war powers and the ways in which separation of powers principles require that he share it with the Congress and the federal courts.

We think consideration of the decisional law touching on the nature and scope of the President's war powers sheds important light on our present inquiry under *Baker*'s "demonstrable textual commitment" test. The Supreme Court has characterized the nature of the President's war powers thusly:

> The Constitution . . . invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

Ex parte Quirin, 317 U.S. at 26 (emphasis added). And where circumstances are such that war is made on the Nation rather than declared by the Congress, the Court has long held that although he may "not initiate the war, [the President] is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) at 668.

In exercising the power to wage war, the President finds authorization in the Constitution itself to "direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." *Ex parte Quirin*, 317 U.S. at 28. Within these functions are "important incidents to the conduct of war" such as "the adoption of measures by the military command . . . to repel and defeat the enemy. . . ." *Id.* They also include "the power to seize and subject to disciplinary

measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Id.* at 28–29; see also *Hamdi v. Rumsfeld*, 159 L.Ed.2d 578, 124 S. Ct. 2633, 2640 (2004) ("The capture and detention of lawful combatants and the capture, detention and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incidents of war.' " (citing *Ex parte Quirin*, 317 U.S. at 28)).

In our view, the President's power to wage war must also necessarily include the power to make extraterritorial enemy property designations because such designations are also an important incident to the conduct of war. As much is borne out of the history of this nation's many declared and undeclared wars, part of which is documented in the cases where courts have applied the enemy property doctrine. The cases teach that the purpose of such designations is almost always to "repel and defeat the enemy" by diminishing the sum of material resources it has at its disposal to prosecute hostilities against the United States and its citizens. . . . We cannot envision how a military commander, much less the Commander-in-Chief, could wage war successfully if he did not have the inherent power to decide what targets, i.e., property, belonged to the enemy and could therefore be destroyed free from takings liability.

Moreover, in one case where the Court of Claims considered the interplay between political question doctrine and the Takings Clause, the court expressly declined to consider a takings claim that arose from military conduct directly traceable to the President's conduct as Commander-in-Chief . . . *Ingenio Porvenir C. Por A. v. United States*, 70 Ct. Cl. 735, 738 (1930) . . .

Although we conclude, based on our reading of precedent, that those passages of the Constitution that create and define the President's inherent war powers include within their terms the authority to make extraterritorial enemy property designations, our analysis under the first Baker test is not at an end. This is so because the entirety of the war powers the Constitution creates are not the President's to exercise alone. They are instead shared with the Congress and the federal courts, especially where an individual's right to own and enjoy property is concerned. *See Hamdi*, 124 S. Ct. at 2650 . . . As the Supreme Court recently

reminded, the President does not enjoy a "blank check" merely because a state of war exists. *Hamdi*, 124 S. Ct. at 2650 (citing *Youngstown Sheet & Tube Co.*, 343 U.S. at 587).

With these important separation of powers principles in mind, we conclude nevertheless that the appellants may not seek judicial review of the President's designation of the Plant as enemy property. The appellants' theory of takings liability centers on the alleged inaccuracy of the President's designation of the Plant as enemy property. This must be the case, because as we noted above, if the Plant was in fact the property of al-Qaeda, the appellants would have no claim in takings against the United States for its destruction. In essence then, the appellants are contending that the President failed to assure himself with a sufficient degree of certainty that the Plant was in fact a chemical weapons factory, despite his declaration to the contrary that the information he possessed in 1998 indicated al-Qaeda was using it to manufacture chemical weapons ingredients. The appellants would have the Court of Federal Claims in the first instance, and this court on appeal, provide them with an opportunity to test that contention, and in the process, require this court to elucidate the constitutional standards that are to guide a President when he evaluates the veracity of military intelligence.

We are of the opinion that the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies. In our view, the Constitution envisions that the political branches, directly accountable to the People, will adopt and promulgate measures designed to ensure that the President makes the right decision when, pursuant to his role as Commander-in-Chief, he orders the military to destroy private property in the course of exercising his power to wage war. Today, we need not decide whether and to what extent the Executive and Legislative branches share that responsibility. We conclude only that the Constitution does not contemplate or support the type of supervision over the President's extraterritorial enemy property designations the appellants request in this case.

The circumstances here, under which the Plant was targeted and destroyed, strengthen this conclusion. When the President ordered the Plant destroyed, he exercised the "authority . . . the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." *Ex parte Quirin*, 317 U.S. at 28. In 1998, the President determined that the Plant's destruction was a necessary and proper response to "the imminent threat of further terrorist attacks against U.S. personnel and facilities." (J.A. at 210.) In his radio address following the strike on the Plant, he maintained that he had "convincing" evidence that the "bin Laden network of radical groups," was responsible for the then recent attacks on United States embassies in Kenya and Tanzania as well as "compelling evidence that the bin Laden network was poised to strike at [the United States] again." President's Radio Address, 2 Pub. Papers (Aug. 22, 1998).

Under these conditions, where the President's own assessment of the offensive posture of the Nation's enemies overseas leads him to conclude that the Nation is at risk of imminent attack, we cannot find in the Constitution any support for judicial supervision over the process by which the President assures himself that he has in fact targeted that part of the enemy's wealth of property that he thinks, if it were destroyed, would most effectively neutralize the possibility of attack. In the *Prize Cases*, the Supreme Court was asked to review the correctness of President Lincoln's determination that a state of war existed between the Union and the secessionist States, and pursuant to that decision, to exercise the right of prize and capture on behalf of the United States over the plaintiffs' ships which had been seized pursuant to an embargo. *The Prize Cases*, 67 U.S. (2 Black) at 666–70. On that question, the Court concluded:

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be

> decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

Id. at 670. Likewise as we indicated above, we think that it is up to the President to determine when he has received "convincing" or "compelling" information sufficient to justify the use of force to destroy private property located outside the territory of the United States belonging to a nonresident alien. Such a determination is, in our view, "a core strategic matter[] of warmaking belonging in the hands of those who are best positioned and most politically accountable for making them." *See Hamdi*, 124 S. Ct. at 2647 (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 530, 98 L.Ed.2d 918, 108 S. Ct. 818 (1988), and *Youngstown Sheet & Tube Co.*, 343 U.S. at 587).

Moreover, we wonder how a federal court might go about testing the veracity of the intelligence relied upon by the President in deciding to attack the Plant. On this point, the appellants argue that "the question whether an individual [or his property] is associated with a nation or group hostile to the United States is a question of historical fact which the adversarial system is well-suited to determine." Appellants' Opening Br. at 39. We suspect this characterization belies the complicated and sensitive nature of determining whether private property has in fact been pressed into use by terrorists. More than "questions of historical fact," enemy property designations made pursuant to the President's duty to prevent future terrorist attacks from the country's enemies abroad are often "delicate[] and complex" and can "involve large elements of prophecy" at the time at which they are made. See *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 92 L.Ed. 568, 68 S. Ct. 431 (1948). The appellants' desire for judicial review of the President's decision to target the Plant would most surely give way to the specter of field commanders vetting

before the civil courts the intelligence on which they rely in selecting targets for destruction while simultaneously dealing with the exigencies of waging war on the battlefield. The Supreme Court has considered what such a state of affairs would mean for the military's ability to wage war and has stated that:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

Johnson v. Eisentrager, 339 U.S. 763, 779, 94 L.Ed. 1255, 70 S. Ct. 936 (1950). These concerns apply with equal force here, given the appellants' desire to test the veracity of the information upon which the President claims to have relied in ordering the destruction of their property. (fn. omitted).

* * * *

For all of these reasons, we think the Constitution, in its text and by its structure, commits to the President the power to make extraterritorial enemy property designations such as the one made regarding the appellants' Plant.

* * * *

2. Executive-Legislative Separation of Powers

From time to time, in signing federal legislation into law, the President includes language in his signing statement preserving his constitutional prerogatives where aspects of the legislation are inconsistent with those prerogatives. *See Cumulative Digest 1991–1999* at 801–02.

In 2004, for example, President George W. Bush addressed provisions inconsistent with his constitutional authority in areas related to foreign affairs in his statement upon signing the Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, 118 Stat. 3, on January 23, 2004.

The full text of the signing statement, excerpted below, is available at *www.whitehouse.gov/news/releases/2004/01/20040123-10.html*.

Today, I have signed into law H.R. 2673, the "Consolidated Appropriations Act, 2004" (CAA). The CAA consolidates into a single appropriations Act several appropriations bills that the Congress normally passes each year as separate bills to fund the operations of the Federal Government.

Many provisions of the CAA are inconsistent with the constitutional authority of the President to conduct foreign affairs, command the Armed Forces, protect sensitive information, supervise the unitary executive branch, make appointments, and make recommendations to the Congress. Many other provisions unconstitutionally condition execution of the laws by the executive branch upon approval by congressional committees.

The executive branch shall construe as advisory the provisions of the Act that purport to: (1) direct or burden the Executive's conduct of foreign relations, including sections 514, 531, 548, 557, 570, 571, 589, 610, and 618(b) of, and language relating to an agreement under the heading "Other Bilateral Economic Assistance, Economic Support Fund" in, the Foreign Operations Appropriations Act; and sections 404, 612, and 635 of the Commerce, Justice, State Appropriations Act and language in that Act relating to World Trade Organization negotiations and United Nations Security Council voting; (2) limit the President's authority as Commander in Chief, such as language under the heading "Andean Counterdrug Initiative" in the Foreign Operations Appropriations Act and section 610 of the Commerce, Justice, State Appropriations Act; (3) limit the President's authority to supervise the unitary executive branch, such as section 610(3) of the Commerce, Justice, State Appropriations Act, and sections 618 and 628 of the Transportation, Treasury Appropriations Act and the language in that Act relating to Office of Management and Budget (OMB) review of executive branch orders, activities, regulations, transcripts, and testimony; or (4) restrict the President's constitutional authority to make appointments, such as section

604(c)(3)(B) of the Foreign Operations Appropriations Act and subsections 112(a) and (d) of the Commerce, Justice, State Appropriations Act.

In addition, the executive branch shall construe provisions in the CAA that mandate submission of information to the Congress, other entities outside the executive branch, or the public, such as section 637(e)(2) of the Commerce, Justice, State Appropriations Act, in a manner consistent with the President's constitutional authority to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. . . .

The executive branch shall construe the phrase "developed by the Kimberley Process" in section 584 of the Foreign Operations Appropriations Act as requiring the enforcement only of those standards that are in existence as of enactment of the CAA, for the reasons I stated upon signing the Clean Diamond Trade Act on April 25, 2003.

* * * *

Section 409 of the Commerce, Justice, State Appropriations Act purports to compel the Secretary of State to furnish all Department of State cables, on any topic and of whatever classification, to any member of the House or Senate appropriations committees who requests them. The executive branch shall construe this provision consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative process of the Executive, or the performance of the Executive's constitutional duties.

* * * *

Sections 153 and 154 of Division H of the CAA purport to establish interparliamentary groups of U.S. Senators to meet with members of the national legislatures of certain foreign countries for a discussion of common problems in the interest of relations between the United States and those countries. Consistent with the President's constitutional authority to conduct the Nation's foreign relations and as Commander in Chief, the executive branch

shall construe sections 153 and 154 as authorizing neither representation of the United States nor disclosure of national security information protected by law or executive order.

* * * *

On December 23, 2004, in signing into law the Comprehensive Peace in Sudan Act of 2004, President Bush noted again his intention to construe provisions consistent with his constitutional authority to withhold information that could impair foreign relations and national security. In addition, the President stated as follows. The full text of the signing statement is available at 23 WEEKLY COMP. PRES. DOC. 3013 (Dec. 27, 2004).

Today, I have signed into law S. 2781, the "Comprehensive Peace in Sudan Act of 2004" (the "Act"). The Act is intended to help resolve conflict, reduce human suffering, and encourage freedom and democracy.

Section 6 of the Act includes provisions that, if construed as mandatory, would impermissibly interfere with the President's exercise of his constitutional authorities to conduct the Nation's foreign affairs, participate in international negotiations, and supervise the unitary executive branch. Section 6(a), for example, appears to require the President to implement the measures set forth in section 6(b)(2) of the earlier Sudan Peace Act (Public Law 107–245), which purports to direct or burden the conduct of negotiations by the executive branch with foreign governments, international financial institutions, and the United Nations Security Council. When necessary to avoid such unconstitutional interference, the executive branch shall construe the provisions of section 6 as advisory.

* * * *

Provisions of the Act define a particular entity as the "Government of Sudan" for purposes of implementing the Act and section 12 of the Sudan Peace Act (Public Law 107–245). The executive branch shall construe the provisions in a manner

consistent with the President's constitutional authority for the United States to recognize foreign states and to determine what constitutes the governments of such foreign states.

B. CONSTITUENT ENTITIES

1. Northern Mariana Islands

On July 1, 2004, the Ninth Circuit Court of Appeals reversed and remanded a lower court decision that had held that two citizens of the Commonwealth of Northern Mariana Islands ("CNMI") born in 1982 and 1983 are not citizens of the United States and therefore not entitled to a U.S. passport. *Sabangan v. Powell*, 375 F.3d 818 (9th Cir. 2004). *See Digest 2003* at 273–75 concerning U.S. views supporting the lower court opinion.

At issue in the case was § 501(a) of the Covenant between the CNMI and the United States, effective January 9, 1978, which provides *inter alia* that the Fourteenth Amendment § 1 of the U.S. Constitution "will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States." That section of the Fourteenth Amendment reads in part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As the court of appeals noted, in the view of the United States, persons born in the Commonwealth only became citizens at birth in 1986, the effective date of § 303 of the Covenant, which provides expressly for citizenship at birth for persons born in the Commonwealth after that date.

The Ninth Circuit concluded that "[t]he Covenant, section 501 makes section 1 of the Fourteenth Amendment apply as if the Northern Mariana Islands 'were one of the several States.' The language is precise." The two claimants in the case, "were therefore born in a jurisdiction at a time in which by force of the Constitution itself they became citizens of the United States."

2. Republic of the Marshall Islands

On May 1, 2004, the United States and the Republic of the Marshall Islands exchanged diplomatic notes in Majuro bringing into force the Compact of Free Association, as amended. *See Digest 2003* at 271–73. As described in a press statement issued May 3, 2004, by the Department of State:

> . . . The Compact is a bilateral agreement, originally agreed to in 1986, through which the U.S. provides a defense commitment and substantial economic assistance to the Republic of the Marshall Islands. Grants provided under the Amended Compact over the next twenty years will facilitate the economic and social development of all Marshallese citizens. The Amended Compact also provides the U.S. a 50-year extension to rights to use the eleven defense sites that comprise the missile defense testing and space operations facility on Kwajalein Atoll.

The press statement is available in full at *www.state.gov/r/pa/prs/ps/2004/32116.htm*.

Cross-references

Alien Tort Statute not available against United States, **Chapter 6.G.6.a.(2)(v).**

U.S. sovereign immunity under Federal Tort Claims Act, **Chapter 6.G.6.a.(1) and (2)(v).**

Customary international law and Sunken Military Craft Act, **Chapter 12.A.3.c.(2).**

Executive Branch constitutional authority in foreign state recognition and passports, **Chapter 9.B.**

No constitutional takings claim for right to fish in EEZ, **12.A.4.**

CHAPTER 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On February 25, 2004, the Department of State released the 2003 Country Reports on Human Rights Practices. The document is submitted to Congress by the Department of State 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. The report is available at *www.state.gov/g/drl/rls/hrrpt/2003/*.

In announcing the release of the country reports, Secretary of State Colin L. Powell stated:

> The Country Reports help us to identify and close gaps between principles and practices, between internationally agreed human rights standards and the actual enjoyment of such rights by a country's citizens.
>
> The United States is strongly committed to working with other governments and civil society around the world to expose and end existing human rights violations, and to foster the legal and democratic reforms that can prevent further violations from occurring.
>
> We have done our utmost to ensure that these Country Reports are accurate and objective. We trust

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> that they will provide as useful a set of information to other governments as they do for our own government.

Secretary Powell's remarks are available in full at *www.state.gov/secretary/former/powell/remarks/29876.htm.*

On May 17, 2004, the Department of State submitted Supporting Human Rights and Democracy: The U.S. Record 2003–2004, its second annual report in compliance with § 665 of Pub. L. No. 107–228. As explained in the Purpose and Acknowledgements section of the report:

> This report is submitted to the Congress by the Department of State in compliance with Section 665 of P.L. 107–228, the Fiscal Year 2003 Foreign Relations Authorization Act, which requires the Department to report on actions taken by the U.S. Government to encourage respect for human rights. This second annual submission complements the longstanding Country Reports on Human Rights Practices for 2003, and takes the next step, moving from highlighting abuses to publicizing the actions and programs the United States has taken to end those abuses.
>
> Unlike the 196 Country Reports, Supporting Human Rights and Democracy: The U.S. Record 2003–2004 highlights U.S. efforts to promote human rights and democracy in only 101 countries and entities—those with the most human rights abuses. . . .

As required by § 665, the report includes "for each country with respect to which the report indicates that extrajudicial killings, torture, or other serious violations of human rights have occurred in the country, the extent to which the United States has taken or will take action to encourage an end to such practices in the country."

The report and related statements are available at *www.state.gov/g/drl/rls/shrd/2003.*

2. Inter-American Commission on Human Rights: Admissibility of Petitions

a. Isamu Carlos Shibayama

On December 17, 2004, the United States submitted to the Inter-American Commission on Human Rights ("Commission" or "IACHR") its response to Petition No. P-434-03 *In Re Isamu Carlos Shibayama et al.* The United States argued that the petition should be declared inadmissible on the ground that the Commission "is not competent, *ratione temporis*" because the allegations concerned U.S. policies during World War II, before the creation of the Commission and the adoption of the American Declaration on the Rights and Duties of Man. The U.S. also argued that even if the Commission were competent *ratione temporis*, the petition would still be inadmissible for failure to pursue and exhaust domestic remedies.

In this case petitioners alleged that they were relocated from Peru to the United States in 1944, and were interned at a WWII internment camp in Crystal City, Texas until early 1946. They alleged further that although the Civil Liberties Act ("CLA"), Pub. L. No. 100–383, Title I, 102 Stat. 904 (1988), provided redress payments of $20,000 to persons of Japanese ancestry interned during WWII and included an official apology, they were informed in 1992 that they were ineligible under the CLA because they were not U.S. citizens or permanent resident aliens at the time of their internment. Petitioners joined a class action lawsuit against the United States that resulted in a court-approved settlement providing $5,000 in restitution for each member of the class. *Mochizuki v. United States*, 43 Fed. Cl. 97 (Fed. Cl. 1999). The petitioners in this case, however, refused the settlement. In subsequent litigation alleging Fifth Amendment and international human rights violations and seeking redress under the CLA, the U.S. Court of Federal Claims ruled that petitioners were not eligible for the requested relief because they were not U.S.

citizens or permanent resident aliens at the time of their internment. *Shibayama v. United States*, 55 Fed. Cl. 720 (Fed. Cl. 2002). Petitioners did not appeal that decision. In their petition to the IACHR,

> [p]etitioners allege that the United States violated Articles I, II, V, VIII, XII, XIV, XVIII, XXV, and XXVI of the American Declaration as a consequence of:
>
> 1. Their "seizure and detention" by the United States Government. . . .
> 2. Their inclusion in classes at the internment camp that were only taught in English or Japanese languages . . . ; and
> 3. The denial of compensation under the CLA. . . .

U.S. Response at 2.

The full text of the U.S. response, further excerpted below (most footnotes omitted), is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

1. The Shibayamas' Petition Should be Declared Inadmissible Because the Commission Lacks Competence Ratione Temporis *to Hear Their Petition*

In order for the Commission to declare a petition admissible, it must be satisfied that the Commission has competent *ratione temporis, ratione loci, ratione personae, and ratione materiae*. *See e.g.*, IACHR, Admissibility Report No. 62/03, Petition P12.049, Kenneth Walker, October 10, 2003, United States, Annual Report 2003, para. 38 (finding petitioner's claim inadmissible). *Ratione temporis*, or temporal jurisdiction, means that the Commission is competent only to hear petitions alleging facts that occurred on or after the date on which the commitments of the State involved took effect. *See e.g.*, I/A Court H.R. *Alfonso Martín Del Campo Dodd Case*, Preliminary Objections, Judgment of September 3, 2004, Ser. C No. 113, (2004), para. 85 (holding that the Court

lacked competent *ratione temporis* because the alleged events ceased to exist prior to Court having cognizance over supposed violations). Moreover, the Commission has stated that it has competence *ratione temporis* to examine only those complaints that allege facts that occurred "on or after the date on which the United States' [commitments] under the American Declaration took effect." Kenneth Walker at para. 38.

A. Alleged Facts Stated by Petitioners Occurred Before the Adoption of the American Declaration and the Creation of the Commission, Thereby Precluding Ratione Temporis

Ratione temporis is an established principle of international law. Article 28 of the Vienna Convention on the Law of Treaties ("Vienna Convention") states:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 28, 8 ILM 679. Nowhere do the Rules of Procedure of the Commission indicate any intention to [deviate] from the longstanding rule memorialized in Article 28 of the Vienna Convention. Indeed, as noted above, *ratione temporis* competency is a necessary component of the Commission's admissibility analysis. *See e.g.*, Kenneth Walker, at para. 38. In this regard, the Commission is merely applying a generally accepted principle of international law. *See e.g.*, I/A Court H.R., *Cantos v. Argentina*, Preliminary Objections, Judgment of September 7, 2001, Ser. C No. 85, para. 37 (recognizing that the principle of non-retroactivity of international norms is embodied in the Vienna Convention).

Other international human rights bodies formed under multinational conventions condition admissibility in their forums on *ratione temporis*, as well. In a United Nations ("UN") Human Rights Committee decision involving Argentina, claimants alleged

that, among other things, their relatives were either killed or kidnapped under the previous Argentine government in 1976. *R.A.V.N. v. Argentina*, Hum. Rts. Comm., Communication No. 343/1988 (5 April 1990), para. 2.3. However, the two applicable instruments—the International Covenant on Civil and Political Rights and the Optional Protocol for Argentina—did not come into force for Argentina until November 8, 1986. *Id.* at para. 5.2. The Committee held that the Covenant "cannot be applied retroactively" and that the Committee is "precluded *ratione temporis*" from examining alleged violations of the Covenant that occurred before the Covenant entered into force for Argentina. *Id.*

In the present case, the gravamen of Petitioners' allegations [is] that they were forcibly abducted by United States military forces from Peru in 1944. (Petition at 1) Petitioners further state that they were detained in the United States until 1946. (Petition at 1) However, the Commission was not created until some 13 years later, in 1959. Furthermore, the American Declaration—as well as the Organization of American States, for that matter—did not come into existence until 1948 when the OAS was founded and the American Declaration was adopted. *See* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/I.4Rev.9 at 4 (2003); *see also* IACHR, Report No. 113/01, Case No. 11.140, Mary and Carrie Dann, October 15, 2001, United States, Annual Report 2001, para. 95 (finding fact that events raised in Petitioner's claim occurred subsequent to the State's ratification of the OAS Charter as paramount to question of American Declaration's applicability). For the Commission to assert jurisdiction *ratione temporis* and retroactively consider the American Declaration in the context of this case's facts—which predate the Commission's formation by 13 years and the existence of the American Declaration by two—would cause the Commission to be in clear contravention of established international legal norms, as reflected in Article 28 of the Vienna Convention, the Commission's previous findings, and the work of other international processes. Any petition alleging facts that occurred before the time of the Commission's *creation* and the American Declaration's *adoption* is beyond the competence of the Commission, and therefore, inadmissible.

B. Petitioners Fail to Demonstrate that Alleged Facts are "Continuing Violations"

Although the alleged acts ended with Petitioners' release in 1946, Petitioners claim that the acts are "ongoing." (Petition at 6) As indicated by Article 28 of the Vienna Convention, despite all attempts at artful argument, it is evident that all of the purported subsequent violations are, in fact, premised on the allegedly wrongful actions arising before 1948.

The Inter-American Court has adopted a strict interpretation of what constitutes a permissible "ongoing illicit act." *See e.g., Cantos*, at para. 39. In *Cantos*, the petitioner, José María Cantos, was the owner of a business group in Argentina, employing over 700 people. *Id.* at para. 2. In 1972, the government conducted a series of searches in Cantos' administrative offices, seizing all company books, accounting documentation, and other business records. *Id.* The government continued to harass Cantos by detaining him incommunicado more than 30 times. *Id.* However, because these abuses "occurred before the entry into effect [September 5, 1984] of the Convention for Argentina," the court held that they did not fall within the Court's jurisdiction. *Id.* at para. 38. The Inter-American Court concluded by noting that, "if any of the facts imputed to the State were [ongoing illicit acts] it would not be a 'fact that had occurred after September 5, 1984,'" the time at which Argentina's commitments under the American Convention on Human Rights began. *Id.* at para. 39. Thus, even if an alleged act were deemed an "ongoing illicit act," the Inter-American Court could only have competence *ratione temporis* if such acts occurred "on or after the date" the State assumed its commitments under the relevant treaty. *Id.*

The strict interpretation of what constitutes an "ongoing illicit act" employed by the Inter-American Court is shared by other international judicial bodies. The European Court of Human Rights ("ECHR") defines a "continuing situation" as "a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims." *Posti and Rahko v. Finland*, Eur. Ct. H.R., Application No. 27824/95 (2002), para. 40, *available at*: *http://www.ehcr.coe.int/eng* (accepting, in part,

Finland's preliminary objection because the Government's issuance of a decree that limited the fishing gear fishermen could use is not deemed a "continuing situation," despite the decree's permanent nature). The ECHR further states that "the fact that an event has significant consequences over time . . . does not mean that the event has produced a 'continuing situation.'" *Id.*

Here, it is abundantly clear that the alleged acts occurred and ceased well before the creation of the American Declaration and the Commission. The alleged "seizure and detention" of Petitioners began in 1944 and ceased when Petitioners left the Crystal City Internment Camp in 1946. (Petition at 1) While "these acts" as they are termed in the petition, were arguably "ongoing" for 1944–1946, it is impossible for the alleged "seizure and detention," to have continued beyond the Shibayamas' release from Crystal City in 1946. (Petition at 6) Therefore, lacking any alleged acts that occurred after the creation of the American Declaration and the Commission, this petition cannot be competently heard by the Commission.

Despite acknowledging that these alleged events occurred over a decade before the Commission was created and two years before the American Declaration took effect, Petitioners claim that "these acts are ongoing" because: 1) "[the Petitioners] have received no redress;" and 2) the alleged acts of "seizure and detention" are part of a "continuing policy" in which the United States is still participating.[3] (Petition at 6) However, even assuming the impossible—that detentions ending with Petitioners' release in 1946 could effectively continue *after* their release—their further justifications are patently erroneous.

First, in order for such a "continuing policy" to exist, the United States Government would have needed to have had a policy of detention *and* that policy would have needed to extend long enough so that it was still in effect *after* the advent of the American Declaration and the Commission, which it clearly did not do. The detention of all WWII internees, including Petitioners, ended

[3] In this context, the United States Government rejects the Petitioners' unsubstantiated assertion that the recent detention of enemy combatants in the war on terrorism is related to the present situation. (Petition at 6, n.17).

in 1946. Following their release, Petitioners took advantage of a myriad of administrative and judicial processes that belie their assertion that "ongoing" activities rendered them continuous victims. Seemingly, Petitioners mistakenly identify the myriad of due process rights they exercised as evidence of a "continuing policy" of "seizure and detention." (Petition at 6) Petitioners claim, without basis, that because the United States Government has failed to issue an "appropriate apology" and "acknowledge its true role" for the allegations leveled by Petitioners, this indicates the "policy" is still in effect. (Petition at 6, n.17)

However, the United States Government has *already made* a full apology for the wrongful internment to the people of Japanese ancestry who were taken from Latin American countries. (Petition at 2) Former President Bill Clinton issued an official apology at the time the settlement agreement was reached. James Rainey, *U.S. Apologizes to Internees*, Los Angeles Times, June 13, 1998, at B1. Offering the apology "on behalf of all Americans," President Clinton said:

> We recognize the wrongs of the past and offer our profound regret to those who endured such grave injustice. We understand that our nation's actions were rooted in racial prejudice and wartime hysteria, and we must learn from the past and dedicate ourselves as a nation to renewing and strengthening equality, justice and freedom.

Id. Indeed, even recipients of the settlement felt that the United States Government had properly accepted responsibility for the internments, which occurred over 50 years before. Carmen Mochizuki, the named plaintiff in the class action lawsuit, said at the time of the settlement: "We are victorious today for making the United States government [sic] finally accept responsibility for its actions against us." *Id.*

Second, as stipulated by Petitioners, the sole reason that Petitioners did not receive redress for their detentions is because they *refused* a class action settlement agreement, in which the United States Government agreed to make a $5,000 redress payment to each eligible member of the class, which included

Petitioners. (Petition at 2); *see also Mochizuki*, 43 Fed. Cl. Thus, in filing this petition, Petitioners are essentially asking the Commission to provide remedies for events for which the United States Government has already offered redress.

. . . Petitioners' claim that the alleged acts are "ongoing" because "they have received no redress," (Petition at 6), implies more than it should. While it is true they have not received redress, it was because of Petitioners' own choices. In this regard, Petitioners are attempting to use the Commission to circumvent and replace a "fair, reasonable, and adequate" domestic remedy. To permit such obvious "awards shopping" would undercut the effective administration of case settlements in the domestic courts of Member States.

For the Commission to find competence *ratione temporis* in this case, it would have to embark upon a dangerously slippery slope without any temporal boundaries to possible claims. . . . By considering this Petition, the Commission improperly would be exceeding the limits of its jurisdiction to investigate and hear claims that predate its existence and the application of the relevant instrument, i.e., the American Declaration.

2. The Petition Should be Declared Inadmissible Because Petitioners Failed to Pursue and Exhaust Domestic Remedies

Article 31(1) of the Commission's Rules of Procedure provides that, in order for a petition to be admissible, the petitioning party must affirm that "the remedies of the domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." As the Inter-American Court has stated: "the rule of prior exhaustion of domestic remedies allow the state to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction." I/A Court H.R., *Velásquez Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988, Ser. C No. 4, para. 61 (1988) (holding in a case of forced disappearance that domestic legal remedies were ineffective because the detention was clandestine). The exhaustion

requirement essentially compels the claimant to present his claim to an appropriate domestic court, support the claim with all relevant evidence and legal arguments, and take advantage of all procedures for appeal. *Restatement of Foreign Relations Law* (*Third*) section 713, reporter's note 5, and citations contained therein.

Petitioners failed to exhaust available domestic remedies. Their denial of CLA relief by the Court of Federal Claims could have been appealed to the United States Court of Appeals for the Federal Circuit. Under United States' Federal Rules of Appellate Procedure, Petitioners had 60 days to appeal from the time the Court of Federal Claims entered its decision, but Petitioners chose not to appeal. Fed. R. App. P. 4(a)(1)(B). Petitioners state that they did not appeal the decision because the United States Supreme Court had declined certiorari for the appeals of *other* claimants for *non*-CLA matters. (Petition at 4) However, the Commission has stated that "the fact that [a petitioner] fears an unfavorable judgment . . . is not sufficient reason to abstain from contesting the ruling." IACHR, Admissibility Report No. 87/03, Petition 12.006, Oscar Sirí Zuñiga, October 22, 2003, Honduras, Annual Report 2003, para. 43 (holding that in order for the Inter-American system to fulfill its supplementary role to Member States' internal legal systems, the alleged victim must exhaust all domestic remedies available to him); *see also Velásquez Rodríguez*, at para. 67. The Supreme Court's decision not to take the appeal of other claims has absolutely no bearing on the appellate rights or chances of Petitioners. Furthermore, the claim argued by Petitioners seeking redress under the CLA is highly factual, making it even less likely that the appeals of others would affect the appeals of Petitioners in any way. . . .

Additionally, Article 31(2) of the Commission's Rules of Procedure specifies three exceptions to the exhaustion requirement that may arise when: (1) the domestic legislation of the State concerned does not afford due process; (2) the party alleging violation of his or her rights has been denied access to remedies under domestic law or has been prevented from exhausting them; or (3) there has been unwarranted delay in rendering a final judgment.

None of the specific exceptions to the exhaustion rule under Article 31(2) of the Commission's Rules of Procedure apply to this case. First, the CLA does, in fact, provide for due process, as evidenced by its granting of the Court of Federal Claims review of administrative processes. *See* 50 U.S.C. app. § 1989b-4(h) (Supp. V. 1993). Second, not only have Petitioners not been denied access to remedies under domestic law, but they have actually *refused* existing remedies under domestic law. Finally, there was not any unwarranted delay in rendering a final judgment by the United States court system because, due to Petitioners' decision not to appeal their claim, the appellate courts did not have an opportunity to review the matter. . . .

* * * *

b. Operation Gatekeeper

On February 20, 2004, the United States submitted its reply in Case No. P65/1999, *Operation Gatekeeper*, to the Inter-American Commission on Human Rights ("Commission"). This case was based on a petition by the California Rural Legal Assistance Foundation and the American Civil Liberties Union of San Diego and Imperial Counties alleging that the tightening of border controls under the U.S. initiative in southern California known as Operation Gatekeeper violated the American Declaration of the Rights and Duties of Man. In its reply, the United States requested that the Commission declare the petition inadmissible, *inter alia*, because it "fails to state facts that tend to establish a violation of the rights set forth in the American Declaration of the Rights and Duties of Man ('American Declaration') and is manifestly groundless" and because the case is moot "in view of recent developments and changes in the U.S. border control policy."

The full text of the U.S. reply, excerpted below (footnotes omitted), is available at *www.state.gov/s/l/c8183.htm*.

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Although styled as a human rights petition, the logical thrust of Petitioners' argument is that the United States should somehow be deprived of the sovereign power to control migration of aliens into its territory. The sad reality is that people are willing to take risks to enter the United States illegally. Short of permitting every alien to enter its territory without restriction—a policy taken by no government on earth—it is foreseeable that people may die in an illegal attempt to enter. This unfortunate reality does not constitute a human rights violation, nor could it, as the logical consequences of such a far-reaching decision would be to vanquish all attempts by governments to control entry of foreign nationals into their territory.

Argument

I. *Failure to state facts that tend to establish a violation*

According to Article 34 of the IACHR Rules of Procedure ("Rules") the petition must state facts that tend to establish a violation of the American Declaration, otherwise the Commission must determine the petition as inadmissible.

In their memorandum of November 29, 2001, Petitioners claim that there are new facts to show that Operation Gatekeeper violates Article I of the Declaration by "deliberately put(ting) migrants in mortal harm's way." They claim that illegal migrants die as a direct result of Operation Gatekeeper. Petitioners' claims are unfounded and inaccurate, and they fail to enumerate specific facts to support their claims.

A. Failure to show state action

Petitioners allege that the rise in the death toll of illegal migrants is attributed to Operation Gatekeeper. Petitioners do not, however, present any evidence, nor can they, that these alleged human rights violations are attributable to State action, and thus there is no showing of a human rights violation. Petitioners do admit that the causes of death for illegal migrants crossing the border are heat exposure, hypothermia, dehydration, or drowning. These deaths,

while tragic, are a result of people being ill prepared to cross harsh terrain and are not attributable to any policy or specific actions of the United States.

The petition also fails to articulate specific actions of U.S. actors, such as border control agents or law enforcement officers that resulted in the death of illegal migrants. Petitioners cannot allude to such specifics because they do not have any facts to support such a claim.

B. Failure to show breach of a duty under the American Declaration

Petitioners argue that Operation Gatekeeper violates Article I of the American Declaration. Petitioners' argument is simply not true, nor have Petitioners offered any facts that demonstrate the veracity of this allegation. Instead, Petitioners are attempting to cloak a political critique of the United States border control policy in the garments of a human rights violation.

In attempting to create a human rights argument, Petitioners erroneously cite to various cases that are clearly distinguishable. For example, in *Neira Alegría*, [Inter-Am. Ct. H.R. (ser. C) No. 20 (1995)] the Inter-American Court addressed the direct actions of State actors that threatened the lives of their citizens, unlike the situation at hand.

In *Neira*, the petitioners were involved in a prison riot during which the Peruvian Navy entered and took control of the prison. As a result, several inmates were killed, and the petitioners' families declared petitioners missing. This case involved the direct actions of State actors that resulted in harm to the petitioners. Here, on the contrary, there were no direct actions by State actors that resulted in harm to the Petitioners.

Petitioners also improperly cite to *McCann and Others v. the United Kingdom*, Application No. 17/1994/464/545 (27 August 1995). Apart from the obvious fact that *McCann* involves the interpretation of the European Convention rather than the American Declaration, in *McCann*, the European Court of Human Rights determined that the United Kingdom violated Article 2 of the European Convention for the Protection of Human Rights when

U.K. military personnel killed three Irish Republican Army terrorists suspected of planning an attack in Gibraltar. *McCann* involved actions by the State actors that resulted in death.

Petitioners additionally cite to *K.H.W. v. Germany*, Application No. 37201/97 (22 March 2001), in which the Court held that border-policing regimes must comply with the need to preserve human life. The facts in that case involved East Germans who attempted to cross the Berlin wall over to West Germany and died as a result of triggering anti-personnel mines or automatic firing systems, or were shot by East German border guards. As with the previously mentioned cases, the facts at issue were the direct actions of State actors that resulted in the death of those attempting to cross the Berlin wall. On the contrary, Operation Gatekeeper did not involve the implementation of anti-personnel mines or automatic firing systems. The deaths of illegal migrants are directly attributable to the natural environment and their own unlawful attempts to enter the United States. Operation Gatekeeper, Operation Desert Safeguard, and subsequent policies have included measures that offer humanitarian assistance to illegal migrants and serve to protect and save lives.

At issue in this petition are not the direct actions of U.S. border patrol agents that resulted in a particular harm to a specific migrant, but the overall policy of the United States border control. The facts in the cases cited above center around the actions of State actors that led to injury or death. Here, it is the harsh natural environment and the unlawful actions of the smugglers and migrants crossing the southern border of the United States that result in injury or death at issue in this petition.

Petitioners further attempt to argue that these cases are applicable to Operation Gatekeeper on the ground that states must take "all reasonable efforts" to minimize threats to the right to life. As a preliminary matter, there is no basis under the American Declaration for imposing such a standard on governmental policies of a general nature. Indeed, such a standard would seem to invite the Commission to review virtually all policies of governments and substitute its judgment on issues of a general nature for those of democratically elected governments. That said, it should be noted that the United States is taking reasonable efforts to minimize

the threat to the right to life for those illegally crossing the border. As will be discussed further, the United States Border Safety Initiative ("BSI") has significantly increased its capabilities in addressing the humanitarian needs of migrants. The United States BSI has also targeted smugglers who are responsible for leading illegal migrants through the worst parts of the desert in an attempt to escape detection. The United States, in [an] attempt to help save the lives of illegal migrants who are at the mercy of the smugglers, has established Operation ICE (Immigration and Customs Enforcement) Storm, which targets smugglers' monetary sources.

Petitioners claim that the result of illegal migrants dying in the harsh desert landscapes of the United States is somehow attributable to Operation Gatekeeper . . . The United States, however, cannot be held responsible for the natural landscape of its borders nor for the illegal activity that its law enforcement personnel are acting to prevent. . . .

Petitioners further claim that the deaths result from Operation Gatekeeper "pushing" illegal migrant traffic to certain spots along the United States border. The reality is that Operation Gatekeeper, Operations Desert Safeguard, and other programs operate together to protect the entire southern border of the United States. The result of illegal migrants attempting to traverse tougher terrain is a purposeful choice by illegal migrants and smugglers to escape detection and apprehension by U.S. border control. Regardless of where the illegal migrants choose to try to enter the United States, they are still crossing the borders of the United States "illegally and in violation of our laws." . . .

Article I of the American Declaration enumerates a right to life and security of person. Here, the right to life is a decision that rests in the hands of an individual of whether or not to take the risk of crossing the harsh terrain of the United States southern border. The individual migrant will make many vital decisions, such as to violate immigration laws by entering illegally, to choose a particular route, what preparations they undertake, and what safety precautions prior to such a perilous journey.

The United States has a right to secure its borders and enforce its immigration laws. Therefore, in order to protect the security of its citizens, the United States has a right and indeed a duty to its

citizens to employ border agents to secure its borders and protect its citizens. Especially since the attacks on the United States of September 11, 2001, in order to ensure the security of its citizens, the United States has an urgent and compelling need to ensure that its borders are secure. The United States border control policies of Operation Gatekeeper, Operation Desert Safeguard, and others operate together to keep the U.S. borders free of illegal migrants and potential terrorists. According to U.S. Customs and Border Protection Commissioner Robert C. Bonner, the addition of Operation Desert Safeguard and the increase of agents "was a matter of national security."

Contrary to Petitioners' claim, the United States is acting in good faith in implementing its border control policy. The principle of good faith and the abuse of rights doctrine preclude a State from actions that cause unnecessary injury. As previously stated, at issue in the Petition is not any particular actions of U.S. border agents that have resulted in the deaths of illegal migrants, but a critique of U.S. border control policy.

The right to life does not impose an affirmative obligation by the state to somehow prevent all loss of life, especially where such deaths are directly attributable to the unlawful acts of the victims themselves. Rather, it provides protection against the arbitrary loss of life. Our policies are reasonable, and they comport with our right to secure our borders, while at the same time taking action to specifically prevent the loss of life among migrants.

Therefore, the Commission should declare petition as inadmissible, because it fails to state facts that tend to establish a violation of the rights set forth in the Declaration and is wholly groundless.

II. *Petition is moot in view of recent developments and changes in the U.S. border control policy.*

According to Article 34(c), a petition is inadmissible when "supervening information or evidence presented . . . reveals that a matter is inadmissible or out of order." Recent developments and changes in the United States border policy demonstrate that petition is inadmissible.

The policy Petitioners cite in their petition is Operation Gatekeeper, which was implemented in 1994. Since 1994, there have been numerous developments to Operation Gatekeeper, including the establishment of other border control policies.

In June 1998, the then Immigration and Naturalization Service announced the Border Safety Initiative [*see www.cbp.gov/xp/cgov/enforcement/border_patrol/safety_initiative.xml.*] The goal of the BSI is to reduce injuries and fatalities along the Southwest border. On June 22, 2001, the United States and Mexico issued a formal joint communiqué in which they agreed to conduct joint training in search-and-rescue techniques, exchange intelligence related to migrant smuggling, and enhance the effectiveness of their joint outreach efforts to would-be migrants on the dangers of unauthorized border crossings, especially in remote areas during hot summer and cold winter months. From the inception of the BSI in June 1998 to February 2003, Border Patrol Agents rescued over 5,000 aliens.

One of the more recent developments occurred in June 2003 with the introduction of Operation Desert Safeguard. This program is a multi-agency operation, performed in conjunction with the Mexican government, that is designed to "dramatically reduce the number of people attempting to illegally enter the United States through the West Desert corridor of the Sonoran Desert from Mexico, and by so doing, to dramatically reduce the number of people who die attempting to cross that desert." Operation Desert Safeguard includes increasing the number of agents, helicopters, surveillance flight hours, interior checkpoints, and the involvement of the Shadow Wolves from Tohono O'Oodham reservation.

Additionally, the U.S. Border Control has created the Border Patrol Search, Trauma and Rescue Team ("BORSTAR") which is a highly-specialized team of individuals that are trained to conduct search and rescue missions in difficult terrain and to provide the best medical care possible to stabilize patients and transport them to areas accessible to more advanced emergency medical facilities. BORSTAR is credited with saving lives not only of civilians and Border Patrol agents but also of illegal immigrants. . . .

In addition, the U.S. and Mexico have agreed upon an updated Action Plan for Cooperation and Border Safety and a

Memorandum of Understanding on the Safe, Orderly, Dignified and Humane Repatriation of Mexican Nationals. These two documents enhance efforts to ensure a safe, orderly, and humane border and signal continued, deepened binational coordination and cooperation to address a common problem. The programs outlined above display the good faith commitment of the United States to provide humanitarian relief to those attempting to illegally cross our borders.

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3. Human Rights in Sudan: Darfur

As discussed in Chapter 17.A.5., during 2004 the United States continued to be engaged in efforts to reach a peaceful resolution in Sudan of the long-standing civil war (often referred to as the "North-South" peace talks) and to address the crisis in the western region of Darfur. On September 9, 2004, Secretary of State Colin L. Powell testified on Darfur before the U.S. Senate Foreign Relations Committee. Excerpts below from his prepared testimony address the U.S. conclusion concerning the commission of genocide in Sudan.

The full text of Secretary Powell's testimony is available at *www.state.gov/secretary/former/powell/remarks/36032.htm*

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* * * *

Since the U.S. became aware of atrocities occurring in Sudan, we have been reviewing the Genocide Convention and the obligations it places on the Government of Sudan.

In July, we launched a limited investigation by sending a team to refugee camps in Chad. They worked closely with the American Bar Association and the Coalition for International Justice and were able to interview 1,136 of the 2.2 million people the UN estimates have been affected by this horrible violence. Those interviews indicated:

- A consistent and widespread pattern of atrocities (killings, rapes, burning of villages) committed by *jinjaweid* and government forces against non-Arab villagers;
- Three-fourths (74%) of those interviewed reported that the Sudanese military forces were involved in the attacks;
- Villages often experienced multiple attacks over a prolonged period before they were destroyed by burning, shelling or bombing, making it impossible for villagers to return.

When we reviewed the evidence compiled by our team, along with other information available to the State Department, we concluded that genocide has been committed in Darfur and that the Government of Sudan and the *jinjaweid* bear responsibility—and genocide may still be occurring. Mr. Chairman, we are making copies of the evidence our team compiled available to this committee today.

We believe in order to confirm the true nature, scope and totality of the crimes our evidence reveals, a full-blown and unfettered investigation needs to occur. Sudan is a contracting party to the Genocide Convention and is obliged under the Convention to prevent and to punish acts of genocide. To us, at this time, it appears that Sudan has failed to do so.

Article VIII of the Genocide Convention provides that Contracting Parties "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

Today, the U.S. is calling on the UN to initiate a full investigation. To this end, the U.S. will propose that the next UN Security Council Resolution on Sudan request a UN investigation into all violations of international humanitarian law and human rights law that have occurred in Darfur, with a view to ensuring accountability.*

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* Editor's note: *See* UN Security Council Resolution 1564, discussed in Chapter 17.A.5.b.

Mr. Chairman, as I said, the evidence leads us to the conclusion that genocide has occurred and may still be occurring in Darfur. We believe the evidence corroborates the specific intent of the perpetrators to destroy "a group in whole or in part". This intent may be inferred from their deliberate conduct. We believe other elements of the convention have been met as well.

Under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which both the United States and Sudan are parties, genocide occurs when the following three criteria are met:

- Specified acts are committed:
  a) killing;
  b) causing serious bodily or mental harm;
  c) deliberately inflicting conditions of life calculated to bring about physical destruction of a group in whole or in part;
  d) imposing measures to prevent births; or
  e) forcibly transferring children to another group;
- These acts are committed against members of a national, ethnic, racial or religious group; and
- They are committed "with intent to destroy, in whole or in part, [the group] as such".

The totality of the evidence from the interviews we conducted in July and August, and from the other sources available to us, shows that:

- The *jinjaweid* and Sudanese military forces have committed large-scale acts of violence, including murders, rape and physical assaults on non-Arab individuals;
- The *jinjaweid* and Sudanese military forces destroyed villages, foodstuffs, and other means of survival;
- The Sudan Government and its military forces obstructed food, water, medicine, and other humanitarian aid from reaching affected populations, thereby leading to further deaths and suffering; and

- Despite having been put on notice multiple times, Khartoum has failed to stop the violence.

Mr. Chairman, some seem to have been waiting for this determination of genocide to take action. In fact, however, no new action is dictated by this determination. We have been doing everything we can to get the Sudanese government to act responsibly. So let us not be preoccupied with this designation of genocide. These people are in desperate need and we must help them. Call it a civil war. Call it ethnic cleansing. Call it genocide. Call it "none of the above." The reality is the same: there are people in Darfur who desperately need our help.

I expect that the government in Khartoum will reject our conclusion of genocide anyway. Moreover, at this point genocide is our judgment and not the judgment of the international community. Before the Government of Sudan is taken to the bar of international justice, let me point out that there is a simple way for Khartoum to avoid such wholesale condemnation. That way is to take action.

The government in Khartoum should end the attacks, ensure its people—all of its people—are secure, hold to account those who are responsible for past atrocities, and ensure that current negotiations are successfully concluded. That is the only way to peace and prosperity for this war-ravaged land. Specifically, Mr. Chairman, the most practical contribution we can make to the security of Darfur in the short-term is to increase the number of African Union monitors. That will require the cooperation of the Government of Sudan.

In the intermediate and long term, the security of Darfur can be best advanced by a political settlement at Abuja and by the successful conclusion of the peace negotiations between the SPLM and the Government of Sudan.

Further excerpts below from Secretary Powell's prepared remarks address the broader issues of the humanitarian crisis.

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* * * *

The violence in Darfur has complex roots in traditional conflicts between Arab nomadic herders and African farmers. The violence intensified during 2003 when two groups—the Sudan Liberation Movement and the Justice and Equality Movement—declared open rebellion against the Government of Sudan because they feared being on the outside of the power and wealth-sharing agreements in the north–south negotiations. Khartoum reacted aggressively, intensifying support for Arab militias, the so-called *jinjaweid*. The Government of Sudan supported the *jinjaweid*, directly and indirectly, as they carried out a scorched-earth policy towards the rebels and the African civilian population.

Mr. Chairman, the United States exerted strong leadership to focus international attention on this unfolding tragedy. We first took the issue of Sudan to the United Nations (UN) Security Council last fall. President Bush was the first head of state to condemn publicly the Government of Sudan and to urge the international community to intensify efforts to end the violence. In April of this year, the United States brokered a ceasefire between the Government of Sudan and the rebels, and then took the lead to get the African Union (AU) to monitor that ceasefire.

* * * *

In my midsummer meetings with the Government of Sudan, we presented them with the stark facts of what we knew about what is happening in Darfur from the destruction of villages, to the raping and the killing, to the obstacles that impeded relief efforts. Secretary General Annan and I obtained from the Government of Sudan what they said would be firm commitments to take steps, and to take steps immediately, that would remove these obstacles, help bring the violence to an end, and do it in a way that we could monitor their performance.

There have been some positive developments. . . .

The Sudanese have met some of our benchmarks such as engaging in political talks with the rebels and supporting the deployment of observers and troops from the AU to monitor the ceasefire between Khartoum and the rebels. Some improvements in humanitarian access have also occurred though the government

continues to throw obstacles in the way of the fullest provision of assistance.

The AU Ceasefire Commission has also been set up and is working to monitor more effectively what is actually happening in Darfur. The general who is in charge of that mission, a Nigerian general by the name of Okonkwo, is somebody that we know well. He is the same Nigerian general who went into Liberia last year and helped stabilize the situation there.

The AU's mission will help to restore sufficient security so that these dislocated, starving, hounded people can at least avail themselves of the humanitarian assistance that is available. But what is really needed is enough security so that they can go home. And what is really needed is for the *jinjaweid* militias to cease and desist their murderous raids against these people—and for the Government in Khartoum to stop being complicit in such raids. Khartoum has made no meaningful progress in substantially improving the overall security environment by disarming the *jinjaweid* militias or arresting its leaders.

So we are continuing to press that Government and we continue to monitor them. We continue to make sure that we are not just left with promises instead of actual action and performance on the ground. Because it is absolutely clear that as we approach the end of the rainy season, the situation on the ground must change, and it must change quickly. There are too many tens upon tens of thousands of human beings who are at risk. Some of them have already been consigned to death because of the circumstances they are living in now. They will not make it through the end of the year. Poor security, inadequate capacity, and heavy rains (which will not diminish until late September) continue to hamper the relief effort.

The UN estimates there are 1,227,000 Internally Displaced Persons (IDPs) in Darfur. In July, almost 950,000 IDPs received some form of food assistance. About 200,000 Sudanese refugees are being assisted by UNHCR and partner organizations in Chad. The World Food Program (WFP) expects two million IDPs will need food aid by October.

U.S. Government provision of aid to the Darfur crisis in Sudan and Chad totaled $211.3 million as of September 2, 2004. This

includes $112.9 million in food assistance, $50.2 million in non-food assistance, and $36.4 million for refugees in Chad, $5 million for refugee programs in Darfur, and $6.8 million for the African Union mission.

The U.S. also strongly supports the work of the AU monitoring mission in Darfur. In fact, we initiated the Mission through base camp set-up and logistics support by a private contractor. . . .

As you know, as we watched through the month of July, we felt more pressure was required. So we went to the UN and asked for a resolution. We got it on July 30.

Resolution 1556 demands that the Government of Sudan take action to disarm the *jinjaweid* militia and bring *jinjaweid* leaders to justice. It warns Khartoum that the Security Council will take further actions and measures—UN-speak for sanctions—if Sudan fails to comply. It urges the warring parties to conclude a political agreement without delay and it commits all states to target sanctions against the *jinjaweid* militias and those who aid and abet them as well as others who may share responsibility for this tragic situation. Too many lives have already been lost. We cannot lose any more time. We in the international community must intensify our efforts to help those imperiled by violence, starvation and disease in Darfur.

But the Government of Sudan bears the greatest responsibility to face up to this catastrophe, rein in those who are committing these atrocities, and save the lives of its own citizens. At the same time, however, the rebels have not fully respected the ceasefire. We are disturbed at reports of rebel kidnappings of relief workers. We have emphasized to the rebels that they must allow unrestricted access of humanitarian relief workers and supplies and cooperate fully, including with the AU monitoring mission.

We are pleased that the Government of Sudan and the rebels are currently engaged in talks in Abuja, hosted by the AU. . . .

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President Bashir has repeatedly pledged to work for peace, and he pledged that again when we met in midsummer. But President Bush, this Congress, Secretary General Annan and the international community want more than promises. We want to

see dramatic improvements on the ground right now. Indeed, we wanted to see them yesterday.

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In addition to engaging the United Nations Security Council, as discussed in Secretary Powell's testimony, the United States urged the UN Commission on Human Rights ("UNCHR") and the UN General Assembly Third Committee to take strong action on the human rights abuses in Sudan. At the UNCHR the European Union ("EU") initially sponsored a resolution on Sudan under Agenda Item 9 ("Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World"), cosponsored by the United States, Canada, Australia, and a number of other states. This resolution condemned the mass murder and destruction in Darfur, held the Government of Sudan ("GOS") accountable for supporting the perpetrators, called on the GOS to stop abusing its citizens, and provided for an effective monitoring mechanism and humanitarian assistance. Subsequently, the EU reached agreement with the African Union to replace the Item 9 resolution with a Chairman's Statement under Agenda Item 3 ("Organization of the Work of the Session"). The United States and some other co-sponsors of the Item 9 resolution refused to accept the weaker Chairman's Statement, blocking adoption by consensus. The European Union then tabled the text of their proposed Chairman's Statement as a decision under Agenda Item 3.

The United States offered an amendment to the decision to add language addressing human rights abuses in Sudan from the original Item 9 resolution. The U.S. amendment failed. The United States then called for a vote on the Item 3 decision; the decision was adopted by a vote of 50 to 1 (United States), with two abstentions (Australia and Ukraine). The Item 9 resolution was required to be dropped from consideration as the rules of procedure do not allow adoption of competing texts on the same subject.

Remarks by Ambassador Richard S. Williamson, head of U.S. delegation to the UNCHR, on April 23, 2004, "General

Statement on Item 3 and 9 on Sudan," given after it was announced that the Item 9 resolution on Sudan would be replaced with a Chairman's Statement under Agenda Item 3, are excerpted below.

The full text of Ambassador Williamson's remarks is available at *www.humanrights-usa.net/statements/0423Sudan.htm.*

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Just days ago, Secretary General Kofi Annan traveled to Geneva to address the Commission on Human Rights during the day of remembrance of the 10th anniversary of the genocide in Rwanda. In his remarks, the Secretary General called upon the international community to never fail as we did ten years ago. And we referred to the acts now going on in the Darfur area of Sudan as "ethnic cleansing." We cannot fail as we have before. "Never Again" must be more than mere words or an idle promise.

Mr. Chairman, regarding the terrible acts going on in Darfur, any resolution of, or decision by, the U.N. Commission on Human Rights must condemn acts of ethnic cleansing. It must hold accountable those responsible for the deplorable acts in Darfur. It must call on the Sudan government to stop arming those engaged in these terrible acts of ethnic cleansing and to stop the support given to the Jingaweid militia group. It must have a strong and effective mechanism to monitor and report on the events in Darfur. And it must guarantee unfettered access for humanitarian assistance to the 900,000 displaced persons living in dangerous and desperate conditions in Darfur.

Mr. Chairman, the report of the Office of the High Commissioner for Human Rights mission to Chad from April 5 to 15, 2004, reports about the "possibility that civilian areas have been directly targeted." It discussed reports of indiscriminate killing of civilians and a "policy using rape and other serious forms of sexual violence as a weapon of war" [and] "killings, rape, burning and looting of villages . . . (and) massive displacement." It says [that] Darfur is a "dire humanitarian crisis" [with] disappearances of "women, children, (and) the elderly."

Mr. Chairman, the Mission reports that the dire situation in Darfur has "developed worrying racial and ethnic dimensions."

The report concludes that "(t)he mission was able to identify disturbing patterns of massive human rights violations in Darfur, many of which may constitute war crimes and/or crimes against humanity. According to information collected from refugees, it appears that there is a reign of terror in Darfur."

The Office of the U.N. High Commissioner's Mission's report highlights the following terrible acts that contribute to creating that reign of terror:

A) Repeated attacks on civilians by Government of Sudan military and its proxy militia forces with a view to their displacement;
B) The use of systematic and indiscriminate aerial bombardments and ground attacks on unarmed civilians;
C) The use of disproportionate force by the Government of Sudan and Jingaweid forces;
D) That the Jingaweid have operated with total impunity and in close coordination with the forces of the Government of Sudan
E) The attacks appear to have been ethnically based (let me repeat, the attacks appear to have been ethnically based) with the groups targeted being essentially the following tribes reportedly of African origin: Zaghawas, Masaalit, and Furs . . .
F) The pattern of attacks on civilians includes killing, rape, pillage . . . The patterns of violence point to an intent on the part of the Sudanese authorities to force the population to disperse.

* * * *

And we fear that there is terrible famine to come where tens of thousands may well perish. This could become a catastrophe of unimaginable proportions if we fail to act.

* * * *

The U.N. Commission on Human Rights cannot do everything. It cannot unilaterally stop the carnage. But that does not mean that we must not do what we can.

Mr. Chairman, the Commission can shine light on the desperate situation in Darfur. We can condemn the violence. We can and must stand tall and strong for an end to ethnic violence.

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On November 24, 2004, a statement from John Danforth, U.S. Permanent Representative to the United Nations, was delivered to the Third Committee on the need for action concerning Darfur. A no-action motion before the committee carried, however. The full text of Ambassador Danforth's statement, excerpted below, is available at *www.un.int/usa/04_259.htm. See also* 5.a. below concerning U.S. objection to Sudan's membership in the UNCHR.

Bringing peace to Sudan is a tough, complex process. It requires carefully coordinated, cooperative international pressure combined with equally well-coordinated incentives to the warring parties. Without unity of international action and unity of international outrage, people will continue to suffer. The "no action" vote before the Third Committee today, if successful, will seriously disrupt the process of ending the suffering in Sudan. We urge you to vote "no."

Last week in Nairobi, the parties to the North South conflict in Sudan committed to resolving their differences by December 31. We held out the prospect of international support for Sudan when it completes the peace process. But we also condemned the ongoing atrocities in Darfur and demanded that these atrocities cease immediately. It was an important part of a unified, coordinated process for bringing peace to the region.

The failure of the Third Committee to consider a resolution on Sudan's human rights abuses would be short-sighted, weak, and dangerous. It is bad enough that Sudan is on the Human Rights Commission to begin with. Now the General Assembly risks failing to acknowledge the obvious—Sudan's consistent pattern of human rights abuses.

In fact, there is a lot of bad history here. In its annual session this past spring, the Commission on Human Rights passed a weak

resolution on Sudan—one which the United States tried to amend and then opposed. It was a toothless resolution that failed to address in any serious way the most pronounced example of human rights abuses in the world today. Then, in May, the African Group nominated Sudan to be reelected to the Commission on Human Rights—a move that caused the United States to walk out of the Economic and Social Council in protest. Now, the Third Committee proposes to fail the world again by an indefensible, parochially motivated "No Action" vote on the pending resolution.

Three consecutive failures of member states of the United Nations to present a unified front against well-documented atrocities would represent nothing less than the complete breakdown of the UN's deliberative bodies related to human rights. If these bodies cannot speak with one voice on an issue as clear as Darfur, what can they do? In contrast, the Security Council has in the past two months assisted in the conclusion of a peace agreement, kept constant pressure on the warring parties, and launched a commission of inquiry on human rights abuses.

If the no action motion passes, today will be yet another bad day for the people of Darfur. The Charter of the United Nations requires that member states—and I quote—"reaffirm the faith in fundamental human rights, and in the dignity and worth of the human person." By valuing group solidarity over assisting those in dire need, by refusing to censure member states by name, the Commission on Human Rights, ECOSOC, and now the Third Committee will have abdicated their responsibilities to the international community and will ignore the Charter of the United Nations.

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See also declaration by President George W. Bush, Prime Minister of Ireland Bertie Ahern, and President of the European Commission Romano Prodi at EU-U.S. summit in Shannon, Ireland, June 24, 2004, Chapter 17.A.5.a.

4. Human Rights in Colombia

a. Colombian Armed Forces

Section 564(a)of the FY 2003 Foreign Operations, Export Financing and Related Programs Appropriations Act conditions the obligation of 25 percent of the funds appropriated by that act that are available for assistance for the Colombian Armed Forces on two certifications to Congress by the Secretary of State with respect to certain human rights-related issues. Division E of the Consolidated Appropriations Resolution, 2003, Pub.L.No. 108–7, 117 Stat. 11,205. The Secretary of State made the first determination on July 7, 2003, *see Digest 2003* at 284. On January 30, 2004, the Secretary of State made the second determination, enabling the obligation of the remaining foreign assistance funds for Colombia at issue. 69 Fed. Reg. 4555 (Jan. 30, 2004). The certification stated, in accordance with the statutory requirement, that:

> (A) The Commander General of the Colombian Armed Forces is suspending from the Armed Forces those members, of whatever rank, who have been credibly alleged to have committed gross violations of human rights, including extra-judicial killings, or to have aided or abetted paramilitary organizations; (B) The Colombian Government is prosecuting those members of the Colombian Armed Forces, of whatever rank, who have been credibly alleged to have committed gross violations of human rights, including extra-judicial killings, or to have aided or abetted paramilitary organizations, and is punishing those members of the Colombian Armed Forces found to have committed such violations of human rights or to have aided or abetted paramilitary organizations; (C) The Colombian Armed Forces are cooperating with civilian prosecutors and judicial authorities in such cases, (including providing requested information, such as the identity of the persons suspended

from the Armed Forces and the nature and cause of the suspension, and access to witnesses, relevant military documents and other requested information); (D) The Colombian Armed Forces are severing links (including denying access to military intelligence, vehicles, and other equipment or supplies, and ceasing other forms of active or tacit cooperation), at the command, battalion, and brigade levels, with paramilitary organizations; (E) The Colombian Armed Forces are executing orders for capture of leaders of paramilitary organizations that continue armed conflict; and that, as required in section 564(a)(3), the Colombian Armed Forces are conducting vigorous operations to restore government authority and respect for human rights in areas under the effective control of paramilitary and guerrilla organizations.

In 2004 substantially similar certification requirements were enacted as § 563 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, Division D, Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, 118 Stat. 3. Secretary of State Colin L. Powell published the first required certification in the Federal Register on September 29, 2004, thus allowing all but 12.5% of the relevant funds appropriated in the FY 2004 act to be made available for the Colombian Armed Forces. 69 Fed. Reg. 58,211 (Sept. 29, 2004). *See also* U.S. comments on report of the UN High Commissioner for Human Rights on the human rights situation in Colombia, available at *www.humanrights-usa.net/2004/statements/0414Columbia.htm*.

b. Report on U.S. programs

In April 2004 the Department of State transmitted to Congress its second annual report in response to § 694(a) of the Foreign Operations Authorization Act, FY 2003, Pub. L. No. 107–229, 106 Stat. 1465. The report described the status of activities funded or authorized, in whole or in part, by the Department of State or the Department of Defense in

Colombia to promote alternative development, recovery and resettlement of internally displaced persons, judicial reform, the peace process, and human rights. As further requested by House Managers Report 108–222, the report also included information on the progress of USAID-funded programs that provide assistance to Afro-Colombian communities. Excerpts below address the status of military justice programs "that sensitize the Colombian military on the rule of law, human rights, and international humanitarian law."

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

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During FY 2003, the U.S. Southern Command continued its support in establishing and implementing Colombian military justice programs that sensitize the Colombian military on the rule of law, human rights, and international humanitarian law. In September 2003, the Colombian Military Penal Justice Corps (MPJC) celebrated its second anniversary. The MPJC's 320 military, police and civilian lawyers, along with non-legal personnel continue to receive professional legal education and training. Courses include Military Justice, Criminal Investigation Operational Law, International Humanitarian Law and Human Rights. The organization's primary purpose is the administration of justice throughout the Colombian armed forces. Ninety Colombian MPJC officers have completed or are enrolled in a one-year Military Penal Justice specialization degree program. This corps of instructors in human rights and international humanitarian law travels to military units throughout Colombia to provide training. A School of Human Rights, International Humanitarian Law and Military Justice was established at the Colombian Military University of Nueva Granada in July 2003.

It serves as both a home for the MPJC as well as a central coordinator for human rights, international humanitarian law and rule of law training for the Colombian Armed Forces. To date, US Southern Command has supported specific training in these areas

for over 3,362 personnel in addition to incorporating these topics in all military training provided.

United States Military Group (USMILGP) sponsored activities in support of military respect for human rights include seminars on human rights in military operations for Colombian Army, Navy and Air Force unit commanders, human rights officers, legal advisors, and operational personnel, and distribution of instructors' manuals and CD-ROMS on human rights and international humanitarian law for trainers in the Colombian armed forces. Long distance learning courses have been established to maximize the training audience. While previously, USMILGP had sent Colombian military and Ministry of Defense personnel to the Human Rights Instructor course at the Western Hemisphere Institute of Security and Cooperation (WHINSEC), now these instructors are being trained by the Colombian Armed Forces own School of Human Rights. In 2003, a training team from the Defense Institute of Legal Studies traveled to Colombia and trained over 300 Naval Cadets and 30 Colombian Marine military and police personnel.

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5. UNCHR

a. Reform of the UN Commission on Human Rights

On March 19, 2004, Richard S. Williamson, U.S. Representative to the UNCHR, commented on the Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on Human Rights in remarks to the sixtieth session of the UNCHR. Excerpts below from his comments present U.S. views on the role of the commission.

The full text of Ambassador Williamson's remarks is available at *www.humanrights-usa.net/2004/statements/0319Williamson.htm.*

In view of the responsibility originally intended for this Commission, the United States is committed to an effective Commission—one that takes concrete steps that result in real and tangible improvements in the life of human beings worldwide. To this end we focus on:

- Working with other nations that respect the rule of law at home to improve the work of the Commission to extend the rule of law internationally;
- Encouraging the operation of a democracy caucus to express shared, core values;
- Encouraging the election to this Commission of members with strong human rights records who embrace democratic principles and practices; and
- Improving the procedural mechanisms, and thus the daily and the overall functioning, of the Commission.

We believe that initial steps towards reform of this Commission, the premiere body dedicated solely to the global protection of human freedom, must focus on its membership. As Secretary General Kofi Annan stated one year ago: "Membership in this Commission implies responsibilities as well as privileges." We must find a way to ensure that members share a true commitment to the basic purpose and mandate of this Commission to promote and protect human rights. This important body should not be allowed to become a protected sanctuary for human rights violators who aim to pervert and distort its work. We therefore commit ourselves to the goal that real democracies, democracies with regularly scheduled and free and fair elections, an independent judiciary, a strong multi-party system, the rule of law, transparency and accountability in government, a free and independent media, and constitutional guarantees of human rights and fundamental freedoms, are most fit for membership on the Commission. We encourage democratic governments in each regional group to present themselves as candidates for the Commission and urge democracies to support the election of other democracies. As President Bush said earlier this month, "All democracies do not look the same. Around the world, democracy grows in very different

circumstances. . . . [However,] all successful democracies are built on a foundation of tolerance, religious liberty, respect for both men and women, the rule of law and economic freedom."

A second goal of reform of this Commission would be for it to re-establish the importance of implementation of treaties and other human rights obligations that States have ratified or undertaken. The true problem in advancing the protection of individual rights is not the absence of standards but the lack of political will to abide by existing standards. Far too many governments, including profoundly repressive ones, have cynically ratified and then ignored major human rights treaties. The Commission should seek to rectify this hypocrisy.

A third objective of reform is to improve the procedures of this body to enable it to perform its work more effectively. We agree with the objective stated in the High Commissioner's Report on the need for strengthening the system of special rapporteurs, and we put forth the following specific proposals for consideration by the High Commissioner and the membership.

- One, in order to increase resources available to each special mechanism, avoid redundancy, and strengthen their overall functioning and contribution, we support a halt to the recent proliferation of special rapporteurs or other unnecessary mandate-holders (there are over 40 at last count) in order to focus on clear and high priority concerns.
- Two, we call for rationalization and consolidation of the special mechanisms and compliance with the defined mandate (for example, consideration should be given to merging the mandates of the Special Rapporteur on the Right to Development and the Special Rapporteur on Extreme Poverty into one Special Rapporteur on Human Rights and Development).
- Three, we call on the Commission to oppose a no-action motion for items within the Commission's competence, as such motions are often used only to silence discussion of human rights realities.

- Four, we maintain that all Programmatic Budget Implications (PBIs) must be circulated in writing well in advance of action on the items in question.
- Five, we support the effort to increase compliance with Commission timetables and to rationalize maximum length and number of interventions and resolutions.
- And Six, we support efforts to increase transparency (including prior and adequate notice) of informal consultations by sponsors and co-sponsors.

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On May 4, 2004, Ambassador Sichan Siv, U.S. Representative to the Economic and Social Council, addressed the Economic and Social Council on the candidacy of Sudan for the Commission on Human Rights prior to the United States walking out of the Council in order to avoid participating in the election of Sudan to the Commission. Sudan was made a member of the Commission.

The full text of Ambassador Siv's remarks, set forth below in full, is available at *www.un.int/usa/04_074.htm.* For further discussion of Sudan, *see* A.3. *supra* and Chapter 17.A.5.

The United States is perplexed and dismayed by the decision to put forward Sudan—a country that massacres its own African citizens—for election to the Commission on Human Rights (CHR). This will mark the third recent term for which the African Group has presented Sudan as a CHR candidate in a clean slate. This year, above all previous ones, my delegation believes that this candidature is entirely inappropriate.

With credible reports continuing to come out of Sudan regarding the most serious human rights violations in Darfur, Sudan's membership on the Commission threatens to undermine not only its work, but its very credibility. On the final day of its 60th session last month—just 11 days ago—the Commission articulated its deep concerns about the human rights situation in Sudan. It adopted a decision calling for the appointment of an independent expert to monitor the situation in Darfur. While at the time, my Government

made it clear that it advocated a much stronger resolution on Darfur, the difference between the U.S. position and that of most of Commission members was a matter of tactics—that is, how best to persuade the Government of Sudan to stop abusing its citizens—rather than different assessments of the situation. It was clear to us, and to most of the Commission, that a human rights and humanitarian crisis of tragic scale was occurring in Sudan.

On April 7, Secretary General Kofi Annan participated in the commemoration of the 10th anniversary of the genocide in Rwanda at the Commission on Human Rights in Geneva. He delivered a strong condemnation of the Sudanese Government's behavior in Darfur, and likened events there to "ethnic cleansing." The report of the Office of the High Commissioner for Human Rights Mission to Chad from April 5 to 15, 2004, had reported the "possibility that civilian areas have been directly targeted." It discussed reports of indiscriminate killing of civilians and a "policy using rape and other serious forms of sexual violence as a weapon of war." The mission reported "killings, rape, burning and looting of villages . . . (and) massive displacement." It pointed to a "dire humanitarian crisis" in Darfur, including disappearances of "women, children, (and) the elderly."

As the reality of Darfur unfolded, even Sub-Saharan nations, which had been solidly behind Sudan's efforts to block Commission action on Sudan, began to change their views. However, in the end, the U.S. Delegation lost the fight for a stronger resolution condemning Sudan. But the LEAST we should be able to do is to NOT elect a country to the only global body charged specifically with protecting human rights, at the precise time when thousands of its citizens are being murdered or risk starvation.

We urge you today to consider the implications of having Sudan continue as a member of the Human Rights Commission. Consider the ramifications of standing by and allowing the Commission to become a safe-haven for the world's worst human rights violators, especially one engaged in "ethnic cleansing." Consider the impact that this will have on the Commission's reputation. Consider how it will affect the Commission's ability to function effectively as the world's protector of human rights and fundamental freedoms.

The United States will not participate in this absurdity. Our delegation will absent itself from the meeting rather than lend support to Sudan's candidacy. We ask that the Secretariat take note of our action in the record of this session. This decision flows from our commitment to the CHR. It is our belief that the Commission must adhere to high standards if it is to have credibility and achieve the purposes for which it was created.

We strongly urge delegations to use this election as an opportunity to express concerns about the grave human rights situation in Sudan, rather than lend their support to Sudan's candidacy.

b. Treatment of individual countries

On March 25, 2004, Ambassador Williamson addressed the UNCHR on Agenda Item 9 ("Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World") of the Commission's work. As Ambassador Williamson explained, "[t]his is the place where country specific concerns are raised and some country specific resolutions are tabled. It is the place where violators of the Universal Declaration of Human Rights are 'named and shamed.'" Excerpts below provide the U.S. views of the importance of retaining item 9 on the UNCHR agenda.

The full text of Ambassador Williamson's remarks, which includes U.S. views on specific countries that have made progress in advancing human rights and those where human rights abuses have worsened in the previous year, is available at *www.humanrights-usa.net/2004/statements/0325Item9.htm*.

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There are those among us who say this agenda item should be eliminated. It is divisive, they say. It harms the spirit of conciliation, cooperation and consensus. Some even argue that it is discriminatory. Some suggest it is unfair to single out the worst abusers of human rights. Furthermore, some suggest that this exercise of

talking about those governments that violate the human rights of their own citizens is so much "sound and fury amounting to naught." . . . Resolutions without practical enforcement provisions, without concrete costs imposed on violators, do not help the victims.

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But, in fact, "naming and shaming" gross violators of the basic human rights delineated in the Universal Declaration of Human Rights does advance the cause. It gives voice to the victims who too often have been denied a voice at home. . . .

Furthermore, we should not diminish the desire of governments for international respectability. To be "named and shamed" for violating the Universal Declaration of Human Rights is to have that respectability challenged. Countries singled out by the UN Commission on Human Rights are being held to account for their unacceptable behavior. Their violations of human rights are not going unnoticed. Their abuses are sustained in the shroud of silence and threatened by the light of public examination. Their abuses of the basic rights of their own citizens lessen their legitimacy and respectability in the community of nations. And we have seen countries modify their behavior as a consequence of Commission resolutions. Some regimes modify their behavior only slightly in hopes of escaping future Commission examination. Some reform more substantially, but in either event good has been done. And we should, we must, be diligent until the inalienable rights of all men and women are enjoyed by all people, everywhere.

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Therefore, it would be a grave mistake to eliminate item 9 from the agenda of the Commission on Human Rights. "Violation(s) of human rights and fundamental freedoms in any part of the world" are the business of this body. "Naming and shaming" is our responsibility and our opportunity. . . .

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In the sixtieth session of the UNCHR the United States introduced resolutions condemning human rights abuses

in China and Belarus; the UNCHR adopted the resolution as to Belarus (E/CN.4/RES/2004/14) on April 15, 2004; it voted to take no action on the resolution on China. *See* U.S. statements at *www.humanrights-usa.net/2004/statements/0415China.htm* and *www.humanrights-usa.net/2004/statements/0415Belarus.htm*. The United States also co-sponsored resolutions on the Democratic People's Republic of Korea, Cuba, and Zimbabwe. *See* U.S. statements at *www.humanrights-usa.net/2004/statements/0416DemocraticPeople'sRepublicofKorea.htm, www.humanrights-usa.net/2004/statements/0514Cuba.htm,* and *www.humanrights-usa.net/2004/statements/0416StatementonZimbabwe.htm. See also* discussion of Sudan, A.2. *supra*.

Following adoption of the resolution condemning Cuba on April 15, Frank Calzon, representing Liberal International, a U.S.-registered non-governmental organization, was physically assaulted and knocked unconscious outside the UNCHR chamber. Mr. Calzon had addressed the Commission on Cuba's human rights record; his attacker was identified by the Cuban ambassador as a member of the Cuban delegation. Ambassador Kevin Moley, U.S. Permanent Representative to the United Nations and other International Organizations in Geneva, witnessed the incident. In a letter of April 19, 2004, to the Director-General of the United Nations Office at Geneva, with a copy to the Deputy Permanent Representative from Switzerland, Ambassador Moley, stated that the behavior of the Cuban delegate

> was not only a disgrace but showed disrespect for the Commission on Human Rights and its members as well as for the United Nations. I am sure you will agree that it is important to signal that such behavior is unacceptable. Under the circumstances, we believe that the Cuban delegate should be barred from the UN Palais and declared *persona non grata* from the United Nations and International Organizations in Geneva.

In a letter of June 23, 2004, to the Permanent Representative of Switzerland, Ambassador Moley noted that Mr. Calzon had filed a criminal complaint and offered his assistance in bringing the perpetrator to justice:

> Having witnessed firsthand the assault, as well as the assailant's attempt to flee, his seizure by UN security guards, and the Cuban Ambassador identifying the assailant as a member of his official delegation, I am prepared to provide information, on a voluntary basis and in a manner respectful of the office I hold, to the competent Swiss authorities on the understanding that doing so will not constitute a waiver of diplomatic immunities and will not constitute submission to jurisdiction. . . .

The full text of the letter is available at *www.state.gov/s/l/c8183.htm.* At the end of 2004 the U.S. mission continued to cooperate with Swiss authorities and to urge that the Cuban delegate at issue not be allowed to return to the UN Palais.

c. Status of the international covenants on human rights

The United States proposed an amendment to paragraph 2(b) of draft resolution, "Status of the International Covenants on Human Rights." The U.S. amendment would have replaced the word "become" with "consider as a matter of priority becoming," and would have deleted "as a matter of priority" in the paragraph, as introduced and orally amended by the observer for Finland, which provides:

> Appeals strongly to all States that have not yet done so to become parties to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as to consider, as a matter of priority, acceding to the Optional Protocols to the International Covenant on Civil and Political Rights and making the declaration provided for in article 41 of that Covenant;

The U.S. amendment was defeated and the resolution was adopted without a vote. E/CN.4/RES/2004/69.

B. DISCRIMINATION

1. Race

a. Organization for Security and Cooperation in Europe ("OSCE")

On June 16 and 17, 2004, the OSCE participating States met in Paris on the "relationship between racist, xenophobic and anti-Semitic propaganda on the Internet and hate crimes." In remarks at the closing session, June 17, 2004, Ambassador Stephan M. Minikes, U.S. Mission to the OSCE, summarized the points of consensus and presented a ten-point action plan. Ambassador Minikes' prepared statement, excerpted below, is available at *www.osce.org/documents/cio/2004/06/3141_en.pdf.*

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No one here questions that the Internet provides a potent new tool for the dissemination of objectionable speech. The question is how best to address this potential.

During the past two days, we have heard some advocate that hate speech on the Internet must be suppressed. Respectfully, we disagree. Rather than fear the purveyors of hate, let us confront them in the marketplace of free ideas, where the bright light of truth will expose their bigotry and their lies can be unmasked.

Once we surrender to government the power to determine what ideas may or may not be heard, how do we guarantee the efficacy of these different decisions and then protect against even greater restrictions? How can we ensure, for example, that restrictions directed against what some call religious extremism are not used to target minority religions, as is already the case among some of those who advocate this approach? Or that restrictions against so-called xenophobic or racist speech are not a

proxy for stifling political dissent, as we also see happening in parts of the world?

Demands that governments restrict the new and widespread dissemination of information are not new. Five hundred years ago, Gutenberg's movable-type press prompted many governments to censor all printed works. The potential for widespread access to information caused great fear of social change or even upheaval. The spread of the truth was viewed as a danger.

Since then, history is replete with publications that are unworthy of mention. And yet, the ensuing five centuries have seen both an ever-wider dissemination of knowledge, and an inexorable march towards greater democracy and freedom.

Today, the Internet, like the printing press, can be used to promote unpopular ideas. However, the United States believes that ultimately the ability of the Internet to promote discourse and disseminate ideas is the very solution to—and not a problem in—the fight against racism, xenophobia, and anti-Semitism.

We have discussed differences in the ways that our respective nations view government regulation of objectionable speech. More importantly, however, our exchanges over the past two days have also revealed broad areas of consensus. These are:

First, that participating States and NGOs must work together both to educate, particularly the young, and to expose the utter falsehood of the messages conveyed by hate speech. . . . Second, it is clear that much study is needed of the relationship between hate speech on the Internet and bias-motivated crime. . . .

Third, this meeting has revealed broad consensus on the important role played by NGOs and industry groups. . . .

Finally, this meeting has demonstrated consensus on some things government itself should do. . . .

In conclusion, we believe that a basis now exists for immediate action. Our discussions have identified common ground among participating States in a number of areas. Accordingly, the U.S. is pleased to present a 10-point action plan as a roadmap for immediate progress that will be attached to our circulated written statement. We look forward to continuing to work with participating States in the months to come on these important issues and thank our French hosts for their hospitality.

1. Participating States should take action to ensure that the Internet remains an open and public forum for the airing of all viewpoints and to foster access to the Internet both in homes and in schools.
2. Participating States should vigorously investigate and, where appropriate, fully prosecute bias-motivated violence and criminal threats of violence on the Internet.
3. The OSCE Representative on Freedom of the Media should study whether laws prohibiting bias-motivated speech are being enforced in a discriminatory or selective manner or are being misused in any nation as a means of silencing government critics and suppressing political dissent.
4. Participating States should study the effectiveness of laws regulating Internet content, specifically with regard to their effect on the rate of racist, xenophobic, anti-Semitic crimes.
5. Analytically rigorous studies should be conducted of the possible relationship between racist, xenophobic, and anti-Semitic speech on the Internet and the commission of bias-motivated crimes.
6. Participating States should collect information concerning incidents of bias-motivated crimes and publish a report on an annual basis summarizing this data.
7. Participating States should support the establishment of programs to educate children about bias-motivated expression they may encounter on the Internet. Materials from successful educational programs should be widely disseminated.
8. Participating States and [Internet Service Providers ("ISPs")] should take steps to increase parental awareness of widely available filtering software that enables parents to exercise greater supervision and control over their children's use of the Internet.
9. NGOs should continue and increase their efforts to monitor the Internet for, share, and publicize their finding of racist, xenophobic, and anti-Semitic content.
10. Participating States should train investigators and prosecutors on how to address bias-motivated crimes on the Internet.

In a keynote address of June 16, 2004, Daniel Bryant, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice, examined U.S. practice and experience in combating discrimination and bias-motivated crimes.

Mr. Bryant explained the U.S. approach to hate speech as excerpted below.

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We recognize, of course, that the American approach to hate speech differs significantly from the approach to such expression embraced by many of the countries represented at this meeting. So I would like to take a moment to set forth the basis of our position. The First Amendment to the Constitution of the United States provides, in part, that Congress shall make no law "abridging the freedom of speech." As the United States Supreme Court has stated, this provision embodies our country's "profound national commitment to the free exchange of ideas." Pursuant to the First Amendment, the Government of the United States as a general matter may not restrict speech "because of its message, its ideas, its subject matter, or its content." The government thus may not restrict or suppress speech merely because it disapproves of the viewpoint expressed by a speaker. As a result, although the Government of the United States deplores racist, xenophobic, and anti-Semitic speech, we are constitutionally restrained from restricting such expression merely because we disagree with it. And let me be clear: we embrace this principle as an essential component of our constitutional tradition.

Robust debate is the cornerstone of our democracy, and we believe that all individuals must be permitted to add their voices to that debate. . . .

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Our ultimate goal, after all, is not to eliminate racist, xenophobic, and anti-Semitic speech. Rather, it is to end such biases, and the best way to eliminate prejudice is not through the restriction of expression. It is instead to confront those expressing bias by addressing their fallacious arguments head on.

Our experience in the United States does not indicate that respecting the freedoms of speech and expression, on the one hand, and combating prejudice, on the other hand, are mutually conflicting goals; indeed, we believe they go hand in hand. . . .

For all of these reasons, we believe that government efforts to regulate bias-motivated speech on the Internet are fundamentally mistaken, and this is why the United States is respectfully unable to sign the Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems.

At the same time, however, the United States has not stood and will not stand idly by when individuals cross the line on the Internet from protected speech to criminal conduct. The same Internet capabilities that are facilitating increased political dialogue and interpersonal communications are also being used by criminals and terrorists as tools for conspiring to commit and planning violent acts, as well as fundraising, and we are committed to vigorously enforcing the laws forbidding this behavior.

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The full text of Mr. Bryant's address is available at *www.osce.org/documents/cio/2004/06/3116_en.pdf.* The Consolidated Summary of the June meeting, in which Mr. Bryant's address is reprinted, is available at *www.osce.org/documents/cio/2004/09/3642_en.pdf. See also* remarks by Ronald Rychlak, Professor of Law and Associate Dean of the University of Mississippi Law School and a member of the U.S. delegation, available at *www.osce.org/documents/cio/2004/06/3113_en.pdf.* Permanent Council Decision No. 633 adopted at the Sofia Ministerial, "Promoting Tolerance and Media Freedom on the Internet," is available at p. 34 of the results of the Twelfth Meeting of the OSCE Ministerial Council in Sofia, December 6–7, 2004 ("Sofia Report"), at *http://194.8.63.155/documents/mcs/2005/02/4324_en.pdf.*

On September 7, 2004, Secretary of State Powell and Alphonso Jackson, Secretary of Housing and Urban Development and head of the U.S. delegation to the OSCE Conference on Tolerance and the Fight against Racism, Xenophobia and Discrimination, met in preparation for the OSCE conference, held in Brussels on September 13–14, 2004. Remarks to the press following the delegation meeting,

excerpted below, are available at *www.state.gov/secretary/former/powell/remarks/35982.htm.*

SECRETARY POWELL: . . . As President Bush has said, the United States of America stands for the non-negotiable demands of human dignity. That is why we place such a high importance on the conference and the Organization for Security and Cooperation in Europe, a conference that will be held on tolerance and the fight against racism, xenophobia and discrimination which the Belgian Government will graciously host in Brussels on September 13th and 14th. . . .

We do this because we applaud the OSCE's pioneering work in fighting intolerance, reflected earlier this year in the Berlin Conference on Anti-Semitism which I had the privilege to attend and represent the United States at.

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SECRETARY JACKSON: . . .

Following the conference, we anticipate that the countries of the Organization for Security and Cooperation in Europe will negotiate a new and specific commitment by their government to combat discrimination and promote tolerance.

It is critical that the governments enforce anti-discrimination laws, train their law enforcement authorities, gather statistics on hate crimes; more importantly, they need to speak out publicly and forcefully when hate crimes occur in their respective countries.

The conference comes as a direct response to the increase we've seen around the world during the past decade to intolerance and hate crimes. The 55 nations from Europe, Eurasia, North America will come together in Brussels determined to address the increase in hate crimes. We will share ideas of how to combat these crimes.

As you know, the United States has struggled with its own history of prejudice and intolerance. But we've taken many steps to address those past and failing issues. I look forward to sharing the American experience with my colleagues abroad and learn all that we can from their experience as well as they can learn from ours.

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A summary of the conference proceedings, contained in a Chairman's statement referred to as the "Brussels Declaration," is included in the Sofia Report at p. 104, available at *http://194.8.63.155/documents/mcs/2005/02/4324_en.pdf*. The Decision on Tolerance and Non-Discrimination is reprinted at p. 29 of the same document.

b. UN Commission on Human Rights

On April 22, 2004, the UNCHR adopted a resolution "World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action." E/CN.4/RES/2004/88. The United States called for a vote on the resolution and voted no.

On April 16, 2004, the UNCHR adopted a resolution on a recorded vote, "Inadmissibility of certain practices which contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance." E/CN.4/2004/RES/16. The United States voted against adoption of the resolution because it appeared to have been introduced as retribution for another resolution sponsored by the EU.

2. Gender

The United States co-sponsored a resolution in the UN Commission on Human Rights ("UNCHR"), "Trafficking in women and girls." The resolution was adopted without a vote on April 19, 2004. E/CN.4/RES/2004/45. For further discussion of trafficking in persons, *see* Chapter 3.B.5.b. *See also* discussion of UNCHR resolution "Elimination of Violence Against Women," D.5. below; Statement by Ambassador Ellen Sauerbrey, U.S. Representative to the Commission on the Status of Women, on Women's Issues, in the Third Committee, October 12, 2004, available at *www.un.int/usa/04_188.htm,* and U.S. International Women's Initiatives Fact Sheet, issued by the U.S. Mission to the United Nations on March 8, 2004, available at *www.un.int/usa/fact1.htm*.

3. Religion

a. Report on International Religious Freedom

On September 15, 2004, the Department of State submitted to Congress and released to the public the 2004 Annual Report on International Religious Freedom and identified countries of particular concern designated for 2004. A briefing for the press of the same date by Secretary of State Powell and John Hanford, Ambassador-at-Large for International Religious Freedom, is excerpted below.

The 2004 Annual Report is available at www.state.gov/g/drl/rls/irf/2004/. The full text of the briefing is available at *www.state.gov/secretary/former/powell/remarks/36197.htm.*

SECRETARY POWELL:

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Country by country, this report documents the conditions of religious freedom around the world. We are always eager to commend nations that have made progress over the past year, and the report's Executive Summary acknowledges countries, such as Georgia and Turkey, that have adopted good practices or have taken steps to promote greater tolerance for all religious faiths.

But the report also makes clear that too many people in our world are still denied their basic human right of religious liberty. . . .

The report also identifies what we refer to as Countries of Particular Concern, governments that engage in or tolerate gross infringements of religious freedom.

Our decisions are based on a careful assessment of the facts and represent a fundamental standard of human dignity that all nations should uphold.

Today we are re-designating five countries that, in our judgment, continue to violate their citizens' religious liberty: Burma, China, Iran, North Korea and Sudan. We are also adding three additional countries to this list: Eritrea, Saudi Arabia and Vietnam.

Let me emphasize that we will continue engaging the Countries of Particular Concern with whom we have bilateral relationships. Our existing partnerships have flourished in numerous capacities and they are just one of the best ways for us to encourage our friends to adopt tolerant practices.

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AMBASSADOR HANFORD:

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Today, some of the greatest threats to both our national security and to international peace define and even justify their violence in religious terms. This report, in advocating civil societies based on the respect of religious freedom, offers a compelling alternative. Religious extremists cling to the idea that religion demands the death of innocents and the destruction of liberty. We hold confidently to the idea that religious freedom respects the life of all and the cultivation of human dignity.

This is seen in practice as much as in principle. Nations that respect religious freedom rarely pose a security threat to their neighbors. Nations that affirm religious liberty also lay a cornerstone of democracy and rule of law.

For these reasons alone, promoting religious freedom is as much in our national interest as it is our national ideal. . . .

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Our own nation's history has not been perfect, nor do we claim to be so today. We continue to strive at home and abroad to uphold religious freedom as the universal right that it is. . . .

In 1998, Congress passed the International Religious Freedom Act, which, among other things, commissioned this report, created my office with the mandate of integrating religious freedom advocacy into our foreign policy. President Bush has worked to strengthen this commitment as a national priority, stating in his National Security Strategy that the U.S. Government will "take special efforts to promote freedom of religion and conscience, and defend it from encroachment by repressive governments."

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Besides mandating the production of this report, the International Religious Freedom Act also requires us to review conditions around the world and determine which countries, if any, have committed particularly severe violations of religious freedom. If we determine this to be the case, we are required by the law to designate that country as a Country of Particular Concern, or CPC for short. By definition, a CPC is a government that has engaged in or tolerated systematic, ongoing, egregious violations of religious freedom.

Before designating a government as a CPC, we undertake an intensive consideration of the status of religious freedom violations in that country. When possible, we also engage in vigorous and high-level diplomacy with authorities in that country, describing to them the religious freedom violations that place them at the threshold of designation, and suggesting specific steps they can take to improve religious freedom and avoid designation.

Today we are making our CPC designations for 2004. First, I should note that Iraq has been removed from the CPC list. Iraq had been designated in the past due to the Saddam Hussein regime's repression of religious belief and practice, particularly his vicious persecution of Shia Muslims. Now that he has been removed from power and the new transitional government is working to protect religious freedom, Iraq is no longer a CPC.

As the Secretary noted, today we are re-designating the other five countries that were designated last year: China, North Korea, Burma, Iran and Sudan. We are also designating three additional countries as CPCs: Eritrea, Saudi Arabia and Vietnam.

In China, the government continues to repress Tibetan Buddhists, Uighur Muslims, Catholics faithful to the Vatican, underground Protestants and Falun Gong. Many religious believers are in prison for their faith and others continue to face detention, beatings, torture and the destruction of places of worship. Many observers believe that in recent months China has engaged in a crackdown against some independent religious groups.

In North Korea, religious freedom simply does not exist. Credible reports indicate that religious believers, particularly Christians, often face imprisonment, torture or even execution for their faith.

In Burma, the regime's high level of overall repression includes severe violations of religious freedom. Some religious believers, including a number of Buddhist monks, are imprisoned, and some Christian clergy face arrest and the destruction of their churches. The government has destroyed some mosques and Muslims face considerable discrimination, including occasional state-orchestrated or -tolerated violence.

In Iran, religious minorities, including Sunni Muslims, Baha'is, Mandaeans, Jews and Christians face imprisonment, harassment, intimidation and discrimination based on their religious beliefs.

In Sudan, the government continues to attempt to impose Sharia law on non-Muslims in some parts of the country, and non-Muslims face discrimination and restrictions on the practice of their faith.

In Eritrea, the government, in 2002, shut down all religious activity outside of four officially recognized groups. All independent religious groups have been forced to close, and over 200 Protestant Christians and Jehovah's Witnesses remain in prison for their faith. Some reportedly have been subjected to severe torture and pressured to renounce their faith and many others have been detained and interrogated.

In Saudi Arabia, the government rigidly mandates religious conformity. Non-Wahabi Sunni Muslims, as well as Shia and Sufi Muslims, face discrimination and sometimes severe restrictions on the practice of their faith. A number of leaders from these traditions have been arrested and imprisoned. The government prohibits public non-Muslim religious activities. Non-Muslim worshippers risk arrest, imprisonment or deportation for engaging in religious activities that attract official attention. There were frequent instances in which mosque preachers, whose salaries are paid for by the government, used violent language against non-Sunni Muslims and other religions in their sermons.

In Vietnam, at least 45 religious believers remain imprisoned, including members of the Buddhist, Catholic, Protestant, Hoa Hao and Cao Dai faiths. Many ethnic minority Protestants have been pressured by authorities to renounce their faith, and some have been subjected to physical abuse. Hundreds of churches and places of worship in the central highlands have been shut down.

While we are designating three new countries because of their poor record on religious freedom, it's important to note that we have a broader relationship with each of these nations. We appreciate their cooperation on a number of important issues, and we have shared interests with them in many areas. We will continue working together on these and other important issues, and we will continue to speak with these governments about our religious freedom concerns.

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b. Anti-Semitism

(1) Conference on Anti-Semitism

On April 28, 2004, Secretary of State Powell addressed The Conference on Anti-Semitism of the OSCE in Berlin. PC.DEL/325/04.

Secretary Powell's remarks, excerpted below, are available at *www.state.gov/secretary/former/powell/remarks/31885.htm*. *See also* fact sheet issued by the Department of State on October 15, 2004, Department of State Actions To Combat Anti-Semitism, available at *www.state.gov/r/pa/prs/ps/2004/37136.htm*.

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. . . [I]n the opening decade of the 21st century, we, 55 democratic nations of Europe, Eurasia and America, have come to Berlin to stamp out the new fires of anti-Semitism within our societies, and to kindle lights of tolerance so that future generations will never know the unspeakable horrors that hatred can unleash.

* * * *

We are appalled that in recent years the incidence of anti-Semitic hate crimes has been on the increase within our community of democratic nations. All of us recognize that we must take decisive measures to reverse this disturbing trend.

Our states must work together with non-governmental organizations, religious leaders and other respected figures within our societies to combat anti-Semitism by word and deed. We need to work in close partnership to create a culture of social tolerance and civic courage, in which anti-Semitism and other forms of racial and religious hatred are met with the active resistance of our citizens, authorities and political leaders.

We must send the clear message far and wide that anti-Semitism is always wrong and it is always dangerous.

We must send the clear message that anti-Semitic hate crimes are exactly that: crimes, and that these crimes will be aggressively prosecuted.

We must not permit anti-Semitic crimes to be shrugged off as inevitable side effects of inter-ethnic conflicts. Political disagreements do not justify physical assaults against Jews in our streets, the destruction of Jewish schools, or the desecration of synagogues and cemeteries. There is no justification for anti-Semitism.

It is not anti-Semitic to criticize the state of Israel. But the line is crossed when Israel or its leaders are demonized or vilified, for example by the use of Nazi symbols and racist caricatures.

We must send the clear message to extremists of the political right and the political left alike that all those who use hate as a rallying cry dishonor themselves and dishonor their cause in the process.

Regrettably, my country has its share of anti-Semites and skinheads and other assorted racists, and bigots and extremists, who feed on fear and ignorance and prey on the vulnerable.

As a nation of many united as one, we are determined to speak out and take action at home and abroad against anti-Semitism and other forms of intolerance and to promote the rights of persons belonging to minorities. As President Bush has said: "America stands for the non-negotiable demands of human dignity."

Fortunately, the overwhelming majority of Americans are repelled by these hate-mongers and reject their vicious ways, their vicious views, their vicious attitudes. Overwhelmingly, the American people embrace diversity as a national asset and tolerance is embraced as a civic virtue. Our laws and our leaders reflect those enlightened sentiments.

Not only do we believe that combating hatred is the right thing to do, we think that promoting tolerance is essential to building a democratic, prosperous and peaceful world. Hatred is a destroyer, not a builder. People consumed by hate cannot construct a better future for themselves or for their children.

* * * *

The exchange of insights and ideas among our delegations here in Berlin should form a solid basis for practical action by each of our nations. There is much yet that we can do in the key areas of law enforcement, legislation and education to follow up on the decisions we took last December in Maastricht.

That's why I'm pleased that last week the Permanent Council of the Organization for Security and Cooperation in Europe committed all of our 55 states to take further concrete actions against anti-Semitism. The OSCE's Office for Democratic Institutions and Human Rights in Warsaw will play a central role. This office now has a clear mandate to work with member states to collect hate crimes statistics, to track anti-Semitic incidents and to report publicly on these matters. The office will also help states develop national legislation against hate crimes and promote tolerance through education. And I know that, in the course of your deliberations here, other ideas will arise as to how we can pub action behind our words and whether we have institutionalized these actions in the proper way.

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(2) Report on global Anti-Semitism

On October 16, 2004, President George W. Bush signed into law the Global Anti-Semitism Review Act of 2004, Pub. L. No. 108–332, 118 Stat. 1282. The act expressed the sense of Congress that the United States "should continue to strongly support efforts to combat anti-Semitism worldwide." Section 4 of the act required the Secretary of State to submit a report in 2004 to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House

of Representatives on acts of anti-Semitism around the world, including a description of—

(1) acts of physical violence against, or harassment of, Jewish people, and acts of violence against, or vandalism of, Jewish community institutions, such as schools, synagogues, or cemeteries, that occurred in each country;

(2) the responses of the governments of those countries to such actions;

(3) the actions taken by such governments to enact and enforce laws relating to the protection of the right to religious freedom of Jewish people;

(4) the efforts by such governments to promote anti-bias and tolerance education; and

(5) instances of propaganda in government and non-government media that attempt to justify or promote racial hatred or incite acts of violence against Jewish people.

On December 30, 2004, the Department of State submitted its Report on Global Anti-Semitism in accordance with Section 4, covering the period July 1, 2003–December 15, 2004. The report noted that "[w]hile there is no universally accepted definition [of anti-Semitism], there is a generally clear understanding of what the term encompasses." For purposes of the report

> anti-Semitism is considered to be hatred toward Jews—individually and as a group—that can be attributed to the Jewish religion and/or ethnicity. An important issue is the distinction between legitimate criticism of policies and practices of the State of Israel, and commentary that assumes an anti-Semitic character. The demonization of Israel, or vilification of Israeli leaders, sometimes through comparisons with Nazi leaders, and through the use of Nazi symbols to caricature them, indicates an anti-Semitic bias rather than a valid criticism of policy concerning a controversial issue.

The full text of the report is available at *www.state.gov/g/drl/rls/40258.htm*.

c. UN Commission on Human Rights

The United States co-sponsored UNCHR Resolution 2004/36 on the elimination of all forms of religious intolerance subsequent to the passage of its motion to amend the resolution by adding a new operative paragraph as follows:

> *Recognizing with deep concern* the overall rise in instances of intolerance directed against members of many religious communities in various parts of the world, including cases motivated by Islamophobia, anti-Semitism and Christianophobia.

The resolution was adopted with the amendment on April 19, 2004. E/CN.4/RES/2004/36.

On April 13, 2004, the United States called for a vote and voted no on L.5, "Defamation of Religion" at the sixtieth session of the UNCHR. Jeffrey DeLaurentis of the U.S. delegation provided an explanation of the U.S. action, as excerpted below. The resolution was adopted by recorded vote on April 13, 2004. E/CN.4/RES/2004/6.

The full text is available at *www.humanrights-usa.net/2004/statements/0413religions.htm.*

The United States has been a long-standing proponent of the freedom of religion. We believe that a country must not only recognize, but protect, the right of each of its individuals to choose a religion, change their religion, and to worship freely. This, of course, means that countries must not discriminate against individuals who choose a particular religion. But, it also means, that countries must not close their eyes to attacks that occur against individuals because of their religion. Countries must have a legal framework in place to allow individuals the freedom of worship—without fear of persecution.

While we agree with some of the tenets contained in the resolution before us today contained in L.5, such as the "the importance of respecting the values of all cultures, religions and

civilizations", and we deplore the defamation of any religion, we believe this resolution is incomplete.

It fails to address defamation of all religions, and we believe that such inclusive language would have furthered the objective of combating defamation of religion. We also believe that any resolution on this topic must include mention of the need to change educational systems that promote hatred of other religions, as well as the problem of state-sponsored media that engages in the defamation of religion or of people of a certain faith.

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C. CHILDREN

1. Follow-up to Special Session on Children

On October 27, 2004, Governor Jane D. Hull, U.S. Senior Advisor, on Follow-up to the 2002 Special Session on Children, addressed the UN General Assembly, as excerpted below. The full text of Governor Hull's remarks is available at *www.un.int/usa/04_209.htm*.

The United States is pleased to speak on the Follow-up to the United Nations Special Session on Children. As we noted at the time, the Special Session on Children in 2002 represented greater hope for children around the world. The Session resulted in a strong consensus that—for both moral and practical reasons—we need to put children first.

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We see three tracks that—when connected and acted upon simultaneously—will give our children the resources and the capacity to succeed. These are: (1) leading by example at home; (2) engaging with the UN; and (3) supporting other international efforts.

First, leading by example at home. If we, the international community, aspire to better lives for our children, we each must

support our own families and communities at home. Protecting children and strengthening families is a core concern of the United States. . . .

Second, engaging with the UN. Diarrhea alone kills the equivalent of a jumbo-jet full of children every 4 hours. Contaminated water, unsanitary living conditions, water shortages, and poor hygiene kill 2 million children each year. Yet another 2 million children die because they lack access to immunization. And while dramatic progress has been made in reducing child deaths, almost 10 million still die each year—with almost 4 million of those deaths occurring in the first 28 days of life.

In the face of this continuing tragedy, the U.S. Agency for International Development has teamed up with UNICEF, the World Health Organization, the World Bank, the Canadian International Development Agency (CIDA), and other developing country, multilateral and bilateral partners, NGOs and the Gates Foundation to form a new alliance called the Global Child Survival Partnership. Together, through global attention and action, we want to improve child health and save children from dying of preventable causes. . . .

Third, supporting other international efforts. Global partnerships are critical to win the fight against the modern-day slavery of trafficking in human beings. International cooperation has helped prosecute worldwide nearly 8,000 perpetrators of trafficking crimes, resulting in more than 2,800 convictions last year. . . .

One pillar of the Emergency Plan is providing care to 10 million AIDS orphans and people living with HIV/AIDS. In the first 18 months of the Initiative to Prevent Mother to Child Transmission, 378,000 women received services and an estimated 4,800 children —who would otherwise have been infected—were born HIV-free.

Additionally, the United States is the strongest supporter of The Global Fund to Fight AIDS, Tuberculosis and Malaria, and was instrumental in its founding. We have continued to be the largest donor.

And with the Millennium Challenge Account (MCA), the United States has launched the most innovative approach to foreign affairs in the last 50 years. We invest in those countries that are committed to ruling justly, investing in their people, and

encouraging economic freedom. For the first year of this program our Congress allocated $1 billion in funding. We selected 16 countries eligible to receive this assistance, as they take steps to ensure a brighter future for their children.

2. Children and Armed Conflict

On January 20, 2004, Ambassador Stuart W. Holliday, U.S. Alternate Representative for Special Political Affairs, addressed the UN Security Council on the issue of children and armed conflict. Ambassador Holliday welcomed a report by the Secretary General on this topic, U.N. Doc. S/2003/1053. While indicating that the United States was reviewing its specific recommendations closely, Ambassador Holliday commented on specific countries and measures as excerpted below.

The full text of Ambassador Holliday's statement is available at *www.un.int/usa/04_009.htm.* The Security Council subsequently adopted a resolution "Children and Armed Conflict," U.N. Doc. S/RES/1539 (2004) on April 22, 2004.

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The Secretary General's report describes the terrible circumstances where the use of child soldiers continues. My country fully supports the request for all parties listed in the Annexes of the Report to halt recruitment and use of child soldiers in violation of international obligations. The child soldier problem is particularly dire in Burma, Colombia, Cote d'Ivoire, parts of the Democratic Republic of the Congo, Liberia and northern Uganda.

To highlight a few of these problem areas, Burma is thought to have the largest number of child soldiers in the world. Human Rights Watch recently documented the widespread forced recruitment of boys as young as eleven by Burma's national army. Many are forced to fight against armed ethnic opposition groups and carry out human rights abuses such as rounding up villagers for forced labor, the burning of houses and even attacking civilians. The Coalition to Stop the Use of Child Soldiers recently reported

that children may account for 35 to 45 percent of new recruits into the national army, and 70,000 or more of Burma's estimated 350,000 soldiers. Child soldiers are also used in ethnic armies. We encourage Burma's neighbors to provide protection to any child soldiers who desert from the national or ethnic armies and allow international relief organizations, including the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF) to provide humanitarian assistance to resettle and reintegrate them into society.

Colombia's children have long been affected by that country's devastating conflict, including some 11,000 who are currently fighting in irregular armies, including paramilitary and FARC guerrilla forces. Boys and girls, some as young as ten years old, are often recruited forcibly and used as combatants, spies, messengers, porters, kidnappers, guards, cooks, sexual companions or slaves, even for placing and removing bombs. Girls in guerilla and paramilitary groups are particularly at risk of sexual abuse.

In Cote d'Ivoire, armed forces continued to recruit young Liberians from refugee camps in the western part of the country. Equally as tragic, Congolese Armed Forces continued to have children in their ranks despite commitments to demobilization.

Charles Taylor, Liberia's former President, stepped down in August. And on one positive note, shortly after Taylor's departure, 80 ex-child-soldiers who had been fighting in the ranks of either government or opposition forces were under the care of the UN in Monrovia, and we salute the efforts of the UN in Liberia. There is still a great deal more to be done in that country, however.

The Lord's Resistance Army (LRA) has waged a civil war against the government of Uganda since the mid-1980s. Between June 2002 and May 2003, UNICEF estimates that the LRA abducted 8,400 children from northern Uganda to serve as soldiers. UNICEF also estimates that during the past 16 years of fighting, more than 14,000 children have been abducted by the LRA. The UN estimates that an average of 20 children are abducted on a daily basis. Children are forced to participate in acts of extreme violence and are often compelled to help beat or hack to death fellow child captives who have attempted to escape. Girls as young as twelve are given to commanders as de facto "wives." Some

abducted children have managed to escape, while others have died from disease, mistreatment or combat wounds.

Although I've specifically mentioned only six governments that need to take immediate action to eliminate the use of child soldiers, the other governments mentioned in the Secretary General's report that harbor child soldiers must also take action. Of course, I've also mentioned, in addition to governments, armed groups that have perpetrated these horrible acts.

The United States fully supports the following measures:

- Specific request by the Council that the Secretary General submit another list to the Security Council next year, naming all governments and armed groups that illegally recruit and use child soldiers, not just those in countries currently on the Council's agenda.
- Active monitoring of the governments and armed groups that have already been named.
- Direct dialogue with the governments and armed groups concerned by the Council or the Secretary General in order to develop action plans to eliminate the use of child soldiers.

Again a positive note, the number of States parties to the Optional Protocol on the Convention of the Rights of the Child on Children and Armed Conflict continues to increase. This past year realized an increase of 21 to a total of 66 States parties, demonstrating important leadership on the effort to end child soldiers.

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3. Rights of the Child

On April 19, 2004, the United States provided an explanation of its decision to call for a vote and vote no on L.51, "Rights of the Child," at the sixtieth session of the UN Commission on Human Rights ("UNCHR"). The resolution was adopted by recorded vote. E/CN.4/RES/2004/47.

The U.S. statement, set forth below in full, is also available at *www.humanrights-usa.net/2004/statements/0419child.htm.*

The United States welcomes the interest of the United Nations in general and this Commission in particular with regard to issues relating to children. My government is constructively and generously engaged in a wide variety of multilateral and bilateral activities that benefit children around the world. The United States respects and appreciates the interests and contributions of other nations and organizations to promoting and protecting the rights of children, and to enhancing the quality of their lives in direct ways.

We are committed to ensuring that the protection of the rights of children is fully integrated into American foreign policy. It is for this reason that the United States supports many of the principles underlying this resolution. For example, the United States has ratified two Optional Protocols to the Convention on the Rights of the Child relating to the involvement of children in armed conflict and the sale of children, child pornography, and prostitution.

My delegation believes that there are some improvements in this text over its predecessors and greatly appreciates the work of the co-sponsors in certain areas, such as [operative paragraph ("OP")] 12 on family relations, OPs 31–34 on children in particularly difficult situations, and OP 37 on exploitation of children. However, we continue to maintain that the process of dealing with this resolution needs to change. A more transparent drafting process that gives serious consideration to the comments of all interested delegations is needed. Also important is a text that is shorter and targeted on specific issues of critical importance to children, as well as one that concentrates on matters not addressed in other resolutions.

My government will call for a vote and vote No on this draft resolution because it once again contains unacceptable language that my delegation has repeatedly requested the co-sponsors to eliminate or address elsewhere.

In particular, the Convention conflicts with the authorities of parents and other provisions of state and local law in the United

States. We find the assertion that the Convention "must constitute the standard in the promotion and protection of the rights of the child" and the exclusion of other international instruments that also cover children's issues unacceptable. Additionally, the United States consistently opposes calls for abolition of the juvenile death penalty, in view of the U.S. federal system. Finally, we would have preferred that the language on the ICC would be neutral and factual. If these few points in a long text were remedied, my delegation would have been able to join consensus.

D. ECONOMIC, SOCIAL, AND CULTURAL ISSUES

1. Right to Food

a. Report of special rapporteur

On October 27, 2004, Lucy Tamlyn, Senior Advisor, U.S. Mission to the United Nations, addressed a report by the special rapporteur on the right to food before the Third Committee (Social, Humanitarian and Cultural) concerning Agenda Item 105: Human Rights Questions. Her statement, excerpted below, is available at *www.un.int/usa/04_211.htm*.

* * * *

The United States is deeply committed to international food security. Our actions bear this out. . . .

The Special Rapporteur has said: "Hunger is not inevitable. Nor is it acceptable." We agree. Let's look at the record: countries that have made progress on food security have done it by taking conscious decisions to promote growth and to look after the welfare of the vulnerable. Strategies for achieving food security include: increasing agricultural productivity; promoting transparent and accountable government; boosting agricultural science and technology; developing domestic market and international trade opportunities; securing property rights and access to finance; protecting the vulnerable; advancing the status of women; and mainstreaming a gender perspective.

Regrettably, the Special Rapporteur's report contains both legal and factual inaccuracies. The United States supports the progressive realization of the right to adequate food as a component of the right to an adequate standard of living. However the attainment of this right is a goal or aspiration to be realized progressively—it does not give rise to international obligations or domestic legal entitlements.

The Special Rapporteur's inclusion of Cuba as one of four situations of special concern in the world can only be attributed to an ideologically-driven agenda. To place the Cuba embargo on the same scale as the deaths of thousands of innocent men, women and children in Darfur is a horrifying and tragic distortion of international humanitarian priorities. Contrary to the Rapporteur's assertion, the U.S. embargo against Cuba does not constitute a violation of international law. There is no requirement under customary international law that obliges a state to trade with other states. The embargo is one tool among many in the United States' multifaceted policy approach toward Cuba intended to bring about a peaceful transition to democracy and respect for human rights.

Arguments that the United States is denying Cuba access to food and medicine are baseless: Over the past three years, the United States has introduced measures to increase our support for the Cuban people by greatly facilitating the export of U.S. agricultural products, medicines, and medical supplies. Since the legalization of the sale of U.S. agricultural commodities to Cuba in 2000, over $5 billion worth of sales have been authorized. In 2003 alone, licenses were issued for $36 million worth of humanitarian donations and $63 million in medical sales.

Remittances from the U.S. to Cubans have been estimated at close to $1 billion annually. We do not doubt that the people of Cuba may experience food shortages and other hardships. But it is important to examine the situation in its full context, and to acknowledge that the fundamental underlying causes for such problems are rooted in a discredited and unworkable political, economic, and agricultural system that is unsustainable but which the Cuban government refuses to relinquish.

On the issue of the Occupied Territories, the Special Rapporteur has clearly exceeded his mandate with respect to issues concerning the West Bank and Gaza. Furthermore, he has expanded the definition of the right to an adequate standard of living—including food—so that it is entirely lacking in credibility.

Finally, I would note that the United States has indeed responded to Mr. Ziegler's request of information.

b. Voluntary guidelines

On September 23, 2004, the United States joined consensus in the adoption of the Voluntary Guidelines to Support Member States' Efforts to Achieve the Progressive Realization of the Right to Adequate Food in the Context of National Security at the fourth session of the Intergovernmental Working Group of the Food and Agriculture Organization ("FAO") established for that purpose. A statement provided by the U.S. delegation at the time of adoption is set forth below and is reprinted as Annex 2 to the Final Report of the Chair of the Working Group, CL 127/10-Sup.1, available at *www.fao.org/docrep/meeting/008/J3345e/j3345e01.htm#a1.* The FAO Council adopted the food guidelines on November 23, 2004. *See www.fao.org/newsroom/en/news/2004/51653/index.html.*

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Throughout the negotiations, delegates from all regions and representatives of civil society made valuable contributions to the text before us, and worked in a spirit of cooperation and good will.

At the conclusion of the negotiations for the World Food Summit and for the World Food Summit: five years later, the United States formally expressed its views on the nature of what is described in these guidelines as the "progressive realization of the right to adequate food." These statements continue to express the views of the United States. In joining in the adoption of these

Voluntary Guidelines, the United States does not recognize any change in the current state of conventional or customary international law regarding rights related to food. The United States believes that the attainment of any "right to adequate food" or "fundamental freedom to be free from hunger" is a goal or aspiration to be realized progressively that does not give rise to any international obligations nor diminish the responsibilities of national governments toward their citizens.

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c. UN Commission on Human Rights

On April 16, 2004, Jeffrey de Laurentis, U.S. delegate to the UN Commission on Human Rights ("UNCHR") provided an explanation of the U.S. decision to request a recorded vote and vote no on L.24, "Right to Food," as excerpted below. The resolution was adopted. E/CN.4/RES/2004/19.

The statement, excerpted below, is available at *www.humanrights-usa.net/2004/statements/0421Food.htm*.

My delegation cannot support draft resolution L.24. The United States is the largest donor of food aid in the world. My government's commitment to provide food and end hunger remains unquestionable.

The United States supports the progressive realization of the right to adequate food as a component of the right to an adequate standard of living. The attainment of this right is a goal or aspiration to be realized progressively—it does not give rise to international obligations or domestic legal entitlements, nor does it diminish the responsibilities of national governments toward their citizens. The United States understands the right of access to food to mean the opportunity to secure food; it is not a guaranteed entitlement.

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2. Eradication of Poverty

On December 16, 2004, the United States joined consensus in the Second Committee of the UN General Assembly (Economic and Financial) on Agenda Item 89: Implementation of the First United Nations Decade for the Eradication of Poverty. Lucy Tamlyn, Counselor, U.S. Mission to the United Nations, explained the views of the United States in doing so, and its remaining concerns.

Ms. Tamlyn's statement, set forth below, is available at *www.un.int/usa/04_287.htm.*

In joining consensus in this resolution, the United States expresses disappointment at its lack of balance. The resolution largely repeats language from previous years. We need to judge resolutions by a standard that matters—does it contribute anything new or important that will help eradicate poverty? We fear the answer is "probably not" in this case.

The resolution is quite specific in its call for reform of the international system. In contrast, aside from passing references to the private sector and entrepreneurship, it gives scant mention to the domestic policy requirements for poverty eradication. In this respect, the Secretary General's Commission on the Private Sector and Development recently released important findings and recommendations on how to realize the potential of entrepreneurship and competitive markets as means of providing goods, services, jobs, and income to the poor. The report underscores that its findings and recommendations are not new, but are often ignored.

A serious and balanced resolution on poverty eradication would have welcomed those findings and encouraged member states, UN funds and programs, and regional organizations to act upon them. Many developing countries and countries with economies in transition that are acting upon them are achieving growth and overcoming poverty. A balanced resolution would have also lauded the fact that approximately 75 percent of the world's population lives in countries that are on track to meet the internationally

agreed development goal on poverty reduction; an important and positive fact that this resolution has ignored.

The United States understands the term "right to development" referenced in this resolution to mean that each individual should enjoy the right to develop his or her intellectual or other capacity to the maximum extent possible through the exercise of the full range of civil and political rights.

In joining consensus on this resolution, the United States notes that we welcome the World Leaders Meeting as an event that helped renew and strengthen our collective commitment to combat poverty and hunger. The United States opposed then, and continues to oppose, some of the ideas presented at that meeting for financing that commitment. Among those ideas that we oppose is the call for global taxes, for reasons already provided in the U.S. statement under Financing for Development.

The United States reaffirms that it does not accept international aid targets based on percentage of donor GNP. The United States does believe that aid should be increased to those developing countries making a demonstrated commitment to governing justly, investing in their people, and promoting enterprise and entrepreneurship.

3. Globalization and Interdependence

On December 16, 2004, Lucy Tamlyn, Counselor, U.S. Mission to the United Nations, provided the explanation of the U.S. position on Agenda Item 87: Globalization and Interdependence, in the Second Committee (Economic and Financial). U.N. Doc. A/59/485. The explanation is set forth below and is available at *www.un.int/usa/04_290.htm*.

This resolution contains much that is positive. It notes the importance of the role of the private sector and entrepreneurship in promoting development. However, we have reservations about the way that this resolution characterizes globalization. Globalization is neutral—it is neither good nor bad. In democratic societies based on free markets, globalization is the result of a

myriad of individual, private sector and governmental decisions to interact in the international arena. It is the creativeness and vibrancy of those actors, and the exchange of ideas, products and services among them that lead to economic benefits.

The response to globalization begins at home. There is wide agreement on what we must all urgently strive for in this regard: good political governance based on a democratic political system, respect for human rights and the rule of law. An effective state that ensures high and stable economic growth, promotes private sector growth and entrepreneurship and raises the capabilities of its people through universal access to education and one with a vibrant civil society, empowered by freedom of association and expression will be able to take advantage of the benefits of globalization. Without these basics, countries will see weaker growth or stagnation.

4. Family

On December 20, 2004, the United States disassociated itself from consensus on General Assembly Resolution 59/147. U.N. Doc. A/RES/59/147, "Celebration of the Tenth Anniversary of the International Year of the Family and Beyond." Lucy Tamlyn, Counselor to the U.S. Mission to the United Missions provided an explanation of the U.S. position, excerpted below.

The full text of Ms. Tamlyn's remarks is available at *www.un.int/usa/04_296.htm.*

The United States disassociates itself from consensus on this resolution. We note that on December 6, this Assembly adopted by consensus a very similar resolution, UNGA Resolution 59/111, entitled "Celebrating the tenth anniversary of the International Year of the Family" that better reflects the current negotiated international agreement on how to recognize and celebrate this important milestone.

Draft Resolution I of A/59/492 was originally negotiated in February 2004 at the Commission for Social Development,

considerably prior to the December 6 consensus on 59/111. Draft Resolution I passed through ECOSOC to the 59th Assembly, where it was reported out of a concluded Third Committee in mid-November. Therefore, 59/111 will remain the most recent negotiated agreement by the 59th Assembly.

Draft Resolution I includes the phrase "in different cultural, political and social systems various forms of the family exist". Going forward, we must consider this phrase in the context of the Universal Declaration on Human Right's definition of the family and in the context of the Secretary-General's report of last July 23 that states.

(Quote) Given the diversity of family structures and relationships, family policies should not focus on one type of family alone. Instead, ***they should take into account all types of family, including single-parent, compound, extended and recomposed families***, and make provision for the different needs and particular circumstances of each. (Unquote)

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5. Physical and Mental Health

During 2004 the United States commented on issues raised in UNCHR documents relating to rights associated with physical and mental health. Among other things, the United States objected to language that appeared to be supporting, promoting, or endorsing abortion or abortion-related services.

On March 30, 2004, Ambassador Richard S. Williamson provided a statement on the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (E/CN.4/2004/49), as excerpted below.

The full text of Ambassador Williamson's statement is available at *www.humanrights-usa.net/2004/statement/0330WilliamsonHealth.htm.*

The U.S. did not support creation of the position of this Special Rapporteur.

One reason was the breadth and lack of clarity of the Special Rapporteur's mandate. . . .

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Turning to the report before us, we would like to know the Special Rapporteur's rationale for his assertion that the right to health encompasses "vested" entitlements—as opposed to aspirational goals. Such goals cannot properly be interpreted as legally enforceable entitlements that require the establishment of judicial or administrative enforcement remedies at the national or international levels.

The Special Rapporteur's report appears to be endorsing, supporting, or promoting abortion. The U.S. Government does not support, promote, or endorse abortion or abortion-related services. The United States fully supports the principle of voluntary choice with regard to family planning. We strongly believe that in no case should abortion be promoted as a method of family planning, and that women who have recourse to abortion should in all cases have humane treatment and counseling provided for them. We also support the treatment of women who suffer injuries or illnesses caused by legal or illegal abortion, including, for example, post-abortion care, and do not place such treatment among abortion-related services. . . .

* * * *

Most troubling, however, is the Special Rapporteur's apparent confusion about what constitutes international human rights law. We would like to know why he appears to believe "General Comments" produced by treaty bodies, as well as Summit documents, principles, and guidelines, constitute international human rights law, as he has erroneously suggested in his discussion on discrimination on the ground of sexual orientation. In fact, it is not international human rights law.

Finally, we would note that the shorthand phrase "right to health" has become quite common and convenient. However, Mr. Hunt's correct title, which was carefully negotiated, is "Special

Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." We would like to know why he has chosen to use the title "Special Rapporteur on the Right to Health" in official communications to governments, including our own. A title that is inaccurate and misleading.

On April 16, 2004, the U.S. delegation called for two votes, one on two preambular paragraphs ("PPs") and one operative paragraph and another on a different operative paragraph ("OP"), of L.41, "The Right of Everyone to the Enjoyment of the Highest Standard of Physical and Mental Health" at the sixtieth session of the UNCHR. The resolution was adopted by recorded vote; the United States voted no. E/CN.4/RES/2004/27.

The U.S. explanation of its vote on these paragraphs is excerpted below and is available at *www.humanrights-usa.net/2004/statements/0416health.htm. See also* letter dated April 16 from the Permanent Mission of the United States to the United Nations Office at Geneva, addressed to the Chairperson of the UNCHR, transmitted April 19, 2004, and referred to below. E/CN.4/2004/G/50.

For the U.S. position on L.40, "Resolution on Access to Medication in the context of Pandemics," (E.CN.4/RES/2004/26) referred to above, *see www.humanrights-usa.net/2004/statements/1604medication.htm.*

We . . . request one vote together on PP1, PP2, and OP 12.

PP1 of the resolution reaffirms the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child.

—As we noted in our statement on L.40 [concerning the difficulty for a non-party to a treaty to reaffirm a treaty to which it is not a party], there would be a number of ways to remedy this

paragraph, but we continue to find no flexibility on the part of the co-sponsors to accommodate our concerns.

PP 2 opens by "Reaffirming also that the right of everyone to the enjoyment of the highest attainable standard of physical and mental health is a human right." As in L.40, we proposed inserting the words "to be progressively realized" after this clause, but our amendment was rejected.

—Again, we wish to emphasize that the progressive realization of this right may be a fact that is clear to States Parties to the Covenant on Economic, Social, and Cultural Rights, but it needs to be articulated clearly in this resolution, since not all countries are party to that Covenant.

OP 12 of the resolution, which is language never before adopted by the Commission, strays into issues related to access to water that have yet to be agreed upon internationally and that are inherently contentious.

—The language in the resolution could be read to be a statement that access to water is a precondition to the right to the highest attainable standard of health. As a matter of logic, this might lead to the assertion that if access to water is for whatever reason impeded, the right to the highest attainable standard of health is violated or impaired, resulting in a violation of human rights. We do not accept that reasoning.

—Alternatively, the language could be read to mean that the underlying human right is somehow conditioned on access to water. Human rights have an independent existence and should not be conditioned on access to water or other considerations. While this conditionality is not the intention of the sponsors of the language, this is a possible reading of the text and is an additional cause for concern.

—Access to clean water is, of course, an important factor related to an individual's health and well-being. The United States Government provides technical and financial assistance to countries around the world to develop access to safe water. However, such access is only one of many factors that may affect an individual's enjoyment of the highest attainable standard of health as a component of the right to an adequate standard of living.

My delegation also requests a separate vote on OP 14:

—OP 14 takes note of the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. We have made clear our views on the Special Rapporteur's report, both in a statement to the Commission and in a letter that I will send to you, Mr. Chairman, that I will ask you to circulate to members of the Commission. . . . We do not believe this report merits noting by the Commission, and call for the deletion of this paragraph.

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On April 20, the United States proposed two amendments to the text of L.63: Elimination of Violence Against Women at the UNCHR. The amendment relating to health services would have deleted the word "services" from the phrase "health care services" in OP 7. *See www.humanrights-usa.net/2004/statements/0420vaw.htm*. The amendment was defeated.

The United States then joined consensus on the resolution, which was adopted on April 20, 2004. E/CN.4/RES/2004/46. The United States provided a statement as set forth in full below. See *www.humanrights-usa.net/2004/statements/0420vaw-eov.htm*. *See also* amendment related to the International Criminal Court, discussed in Chapter 3.C.3.d.

The United States understands that the term "health services" or "health care services" in the context of speaking about reproductive health should not be interpreted as including or promoting abortion, abortion services or the use of abortifacients.

The United States fully supports the principle of voluntary choice with regard to family planning. We strongly believe that in no case should abortion be promoted as a method of family planning, and that women who have recourse to abortion should in all cases have humane treatment and counseling provided for them. We also support the treatment of women who suffer injuries or illnesses caused by legal or illegal abortion, including, for

example, post-abortion care, and do not place such treatment among abortion-related services.

The United States emphasizes its commitment to programs that address greater male involvement in pregnancy prevention and voluntary family planning efforts, and the need to stress the practices of abstinence, monogamy, fidelity, partner reduction and the use of condoms to, among other reasons, prevent HIV-AIDS infection.

With these understandings, the United States will join consensus on this resolution.

6. Development

On March 23, Tamala Longaberger, a public member of the U.S. delegation to the UNCHR, provided a statement on the right to development, as excerpted below. On April 13, 2004, the United States called for a vote on the resolution and voted no. The resolution was adopted. E/CN.4/RES/2004/7.

The full text of Ms. Longaberger's remarks is available at *www.humanrights-usa.net/2004/statements/0323Development.htm*.

It is my privilege to speak today on the Right to Development.

This term has been hijacked in recent years. Development, as an economic phenomenon, is a measurement of nation states. But states do not have rights; people have rights. States have responsibilities to the people. In reading the Universal Declaration, I am struck by the broad scope of rights and protections that those Nations listed as important, over 55 years ago. Those human rights can be seen as a blueprint for human development. Under the terms of the Universal Declaration, we can talk about each person's right to development.

We know that a person's development begins early, with good health, and good nutrition for children as well as a safe community and a secure home. The Universal Declaration states clearly that all children, boys and girls, have the right to a free elementary education. The opportunity for higher education should be "equally

accessible on the basis of merit." These are words we live by in the United States.

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The United States is a developed country, but not because of some ephemeral right to development. The United States is developed because our Constitution and our laws protect the rights of the American people to compete in a free market and to reap the benefits of their hard work. We believe that every person in the world should have the same opportunity to make a better life for himself, . . . or herself . . . and for their families. Governments should work to protect that right, and should strive to create an environment where working people can thrive.

The United States is convinced that everyone in the world has the inherent ability to move ahead, to work in his or her own country, and to compete in the world market. We recognize however, that some countries have been ravaged by civil war or other catastrophes and therefore need development assistance to lay the foundation of education, health and basic infrastructure that will enable their children and citizens to develop.

In this regard the record of the United States in providing overseas development assistance is second to none. . . . But simply giving money to the poor or the disadvantaged is not enough. Everyone here is familiar with the saying, "If you give a hungry man a fish, he will be hungry tomorrow, but if you teach him how to fish, tomorrow he will feed himself."

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This is why the President created the largest development aid program since the Marshall Plan for Europe after World War II; known as the Millennium Challenge Account. This new program is designed to identify those countries that are helping, not hindering, their people on the road to economic development. The new program seeks countries that provide a good education to all citizens . . . including boys, girls, and people from minority groups. It links development aid with respect for human rights. . . .

7. Corporate Responsibility

On April 20, 2004, the UNCHR decided, without a vote, to recommend that the Economic and Social Council (a) confirm the importance of issues related to responsibilities of transnational corporations, (b) request the Office of the High Commissioner for Human Rights to compile a report "setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights," and (c) "[a]ffirm that document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard." E/CN.4/DEC/2004/116. Subsection (c), of particular importance to the United States, concerned a report of the Sub-Commission on the Promotion and Protection of Human Rights entitled "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights."

On April 21, 2004, the UNCHR decided to request the Office of the UN High Commissioner for Human Rights "to circulate to Member States and to intergovernmental and non-governmental organizations the pre-draft declaration on human social responsibilities (E/CN.4/2003/105, annex I), requesting their views on it." E/CN.4/DEC/2004/117. The United States voted against adoption of this decision, viewing it as placing international responsibility inappropriately on individuals and entities such as corporations and non-governmental organizations.

8. Protocol to Convenant on Economic, Social, and Cultural Rights

On April 19, 2004, the UNCHR adopted a resolution, "Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International

Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights." E/CN.4/RES/2004/29.

The United States proposed the deletion of operative paragraph 14, which renewed for two years the mandate of the working group to consider an optional protocol to the International Covenant on Economic, Social and Cultural Rights.

The proposed amendment was defeated and the United States voted against the resolution . . .

E. TORTURE

1. Executive Branch Statements

On June 26, 2004, President George W. Bush issued a statement to mark the UN International Day in Support of Victims of Torture. 40 WEEKLY COMP. PRES. DOC. 1167 (July 5, 2004). In the statement, set forth below, President Bush reaffirmed the U.S. commitment to elimination of torture worldwide and to helping victims of torture. The issue of abuse of detainees being held by the United States at the Iraqi prison Abu Ghraib referred to in his statement is discussed in Chapter 18.A.2.c. *See also* legislative amendments related to U.S. extraterritorial jurisdiction over the federal crime of torture, discussed in Chapter 3.B.6.

Today, on United Nations International Day in Support of Victims of Torture, the United States reaffirms its commitment to the worldwide elimination of torture. The non-negotiable demands of human dignity must be protected without reference to race, gender, creed, or nationality. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law.

To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of all detainees.

The United States also remains steadfastly committed to upholding the Geneva Conventions, which have been the bedrock of protection in armed conflict for more than 50 years. These Conventions provide important protections designed to reduce human suffering in armed conflict. We expect other nations to treat our service members and civilians in accordance with the Geneva Conventions. Our Armed Forces are committed to complying with them and to holding accountable those in our military who do not.

The American people were horrified by the abuse of detainees at Abu Ghraib prison in Iraq. These acts were wrong. They were inconsistent with our policies and our values as a Nation. I have directed a full accounting for the abuse of the Abu Ghraib detainees, and investigations are underway to review detention operations in Iraq and elsewhere.

It is often American men and women in uniform who fight for the freedom of others from tyrannical regimes that routinely use torture to oppress their citizens. From Nazi Germany to Bosnia, and Afghanistan to Iraq, American service members have fought to remove brutal leaders who torture and massacre. It is the American people and their contributions that have helped to rebuild these traumatized nations to give former victims hope.

A little over a year ago, American service members and our coalition partners freed the Iraqi people from a dictatorship that routinely tortured and executed innocent citizens because of what they believed in or what ethnic or religious group they came from. In torture chambers, innocent Iraqis were brutalized and the bodies of the dead left in mass graves. Throughout the past year, Americans have assisted the Iraqi people in establishing institutions to ensure accountability so that such acts do not occur again and to help victims recover.

Despite international efforts to protect human rights around the world, repressive regimes continue to victimize people through torture. The victims often feel forgotten, but we will not forget them. America supports accountability and treatment centers for torture victims. We contribute to the U.N. Fund for the Victims of Torture and support the work of non-governmental organizations to end torture and assist the victims. We also provide protection, counseling, and where necessary and possible, relocation in the United States. We stand with the victims to seek their healing and recovery, and urge all nations to join us in these efforts to restore the dignity of every person affected by torture.

These times of increasing terror challenge the world. Terror organizations challenge our comfort and our principles. The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.

Four days earlier, on June 22, White House Counsel Alberto Gonzales announced at a press briefing that the administration was "releasing a series of documents . . . that highlight the thorough deliberative process the administration used to make policy decisions on how we wage a global war against a [terrorist] organization." Excerpts below from Mr. Gonzales' opening remarks addressed concerns related to torture.

The full text of the press briefing, by Mr. Gonzales, DOD General Counsel William Haynes, DOD Deputy General Counsel Daniel Dell'Orto, and Deputy Chief of Staff for Intelligence General Keith Alexander, is available at *www.whitehouse.gov/news/releases/2004/06/20040622-14.html.*

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. . . [T]o the extent that some of these documents, in the context of interrogations, explored broad legal theories, including legal

theories about the scope of the President's power as Commander-in-Chief, some of their discussion, quite frankly, is irrelevant and unnecessary to support any action taken by the President. The administration has made clear before, and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws.

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. . . [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable. The President has not directed the use of specific interrogation techniques. There has been no presidential determination of necessity or self-defense that would allow conduct that constitutes torture. There has been no presidential determination that circumstances warrant the use of torture to protect the mass security of the United States.

The President has given no order or directive that would immunize from prosecution anyone engaged in conduct that constitutes torture. All interrogation techniques actually authorized have been carefully vetted, are lawful, and do not constitute torture.

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2. Memorandum Opinion on Legal Standards

On December 30, 2004, the Office of Legal Counsel ("OLC"), U.S. Department of Justice, released a memorandum opinion interpreting the legal standards applicable under 18 U.S.C. §§ 2340–2340A, also referred to as the Federal Torture Statute. Memorandum for Deputy Attorney General James B. Comey from Daniel Levin, Acting Assistant Attorney General, OLC, *re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A,* available at *www.usdoj.gov/olc/dagmemo.pdf.* As explained in the memorandum opinion, §§ 2340–2340A

of the criminal code implement U.S. obligations under the Convention Against Torture.

As explained in the text of the December 30 memorandum, it replaced an August 2002 document on the same subject, which was withdrawn in June 2004. The 2002 memorandum was also discussed in the press briefing *supra*.

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340–2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT")[1] customary international law[2]; centuries of Anglo-American law[3]; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.[4]

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[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec.10, 1984, S. Treaty Doc.No.100–20, 1465 U.N.T.S. 85. *See also, e.g.*, International Covenant on Civil and Political Rights, Dec.16, 1966, 999 U.N.T.S. 171.

[2] It has been suggested that the prohibition against torture has achieved the status of jus cogens (i.e., a peremptory norm) under international law. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte* (No.3), [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

[3] See generally John H. Langbein, Torture and the Law of Proof: Europe and England in the Ancien Regime (1977).

[4] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right. . . ."); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."); *see also Letter of Transmittal from President Ronald Reagan to the Senate* (May 20, 1988), in *Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100–20, at iii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.").

This Office interpreted the federal criminal prohibition against torture—codified at 18 U.S.C. §§ 2340–2340A—in *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A* (Aug.1, 2002) ("August 2002 Memorandum"). The August 2002 Memorandum also addressed a number of issues beyond interpretation of those statutory provisions, including the President's Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340–2340A. *See id.* at 31–46.

Questions have since been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that "severe" pain under the statute was limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at I.[5] We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety.[6] Because the discussion in that memorandum

[5] *See, e.g.*, Anthony Lewis, *Making Torture Legal*, N.Y. Rev. of Books, July 15, 2004; R. Jeffrey Smith, Slim Legal Grounds for Torture Memos, Wash. Post, July 4, 2004, at A12; Kathleen Clark & Julie Mertus, *Torturing the Law; the Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev.97 (2004).

[6] This memorandum necessarily discusses the prohibition against torture in sections 2340–2340A in somewhat abstract and general terms. In applying this criminal prohibition to particular circumstances, great care must be taken to avoid approving as lawful any conduct that might constitute torture. In addition, this memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees (for example, the Geneva Conventions; the Uniform

concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows, Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture.[7]

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340–2340A. For example, we disagree with statements in the August 2002 Memorandum limiting "severe" pain under the statute to "excruciating and agonizing" pain, *id.* at 19, or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," *id.* at 1. There are additional areas where we disagree with or modify the analysis in the August 2002 Memorandum, as identified in the discussion below.[8]

The Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below.

I.

Section 2340A provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under

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Code of Military Justice, 10 U.S.C. § 801 et seq.; the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–3267; and the War Crimes Act, 18 U.S.C. § 2441, among others). Any analysis of particular facts must, of course, ensure that the United States complies with all applicable legal obligations.

[7] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167–68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.").

[8] While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." (fn. setting forth full text of § 2340A omitted). Section 2340(1) defines "torture" as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." (fn. setting forth full text of § 2340 omitted).

In interpreting these provisions, we note that Congress may have adopted a statutory definition of "torture" that differs from certain colloquial uses of the term. *Cf. Cadet v. Bulger*, 311 F.3d 1173, 1194 (11th Cir.2004) ("[I]n other contexts and under other definitions [the conditions] might be described as torturous. The fact remains, however, that the only relevant definition of 'torture' is the definition contained in [the] CAT. . . ."). We must, of course, give effect to the statute as enacted by Congress.[11]

Congress enacted sections 2340–2340A to carry out the United States' obligations under the CAT. *See* H.R. Conf. Rep. No. 103–482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts.2, 4–5. Sections 2340–2340A satisfy that requirement with respect to acts committed outside the United States.[12] Conduct constituting "torture" occurring within the United

[11] Our task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

[12] Congress limited the territorial reach of the federal torture statute, providing that the prohibition applies only to conduct occurring "outside the United States,"18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." *Id.* § 2340(3).

States was—and remains—prohibited by various other federal and state criminal statutes that we do not discuss here.

The CAT defines "torture" so as to require the intentional infliction of "severe pain or suffering, whether physical or mental." Article 1(1) of the CAT provides:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate attached the following understanding to its resolution of advice and consent to ratification of the CAT:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S.Exec.Rep.No.101–30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification, *see* 1830 U.N.T.S. 320 (Oct.21, 1994), and thus defines the scope of the United States' obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op.O.L.C.28, 32–33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. §§ 2340–2340A generally tracks the prohibition in the CAT, subject to the U.S. understanding.

II.

Under the language adopted by Congress in sections 2340–2340A, to constitute "torture," the conduct in question must have been "specifically intended to inflict severe physical or mental pain or suffering." In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of "severe"; (2) the meaning of "severe physical pain or suffering"; (3) the meaning of "severe mental pain or suffering"; and (4) the meaning of "specifically intended."

(I) The meaning of "severe."

Because the statute does not define "severe," "we construe [the] term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The common understanding of the term "torture" and the context in which the statute was enacted also inform our analysis.

Dictionaries define "severe" (often conjoined with "pain") to mean "extremely violent or intense: *severe pain*." *American Heritage Dictionary of the English Language* 1653 (3d ed. 1992); *see also XV Oxford English Dictionary* 101 (2d ed. 1989) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "Of circumstances . . . : Hard to sustain or endure").[13]

[13] Common dictionary definitions of "torture" further support the statutory concept that the pain or suffering must be severe. *See Black's Law Dictionary* 1528 (8th ed. 2004) (defining "torture" as "[t]he infliction of *intense pain* to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure") (emphasis added); *Webster's*

The statute, moreover, was intended to implement the United States' obligations under the CAT, which, as quoted above, defines as "torture" acts that inflict "severe pain or suffering" on a person. CAT art. 1(1). As the Senate Foreign Relations Committee explained in its report recommending that the Senate consent to ratification of the CAT:

> The [CAT] seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .
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> . . . The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

S.Exec.Rep.No.101–30 at 13–14. *See also* David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 Nova L.Rev. 449, 455 (1991) ("By stressing the extreme nature of torture, . . . [the] definition [of torture in the CAT] describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems.").

Third New International Dictionary of the English Language Unabridged 2414 (2002) (defining "torture" as "the infliction of *intense pain* (as from burning, crushing, wounding) to punish or coerce someone") (emphasis added); *Oxford American Dictionary and Language Guide* 1064 (1999) (defining "torture" as "the infliction of *severe bodily pain*, esp. as a punishment or a means of persuasion") (emphasis added).

This interpretation is also consistent with the history of torture. *See generally* the descriptions in Lord Hope's lecture, *Torture*, University of Essex/Clifford Chance Lecture 7–8 (Jan.28, 2004), and in Professor Langbein's book, *Torture and the Law of Proof: Europe and England in the Ancien Régime*. We emphatically are not saying that only such historical techniques—or similar ones—can constitute "torture" under sections 2340–2340A. But the historical understanding of "torture" is relevant to interpreting Congress's intent. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952).

Further, the CAT distinguishes between torture and "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." CAT art.16. The CAT thus treats torture as an "extreme form" of cruel, inhuman, or degrading treatment. *See* S.Exec.Rep.No.101–30 at 6, 13; *see also* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 80 (1988) ("CAT Handbook") (noting that Article 16 implies "that torture is the gravest form of [cruel, inhuman, or degrading] treatment [or] punishment") (emphasis added); Malcolm D. Evans, *Getting to Grips with Torture*, 51 Int'l & Comp.L.Q. 365, 369 (2002) (The CAT "formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them.").[14] The Senate Foreign Relations Committee

[14] This approach—distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment—is consistent with other international law sources. The CAT's predecessor, the U.N. Torture Declaration, defined torture as "an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.Res. 3452, art.1(2) (Dec.9, 1975) (emphasis added); *see also* S. Treaty Doc.No.100–20 at 2 (The U.N. Torture Declaration was "a point of departure for the drafting of the [CAT]."). Other treaties also distinguish torture from lesser forms of cruel, inhuman, or degrading treatment. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art.3, 213 U.N.T.S. 221 (Nov. 4, 1950) ("European Convention") ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); Evans, *Getting to Grips with Torture*, 51 Int'l & Comp.L.Q. at 370 ("[T]he ECHR organs have adopted . . . a 'vertical' approach . . . , which is seen as comprising three separate elements, each representing a progression of seriousness, in which one moves progressively from forms of ill-treatment which are 'degrading' to those which are 'inhuman' and then to 'torture'. The distinctions between them is [*sic*] based on the severity of suffering involved, with 'torture' at the apex."); Debra Long, Association for the Prevention of Torture, *Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights* 13 (2002) (The approach of distinguishing between "torture," "inhuman" acts, and "degrading" acts has "remained the standard approach taken by the European judicial bodies.

emphasized this point in its report recommending that the Senate consent to ratification of the CAT. *See* S.Exec.Rep.No.101–30 at 13 ("'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture. . . . The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . .'"). *See also* Cadet, 377 F.3d at 1194 ("The definition in CAT draws a critical distinction between 'torture' and 'other acts of cruel, inhuman, or degrading punishment or treatment.'").

Representations made to the Senate by Executive Branch officials when the Senate was considering the CAT are also relevant in interpreting the CAT's torture prohibition—which sections 2340–2340A implement. Mark Richard, a Deputy Assistant Attorney General in the Criminal Division, testified that

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Within this approach torture has been singled out as carrying a special stigma, which distinguishes it from other forms of ill-treatment."). *See also CAT Handbook* at 115–17 (discussing the European Court of Human Rights ("ECHR") decision in *Ireland v. United Kingdom*, 25 Eur. Ct H.R. (ser. A) (1978) (concluding that the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted inhuman or degrading treatment but not torture under the European Convention)). Cases decided by the ECHR subsequent to Ireland have continued to view torture as an aggravated form of inhuman treatment. *See, e.g., Aktas v. Turkey*, No. 24351/94 If 313 (E.C.H.R. 2003); *Akkoc v. Turkey*, Nos. 22947/93 & 22948/93 If 115 (E.C.H.R. 2000); *Kaya v. Turkey*, No. 22535/93 If 117 (E.C.H.R. 2000).

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") likewise considers "torture" as a category of conduct more severe than "inhuman treatment." *See, e.g., Prosecutor v. Delalic*, IT-96-21, Trial Chamber Judgment/542 (ICTY Nov. 16, 1998) ("[I]nhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.").

"[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong.16 (1990) ("*CAT Hearing*") (prepared statement). The Senate Foreign Relations Committee also understood torture to be limited in just this way. *See* S.Exec.Rep.No.101–30 at 6 (noting that "[f]or an act to be 'torture,' it must be an extreme form of cruel and inhuman treatment, causing severe pain and suffering, and be intended to cause severe pain and suffering"). Both the Executive Branch and the Senate acknowledged the efforts of the United States during the negotiating process to strengthen the effectiveness of the treaty and to gain wide adherence thereto by focusing the Convention "on torture rather than on other relatively less abhorrent practices." *Letter of Submittal from George P. Shultz, Secretary of State, to President Ronald Reagan* (May 10, 1988), *in* S. Treaty Doc.No.100–20 at v; *see also* S.Exec.Rep.No.101–30 at 2–3 ("The United States" helped to focus the Convention "on torture rather than other less abhorrent practices."). Such statements are probative of a treaty's meaning. *See* 11 Op.O.L.C. at 35–36.

Although Congress defined "torture" under sections 2340–2340A to require conduct specifically intended to cause "severe" pain or suffering, we do not believe Congress intended to reach only conduct involving "excruciating and agonizing" pain or suffering. Although there is some support for this formulation in the ratification history of the CAT,[15] a proposed express understanding to that effect[16] was "criticized for setting too high a threshold of pain," S.Exec.Rep.No.101–30 at 9, and was not adopted. We are not aware of any evidence suggesting that the

[15] Deputy Assistant Attorney General Mark Richard testified: "[T]he essence of torture" is treatment that inflicts "excruciating and agonizing physical pain." *CAT Hearing* at 16 (prepared statement).

[16] *See* S. Treaty Doc.No.100–20 at 4–5 ("The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.").

standard was raised in the statute and we do not believe that it was.[17]

Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.[18] We are, however aided in this task by judicial interpretations of the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000).

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[17] Thus, we do not agree with the statement in the August 2002 Memorandum that "[t]he Reagan administration's understanding that the pain be 'excruciating and agonizing' is in substance not different from the Bush administration's proposal that the pain must be severe." August 2002 Memorandum at 19. Although the terms are concededly imprecise, and whatever the intent of the Reagan Administration's understanding, we believe that in common usage "excruciating and agonizing" pain is understood to be more intense than "severe" pain.

The August 2002 Memorandum also looked to the use of "severe pain" in certain other statutes, and concluded that to satisfy the definition in section 2340, pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1; *see also id.* at 5–6, 13, 46. We do not agree with those statements. Those other statutes define an "emergency medical condition," for purposes of providing health benefits, as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)" such that one could reasonably expect that the absence of immediate medical care might result in death, organ failure or impairment of bodily function. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B)(2000); *id.* § 1395dd(e)(2000). They do not define "severe pain" even in that very different context (rather, they use it as an indication of an "emergency medical condition"), and they do not state that death, organ failure, or impairment of bodily function cause "severe pain," but rather that "severe pain" may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting "severe pain" in the very different context of the prohibition against torture in sections 2340–2340A. *Cf. United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase "wages paid" has different meaning in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343–44 (1997) (term "employee" has different meanings in different parts of Title VII).

[18] Despite extensive efforts to develop objective criteria for measuring pain, there is no clear, objective, consistent measurement. As one publication explains:

The TVPA, also enacted to implement the CAT, provides a civil remedy to victims of torture. The TVPA defines "torture" to include:

> any act, directed against an individual in the offender's custody or physical control, by which *severe pain or suffering* (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind. . . .

28 U.S.C. § 1350 note, § 3(b)(l)(emphases added). The emphasized language is similar to section 2340's "severe physical or mental pain or suffering."[19] As the Court of Appeals for the District of Columbia Circuit has explained:

> The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal

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> Pain is a complex, subjective, perceptual phenomenon with a number of dimensions—intensity, quality, time course, impact, and personal meaning—that are uniquely experienced by each individual and, thus, can only be assessed indirectly. Pain is a subjective experience and there is no way to objectively quantify it. Consequently, assessment of a patient's pain depends on the patient's overt communications, both verbal and behavioral. Given pain's complexity, one must assess not only its somatic (sensory) component but also patients' moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.

Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993 (emphasis added). This lack of clarity further complicates the effort to define "severe" pain or suffering.

[19] Section 3(b)(2) of the TVPA defines "mental pain or suffering" similarly to the way that section 2340(2) defines "severe mental pain or suffering."

> condemnation that the term "torture" both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that "only acts of a certain gravity shall be considered to constitute torture."
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> The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92–93 (D.C.Cir. 2002) (citations omitted). That court concluded that a complaint that alleged beatings at the hands of police but that did not provide details concerning "the severity of plaintiffs' alleged beatings, including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out," did not suffice "to ensure that [it] satisf[ied] the TVPA's rigorous definition of torture." *Id.* at 93.

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C.Cir. 2003), the D.C. Circuit again considered the types of acts that constitute torture under the TVPA definition. The plaintiff alleged, among other things, that Libyan authorities had held her incommunicado and threatened to kill her if she tried to leave. *See id.* at 232, 234. The court acknowledged that "these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators," but, reversing the district court, went on to hold that "they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA]." *Id.* at 234. Cases in which courts have found torture suggest the nature of the extreme conduct that falls within the statutory definition. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 789, 790–91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a "suffocatingly hot"

and cramped cell, and eight years of solitary or near-solitary confinement, constituted torture); *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1332–40, 1345–46 (N.D.Ga. 2002) (concluding that a course of conduct that included, among other things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette," constituted torture); *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19, 22–23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of "physical torture, such as cutting off . . . fingers, pulling out . . . fingernails," and electric shocks to the testicles); *Cicippio v. Islamic Republic of Iran*, 18 F.Supp.2d 62, 64–66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial, constituted torture).

(2) The meaning of "severe physical pain or suffering."

The statute provides a specific definition of "severe mental pain or suffering," *see* 18 U.S.C. § 2340(2), but does not define the term "severe physical pain or suffering." Although we think the meaning of "severe physical pain" is relatively straightforward, the question remains whether Congress intended to prohibit a category of "severe physical suffering" distinct from "severe physical pain." We conclude that under some circumstances "severe physical suffering" may constitute torture even if it does not involve "severe physical pain." Accordingly, to the extent that the August 2002 Memorandum suggested that "severe physical suffering" under the statute could in no circumstances be distinct from "severe physical pain," *id.* at 6 n.3, we do not agree.

We begin with the statutory language. The inclusion of the words "or suffering" in the phrase "severe physical pain or

suffering" suggests that the statutory category of physical torture is not limited to "severe physical pain." This is especially so in light of the general principle against interpreting a statute in such a manner as to render words surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Exactly what is included in the concept of "severe physical suffering," however, is difficult to ascertain. We interpret the phrase in a statutory context where Congress expressly distinguished "physical pain or suffering" from "mental pain or suffering." Consequently, a separate category of "physical suffering" must include something other than any type of "mental pain or suffering."[20]

Moreover, given that Congress precisely defined "mental pain or suffering" in the statute, it is unlikely to have intended to undermine that careful definition by including a broad range of mental sensations in a "physical suffering" component of "physical pain or suffering."[21]

Consequently, "physical suffering" must be limited to adverse "physical" rather than adverse "mental" sensations.

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[20] Common dictionary definitions of "physical" confirm that "physical suffering" does not include mental sensations. *See, e.g., American Heritage Dictionary of the English Language* at 1366 ("Of or relating to the body as distinguished from the mind or spirit"); *Oxford American Dictionary and Language Guide* at 748 ("of or concerning the body (*physical exercise; physical education*)").

[21] This is particularly so given that, as Administration witnesses explained, the limiting understanding defining mental pain or suffering was considered necessary to avoid problems of vagueness. *See, e.g., CAT Hearing* at 8, 10 (prepared statement of Abraham Sofaer, Legal Adviser, Department of State: "The Convention's wording . . . is not in all respects as precise as we believe necessary. . . . [B]ecause [the Convention] requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law. . . . [W]e prepared a codified proposal which . . . clarifies the definition of mental pain and suffering."); *id.* at 15–16 (prepared statement of Mark Richard: "The basic problem with the Torture Convention—one that permeates all our concerns—is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This

The text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended separately to include as "severe physical suffering." Indeed, the record consistently refers to "severe physical pain or suffering" (or, more often in the ratification record, "severe physical pain and suffering"), apparently without ever disaggregating the concepts of "severe physical pain" and "severe physical suffering" or discussing them as separate categories with separate content. Although there is virtually no legislative history for the statute, throughout the ratification of the CAT—which also uses the disjunctive "pain or suffering" and which the statutory prohibition implements—the references were generally to "pain and suffering," with no indication of any difference in meaning. The *Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which appears in S. Treaty Doc.No.100–20 at 3, for example, repeatedly refers to "pain and suffering." *See also* S.Exec.Rep.No.101–30 at 6 (three uses of "pain and suffering"); *id.* at 13 (eight uses of "pain and suffering"); *id.* at 14 (two uses of "pain and suffering"); *id.* at 35 (one use of "pain and suffering"). Conversely, the phrase "pain or suffering" is used less frequently in the Senate report in discussing (as opposed to quoting) the CAT and the understandings under consideration, *e.g.*, *id.* at 5–6 (one use of "pain or suffering"), *id.* at 14 (two uses of "pain or suffering"); *id.* at 16 (two uses of "pain or suffering"), and, when used, it is with no suggestion that it has any different meaning.

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definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States."); *id.* at 17 (prepared statement of Mark Richard: "Accordingly, the Torture Convention's vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law. In an effort to overcome this unacceptable element of vagueness in Article I of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to . . . meet Constitutional due process requirements.").

Although we conclude that inclusion of the words "or suffering" in "severe physical pain or suffering" establishes that physical torture is not limited to "severe physical pain," we also conclude that Congress did not intend "severe physical pain or suffering" to include a category of "physical suffering" that would be so broad as to negate the limitations on the other categories of torture in the statute. Moreover, the "physical suffering" covered by the statute must be "severe" to be within the statutory prohibition. We conclude that under some circumstances "physical suffering" may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve "severe physical pain." To constitute such torture, "severe physical suffering" would have to be a condition of some extended duration or persistence as well as intensity. The need to define a category of "severe physical suffering" that is different from "severe physical pain," and that also does not undermine the limited definition Congress provided for torture, along with the requirement that any such physical suffering be "severe," calls for an interpretation under which "severe physical suffering" is reserved for physical distress that is "severe" considering its intensity and duration or persistence, rather than merely mild or transitory.[22] Otherwise, the inclusion of such a category would lead to the kind of uncertainty in interpreting the statute that Congress sought to reduce both through its understanding to the CAT and in sections 2340–2340A.

[22] Support for concluding that there is an extended temporal element, or at least an element of persistence, in "severe physical suffering" as a category distinct from "severe physical pain" may also be found in the prevalence of concepts of "endurance" of suffering and of suffering as a "state" or "condition" in standard dictionary definitions. *See, e.g., Webster's Third New International Dictionary* at 2284 (defining "suffering" as "the endurance of or submission to affliction, pain, loss"; "a pain endured"); *Random House Dictionary of the English Language* 1901 (2d ed. 1987) ("the state of a person or thing that suffers"); *Funk & Wagnalls New Standard Dictionary of the English Language* 2416 (1946) ("A state of anguish or pain"); *American Heritage Dictionary of the English Language* at 1795 ("The condition of one who suffers").

(3) The meaning of "severe mental pain or suffering."

Section 2340 defines "severe mental pain or suffering" to mean:

> the prolonged mental harm caused by or resulting from—
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality [.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. Id. § 2340(1).

An important preliminary question with respect to this definition is whether the statutory list of the four "predicate acts" in section 2340(2)(A)–(D) is exclusive. We conclude that Congress intended the list of predicate acts to be exclusive—that is, to constitute the proscribed "severe mental pain or suffering" under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. We reach this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catchall provision or any other language suggesting that additional acts might qualify (for example, language such as "including" or "such acts as").[23] Congress plainly considered very specific predicate acts, and this definition tracks the Senate's

[23] These four categories of predicate acts "are members of an 'associated group or series,' justifying the inference that items not mentioned were

understanding concerning mental pain or suffering when giving its advice and consent to ratification of the CAT. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate's understanding, and with the fact that it was adopted out of concern that the CAT's definition of torture did not otherwise meet the requirement for clarity in defining crimes. *See supra* note 21. Adopting an interpretation of the statute that expands the list of predicate acts for "severe mental pain or suffering" would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to adopt its understanding when giving its advice and consent to ratification of the CAT.

Another question is whether the requirement of "prolonged mental harm" caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such "prolonged mental harm" is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute's reference to "the prolonged mental harm caused by or resulting from" the predicate acts as creating a statutory presumption that each of the predicate acts always causes prolonged mental harm, we do not believe that was Congress's intent. As noted, this language closely tracks the understanding that the Senate adopted when it gave its advice and consent to ratification of the CAT:

> in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or

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excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any "contrary indications" that would rebut this inference. *Vonn*, 535 U.S. at 65.

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

S.Exec.Rep.No.101–30 at 36. We do not believe that simply by adding the word "the" before "prolonged harm," Congress intended a material change in the definition of mental pain or suffering as articulated in the Senate's understanding to the CAT. The legislative history, moreover, confirms that sections 2340–2340A were intended to fulfill—but not go beyond—the United States' obligations under the CAT: "This section provides the necessary legislation to implement the [CAT]. . . . The definition of torture emanates directly from article 1 of the [CAT]. The definition for 'severe mental pain and suffering' incorporates the [above mentioned] understanding." S.Rep.No.103–107, at 58–59 (1993). This understanding, embodied in the statute, was meant to define the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines "severe mental pain or suffering" carefully in language very similar to the understanding, we do not believe that Congress intended the definition to create a presumption that any time one of the predicate acts occurs, prolonged mental harm is deemed to result.

Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we believe that Congress intended this phrase to require mental "harm" that is caused by or that results from a predicate act, and that has some lasting duration. There is little guidance to draw upon in interpreting this phrase.[24] Nevertheless, our interpretation is

[24] The phrase "prolonged mental harm" does not appear in the relevant medical literature or elsewhere in the United States Code. The August 2002

consistent with the ordinary meaning of the statutory terms. First, the use of the word "harm"—as opposed to simply repeating "pain or suffering"—suggests some mental damage or injury. Ordinary dictionary definitions of "harm," such as "physical or mental damage: injury," *Webster's Third New International Dictionary* at 1034 (emphasis added), or "[p]hysical or psychological injury or damage," *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to "prolong" means to "lengthen in time" or to "extend in duration," or to "draw out," *Webster's Third New International Dictionary* at 1815, further suggesting that to be "prolonged," the mental damage must extend for some period of time. This damage need not be permanent, but it must continue for a "prolonged" period of time.[25] Finally, under section 2340(2), the

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Memorandum concluded that to constitute "prolonged mental harm," there must be "significant psychological harm of significant duration, e.g., lasting for months or even years." *Id.* at 1; *see also id.* at 7. Although we believe that the mental harm must be of some lasting duration to be "prolonged," to the extent that that formulation was intended to suggest that the mental harm would have to last for at least "months or even years," we do not agree.

[25] For example , although we do not suggest that the statute is limited to such cases, development of a mental disorder—such as post-traumatic stress disorder or perhaps chronic depression—could constitute "prolonged mental harm." *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369–76, 463–68 (4th ed. 2000) ("DSM-IV-TR"). *See also, e.g., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, at 14 (2004) ("The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder."); *see also* Metin Basoglu et al., *Torture and Mental Health: A Research Overview*, in Ellen Gerrity et al. eds., *The Mental Health Consequences of Torture* 48–49 (2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners*, in Metin Basoglu ed., *Torture and Its Consequences: Current Treatment Approaches* 11 (1992) (referring to findings of post-traumatic stress disorder in torture survivors).

"prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts.[26]

Although there are few judicial opinions discussing the question of "prolonged mental harm," those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic*, the court explained that:

> [The defendant] also caused or participated in the plaintiffs' mental torture. Mental torture consists of "prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . . ," As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of "Russian roulette." *Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.*

198 F.Supp.2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question: one plaintiff "suffers from anxiety, flashbacks, and nightmares and has difficulty sleeping. [He] continues to suffer thinking about what happened to him during this ordeal and has been unable to work as a result of the continuing effects of the torture he endured." *Id.* at 1334. Another plaintiff "suffers from anxiety, sleeps very little, and has frequent nightmares. . . . [He] has found it impossible to return to work." *Id.* at 1336. A third

[26] This is not meant to suggest that, if the predicate act or acts continue for an extended period, "prolonged mental harm" cannot occur until after they are completed. Early occurrences of the predicate act could cause mental harm that could continue—and become prolonged—during the extended period the predicate acts continued to occur. For example, in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601–02 (E.D. Pa. 2003), the predicate acts continued over a three-to-four-year period, and the court concluded that "prolonged mental harm" had occurred during that time.

plaintiff "has frequent nightmares. He has had to use medication to help him sleep. His experience has made him feel depressed and reclusive, and he has not been able to work since he escaped from this ordeal." *Id.* at 1337–38. And the fourth plaintiff "has flashbacks and nightmares, suffers from nervousness, angers easily, and has difficulty trusting people. These effects directly impact and interfere with his ability to work." *Id.* at 1340. In each case these mental effects were continuing years after the infliction of the predicate acts.

And in *Sackie v. Ashcroft*, 270 F.Supp.2d 596 (E.D.Pa. 2003), the individual had been kidnapped and "forcibly recruited" as a child soldier at the age of 14, and over the next three to four years had been forced to take narcotics and threatened with imminent death. *Id.* at 597–98, 601–02. The court concluded that the resulting mental harm, which continued over this three-to-four-year period, qualified as "prolonged mental harm." *Id.* at 602.

Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F.Supp.2d 1285 (S.D.Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an "ordeal," the court concluded that they had failed to show that their experience caused lasting damage, noting that "there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation." *Id.* at 1294–95.

(4) The meaning of "specifically intended."

It is well recognized that the term "specific intent" is ambiguous and that the courts do not use it consistently. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003). "Specific intent" is most commonly understood, however, "to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *Id.* at 354; *see also* Carter v. United States, 530 U.S. 255, 268 (2000) (explaining that general intent, as opposed to specific intent, requires "that the defendant possessed knowledge

[only] with respect to the *actus reus* of the crime"). As one respected treatise explains:

> With crimes which require that the defendant intentionally cause a specific result, what is meant by an "intention" to cause that result? Although the theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

1 LaFave, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted).

As noted, the cases are inconsistent. Some suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least "[i]n a general sense," *id.* at 405, "specific intent" requires that one consciously desire the result. *Id.* at 403–05. The Court compared the common law's *mens rea* concepts of specific intent and general intent to the Model Penal Code's *mens rea* concepts of acting purposefully and acting knowingly. *Id.* at 404–05. "[A] person who causes a particular result is said to act purposefully," wrote the Court, "if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.' " *Id.* at 404 (internal quotation marks omitted). A person "is said to act knowingly," in contrast, "if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.' " *Id.* (internal quotation marks omitted). The Court then stated: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *Id.* at 405.

In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is

enough that the defendant simply have "knowledge or notice" that his act "would have likely resulted in" the proscribed outcome. *Id.* at 1273. "Notice," the court held," is provided by the reasonable foreseeability of the natural and probable consequences of one's acts." *Id.*

We do not believe it is useful to try to define the precise meaning of "specific intent" in section 2340.[27] In light of the President's directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture. Some observations, however, are appropriate. It is clear that the specific intent element of section 2340 would be met if a defendant performed an act and "consciously desire [d]" that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340–2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g., Bailey*, 444 U.S. at 405, nor to have "knowledge or notice" that his act "would likely have resulted in "the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

Two final points on the issue of specific intent: First, specific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a "good reason." Thus, a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute. *See Cheek v. United States*, 498 U.S. 192, 200–01 (1991). Second, specific intent to take a given action can be found even if the defendant will take

[27] In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant's "precise objective" and that it was not enough that the defendant act with knowledge that such pain "was reasonably likely to result from his actions" (or even that that result "is certain to occur"). *Id.* at 3–4. We do not reiterate that test here.

the action only conditionally. *Cf., e.g., Holloway v.United States*, 526 U.S. 1, 11 (1999) ("[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose."). *See also id.* at 10–11 & nn. 9–12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture under the statute. Presumably that has frequently been the case with torture, but that fact does not make the practice of torture any less abhorrent or unlawful.[28]

3. Statement at OSCE Human Dimension Implementation Meeting

On October 7, 2004, Larry Napper, Head of Delegation to the Human Dimension Implementation Meeting, held in Warsaw October 4–15, 2004, delivered a statement on U.S. condemnation of torture, as excerpted below.

The full text of Ambassador Napper's statement is available at *http://osce.usmission.gov/HDIM/hdim2004.html.*

Mr. Moderator, the United States does not compromise its commitment to human rights in accordance with the law, even now, when we are engaged in a war against a ruthless and

[28] In the August 2002 Memorandum, this Office indicated that an element of the offense of torture was that the act in question actually result in the infliction of severe physical or mental pain or suffering. *See id.* at 3. That conclusion rested on a comparison of the statute with the CAT, which has a different definition of "torture" that requires the actual infliction of pain or suffering, and we do not believe that the statute requires that the defendant actually inflict (as opposed to act with the specific intent to inflict) severe physical or mental pain or suffering. *Compare* CAT art. 1(1) ("the term 'torture' means any act by which severe pain or suffering, whether physical or mental, *is intentionally inflicted*") (emphasis added) with 18 U.S.C. § 2340 ("'torture' means an act . . . *specifically intended to inflict* severe physical or mental pain or suffering") (emphasis added). It is unlikely that any such requirement would make any practical difference, however, since the statute also criminalizes attempts to commit torture. Id. § 2340A(a).

unprincipled foe in the War on Terrorism. The United States complies with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. The United States does not permit, tolerate or condone torture by its employees under any circumstances. It is our position that no circumstances whatsoever, including war, the threat of war, internal political instability public emergency, or an order from a superior officer or public authority, may be invoked as a justification or defense to commit torture. We cannot stress our position clearly enough: torture is not acceptable under any circumstances.

For that reason, we supported fully the important work conducted at last year's Supplementary Human Dimension Meeting devoted to the Prevention of Torture. Together, we focused on developing the procedural framework and the means to prevent, as well as hold accountable, those who would commit acts of torture. The United States is committed to this framework and we believe the meeting provided valuable recommendations to Participating States and the OSCE institutions.

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Mr. Moderator, over the past year, the United States Government addressed abuses of detainees in Iraq. These abuses were contrary to U.S. law and policy. We have taken steps to investigate and hold accountable those responsible for committing these egregious acts. Mr. Matt Waxman, the Deputy Assistant Secretary of Defense for the Office of Detainee Affairs spoke in the October 5 side panel about Abu Ghraib, the steps that we are taking to ensure detainees are treated humanely and in accordance with our obligations under international law.

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4. UN Commission on Human Rights

The United States co-sponsored a resolution, "Torture and other cruel, inhuman or degrading treatment or punishment," which was adopted without a vote on April 19, 2004. E/CN.4/RES/2004/41.

F. DETENTIONS AND MISSING PERSONS

1. UN General Assembly Third Committee

The United States joined consensus in Agenda Item 105(b): Missing Persons, in the Third Committee of the UN General Assembly, November 18, 2004. U.N.Doc. No. A/RES/59/189. The U.S. delegation provided the following explanation of its position "to clarify legal points of importance."

The full text of the statement is available at *www.un.int/usa/04_248.htm*.

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First, with regards to [operative paragraph ("OP")] 3, it is our interpretation that the reference to "the right to know the fate of missing relatives" is based upon Article 32 of Additional Protocol I to the Geneva Convention of 1949, and that right is binding only on States Parties to Additional Protocol I.

Second, we interpret OP4 to mean that States should take reasonable and appropriate measures to search for missing persons [which "*reaffirms* that each party to an armed conflict, as soon as circumstances permit and, at the latest, from the end of active hostilities, shall search for the persons who have been reported missing by an adverse party;"]

Third, with respect to [preambular paragraph ("PP")] 4 and PP6, references to human rights law during armed conflict by necessity refer only to those provisions, if any, that may be applicable. As may be well known, it is the position of the United States Government that the Law of War is the *lex specialis* governing armed conflict.

2. UN Commission on Human Rights

a. Missing persons

On April 20, 2004, the United States commented on Resolution L. 70, "Missing Persons" at the sixtieth session

of the UN Commission on Human Rights ("UNCHR"). While supporting "the concept of helping the families of missing persons," the U.S. statement indicated that it could not approve operative paragraphs ("OPs") 1, 3, and 4, as currently drafted "because they contain language that is both legally and factually inaccurate."

The full text of the statement, excerpted below, is available at *www.humanrights-usa.net/2004/statements/0420missingpersons.htm.*

. . . [The United States wishes] to offer minor amendments to those paragraphs that would address our concerns without in any way diminishing the substantive content of those paragraphs. We ask that our amendments be separately considered.

1. We propose that OP 1 be amended by inserting the phrase "for States Parties," after the words "12 August 1949". That paragraph would then make it clear that the rules of international humanitarian law as provided for in the Additional Protocols apply only to States Parties to those Protocols. Mr. Chairman, the US and dozens of other States are not parties to the Additional Protocols and, in fairness, the wording in L.70 should respect that fact.

[OP 1 (as revised)-Urges States strictly to observe and respect and ensure respect for the rules of international humanitarian law, as set out in the Geneva Conventions of 12 August 1949 and, for States Parties, in the Additional Protocols thereto of 1977.]

2. We propose a modest amendment to OP 3 so that it reads: "Reaffirms, as provided for in Article 33 of Additional Protocol I, the right of families to know the fate of their relatives reported missing in connection with armed conflicts." OP 3 as drafted reaffirms a right that is erroneously presumed to be universally recognized. That right, however, has been recognized in only one legally binding international instrument: Art. 33 of Additional Protocol I. The U.S. objects to an asserted "right to know" insofar as it being considered as an established principle of international

human rights law and we object to any legally enforceable "right to know".

3. We propose that OP 4 be amended so that it would read: "Also reaffirms, as provided for in Article 33 of Additional Protocol I, that each party", and then the rest of the sentence would remain unchanged. OP 4 as now drafted paraphrases a legal obligation without properly citing its source, which is Art. 33 of Additional Protocol I. Also, OP 4 asserts a mandatory obligation (using the word "shall") that is not appropriate for the Commission on Human Rights resolution.

These proposed amendments are more than mere technical fixes; they relate to serious points of substance that have important legal and policy implications for the United States. We ask that co-sponsors, in a spirit of compromise and flexibility, will agree to these modest amendments and avoid the need to vote.

b. Enforced or involuntary disappearances

On April 19, 2004, T. Michael Peay, Legal Adviser, U.S. Mission to the United Nations in Geneva, provided an explanation of the U.S. position in joining consensus on L. 59, "Enforced or Involuntary Disappearances," to the sixtieth session of the UNCHR, excerpted below. E/CN.4/RES/2004/40.

The full text is available at *www.humanrights-usa.net/2004/statements/0419disappearances.htm*.

Mr. Chairman, the United States has long been and remains among the strongest champions of the right of everyone to be free from enforced or involuntary disappearances. Toward this end, the United States has actively participated in the on-going negotiations of the open-ended working group to elaborate a legally binding instrument to protect all persons from enforced disappearances. The text of L.59—quite appropriately—attaches considerable importance to the on-going negotiations on that instrument and welcomes the substantial progress made thus far by the negotiators.

. . . What is most important is that the final instrument be carefully-crafted, comprehensively-analyzed, consensus-based, and

by no means subject to arbitrary timeframes for its completion. It is our hope and expectation that these guiding principles will continue to shape this negotiating process. For it is only within that framework that the final instrument can expect to win adoption by consensus and universal acceptance within the international community.

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G. JUDICIAL PROCEDURE, PENALTIES AND RELATED ISSUES

1. Remedies

On April 19, 2004, at the sixtieth session of the UN Commission on Human Rights ("UNCHR"), the United States co-sponsored L.53, "The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms." The resolution was adopted without a vote. E/CN.4/RES/2004/34.

The U.S. comment, excerpted below, is available at *www.humanrights-usa.net/2004/statements/0419remedy.htm*. The U.S. comments on the Basic Principles and Guidelines on the Right to a Remedy for Victims of Violations of International Human Rights and Humanitarian Law referred to here are available at *www.us-mission.ch/press2003/1508Statement%200n%20International%20Humantiarian%20Law.html*; *see also Digest 2003* at 347–54.

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We . . . wish, as cosponsors, to reiterate our commitment to produce guidelines on the right to a remedy that will serve as a practical and useful resource for practitioners and government officials. The U.S. continues to believe that this goal can be best realized through a sequential approach where the human rights law content and the international humanitarian law content of the guidelines would be dealt with separately and sequentially. In particular, we invite continued consideration of our proposal that

current efforts on the guidelines focus exclusively on the human rights law content of the draft guideline and that the international humanitarian law content be set aside for consideration by states in a separate forum, ideally one with established expertise in the area of international humanitarian law. Since the guidelines are intended as a summary or restatement of existing rules within these two bodies of law, we think such an approach is warranted.

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2. Capital Punishment

a. Organization for Security and Cooperation in Europe

The Organization for Security and Cooperation in Europe ("OSCE") Human Dimension Implementation Meeting was held inWarsaw from October 4–15, 2004. On October 7 Marshall Brown, U.S. delegation member, provided the following reply of the United States on the death penalty.

In past meetings the United States delegation has noted the fact that U.S. law on the imposition of the death penalty is in constant ferment. This is inherent in our system of government. The decision on whether to impose the death penalty is something that is decided by our people, through representatives in our legislatures and through judges in our courts. International law does not prohibit capital punishment but limits its application to the most serious crimes and requires certain safeguards, including due process.

The U.S. Supreme Court has strictly limited the application of the death penalty throughout the United States in a manner that conforms to the international obligations that the United States has adopted. At the same time, the legislatures of the individual states have the power to further limit the application of the death penalty for cases within their competence.

I would like to call to your attention the following developments within the past year on the subject of the execution of juveniles, at the national level and at the state level:

Perhaps the most important is the decision by the United States Supreme Court on January 26, 2004, that it will re-examine the constitutionality of executing juvenile offenders. As we had noted last year to the participants at this meeting, the Missouri Supreme Court ruled in August 2003 that the execution of those who committed crimes while under the age of 18 violates evolving standards of decency and is therefore prohibited by the Eighth Amendment of the United States Constitution. This ruling has now been brought to the U.S. Supreme Court.

This case, *Roper v. Simmons*,* will be an important case to watch because the U.S. Supreme Court is being asked to re-visit a decision it made in 1989, when the Court held that the execution of individuals who commit crimes when they are 16 or 17 years old was not inconsistent with the U.S. Constitution. It is possible that its decision will be based, at least in part, on whether there have been significant developments in the law and society that necessitate reconsideration of this precedent. The October term of the U.S. Supreme Court began on October 4 and, as I understand it, the case is set for argument on October 13.

Since *Roper* is pending, the Supreme Court has granted stays of execution for three juvenile offenders who had been scheduled for execution in Texas.

There have also been some developments at the state level:

The Governors of South Dakota and Wyoming both signed into law legislation raising the age of eligibility for the death penalty in their respective states to 18.

On December 8, 2003, the Governor of Kentucky commuted the death sentence of Kevin Stanford, the only juvenile offender on Kentucky's death row. It was Stanford's case in which a plurality of U.S. Supreme Court Justices held that it was not unconstitutional to execute 16 and 17-year-old offenders in *Stanford v. Kentucky* in 1989.

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* Editor's Note: On March 5, 2005, the Supreme Court decided that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper v. Simmons*, 125 S. Ct. 1183 (2005), to be discussed in *Digest 2005*.

The issues raised in these cases are of great interest to the American people and I can assure you that there will be much discussion of *Roper* in our media and by NGOs, who are free to engage in advocacy on this issue. Such frank exchanges of views contribute to the Court's analysis of what constitutes "evolving standards of decency." And it is through discussions, such as we are having in this room, that we can share national experiences in how we deal with such sensitive matters as moral culpability, retribution, and deterrence in democratic societies.

Mr. Moderator, I want to underscore my delegation's view that information about death penalty cases, including the names of those sentenced to death, should be made public. I would note that this is consistent with the 1990 Copenhagen document.

In conclusion, as this debate on the death penalty continues, I can assure you that the United States will continue to respect its international legal obligations.

b. UN Commission on Human Rights

On April 21, 2004, the United States requested a vote and voted no on a draft resolution entitled "Question of the death penalty." Among other things, the resolution "calls upon all States that still maintain the death penalty (*a*) To abolish the death penalty completely and, in the meantime, to establish a moratorium on executions." The United States explained its opposition to the resolution as drafted, as excerpted below. The draft resolution was adopted by the UNCHR on April 21, 2004. E/CN.4/RES/2004/67.

. . . International law does not prohibit the death penalty when due process safeguards are respected and when capital punishment is applied only to the most serious crimes.

Each nation should decide for itself through democratic processes whether its domestic law should permit capital punishment in accordance with international law.

In the United States there is public debate on the use of capital punishment, but the American public is of one mind that when

the death penalty is used, due process must be rigorously observed by all governmental bodies at all governmental levels.

The United States proposed an amendment to a draft resolution, "Human rights in the administration of justice, in particular juvenile justice," to delete operative paragraph 11, which provides:

> 11. *Urges* States to ensure that under their legislation and practice neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years of age;

The amendment was defeated and the resolution was adopted without a vote on April 19, 2004. E/CN.4/RES/2004/43. The United States disassociated itself from the consensus on the resolution and stated that it was not participating in the adoption of the resolution.

3. Integrity of the Judicial System

On April 19, 2004, the UNCHR adopted a resolution, "Integrity of the Judicial System." E/CN.4/2004/RES/2004/32. The United States explained its decision to join consensus on adoption of the resolution as set forth below and at *www.humanrights-usa.net/2004/statements/0419judicialsystem.htm.*

Mr. Chairman, during the past two Commission sessions, the United States found it necessary to call for votes on this resolution for a number of substantive legal reasons. We continue to question the necessity for this resolution, particularly in view of the Commission's perennial consideration and adoption of the resolution on the "Independence and Impartiality of the Judiciary and the Independence of Lawyers."

This year, however, the Russian Federation has presented for adoption a resolution that has been seriously negotiated

and that reflects principles that are both accurately stated and universally recognized. We wish to commend the Russian Federation, and particularly its very capable lead negotiators, for their spirit of cooperation and for conducting intensive, consensus-based negotiations at this session. We are encouraged by reports of future inter-sessional discussions between the Russian Federation and Hungary aimed at exploring the possibility of combining their two texts into a single, consensus-based resolution that would appropriately address both the independence of the judiciary and the integrity of the judicial system.

In view of these positive developments, Mr. Chairman, this year, the United States is pleased to join consensus in the adoption of this resolution.

4. Arbitrary Detention

The United States co-sponsored a resolution, "Arbitrary detention," adopted by the UNCHR on April 19, 2004. E/CN.4/2004/RES/39.

5. Small Arms and Light Weapons

On April 21, 2004, the UNCHR decided to approve the request of the Sub-Commission on the Promotion and Protection of Human Rights to the Secretary-General to transmit a questionnaire to Governments, national human rights institutions, and non-governmental organizations "to solicit information required . . . in particular on the national laws and training programmes used to implement the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, in order that the Special Rapporteur may take them fully into account in preparing her progress report." E/CN.4/DEC/2004/124. The United States called for a vote and voted no on the decision because it does not agree that firearms *per se* cause human rights violations or that the topic belongs at the UNCHR.

6. Alien Tort Statute and Torture Victims Protection Act

The Alien Tort Statute ("ATS"), also often referred to as the Alien Tort Claims Act ("ATCA"), was enacted in 1789 and is now codified at 28 U.S.C. § 1350. It currently provides that 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." Over the past several decades, the statute has been interpreted by the federal courts in various human rights cases, beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). By its terms this statutory basis for suit is available only to aliens.

The Torture Victims Protection Act ("TVPA") was enacted in 1992 and is codified at 28 U.S.C. § 1350 note. It provides a cause of action in federal courts for individuals regardless of nationality, including U.S. nationals, who are victims of official torture or extrajudicial killing against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation." The TVPA contains a ten-year statute of limitations.

Litigation is frequently initiated under both statutes and hence judicial opinions often discuss the two together.

a. Scope

(1) Limited causes of action encompassed by ATS: Sosa v. Alvarez-Machain

On June 29, 2004, the U.S. Supreme Court reversed decisions upholding remedies under the ATS and the Federal Tort Claims Act ("FTCA") on writs of certiorari to the U.S. Court of Appeals for the Ninth Circuit. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

The litigation in this case began in 1993 when Dr. Alvarez-Machain sued the U.S. Drug Enforcement Administration ("DEA"), certain U.S. government officials, and Mexican citizens (including Jose Francisco Sosa) for claims arising from

Alvarez-Machain's 1990 detention in Mexico and transportation to the United States for trial on charges connected with his alleged involvement in the 1985 murder of DEA Special Agent Enrique Camarena-Salazar in Guadalajara, Mexico. In 1992 the Supreme Court held that the manner of Alvarez-Machain's seizure in Mexico did not affect the jurisdiction of a federal court over his prosecution, *United States v. Alvarez-Machain,* 504 U.S. 655 (1992). He was subsequently tried and acquitted. In 2003 the Ninth Circuit sitting *en banc* found that Dr. Alvarez-Machain was entitled to a remedy at law under the ATS against Sosa for a violation of the "law of nations" (and under the FTCA against the United States). *United States v. Alvarez-Machain,* 331 F.3d 604 (9th Cir. 2003). *See Digest 2003* at 380–83; *see also Cumulative Digest 1991–1999 at* 435–44 and *Digest 2001* at 326–34. The Supreme Court granted writs of certiorari filed by both Sosa and the United States.

The United States filed its brief as petitioner in January 2004, and a reply brief in March 2004 in *United States v. Alvarez-Machain*, available at *www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0485.mer.aa.html* and *www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0485.mer.rep.html*. Also in January and March the United States filed a brief and reply brief supporting petitioner Sosa in *Sosa v. Alvarez-Machain,* available at *www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.html* and *www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.rep.html*.

The Supreme Court combined the cases and concluded:

> The two issues are whether respondent Alvarez-Machain's allegation that the Drug Enforcement Administration instigated his abduction from Mexico for criminal trial in the United States supports a claim against the Government under the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. § 1346(b)(1), §§ 2671–2680, and whether he may recover under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. We hold that he is not entitled to a remedy under either statute.

As to the claims under the FTCA, the Court held that the FTCA's exception to waiver of the sovereign immunity of the United States for "any claim arising in a foreign country," "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." In so doing, it rejected the "headquarters analysis" applied by the Ninth Circuit in finding the United States liable for the actions in Mexico because "Alvarez's abduction in Mexico was the direct result of wrongful acts of planning and direction by DEA agents located in California." The Court explained:

> The object [of the foreign country exception to the waiver of U.S. sovereign immunity] being to avoid application of substantive foreign law, Congress evidently used the modifier "arising in a foreign country" to refer to claims based on foreign harm or injury, the fact that would trigger application of foreign law to determine liability. That object, addressed by the quoted phrase, would obviously have been thwarted, however, by applying the headquarters doctrine, for that doctrine would have displaced the exception by recasting claims of foreign injury as claims not arising in a foreign country because some planning or negligence at domestic headquarters was their cause. (fn. omitted) And that, in turn, would have resulted in applying foreign law of the place of injury, in accordance with the choice-of-law rule of the headquarters jurisdiction.

As to the claims against Sosa under the ATS, the Court concluded:

> Although we agree [as argued by Sosa and by the United States as *amicus*] the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law. We do not believe, however, that the limited, implicit sanction to entertain the handful of international law cum common law claims understood

in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.

Further excerpts from the Supreme Court's analysis of the application of the ATS and the role of international law follow (most footnotes omitted).

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* * * *

The parties and *amici* here advance radically different historical interpretations of this terse provision. Alvarez says that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law. We think that reading is implausible. As enacted in 1789, the ATS gave the district courts "cognizance" of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law. See, *e.g.*, The Federalist No. 81, pp 447, 451 (J. Cooke ed. 1961) (A. Hamilton) (using "jurisdiction" interchangeably with "cognizance"). The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature. Nor would the distinction between jurisdiction and cause of action have been elided by the drafters of the Act or those who voted on it. As Fisher Ames put it, "there is a substantial difference between the jurisdiction of courts and rules of decision." 1 Annals of Cong. 807 (Gales ed. 1834). It is unsurprising, then, that an authority on the historical origins of the ATS has written that "section 1350 clearly does not create a statutory cause of action," and that the contrary suggestion is "simply frivolous." Casto, The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 479, 480 (1986) (hereinafter Casto, Law of Nations); Cf. Dodge, The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context, 42 Va. J. Int'l L. 687, 689 (2002). In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.

But holding the ATS jurisdictional raises a new question, this one about the interaction between the ATS at the time of its enactment and the ambient law of the era. Sosa would have it that the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action. *Amici* professors of federal jurisdiction and legal history take a different tack, that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time. Brief for Vikram Amar et al. as *Amici Curiae*. We think history and practice give the edge to this latter position.

* * * *

"When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Ware v. Hylton,* 3 Dall. 199, 281, 3 U.S. 199, 3 Dallas 199, 1 L.Ed. 568 (1796) (Wilson, J.). In the years of the early Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other: "*the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights*," E. de Vattel, The Law of Nations, Preliminaries § 3 (J. Chitty et al. transl. and ed. 1883) (hereinafter Vattel) (footnote omitted), or "that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other," 1 James Kent Commentaries *1. This aspect of the law of nations thus occupied the executive and legislative domains, not the judicial. See 4 W. Blackstone, Commentaries on the Laws of England 68 (1769) (hereinafter Commentaries) ("[O]ffenses against" the law of nations are "principally incident to whole states or nations").

The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor. To Blackstone, the law of nations in this sense was implicated "in mercantile questions, such as bills of exchange

and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry . . . ; [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills." *Id.*, at 67. The law merchant emerged from the customary practices of international traders and admiralty required its own transnational regulation. And it was the law of nations in this sense that our precursors spoke about when the Court explained the status of coast fishing vessels in wartime grew from "ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law. . . ." *The Paquete Habana*, 175 U.S. 677, 686, 44 L.Ed. 320, 20 S. Ct. 290 (1900).

There was, finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 4 Commentaries 68. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war. See Vattel 463–464. It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS with its reference to tort.

* * * *

. . . [A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

IV

We think it is correct . . . to assume 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, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (CA2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized. This requirement is fatal to Alvarez's claim.

A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute. First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms. When § 1350 was enacted, the accepted conception was of the common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533, 72 L.Ed. 681, 48 S. Ct. 404 (1928) (Holmes, J., dissenting). Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created. Holmes explained famously in 1881 that

> "in substance the growth of the law is legislative . . . [because t]he very considerations which judges most rarely mention, and always with an apology, are the secret root

> from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned." The Common Law 31–32 (Howe ed. 1963).

One need not accept the Holmesian view as far as its ultimate implications to acknowledge that a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.

Second, along with, and in part driven by, that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S. Ct. 817 (1938), was the watershed in which we denied the existence of any federal "general" common law, *id.*, at 78, 82 L.Ed. 1188, 58 S. Ct. 817, which largely withdrew to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly, *e.g., Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 1 L.Ed.2d 972, 77 S. Ct. 912 (1957) (interpretation of collective-bargaining agreements); Fed. Rule Evid. 501 (evidentiary privileges in federal-question cases). Elsewhere, this Court has thought it was in order to create federal common law rules in interstitial areas of particular federal interest. *E.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726–727, 59 L.Ed.2d 711, 99 S. Ct. 1448 (1979). And although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, 11 L.Ed.2d 804, 84 S. Ct. 923 (1964), the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.

Third, this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68, 151 L.Ed.2d 456, 122 S. Ct. 515 (2001); *Alexander v. Sandoval*, 532 U.S. 275,

286–287, 149 L.Ed.2d 517, 121 S. Ct. 1511 (2001). The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly. While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.

Fourth, the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. Cf. *Sabbatino, supra*, at 431–432, 11 L.Ed.2d 804, 84 S. Ct. 923. Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private interests in § 1350 cases. Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution. Cf. *Tel-Oren v. Libyan Arab Republic*, 233 U.S. App. D.C. 384, 726 F.2d 774, 813 (CADC 1984) (Bork, J., concurring) (expressing doubt that § 1350 should be read to require "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens").

The fifth reason is particularly important in light of the first four. We have no congressional mandate to seek out and define

new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. It is true that a clear mandate appears in the Torture Victim Protection Act of 1991, 106 Stat 73, providing authority that "establish[es] an unambiguous and modern basis for" federal claims of torture and extrajudicial killing, H.R. Rep. No. 102–367, pt. 1, p 3 (1991). But that affirmative authority is confined to specific subject matter, and although the legislative history includes the remark that § 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," *id.*, at 4, Congress as a body has done nothing to promote such suits. Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing. 138 Cong. Rec. 8071 (1992).

B

. . . These reasons argue for great caution in adapting the law of nations to private rights. . . . All Members of the Court agree that § 1350 is only jurisdictional. We also agree, or at least Justice Scalia does not dispute, *post*, at ____, ____, 159 L.Ed.2d, at 758, 761, that the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority. Justice Scalia concludes, however, that two subsequent developments should be understood to preclude federal courts from recognizing any further international norms as judicially enforceable today, absent further congressional action. As described before, we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, see *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S. Ct. 817 (1938),

that federal courts have no authority to derive "general" common law.

Whereas Justice Scalia sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today. . . . For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

* * * *

We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises, and for this case it suffices to look to the historical antecedents. Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. See, *e.g., United States v. Smith*, 18 U.S. 153, 5 Wheat. 153, 163–180, 5 L.Ed. 57 (1820) (illustrating the specificity with which the law of nations defined piracy). This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. See *Filartiga, supra*, at 890 ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind"); *Tel-Oren, supra*, at 781 (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions—each of which violates definable, universal and obligatory norms"); *see also In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (CA9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"). And the

determination whether a norm is sufficiently definite to support a cause of action[20] should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.[21]

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[20] A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. *Compare Tel-Oren v. Libyan Arab Republic, 233 U.S. App. D.C. 384, 726 F.2d 774, 791–795 (CADC 1984)* (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), *with Kadic v. Karadzic*, 70 F.3d 232, 239–241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

[21] 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 case. For example, the European Commission argues as amicus curiae that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals. *See* Brief for European Commission as Amicus Curiae 24, n.54 (*citing* I. Brownlie, Principles of Public International Law 472–481 (6th ed. 2003)); *cf*. Torture Victim Protection Act of 1991, § 2(b), 106 Stat 73 (exhaustion requirement). We would certainly consider this requirement in an appropriate case.

Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches. For example, there are now pending in federal district court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. *See In re South African Apartheid Litigation, 238 F. Supp. 2d 1379 (JPML 2002) (granting a motion to transfer the cases to the Southern District of New York)*. The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa, reprinted in App. to Brief for Government of Commonwealth of Australia et al. as Amici Curiae 7a, P 3.2.1 (emphasis deleted). The United States has agreed. *See* Letter of William H. Taft IV, Legal Adviser, Dept. of State, to Shannen W. Coffin, Deputy Asst. Atty. Gen., Oct. 27, 2003, reprinted in id., at 2a. In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of

Thus, Alvarez's detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.

* * * *

. . . [It is useful to examine Alvarez's complaint in greater detail. As he presently argues it, the claim does not rest on the cross-border feature of his abduction. . . . [His position now is that] his arrest was arbitrary and as such forbidden by international law not because it infringed the prerogatives of Mexico, but because no applicable law authorized it.

Alvarez thus invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. Whether or not this is an accurate reading of the Covenant [of Civil and Political Rights], Alvarez cites little authority that a rule so broad has the status of a binding customary norm today. He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under Rev Stat § 1979, 42 U.S.C. § 1983 [42 USCS § 1983] and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S. Ct. 1999 (1971), that now provide damages remedies for such violations. It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. And all of this assumes that Alvarez

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the case's impact on foreign policy. *Cf.* R*epublic of Aus. v. Altmann*, 541 U.S. ___, ___, 159 L.Ed.2d 1, 124 S. Ct. 2240 (2004) (slip op., at 23–24) (discussing the State Department's use of statements of interest in cases involving the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq.)

could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still.

Alvarez's failure to marshal support for his proposed rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States (1987), which says in its discussion of customary international human rights law that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention." *Id.*, § 702. Although the Restatement does not explain its requirements of a "state policy" and of "prolonged" detention, the implication is clear. Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of authority. Even the Restatement's limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses. In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law. *E.g., Groh v. Ramirez*, 540 U.S. 551, 157 L.Ed.2d 1068, 124 S. Ct. 1284 (2004).

Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.[29] Creating a private cause of action to further that aspiration would go beyond any residual common law discretion

[29] It is not that violations of a rule logically foreclose the existence of that rule as international law. Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884, n.15 (CA2 1980) ("The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law"). Nevertheless, that a rule as stated is as far from full realization as the one Alvarez urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed.

we think it appropriate to exercise. It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.

* * * *

(2) *Cases decided subsequent to* Sosa

Several of the lower court cases considered or reconsidered during 2004 in light of the *Sosa* decision are discussed below. In each of these cases the courts referred to the relevant statute as the ATCA rather than the ATS. To avoid confusion, the editorial commentary will refer to the statute as the ATS/ATCA.

(i) South African Apartheid Litigation

On November 29, 2004, the U.S. District Court for the Southern District of New York dismissed consolidated class action claims against a number of multinational corporations that did business during the apartheid regime in South Africa. *South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). The court concluded, based on the analysis in *Sosa*, that "[b]ecause the Court finds that the various Complaints do not sufficiently allege that defendants violated international law, this Court lacks subject matter jurisdiction under the ATCA."

In this case, three groups of plaintiffs sought equitable, injunctive, and monetary relief that included "restitution and disgorgement of all monies that can be linked to aiding, conspiring with, or benefiting from apartheid South Africa" and compensatory and punitive damages. As described by the court, allegations from the various complaints, included the following:

> While defendants were benefiting from apartheid policies which provided them with cheap labor, cheap power,

> and high levels of government services to white areas, see 6 Report of the Reparation and Rehabilitation Committee at 140–41; . . . , the United Nations was actively engaged in passing resolutions which urged the South African government to dismantle its policy of apartheid. . . . The General Assembly deemed apartheid "a crime against humanity," G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 21, at 75, U.N. Doc. A/9030 (1974), and the Security Council declared that "all States shall cease forthwith any provision to South Africa of arms and related materiel of all types," S.C. Res. 418, U.N. SCOR, 32d Sess., U.N. Doc. S/INF/33 (1977). Following these international rebukes of apartheid, many defendants publicly withdrew from South Africa while maintaining profitable entities within the nation that continued to provide goods and services that assisted the regime. . . .

Excerpts below provide the court's analysis of the ATS/ATCA claims (most footnotes and references to pleadings filed in the case omitted). *See also Digest 2003* at 387–90 for the U.S. Statement of Interest filed in the case at the request of the court and referred to here and in *Sosa, supra.*

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* * * *

Plaintiffs have alleged a veritable cornucopia of international law violations, including forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination. Plaintiffs link defendants to these alleged international law violations in three ways. Plaintiffs contend that defendants engaged in state action by acting under color of law in perpetrating these international law violations, that defendants aided and abetted the apartheid regime in the commission of these violations, and that defendants' business activities alone are sufficient to make out an international law violation.

Although it is clear that the actions of the apartheid regime were repugnant, and that the decisions of the defendants to do business with that regime may have been morally suspect or

"embarrassing," it is this Court's job to apply the law and not some normative or moral ideal. . . . Given the Court's ruling in *Sosa*, as well as the Second Circuit's decision in *Flores* [*v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003)], it is clear that none of the theories pleaded by plaintiffs support jurisdiction under the ATCA.

1. State Action

First, it is plain from relevant Second Circuit authority that plaintiffs have not pleaded facts that would allow this Court to find that defendants engaged in state action by acting under color of law in perpetrating the complained-of acts. . . .

* * * *

Here, plaintiffs do not allege actions by the defendants that elevate them to the status of state actors in the commission of torture, genocide, killings, and other serious crimes. At most, by engaging in business with the South African regime, defendants benefitted from the unlawful state action of the apartheid government.

Plaintiffs make much of Judge Wood's decision in *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002). In *Wiwa*, plaintiffs alleged that defendants actively cooperated with Nigerian officials in the suppression of a group that was in opposition to the defendants' activities in the region. Id. 2002 U.S. Dist. LEXIS 3293, at *13. Defendants made payments to the military, contracted to purchase weapons for the military, coordinated raids on the group, and paid the military to violently respond to opposition. *Id.*

These activities are not present here. At most, plaintiffs allege that defendants followed the National Key Points Act and made the necessary preparations to defend their premises from uprisings. This activity alone does not constitute joint action with the apartheid regime to commit the slew of international law violations that are complained of. . . . Defendants engaged in no behavior which, because of its connection with the apartheid regime, "may

be fairly treated as that of the State itself."*Abdullahi v. Pfizer, Inc.*, 2002 U.S. Dist. LEXIS 17436, No. 01 Civ. 8118, 2002 WL 31082956, at *5 (S.D.N.Y. Sept. 17, 2002) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004, 73 L.Ed.2d 534, 102 S. Ct. 2777 (1982)). Because this Court does not find state action, it need not consider whether the actions of the apartheid regime violated the law of nations so as to support jurisdiction under the ATCA.

2. Aiding and Abetting and Doing Business in South Africa

Because defendants did not engage in state action, plaintiffs will need to show that either aiding and abetting international law violations or doing business in apartheid South Africa are violations of the law of nations that are "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" such as piracy and crimes against ambassadors. *Sosa*, 124 S. Ct. at 2761–62.

* * * *

Plaintiffs here point to little that would lead this Court to conclude that aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation. Plaintiffs point to the International Criminal Tribunals for the former Yugoslavia, ICTY STAT. art. 7(1), and Rwanda, ICTR STAT. art 6(1), respectively, the Nuremberg trials, the International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"), November 30, 1973, art. I, 1015 U.N.T.S. 243, 245, and this Court's ruling in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003). None of these sources establishes a clearly-defined norm for ATCA purposes.

The International Criminal Tribunals and rulings pursuant thereto, besides dealing with criminal and not civil matters, are not binding sources of international law. *See Flores*, 343 F.3d at 169–70. The same applies for the Nuremberg trials. The Apartheid Convention, which similarly dealt with the criminal repercussions for aiding apartheid, was not ratified by a number of major world powers, including the United States, Great Britain, Germany,

France, Canada, and Japan. *See* Participants to International Convention on the Suppression and Punishment of the Crime of Apartheid reprinted in Appendix of Declarations and Cited Public Materials to the Memorandum of Law in Support of Defendants' Joint Motion to Dismiss at A357. Without the backing of so many major world powers, the Apartheid Convention is not binding international law. *See Flores*, 343 F.3d at 163 n.33.

Finally, this Court declines the invitation to follow the lead of *Presbyterian Church* in finding that aider and abettor liability is recognized under the ATCA. This is especially true since the applicability of that concept in a civil context is dubious at best.

* * * *

. . . Although the ATCA points to international law for the causes of action over which it grants jurisdiction, the ATCA presently does not provide for aider and abettor liability, and this Court will not write it into the statute. In refusing to do so, this Court finds this approach to be heedful of the admonition in *Sosa* that Congress should be deferred to with respect to innovative interpretations of that statute.

This conclusion is strengthened by the policies behind *Central Bank* [*of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994)] and is in accord with the framework announced by *Sosa*. To allow for expanded liability, without congressional mandate, in an area that is so ripe for non-meritorious and blunderbuss suits would be an abdication of this Court's duty to engage in "vigilant doorkeeping." *Sosa*, 124 S. Ct. at 2764. . . .

This Court is also mindful of the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe. To do so would not be consistent with the "restrained conception" of new international law violations that the Supreme Court has mandated for the lower federal courts.

The final possible basis upon which to ground ATCA jurisdiction here is the theory that defendants violated the law of nations by doing business in apartheid South Africa. . . .

* * * *

Although treaties that set forth definite rules and enjoy overwhelming acceptance and adherence are valid sources of international norms for ATCA purposes . . . , the treaties relied on by plaintiffs suffer from a number of defects that preclude findings that any one of them provide applicable customary international law.

Although the Genocide Convention and the Convention Against Torture . . . may apply to the acts undertaken by the apartheid regime itself, they nonetheless do not describe the actions undertaken by defendants here. While both punish complicity in engaging in such acts, both conventions are criminal in nature, and neither is self-executing . . . It follows that no liability based upon any alleged violation of these norms can form an adequate predicate for jurisdiction under the ATCA.

. . . [As to the ICCPR], although these provisions may apply to the apartheid regime, they do not apply to the actions of defendants.

The other authorities relied on by plaintiffs simply do not create binding international law [including the Apartheid Convention, the UN Charter, the Declaration of Human Rights, and General Assembly resolutions].

* * * *

Moreover, as *Sosa* points out, this Court must be aware of the collateral consequences that would result from finding a new international law violation that would support ATCA jurisdiction. In this case, those consequences are not only far-reaching but would raise the prospect of serious impediments to the flow of international commerce. Indeed, the South African government has indicated that it does not support this litigation and that it believes that allowing this action to proceed would preempt the ability of the government to handle domestic matters and would discourage needed investment in the South African economy. See Declaration of Minister Penuell Mpapa Maduna, dated July 11, 2003 at PP10, 12. Similarly, the United States government has expressed its belief that the adjudication of this suit would cause tension between the United States and South Africa and would serve to hamper the policy of encouraging positive change in

developing countries via economic investment. *See* Statement of Interest of the United States, dated October 30, 2003. As the *Sosa* Court made clear, these opinions as to the foreign relations consequences of this action certainly deserve great weight. *See Sosa*, 124 S. Ct. at 2766 n.21 (mentioning this case specifically and stating that "in such cases, 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").

* * * *

Finally, far from there being a congressional mandate to find a cause of action here, history indicates that Congress, consistent with most other world powers, supported and encouraged business investment in apartheid South Africa. The Comprehensive Anti-Apartheid Act of 1986, 100 Stat. 1086, placed a minimal amount of restrictions on business activities with South Africa. This policy of constructive engagement was similar to the policies of many of the world powers at the time. . . . *See* Statement of Interest of the United States, dated October 30, 2003. Therefore, under the framework set forth by the Court in *Sosa*, this Court finds that doing business in apartheid South Africa is not a violation of international law that would support jurisdiction in federal court under the ATCA.

Therefore, this Court finds that there is no subject matter jurisdiction under the ATCA, and thus all claims thereunder, including those for human rights violations, crimes against humanity, unfair labor practices, and all other premised under international law, must be dismissed. Because this Court finds no cause of action under international law, plaintiffs have failed to state claims upon which to ground jurisdiction under 28 U.S.C. §§ 1331 and 1332.

* * * *

Certain American citizen plaintiffs, referred to as the Digwamaje plaintiffs, had also raised claims in *Apartheid* under the Torture Victim Protection Act. The court dismissed those claims as well, explaining:

> Here, defendants did not engage in torture or extrajudicial killings. Because this is abundantly clear, Digwamaje plaintiffs rely on the concept of aider and abettor liability to make the necessary connection between defendants and the prohibited conduct. . . . Here, defendants were not acting under color of law. . . . [S]ince a prerequisite to TVPA liability is that the individual be acting under color of law, this Court finds that creating aider and abettor liability for private actors not acting under color of law would be inconsistent with the statute and precluded by *Central Bank* [*of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994)*].

The court also dismissed claims under the Racketeer Influenced and Corrupt Organizations Act.

(ii) Jama v. INS

Jama v. INS, 343 F. Supp. 2d 338 (D.N.J. 2004), involved claims alleging "subhuman conditions" in a detention facility maintained by the U.S. Immigration and Naturalization Service ("INS") (now the Bureau of U.S. Citizenship and Immigration Services, Department of Homeland Security) where the plaintiffs were held pending determination of their asylum status. In this decision, among other things, the district court revisited earlier rulings concerning claims brought under the ATS/ATCA in light of *Sosa*. The court concluded that "[n]one of the claims against the individual [detention facility guards] can meet the rigorous *Sosa* requirements." The court denied motions for summary judgment by the company that operated the detention facility and certain of its officials, however, finding that "[t]he law of nations as evidenced in the various conventions, treaties, declarations and other sources cited by the *Jama* plaintiffs can be said to have reached a consensus that the inhumane treatment of a huge number of persons accused of no crime and held in confinement is a violation of the law of nations."

(iii) Doe v. Saravia

In *Doe v. Saravia,* 348 F. Supp. 2d 1112 (E.D. Cal. 2004), the U.S. District Court for the Eastern District of California entered a default judgment awarding $10 million in damages against Alvaro Rafael Saravia. Saravia, a death squad officer, was implicated in the assassination of Archbishop Romero of El Salvador in 1980 during an extended period of civil unrest including what the court described as "steadily increasing human rights abuses [by El Salvadoran military, security forces, and paramilitary groups] against poor civilians and members of the church." The court concluded that "the facts pleaded in the Complaint establish Plaintiff's claims of extrajudicial killing in violation of the TVPA and extrajudicial killing and crimes against humanity in violation of the ATCA." Saravia's role "in coordinating and planning the assassination" was sufficient to establish liability against him under both statutes "as a direct participant, conspirator, accomplice, and aider and abettor."

The court found that the plaintiff had met the further requirements for liability under the TVPA by establishing that Saravia "acted under apparent authority and color of law of the Salvadoran government" and that "no legal remedy was or is available in El Salvador for a civil suit against Saravia, in part due to the Salvadoran amnesty law."

Turning to the ATS/ATCA, the court found first that "[a]lthough the ATCA does not provide a definition of extrajudicial killing, under international law, extrajudicial killing is a norm that is 'specific, universal, and obligatory' [and thus] meets the requirements of *Sosa* to be recognized under federal law." Furthermore, "[t]he prohibition against crimes against humanity constitutes such a specific, universal and obligatory norm." As to Saravia's actions, the court concluded:

> Saravia knew that he was involved in an operation to commit the murder of one of the most important civilians in El Salvador, its revered Archbishop. Given that this particular act took place within the context of other

widespread and systematic attacks against the civilian population by state security forces and state-sponsored death squads, the assassination of Romero meets the four criteria for establishing it as a crime against humanity.

See also 7.c. below concerning the equitable tolling of the statue of limitations in the case.

(iv) Doe v. Liu Qi

Plaintiffs in *Doe v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), brought claims under the TVPA and ATS/ATCA based on human rights abuses allegedly perpetrated by local government officials of the People's Republic of China against adherents to the Falun Gong ("FLG") movement. The district court adopted a magistrate's report and recommendation granting in part plaintiff's motion for summary judgment on certain of the claims involving torture, cruel, inhuman or degrading treatment, and arbitrary detention. *See* 6.b.2 below for discussion of the applicability of the act of state doctrine to the case.

The magistrate found that the complaints of torture were directed against PRC police and security forces, and were thus "committed under color of authority" as required by the TVPA. Furthermore, four of the plaintiffs had "sufficiently alleged facts establishing the severe pain or suffering requirement for torture." The plaintiffs had "all provided specific descriptions of acts that exceed 'garden variety' excessive force. They each have alleged facts showing sustained beatings over a lengthy period. Some have alleged, in addition, heinous methods of inflicting agony."

As to claims under the ATS/ATCA the magistrate concluded that claims by three plaintiffs based on "one day of incarceration and interrogation during which they were pushed, shoved, hit, and placed in a chokehold," did not constitute cruel, inhuman or degrading treatment as recognized by existing authorities on international law. A claim of

sexual abuse by one plaintiff, however, was found to constitute such a claim under the statute. Turning to arbitrary detention, the court found that many of the plaintiffs had stated actionable claims because they had "suffered prolonged detention without being charged and without an opportunity to see family or obtain counsel [and were] detained under cruel or torturous conditions."

(v) Bancoult v. McNamara

On December 21, 2004, the U.S. District Court for the District of Columbia dismissed claims against named U.S. current and former government officials and the United States related to the removal of persons indigenous to the Chagos Archipelago to make way for the establishment of a U.S. military facility in the Indian Ocean in the 1960s and 1970s. *Bancoult v. McNamara*, 370 F. Supp. 2d 1 (D.D.C. 2004). The plaintiffs brought claims under the ATS/ATCA for forced relocation, torture, racial discrimination, cruel, inhuman, and degrading treatment, genocide, intentional infliction of emotional distress, negligence, and trespass. The court dismissed the claims based on the ATS/ATCA against the United States on the ground that the suit raised nonjusticiable political questions.

Following the Supreme Court decision in *Sosa*, the United States had filed a supplemental memorandum, pursuant to an order of the court dated October 19, 2004, addressing *Sosa's* impact on this litigation. *See* U.S. Defendants' Response to Plaintiffs' Supplemental Memorandum Addressing the Impact of the Supreme Court's Decision in *Sosa v. Alvarez-Machain*, filed November 9, 2004, available at *www.state.gov/s/l/c8183.htm*. Among other things, the U.S. submission noted that the Supreme Court had no occasion in *Sosa* to "express itself concerning whether, or under what circumstances, relief could be awarded under the ATS in an action *against the United States*, let alone whether *injunctive or declaratory relief* could be granted in such an action." (emphasis in the original). The U.S. submission continued:

> Moreover, nothing in the language or legislative history of the ATS suggests that it was intended to apply in suits against the United States. To the contrary, as to claims for damages, the law of this Circuit—which the Supreme Court did not disturb in *Sosa*—is clear that the ATS does not itself waive the sovereign immunity of the United States. . . .
>
> The district court opinion did not address this issue.

(3) *U.S. submission on effect of* Sosa *in pending case:* Doe I v. Unocal Corp.

On August 25, 2004, the United States responded to a request by the U.S. Court of Appeals for the Ninth Circuit to file a supplemental brief as *amicus curiae* addressing the effect of the Supreme Court decision in *Sosa* in *Doe I v. Unocal Corp. See* 110 F. Supp. 2d 1294 (C.D. Cal. 2000). Villagers from the Tenasserim region of Myanmar (Burma) brought claims against Unocal (a U.S. company) and others alleging liability under the ATS for international human rights violations perpetrated by the Myanmar military in furtherance of the construction of an oil pipeline in the Yadana Field. In 2003 the Ninth Circuit had vacated a previous decision in the case and granted a motion for rehearing *en banc*. For further description of the case and excerpts from the U.S. brief *amicus curiae* before the Ninth Circuit *en banc*, *see Digest 2003* at 355–71.

Excerpts below from the U.S. supplemental brief *amicus curiae* dispute in particular efforts by plaintiffs to develop a cause of action for aiding and abetting under the ATS (most footnotes have been omitted). The case was subsequently settled.

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. . . As we detail below, all of the cautionary admonitions articulated by the *Sosa* Court apply with full force to the claims in

this case, and should lead the Court to affirm the district court's dismissal of the aiding and abetting counts of the complaint.

A. The Court Should Be Very Hesitant To Apply Its Federal Common Law Powers To Resolve A Claim Centering On The Treatment of Foreign Nationals By Their Own Government.

Under the ATS, although the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law—i.e., the law of the United States. The question, thus, becomes whether the challenged conduct should be subject to a cause of action under—and thus governed by—U.S. law. In this case, the aiding and abetting claim asserted against defendants turns upon the abusive treatment of the Burmese people by their military government. It would be extraordinary to give U.S. law an extraterritorial effect to regulate conduct by a foreign country vis-a-vis its own citizens in its own territory, and all the more so for a federal court to do so as a matter of common law-making power.

Even when construing a federal statute, there is a strong presumption against projecting U.S. law to resolve disputes that arise in foreign nations, especially disputes between such nations and their own citizens. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Ibid.*

Notably, the same strong presumption existed in the early years of this nation, and, significantly, applied even to the federal statute that defined and punished as a matter of U.S. law one of the principal law of nations offenses—piracy. *See United States v. Palmer*, 16 U.S. 610, 630–631 (1818). *See also The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as its own citizens."); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1807) (general statutory language should not be construed to apply to the conduct of foreign citizens outside the United States). The view of that time is reflected by Justice Story:

> No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns * * *. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. *No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.*

United States v. La Eugenie, 26 F. Cas. 832, 847 (D. Mass. 1822) (emphasis added).

While the Supreme Court in *Sosa* concluded that Congress, through the ATS, intended the federal courts to have a limited federal common law power to adjudicate well established and defined international law claims such as piracy and attacks on ambassadors, as noted above, the Court expressly questioned whether this federal common law power could properly be employed "at all" in regard to disputes between a foreign nation and its own citizens. *Sosa*, 124 S. Ct. at 2763. Indeed, it is difficult to imagine that the drafters of the ATS intended to grant the newly created federal courts the unchecked power to apply their federal common law powers to decide extraterritorial disputes regarding a foreign nation's treatment of its own citizens. Nothing in the ATS, or in its contemporary history, suggests that Congress intended it to apply to conduct in foreign lands. To the contrary, the ambassador assaults that preceded and motivated the enactment of the ATS involved purely domestic conduct. *See id.* at 2756–2657.

Moreover, "those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations." *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring). The point of the ATS and the Constitution's Law of Nations Clause was to ensure that the National Government would be able to afford a forum for punishment or redress of violations for which the nation offended by conduct against it or its nationals might hold the United States accountable. A foreign government's

treatment of its own nationals is a matter entirely distinct and removed from these types of concerns.

Against this backdrop, reinforced by caution mandated by the Supreme Court in *Sosa*, courts should be very hesitant ever to apply their federal common law powers to resolve a claim, such as the one here, centering on the mistreatment of foreign nationals by their own government.

B. The Significant Policy Decision To Impose Aiding And Abetting Liability For ATS Claims Should Be Made By Congress, Not The Courts

As the Supreme Court has held, the creation of civil aiding and abetting liability is a legislative act that the courts should not undertake without a conclusion that Congress so intended, and there is no indication in either the language or history of the ATS that Congress intended such a vast expansion of suits in this sensitive foreign policy area.

The ATS speaks to a "civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. An aiding and abetting claim is not brought against a party charged as having "committed" a tort in violation of the law of nations. Rather, allowing aiding and abetting liability for ATS common law claims would extend liability not only to violators of international norms, but also against all those who allegedly gave aid and assistance to the tortfeasor. The ATS simply does not by its terms suggest such third-party liability.

* * * *

The *Sosa* Court cautioned that federal courts should be wary of "exercising innovative authority over substantive law" without "legislative guidance." *Sosa*, 124 S. Ct. at 2762. The Court also warned against assuming a legislative function in "crafting remedies" where resolution of the legal issue could adversely implicate foreign policy and foreign relations. *Id.* at 2763. The caution mandated by *Sosa* in deciding whether to recognize and enforce an international law norm under the ATS, when coupled with the teaching of *Central Bank of Denver* [*v. First Interstate*

Bank, 511 U.S. 164 (1994)], that the decision of whether to adopt aiding and abetting liability for a civil claim is typically a legislative policy judgment, lead to the unmistakable conclusion that aiding and abetting liability should not be recognized under the ATS, absent further congressional action. Ultimately, the questions of whether and, if so, how to expand the reach of civil liability under international law beyond the tortfeasor would present difficult policy and foreign relations considerations that should be determined by Congress, not the courts.

C. Practical Consequences Counsel Against The Adoption Of Aiding And Abetting Liability Under The ATS.

Under *Sosa*, a court deciding whether to adopt a rule extending aiding and abetting liability under the ATS must also consider the potential practical consequences, including the foreign policy effects of such a ruling. *See* 124 S. Ct. at 2766 ("the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts"); *id*. at 2766 n.21 (in discussing other possible limiting principles, the Court stated, "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"). Those consequences strongly counsel against the creation of aiding and abetting liability for ATS claims.

1. One of the "practical consequences" of embracing "aiding and abetting" liability for ATS claims would be to create uncertainty that could interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices. One of these options is to promote active economic engagement as a method of encouraging reform and gaining leverage. Judicial development of aiding and abetting liability under the ATS for aiding oppressive regimes would generate significant uncertainty concerning private liability that could deter many businesses from such economic engagement because of fear of potential liability. Even when companies are not party to or directly responsible for the abuses

of an oppressive regime, they would likely become targets of ATS aiding and abetting suits, and the fact-specific nature of an aiding and abetting inquiry would expose them to protracted and uncertain proceedings in U.S. courts. *Cf. Central Bank of Denver*, 511 U.S. at 188–189.

* * * *

While the United States has no current policy of promoting investment in Burma, the complexity and sensitivity of policy decisions about Burma illustrate why the courts should not embark on a new category of ATS liability that could constrain policy options for the future. As the Supreme Court recognized in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374 (2000), Congress, when enacting sanctions against Burma, "clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma. Although Congress immediately put in place a set of initial sanctions * * *, it authorized the President to terminate any and all of those measures upon determining and certifying that there had been progress in human rights and democracy in Burma * * *. And, most significantly, Congress empowered the President 'to waive, temporarily or permanently, any sanction [under the federal Act] * * * if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.'"

Importantly, the adoption of an aiding and abetting rule for ATS cases would not be limited to the case of Burma, but potentially could affect policy options for the United States around the world. Hence, this Court must look to the "practical consequences" beyond its application to the facts of this case. Adopting aiding and abetting liability under the ATS would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices. The selection of the appropriate tools, and the proper balance between rewards and sanctions, requires policymaking judgment properly left to the federal political branches. *See Crosby*, 530 U.S. at 375–385.

The Supreme Court's admonitions in *Sosa* counsel that such a significant judicial infringement upon the Executive's foreign policy powers should be in accord with the constitutional commitment of "the entire control of international relations" to the political branches. *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893). See also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936); *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386 (2003).

2. Another important practical consideration is that allowing for the proliferation of ATS suits, by adopting an aiding and abetting liability standard, would inevitably lead to greater diplomatic friction. Adopting aiding and abetting liability under the ATS would trigger a wide range of ATS actions where plaintiffs seek to challenge the conduct of foreign nations—conduct that would otherwise be immune from suit under the Foreign Sovereign Immunities Act ("FSIA"). Aiding and abetting liability would afford plaintiffs the ability to, in effect, challenge the foreign government's conduct by asserting claims against those alleged to have aided and abetted the government.

Experience has shown that aiding and abetting ATS suits often trigger foreign government protests, both from the nations where the alleged abuses occurred, and, in cases against foreign corporations, from the nations where the corporations are based or incorporated (and therefore regulated). This can and already has led to a lack of cooperation on important foreign policy objectives.

3. Aiding and abetting liability can also have a deterrent effect on the free flow of trade and investment more generally, because of the uncertainty it creates for those operating in countries where abuses might occur. . . .

Thus, serious foreign policy and other consequences relating to U.S. national interests strongly counsel against the judicial common law adoption of a rule extending civil aiding and abetting liability to ATS claims.

D. Aiding And Abetting Liability Does Not In Any Event Satisfy Sosa's Threshold Requirements That An International Law Norm Be Both Firmly Established And Well Defined.

Under *Sosa*, whatever other considerations are relevant in determining whether an international law norm should be recognized and enforced as part of an ATS federal common law cause of action, a necessary requirement is that the international law principle must be both sufficiently established and well defined. The Court did not provide any definitive methodology for assessing when international law norms meet these standards. The Court explained, however, that the principle must be both "accepted by the civilized world" and "defined with a specificity," and in both respects the norms must be "comparable to the features of the 18th-century paradigms"—i.e., violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 124 S. Ct. at 2761. Thus, in resolving whether the necessary conditions are met, this Court should examine: 1) whether aiding and abetting liability is broadly, if not universally accepted, by the international community in a manner comparable to the "18th-century paradigms," and 2) whether the principle, as accepted by the international community, is defined with "specificity."

The application of those inquiries to aiding and abetting liability demonstrates that a court should not exercise its common law powers to adopt such liability for ATS claims.

1. a. The charters of the modern international criminal tribunals embrace the concept of criminal aiding and abetting liability. See Nuremberg International Military Tribunal Control Council Order No. 10; Statute of the International Criminal Tribunal for the Former Yugoslavia (1993, updated 2004) ("ICTY Statute"), art. 7(1); Statute of the International Criminal Tribunal for Rwanda (1994) ("ICTR Statute"), art. 6(1); Rome Statute of the International Criminal Court (1998). Aiding and abetting liability has also been adopted by the United States when defining acts of international terrorism subject to prosecution before military commissions.[9]

b. Although there is a substantial international consensus on the general concept of extending aiding and abetting criminal liability to offenses punishable by international tribunals, this fact does not translate to an established principle of extending criminal

[9] Military Commission Instruction No. 2, Art. 6(C)(1) (April 30, 2003) (available at *www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf*).

aiding and abetting liability concepts to the civil context. As discussed above, there is no "general presumption" that criminal aiding and abetting liability should be read to extend aiding and abetting liability to the civil context. Rather, the general presumption under our domestic law is that such an extension requires an independent legislative policy choice. *Central Bank of Denver*, 511 U.S. at 182.

Moreover, the decision to charge a person before an international criminal tribunal is a grave matter requiring careful exercise of prosecutorial judgment. As noted earlier, that prosecutorial judgment serves as a substantial check on the application of the criminal aiding and abetting standard.[10] Opening the doors to civil aiding and abetting claims in U.S. courts through the ATS could not be more different. Any aggrieved alien, anywhere in the world, could potentially bring such an ATS civil suit in the United States and claim that a private party aided or abetted abuses committed abroad. Such a "vast expansion" of civil liability by adoption of an aiding and abetting rule, *Central Bank of Denver*, 511 U.S. at 183, is not authorized by any international law document or international tribunal decision.

Under *Sosa*, before creating aiding and abetting liability for civil ATS claims, a court should examine whether there is an international consensus that criminal aiding and abetting liability should necessarily translate into a right to sue the aider/abettor for money damages. Given *Central Bank of Denver*'s statement that the extension of criminal aiding and abetting concepts to the civil context is "at best uncertain," 511 U.S. at 181, it is not possible to make that claim.

2. Even if the general concept of aiding and abetting liability were deemed sufficiently established under international law to

[10] One of the reasons the United States refused to join the Rome Statute is the lack of sufficient checks on prosecutorial discretion. *See* American Foreign Policy and the International Criminal Court, Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International studies, Washington, DC, May 6, 2002 (*www.state.gov/p/9949pf.htm*). . . .

satisfy the first *Sosa* threshold limitation, there remains the second threshold question of whether the principle, as accepted by the international community, is defined with "specificity." In *Sosa*, the Court found that the claim of arbitrary detention, previously deemed by this Court to have achieved universal acceptance, had not achieved the status of a well-defined and broadly embraced international law principle such that it could [be] enforced under the ATS. The Supreme Court explained that any consensus concerning this norm was "at a high level of generality." *Sosa*, 124 S. Ct. at 2768 n.27. The same is true here. A survey of the available international law materials confirms that the general principle of aiding and abetting liability for international law violations has not achieved a universally recognized specific definition. There is simply no established international law standard as to civil aiding and abetting, and even as to a criminal law standard, there is no one universally accepted, well-defined standard established by the international community.

a. The post-WWII Nuremberg tribunals did not establish a specific, well-defined aiding and abetting standard. Article 6 of the Charter of the International Military Tribunal at Nuremberg did not address aiding and abetting liability. Two defendants, Fritz Sauckel and Albert Speer, who had principal responsibility for the Nazi forced labor policy, were found guilty of war crimes and crimes against humanity, but not for Crimes against peace because of their lack of personal participation in planning a "war of aggression."

The Nuremberg International Military Tribunal gave way to subsequent proceedings under Control Council Order No. 10, which provided the legal basis for the four major World War II allies to prosecute war crimes. This provided that a person "is deemed to have committed a crime * * * if he was * * * an accessory to the commission of any such crime or ordered or abetted the same." Control Council Law No. 10, Article II (2). The Order did not, however, define an aiding and abetting standard.

The aiding and abetting standard applied by the U.S. tribunals convened under Control Council Law No. 10 has been described by some as establishing a standard of "knowing practical assistance or encouragement that has a substantial effect on the perpetration

of the crime." The actual decisions of the U.S. tribunal, however, never specify that standard. . . .

* * * *

At bottom, the U.S. tribunal decisions were very contextual in nature and cannot fairly be read as themselves establishing a clear generally applicable definition of aiding and abetting liability.

b. More recently, the *ad hoc* International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda articulated definitions for criminal aiding and abetting. *See Prosecutor v. Tadic*, ICTY-94-1-A, ¶ 194 (July 15, 1999); *Prosecutor v. Vasiljevic*, ICTY-98-32-A (Feb. 25, 2004); *Prosecutor v. Kajelijeli*, ICTR-98-44A-T (2003). These tribunals are, however, of limited scope and authority. United Nations Security Council resolution 827 of May 25, 1993, established the ICTY to address the violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. *See* ICTY Statute, art. 1. The ICTR's jurisdiction is likewise limited to the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. *See* ICTR Statute, art. 1. Though of great significance in their own contexts, the statutes and rulings of the ICTY and the ICTR are specific to their limited jurisdictions and do not create general international law.

c. A distinct criminal aiding and abetting standard was included in the Rome Statute of the International Criminal Court. . . .

Because the United States has declined to become a party to the Rome Statute, however, it would not be appropriate for a U.S. court to directly embrace the precepts of that Statute as governing international law regarding aiding and abetting liability. *See Sosa*, 124 S. Ct. at 2767 (rejecting plaintiff's invocation of nonbinding and non-self-executing treaties in his effort to "establish the relevant and applicable rule of international law").

It is notable, however, that the Rome Statute differs in a very significant respect from the ICTY and ICTR tribunal jurisprudence on the question of *mens rea*. Where the ICTY and ICTR tribunals require an aider/abettor to have "knowledge that

the acts performed by the aider and abettor assist the commission of a specific crime by the principal," *see Vasiljevic, supra*, at ¶ 102, the Rome Statute requires more—the purpose to facilitate the crime.

* * * * *

In sum, there simply is no established international law standard as to civil aiding and abetting, and, even as to the criminal law standard, there is no one well-defined universally accepted standard established by the international community. The concept is still developing and has not achieved international consensus. Accordingly, the adoption of aiding abetting liability for civil claims under the ATS does not meet the "high bar" established by the *Sosa* Court for recognizing a cause of action under U.S. common law, especially with respect to a claim where the primary conduct involves a foreign government's treatment of its own nationals in its own territory.

b. Effect on U.S. foreign policy interests

(1) Mujica v. Occidental Petroleum Corp.

On December 23, 2004, responding to a request from the court, the Department of Justice submitted a Supplemental Statement of Interest of the United States, attaching a December 23, 2004, letter from William H. Taft, IV, Legal Adviser of the Department of State in *Mujica v. Occidental Petroleum Corp., CV 03-2860-WJR(JWJx)(C.D. Cal.)*. As explained in the Statement of Interest, "the Court sought the United States' views concerning whether the action would negatively affect '(1) United States foreign relations with Colombia or other countries in the Andean region; (2) United States efforts, including efforts conducted jointly with the Colombian government, to fight terrorism and/or drug trafficking; (3) the ability of the United States to promote human rights in Colombia and elsewhere; and (4) relevant economic factors, including the willingness of U.S. companies to invest in Colombia and elsewhere.' Additionally, the Court

expressed its interest in 'any information that the [United States] may have on other proceedings pending in Colombia that bear upon' the events at issue in plaintiffs' complaint."

As to the attached letter, the Statement of Interest stated:

> . . . As the Supreme Court has directed, it is appropriate for this Court to give these concerns great weight "as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Austria v. Altman*, 124 S. Ct. 2240, 2255 (2004).[1]

The full texts of Mr. Taft's December 24 letter, excerpted below, and the Statement of Interest are available at *www.state.gov/s/l/c8183.htm*.

* * * *

[1] Moreover, as the Supreme Court has noted, in cases, like this one, arising under the Alien Tort Statue ("ATS"), 28 U.S.C. § 1350, a court must act cautiously and "with a restrained conception of its discretion" in both recognizing ATS claims and in extending liability. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761 (2004); *id.* at 2764, 2766 n.20. Thus, the Supreme Court has instructed federal courts to refrain from taking an "aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries," *id.* at 2762, and, in particular, has noted that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly way of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," *id.* at 2763. The Supreme Court's strongest cautionary note pertains to claims relating to a foreign government's treatment of its own citizens in its own territory: "it is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Id.* at 2763. The Court concluded that recognition of such claims "should be undertaken, if at all, with great caution." *Id.* at 1263 (emphasis added). The Court also directed that federal courts consider the "practical consequences" of recognizing causes of action under the ATS, such as consideration of whether a claimant should be required to exhaust available domestic remedies before seeking relief in a United States federal district court. *Id.* at 2766 & n.21.

I am writing now to request that you bring the following views to Judge Rea's attention. We want to affirm at the outset, of course, that the State Department neither takes any position with respect to the merits of the litigation, nor do we condone or excuse any violations of human rights or humanitarian law which may have occurred in connection with the incidents on which the suit is based. Our views are confined to responding to the question posed to us by the court. For reasons stated below, and in light of the views communicated to us by the Colombian government, the State Department believes that the adjudication of this case will have an adverse impact on the foreign policy interests of the United States.

Allegations related to those involved in the suit before the court are currently being handled in the Colombian legal system. In May 2004, an administrative court in the Arauca Department of Colombia ruled that the Colombian government must pay approximately $700,000 in damages to the plaintiffs in this case. This decision is currently under appeal in the Colombian judicial system. While that action was brought against the Colombian government, Defendant Occidental has, in its motion to dismiss on grounds of *forum non conveniens*, stipulated to service of process and consented to jurisdiction in Colombia. In addition, certain Colombian military personnel who were allegedly involved in the incident in question have been dismissed from their positions and face criminal investigation. On January 3, 2003, the U.S. Embassy in Bogotá informed the Colombian government of the U.S. decision to suspend assistance to CACOM-l, the Colombian Air Force unit involved in the Santo Domingo incident.

The Department believes that foreign courts generally should resolve disputes arising in foreign countries, where such courts reasonably have jurisdiction and are capable of resolving them fairly. An important part of our foreign policy is to encourage other countries to establish responsible legal mechanisms for addressing and resolving alleged human rights abuses. Duplicative proceedings in U.S. courts second-guessing the actions of the Colombian government and its military officials and the findings of Colombian courts, and which have at least the potential for reaching disparate conclusions, may be seen as unwarranted and

intrusive to the Colombian government. Moreover, it may also be perceived that the U.S. Government does not recognize the legitimacy of Colombian judicial institutions. These perceptions could potentially have negative consequences for our bilateral relationship with the Colombian government.

Colombia is one of the United States' closest allies in this hemisphere, and our partner in the vital struggles against terrorism and narcotics trafficking. President Bush recently reaffirmed the importance of our relationship with Colombia when he visited the country in November. Colombia's role in helping to maintain Andean regional security, our trade relationship, and our national interests in the security of U.S. persons and U.S. investments in Colombia, rank high on our foreign policy agenda. Important U.S. foreign policy objectives also include support for the rule of law and human rights in Colombia.

Lawsuits such as the one before Judge Rea have the potential for deterring present and future U.S. investment in Colombia. Reduced U.S. investment, particularly in the oil and other extractive industries, could harm Colombia's economy in several ways, including by increasing unemployment and reducing the Colombian government's revenues from taxes and royalties. Downturns in Colombia's economy could have harmful consequences for the United States and our interests in Colombia and the Andean region. Specifically, such downturns could damage the stability of Colombia, the Colombian government's U.S.-supported campaigns against terrorists and narcotics traffickers, regional security, our efforts to reduce the amount of drugs-that reach the streets of the United States, promotion of the rule of law and human rights in Colombia, and protection of U.S. persons, government facilities, and investments. Finally, reduced U.S. investment in Colombia's oil industry may detract from the vital U.S. policy goal of expanding and diversifying our sources of imported oil.

I have attached two letters from the Colombian Ministry of Foreign Relations to the U.S. Ambassador in Colombia. The first letter (Attachment I), dated February 25, 2004, informs the embassy that the Colombian judiciary is investigating the responsibility of Colombian officials in this case. The second letter (Attachment 2), dated March 12, 2004, states that "any decision in this

case may affect the relations between Colombia and the [United States]."

* * * *

(2) Doe v. Liu Qi*: Act of state doctrine*

> Following the decision in *Sosa*, on August 3, 2004, at the invitation of the court, William H. Taft, IV, Legal Adviser, Department of State, provided the views of the United States on the then pending magistrate's report and recommendation in the case in *Doe v. Liu Qi*, discussed *supra*. Mr. Taft reiterated the Department of State views that the act of state doctrine counseled against relief of any kind, given U.S. concerns that further adjudication of the cases would negatively impact the conduct of U.S. foreign relations. The August 3 letter, excerpted below, and an earlier letter of January 14 suggesting that postponement would be appropriate while *Sosa v. Alvarez-Machain* was pending in the Supreme Court, are available at *www.state.gov/s/l/c8183.htm*. *See also Digest 2002* at 469–76 concerning Mr. Taft's letter filed in 2002.

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* * * *

The Department of State continues to hold the views expressed in my letter of September 25, 2002 (submitted to the Court via Statement of Interest, dated September 26, 2002, attached) responding to Magistrate Judge Chen's questions concerning the Foreign Sovereign Immunities Act and the Act of State doctrine. In that letter I noted that, in the context of the instant cases, "U.S. courts should be cautious when asked to sit in judgment on the acts of foreign officials taken within their own countries pursuant to their government's policy." I also pointed out that such suits could typically not be brought against foreign sovereigns under the Foreign Sovereign Immunities Act.

Particularly with regard to the Act of State doctrine, we note that Magistrate Judge Chen's Report and Recommendation concludes

that prudential considerations weigh in favor of application of the doctrine in the circumstances of this case with respect to the claims for damages and injunctive relief. *See* Report and Recommendation at pp. 30–52. While we do not attempt here to address the contents of the Report and Recommendation in detail, we disagree with the view that declaratory relief of the nature sought would neutralize any foreign policy concerns about adjudication of these cases, indeed, the Act of State doctrine counsels against the courts making such an assessment in the face of Executive Branch assessments to the contrary.

While the Executive Branch has continued to express the United States' concerns to the Chinese government at the highest levels about the activities that have given rise to the allegations in these complaints and has challenged China's anti-Falun Gong policies repeatedly and publicly (see, e.g., China: *Country Report on Human Rights Practices—2003, http://www.state.gov/g/drl/rls/hrrpt/2003/27769.htm)* we believe that the concerns we have expressed weigh in favor of engaging the Chinese bilaterally and in other appropriate fora, such as the United Nations, rather than having official Chinese government conduct and policy in China subject to review by U.S. courts. Any determination by this Court in the form of declaratory relief—even if some might regard it to be consistent with the views expressed by the Executive Branch—would have negative implications for the conduct of United States foreign policy. The Chinese Government has vigorously protested these suits at the highest levels, has declined on at least one occasion to send officials to the United States due to fear that they will be harassed and has threatened not to send officials in the future. This negative reaction is based on China's view that suits such as *Liu* and *Xia* represent an illegitimate assertion of U.S. legal competence over matters that are internal Chinese affairs.

The Executive Branch's view that further adjudication of these cases, even if only to provide declaratory relief, would negatively impact the conduct of United States foreign relations is entitled to significant weight. Indeed, as Magistrate Judge Chen's Report and Recommendation notes, the "touchstone of the act of state doctrine is the risk of interfering with the

conduct of foreign relations by coordinate branches of the government." Report and Recommendation at 52. We believe that the *Sosa* decision reinforces the notion that serious weight should be accorded the Executive's views (as expressed in my previous letter submitted to the Court as well as in this letter) concerning the impact on foreign policy of further adjudication of these cases and counsels in favor of ending these suits to be non-justiciable. *See Sosa* at n 21 ("federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy").

* * * *

c. Statute of limitations

In *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004), 6.a.(2)(iii) *supra,* the court addressed the ten-year statue of limitations under the TVPA, where the killing at issue occurred in 1980 and the complaint was filed September 12, 2003. The court noted, that, as to the ATCA, "[a]lthough there is no express limitation period prescribed by the ATCA, the Ninth Circuit has held the applicable limitations period to be the 10 year period set out in the TVPA." Explaining that the courts "have held that the 10-year TVPA limitation period is subject to equitable tolling . . . consistent with the policy . . . 'of providing a forum for claims of violations of internationally recognized human rights,'" the court concluded that the limitation period "has been equitably tolled through the date of filing of the complaint" in this case:

> 215. . . . Plaintiff could not have obtained justice from Salvadoran courts as a result of Plaintiff's lawyers', and some judges' objective and reasonable fear of retaliation or judicial complicity with the repressive regime. This fear extended to proceedings brought outside of El Salvador as well.

* * * *

> 219. Due to this same fear of violent reprisals, plaintiff was unable to bring this claim in a U.S. Court earlier. Although plaintiff has now brought this case, it is only with the protection of filing under the pseudonym J. Doe. El Salvador remains a dangerous place, but changes in the country have now allowed plaintiff's attorneys to investigate the case and obtain the cooperation of witnesses in El Salvador. . . .

H. INDIGENOUS PEOPLE

1. UN Declaration

On May 17, 2004, the United States delivered a statement to the third session of the UN Permanent Forum on Indigenous Issues, urging completion of a UN Declaration on Indigenous Rights.

The full text of the statement is available at *www.un.int/usa/04_083.htm*.

Over one hundred years ago the United States was in conflict with the Native Peoples of America. In the hundred years since, the United States has adopted various policies—from assimilation to the termination of tribal status to the current era of self-determination. And, history is witness; the United States did not always get it right.

Through it all, Native Peoples struggled to survive, to reclaim their strength, to heal their people. . . . The USA is proud to have a government-to-government relationship with over 560 Indian tribal governments within the United States.

. . . Indigenous people in the Americas comprise the majority of the population in a number of countries in the hemisphere and a significant minority of the population in the remainder of the continent. We must work together. Political systems and political parties must ensure that they are fully open to participation of native peoples at all levels without discrimination. States must

understand the human desire of indigenous peoples to have control over their own local affairs and work with them to meet their ends.

One of the most important developments in the protection of human rights and fundamental freedoms that could occur next year would be the adoption by consensus of a UN Declaration on Indigenous Rights. The adoption of this Declaration would be important as it would have a worldwide impact from the Americas, to Asia, to Africa, to Oceania, to Europe. It will apply to all countries, even to those countries who say that their populations are all indigenous and, therefore, they don't have any indigenous groups. This is simply not true. The fact is that many countries who currently say they don't have any indigenous peoples, groups or individuals, do have indigenous; they have simply failed to recognize them and continue to deny them rights.

In our view, the Declaration should be a blueprint for how states ought to conduct relations with indigenous peoples. The Declaration should recognize that local authorities should be free to make their own decisions on a range of issues from taxation to education to land resources management to membership. These are the powers of a government. This is the essence of a federal system with which we are quite comfortable.

In over a decade, the Working Group on the Draft Declaration has approved only two articles. The Working Group has not even been able to complete a first read of a draft text. We expect that the 2005 [Commission on Human Rights ("CHR")] will have to decide whether the process can continue. We urge the Working Group to make progress based on principles that can apply everywhere for the benefit of indigenous individuals and peoples and the nation states of which they are a part. We urge flexibility on the part of all in reaching a consensus text.

For a Declaration to have full moral authority, consensus among Member States is a prerequisite. We hope and trust that this can occur by the next CHR, particularly in light of the fact that 4 weeks of meetings have been scheduled for this Fall. In our view, unless rapid progress is made in the Working Group during these 4 weeks, the CHR would not be using its resources responsibly if it continues this exercise.

2. Second International Decade

On November 4, 2004, the UN General Assembly Third Committee adopted a draft resolution on the Second International Decade of the World's Indigenous People. U.N. Doc. A/C.3/59/L.30, as orally revised; adopted without vote by the General Assembly on December 20, 2004, as Resolution 174, U.N. Doc. A/RES/59/174. Resolution 174, among other things, proclaimed the Second International Decade of the World's Indigenous People, commencing on January 1, 2005. As to the UN declaration, the General Assembly in operative paragraph 12 "urge[d] all parties involved in the process of negotiation to do their utmost to successfully accomplish the mandate of the open-ended intersessional working group established by the UN Commission on Human Rights in its resolution 1995/32 and to present for adoption as soon as possible a final draft United Nations declaration on the rights of indigenous people"

The United States did not object to the resolution, which was adopted in both the Third Committee and the General Assembly without a vote.

3. Internal Self-Determination

A U.S. statement to the sixtieth session of the UNCHR on April 6, 2004, stated, in addition to the points above, that

> [m]uch has been said about so-called U.S. obstructionism at the [working group on the draft declaration ("WGGD")]. The United States of America takes the work of iterating a Declaration on Rights of Indigenous Peoples seriously. For this reason the U.S. has examined its positions and has offered the notion of "internal self-determination." The notion of "internal self-determination" recognizes that local authorities will and should make their own decisions on a range of issues from taxation to education to land resources management to membership. . . .

The full text of the statement, delivered by U.S. public delegate Luis Zuniga, is available at *www.humanrights-usa.net/2004/statements/0406ZunigaItem15.htm.*

I. RULE OF LAW AND DEMOCRACY PROMOTION

1. Protection of Civil and Political rights

On March 31, 2004, Ambassador Richard S. Williamson delivered a statement on Item 11: Civil and Political Rights. As excerpted below, the statement focused on the need for states to have mechanisms to protect these rights of individuals.

The full text of Ambassador Williamson's remarks is available at *www.humanrights-usa.net/2004/statements/0331Item11.htm.*

Human rights are inalienable. They exist irrespective of whether they are granted or recognized by the legal and social system within which we live. They are moral, pre-legal, natural rights of every man and woman. They are peremptory rights. However, they are not self-enforcing. Societies need mechanisms to make sure they are, in fact, protected.

As Professor Anne-Marie Gardner has written,

> "Wise societies know that there are forces which systemically seek to undermine the rights of others. They therefore construct institutional mechanisms to protect the rights of inhabitants even against legislatures and executives. These mechanisms often include granting constitutional status to some rights, enforceable by independent (constitutional) courts. . . . Courts usually derive their legitimacy from their independence within the state structure, which is in turn based on their primary role as expounders of the law, and as those who ensure that in its application to individual cases the rule of law will be maintained."

In other words, societies must construct protections for "an individual's autonomy and dignity against coercion, whatever the source—state, church, or society." Society must build institutions to stabilize tendencies of human behavior. They must develop institutions that embed civil and political rights into the patterns and traditions of society such as a free press, the right to assembly, labor unions, churches, mosques and synagogues, political parties, access to the press, the right of dissent, private property, an active civil society, minority rights, transparent and accountable governance, and most fundamental to those protections is the rule of law and an impartial judiciary. Such institutions are the bulwark of a free society, the guardrails of democracy, necessary to protect the inalienable rights of every man and woman. They are the protection required in the rough and tumble of daily life in a free society that helps insure continued recognition of and respect for human rights.

The mechanics of elections are not enough to protect human rights. Government should rest on consent. And that consent requires selection "through periodic, inclusive, competitive elections which feature free speech and assembly, including legal protection of minority rights and opposition." It also includes adequate access to the media for the opposition.

* * * *

Societies that respect civil and political rights, practice democracy, and respect the rule of law can do a better job of allowing individuals to fully realize their economic, social, and cultural rights. The advancement of democracy and economic openness are the best foundations for domestic stability and international order.

Democratically governed nations are more likely to secure peace, deter aggression, expand open markets, promote economic development, combat international terrorism and crime, rule responsibly, uphold human rights and fundamental freedoms, and improve human health. Democratic ideals, which include the rule of law and accountability, not only protect the rights of citizens but also provide the stable, secure climate that encourages the investment and economic growth that allows development to occur.

A strong rule of law tradition is necessary to build stable, political and economic environments that benefit all countries and protect citizens from unjust or capricious actions by government that interfere with the exercise of their personal freedoms. Without it, states lack the legal framework necessary for civil society to flourish, for sustainable economic development to take place, for adequate checks on executive and legislative power to function, and for the legal foundations for free and fair electoral and political processes to operate. Deficiencies in the rule of law create an atmosphere conducive to drug and human trafficking, criminal violence, abuse of power, and human rights abuses. Corruption undermines the legitimacy of government, alienates citizens from their leaders, and threatens stability. It also destroys institutions that detect and prevent human rights abuses.

The United States seeks to help those governments that want to make reforms. We engage in private dialogue, but such dialogue must be accompanied by concrete results. We believe the United Nations Commission on Human Rights should be a place where governments can come for assistance. But when governments are not making serious efforts to improve and human rights violations persist, the Commission has the responsibility—and must have the capability—to focus the international community's attention on such governments as a way to spur them to action. "Naming and shaming" does have a place in our work and can help advance the cause of human rights. We must support the weak against the strong and give voice to the victims voiceless in their own land. That is our responsibility and our opportunity.

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2. Democracy Promotion

a. Statement to the Third Committee

Governor Jane D. Hull, Senior Advisor, U.S. Mission to the United Nations, addressed the UN General Assembly Third Committee (Social, Humanitarian and Cultural) on

October 25, 2004. Governor Hull's statement, excerpted below, is available at *www.un.int/usa/04_204.htm.*

The U.S. Government shares a strong and unwavering commitment to protecting human rights and fostering democracy and the rule of law worldwide.

As President Bush told the General Assembly this last Sept. 21, "Both the American Declaration of Independence and the Universal Declaration of Human Rights proclaim the equal value and dignity of every human life. That dignity is honored by the rule of law, limits on the power of the state, respect for women, protection of private property, free speech, equal justice, and religious tolerance. That dignity is dishonored by oppression, corruption, tyranny, bigotry, terrorism and all violence against the innocent."

The International Covenant on Civil and Political Rights states that every citizen shall have the right and the opportunity to take part in the conduct of public affairs. And be able to vote and be elected at genuine periodic elections.

Democracies are more likely to respect human rights, both at home and abroad. We are committed to supporting countries' transitions to democracy throughout the world. We believe firmly that the advent of democracy advances human freedom and human dignity. And empowers individuals and societies to reach their greatest potential.

The United States has been a strong supporter of, and participant in, the Community of Democracies. This unique forum of well over 100 democratic nations is committed to spreading and strengthening democratic principles around the world. Poland, South Korea and Chile have led the Community of Democracies. They have helped to launch numerous initiatives to help democratization and support nascent democracies such as East Timor.

Such a group helps [the] Third Committee, the Commission on Human Rights, and other multilateral fora uphold the values upon which they were founded. Our vision is of a coalition of democratic countries that will increasingly consult and cooperate, uniting their voices based on common democratic interests and values.

On September 21, President Bush proposed the establishment of a Democracy Fund within the United Nations. This would help countries "lay the foundations of democracy by instituting the rule of law and independent courts, a free press, political parties and trade unions." As he explained, "the advance of liberty is the path to both a safer and better world." We hope fellow Community of Democracy member states will lead the way in promoting and funding this initiative.

Freedom of religion is an inalienable right of all humankind. Many around the world would believe the freedom to worship is their most vital and indispensable right. There are robust affirmations of religious freedom in the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, as well as the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

b. UN Commission on Human Rights

(1) Promotion of democracy

The United States co-sponsored a resolution at the sixtieth session of the UN Commission on Human Rights ("UNCHR"), "Enhancing the role of regional, subregional and other organizations and arrangements in promoting and consolidating democracy," which was adopted by recorded vote on April 19, 2004. E/CN.4/RES/2004/30, On that date, the Bureau of International Organization Affairs issued a fact sheet entitled "Resolution on the Consolidation and Promotion of Democracy: 2004 UN Commission on Human Rights." The full text of the fact sheet, excerpted below, is available at *www.state.gov/p/io/fs/2004/31606.htm.*

The United States is deeply committed to working with other democracies to promote democratic values in UN bodies. At the 2004 UN Commission on Human Rights in Geneva, the United States, along with Peru, Romania, and Timor-Leste, successfully

introduced and passed a resolution that promotes the central elements of democracy. The 53-member Commission adopted the resolution (entitled Enhancing the Role of Regional, Sub-regional and Other Organizations and Arrangements in Promoting and Consolidating Democracy) by a vote of 45 to 0 (with eight abstentions), collecting 73 co-sponsors from both members and non-members of the UN Human Rights Commission.

This resolution is closely linked to the Democracy Caucus, an association of countries that share values consistent with democratic ideals and human rights standards. It represents a movement to proactively strengthen the UN's efforts to promote democracy, the rule of law, human rights, and fundamental freedoms. This measure is part of the United States' broader initiative to promote democracy in UN forums and programs, including working to make the Commission's membership and its work live up to its intended mandate. It is a direct follow-up to the commitment made by well over 100 countries at both the Warsaw and Seoul Ministerial meetings of the Community of Democracies.

The resolution, among other things:

- Reaffirms that the promotion and protection of human rights is a basic prerequisite for a democratic society;
- Acknowledges that democracy contributes substantially to preventing violent conflicts and to accelerating reconstruction in post-conflict peace building;
- Recognizes the need for UN Member States to pay further special attention and contribute to democratic institution building;
- Requests the United Nations High Commissioner for Human Rights to promote democracy by considering designating a focal point in the Office of the High Commissioner for Human Rights.

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The foreign ministers of the Community of Democracies, referred to in Governor Hull's statement *supra*, met at the United Nations on September 22, 2004. A communiqué

released at the conclusion of the meeting is available at *www.state.gov/g/drl/rls/36455.htm*.

(2) Self-determination

On March 19, 2004, Ambassador Richard S. Williamson delivered a statement on the right to self-determination as excerpted below.

The full text of Ambassador Williamson's statement is available at *www.humanrights-usa.net/2004/statements/0319itemfive.htm*.

Before the collapse of the Apartheid Regime in South Africa and the disintegration of the Soviet Empire, this was one of the Commission's noblest and [most] worthwhile agenda items. . . .

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Regrettably, the admirable traditions and past accomplishments of this Commission with regard to the right to self-determination have been perverted in recent years by the two principal resolutions that are annually introduced and adopted under this agenda item. These resolutions are entitled "Situation in occupied Palestine" and "The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination." My government not only opposes these resolutions, but is deeply saddened by how they have distorted and twisted this Commission's approach to self-determination.

In the case of the resolution on mercenaries, the principal target of this largely Cuban initiative is the United States. Unable to vote in free and fair elections in Cuba and otherwise denied the right to self-determination by the Cuban Government, hundreds of thousands of Cubans have "voted with their feet" by fleeing their island prison in order to enjoy the right to self-determination in the United States and many other countries represented in this room. The historical record speaks for itself.

In the case of the resolution on Palestine, the target is Israel. But Israel has been the only full democracy in its region and the only country in its region that respects and enforces the right to self-determination of its people. In the words of President George W. Bush,

> "For the Palestinian people, the only path to independence and dignity and progress is the path of democracy. And the Palestinian leaders who block and undermine democratic reform, and feed hatred and encourage violence are not leaders at all. They're the main obstacles to peace, and to the success of the Palestinian people."

Self-determination and democracy are the best safeguard for human rights. Self-determination freely and fairly practiced helps insure that governments serve the people, not the other way around.

In too many areas, democracy has not yet taken root. We should be committed to spreading self-determination and democracy in all corners of the globe, including the Middle East.

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We should not allow this fundamental human right to self-determination that is enshrined in the Universal Declaration of Human Rights and that is so central to the protection of the other fundamental human rights to be hijacked for other political purposes. The Commission fails to demonstrate its respect for the right to self-determination when it passes resolutions like the two I have referred to.

This Commission should recognize that there is no single path to democracy and that future representative governments in the Middle East and elsewhere will reflect their own cultures. It should recognize that democratic nations may be constitutional monarchies, federal republics, or parliamentary systems. It should acknowledge that working democracies take time to develop, as has been the case with my country and other democracies in this Commission.

But in addressing the right to self-determination, this Commission must also recognize, as President Bush has declared, that

> "There are essential principles common to every successful society, in every culture. Successful societies limit the power of the State and the power of the military—so that governments respond to the will of the people, and not the will of an elite. Successful societies protect freedom with the consistent and impartial rule of law, instead of selectively applying the law to punish political opponents. Successful societies allow room for healthy civic institutions—for political parties and labor unions and independent newspapers and broadcast media. Successful societies guarantee religious liberty—the right to serve and honor God without fear of persecution. Successful societies privatize their economies, and secure the right of property. They prohibit and punish official corruption, and invest in the health and education for their people. They recognize the rights of women."

Self-determination offers a road to these universal elements of freedom. Mr. Chairman, this Commission needs to adopt resolutions that promote and protect the right to self-determination, not ones that make a mockery of that very important human right.

(3) Conscientious objection to military service

On April 19, 2004, the United States delegation explained its position in joining consensus on L.54 "Conscientious Objection to Military Service" at the sixtieth session of the UNCHR. E/CN.4/RES/2004/35.

The full text of the U.S. statement, excerpted below, is available at *www.humanrights-usa.net/2004/statements/0419CO.htm.*

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— My delegation will join consensus on this resolution because the United States fully supports the right of everyone to have personal objections to military service as one possible element of

exercising their right to freedom of thought, conscience, and religion.
— Specifically, in countries that practice military conscription, everyone should have the right, without reprisal or punishment of any kind, to seek formal conscientious objector status through a fair and impartial process established by law.
— But no one has an absolute right or entitlement to be granted conscientious objector status.
— Unsuccessful applicants who refuse to perform military service or other alternatives that may be offered must be prepared to accept the consequences provided by law.
— Finally, with regard to Operative Paragraph 4, my delegation understands this language on amnesties and restitution to be clearly intended for, and limited to, civil war situations and their aftermath.

3. Statements on Incidents in Specific Countries

a. Hong Kong

On January 9, 2004, a statement by Richard Boucher, Department of State Spokesman, indicated U.S. support for public popular demonstrations in Hong Kong, stating that "[t]he United States strongly supports democracy through electoral reform and universal suffrage in Hong Kong. These will advance economic and social development and are essential to Hong Kong's prosperity and stability within the 'one country, two systems' framework." *See www.state.gov/r/pa/prs/ps/2004/28035.htm.*

b. Cambodia

On January 22, 2004, Deputy State Department Spokesman Adam Ereli issued a statement condemning the killing of Cambodian Union Leader Chea Vichea, as excerpted below.

The United States strongly condemns the January 22 killing in Phnom Penh of Mr. Chea Vichea, President of the Free Trade Union of Workers of the Kingdom of Cambodia. Chea Vichea was a champion of labor rights and the free trade union movement in Cambodia, which the United States strongly supports. We deplore this cowardly murder and other acts of violence in Cambodia.

The United States calls on the Cambodian government to undertake immediate and effective action to bring the perpetrators of Chea Vichea's murder to justice. A culture of impunity in Cambodia must not be tolerated. The United States urges restraint on all sides so that this tragedy will not be compounded by further violence. We also call on the Royal Government of Cambodia to take steps to ensure the security of Chea Vichea's family, his colleagues and other labor organizers. We offer our condolences to his widow and children.

Cambodian leaders are now working to form a new government based on the July 27, 2003 national elections. It is essential that they are able to do so in an environment free of intimidation and violence. It is the responsibility of all elements of Cambodian society to take a constructive role in finding peaceful solutions to conflicts.

c. Cuba

On January 21, 2004, Deputy Department of State Spokesman Adam Ereli issued a statement condemning the continued imprisonment of Cuban human rights defenders, available at *www.state.gov/r/pa/prs/ps/2004/28316.htm. See also* statement by Ambassador William Marsh, Senior Advisor to the U.S. Mission to the United Nations, in Right of Reply to Cuba, in the Fourth Committee, October 21, 2004, available at *www.un.int/usa/04wm1021.htm.*

Last March, the Cuban government convicted 75 independent Cuban journalists, librarians, and human rights defenders on trumped-up charges and sentenced them to unjust prison

sentences—an average of 20 years each—for attempting to exercise their fundamental, internationally protected rights. The United States condemns the continued unfair detention of these individuals and calls for their immediate release.

As an added injustice, the Cuban government is systematically persecuting these individuals. Christian Liberation Movement member Jose Daniel Ferrer Garcia, who was sentenced to 28 years for his role in promoting the Varela Project, a grassroots movement that supports a national referendum calling for democratic change, was sentenced to three months of solitary confinement as punishment for protesting prison guards' mistreatment of his wife. Martha Beatriz Roque, a 57-year-old independent economist, is serving a 20-year prison term for her efforts to organize non-governmental organizations dedicated to civic freedoms, entered prison with numerous health problems. Independent economist and journalist Oscar Espinosa Chepe, who is 62, remains in very poor health, and suffers from severe liver disease and other ailments. He is serving a 20-year prison term for reporting news about the Cuban economy and social issues. Neither Roque nor Espinosa Chepe have received adequate treatment for their illnesses, and their conditions are deteriorating.

Such deprivation and flagrant abuse of human rights have not been limited to the group of 75. In February, human rights activist Leonardo Bruzon Avila, who is in poor health due to repeated hunger strikes, will soon complete two years in prison without a trial. In March, blind pro-democracy activist Juan Carlos Gonzalez Leyva will also complete two years in prison without a trial. Gonzalez was jailed for protesting the police beating of an independent journalist. Dr. Oscar Elias Biscet, who has worked tirelessly to express his commitment to the use of non-violence to achieve change, was arrested in December 2002 for attempting to teach others about international human rights practices. We also should not forget long-suffering political prisoners like Francisco Chaviano, an advocate of peaceful democratic reforms, who was sentenced in 1994 to 15 years in prison for revealing that a member of his organization was in fact a government agent.

We express our admiration for all Cuban political prisoners and our solidarity with their families. The United States salutes

their courage in standing up to tyranny while continuing to insist that Cuba must change, democratically and peacefully.

d. Federation of St. Kitts & Nevis

In accordance with its rights under the constitution of St. Kitts and Nevis, the Nevis Island Administration has on several occasions since 1996 initiated steps towards secession from the Federation of St. Kitts & Nevis. In 2003 the Nevis Island Administration proposed secession and initiated formal constitutional procedures to hold a referendum on the issue. While opposing secession, the Government of St. Kitts & Nevis acknowledged the constitutional rights of Nevisians to determine their future independence. On January 16, 2004, Department of State Spokesman Richard Boucher issued a statement on the U.S. position on the secession of Nevis from the Federation of St. Kitts & Nevis, recognizing "Nevisians' constitutional right to invoke Clause 113 of the Constitution of St. Kitts and Nevis (the Secession Clause) [while] unequivocally support[ing] the position taken by CARICOM Heads of Government at their July 2003 Summit in Montego Bay, when they voiced their strong preference for the Federation of St. Kitts and Nevis to be preserved as a single nation." *See www.state.gov/r/pa/prs/ps/2004/28234.htm.*

e. Haiti

On January 9, 2004, Department of State Spokesman Richard Boucher issued a statement condemning the response of the Haitian Government to political demonstrations on January 7. The statement, set forth below, is available at *www.state.gov/r/pa/prs/ps/2004/28036.htm.*

The United States condemns the actions of the Haitian Government in response to the political demonstration that occurred January 7 in Port-au-Prince. Although it is clear some elements of the police worked diligently to protect the demonstrators, it is also clear

that other police officers collaborated with heavily-armed, hired gangs to attack the demonstrators. Throughout the day, these same government-sponsored gangs rampaged through the streets of the capital, stealing cars, attacking radio stations, vandalizing businesses, and harassing people.

These actions contradict the government's own declarations that it seeks compromise and a peaceful resolution of Haiti's political crisis. A government that wishes to be considered democratic cannot continue to use street gangs as an instrument of terror and intimidation. The Government of Haiti must end immediately its efforts to suppress peaceful dissent, must punish those who commit violent acts of repression, and must undertake the fundamental reforms necessary to restore the rule of law in Haiti, in accordance with OAS Resolution 822.

The United States Government believes the crisis in Haiti must be resolved through peaceful means and dialogue.

J. TERRORISM

On April 21, 2004, the United States joined consensus on UNCHR Resolution 2004/87, "Protection of human rights and fundamental freedoms while countering terrorism," which created a position of independent expert. E/RES/2004/87 (2004). (When amendments were requested by India that would have resulted in using the Sub-commission instead of creating a new independent expert position, the United States abstained; the amendments were not adopted.)

On November 24, 2004, the United States joined consensus on Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, in the Third Committee A statement by Susan Moore, Senior Advisor, U.S. Mission to the United Nations, explained the views of the United States and is available at *www.un.int/usa/04_264.htm.*

The United States is pleased to join consensus in support of the Agenda item "Protection of human rights and fundamental freedoms while countering terrorism."

The United States sets the highest priority on the protection of human rights and fundamental freedoms. . . .

While countering terrorism, the United States remains committed to the promotion and protection of human rights and fundamental freedoms. Our commitment has been most recently demonstrated by our prompt, forceful and continuing actions in investigating and bringing to justice those persons in our government, including the military, who violate United States law while combating terrorism.

The United States believes that we all must fight radicalism and terror with justice and dignity, to achieve a true peace, founded on human freedom. As President Bush has stated, "Defending our ideals is vital, but it is not enough. Our broader mission as U.N. members is to apply these ideals to the great issues of our time. Our wider goal is to promote hope and progress as the alternatives to hatred and violence. Our great purpose is to build a better world beyond the war on terror."

The United States again calls upon all States and organizations to look at what they have done to contribute to the fight against terrorism and see where they can do more. Deeds matter more than words. We call on states that have not done so to join relevant international terrorism instruments, to enhance their counter-terrorism infrastructure and to seek, as needed, assistance from the U.N. Terrorism Prevention Branch. This global fight can only be won with the unrelenting collaborative efforts of all Member States of this Organization and of all other international bodies committed to fighting this evil.

Cross-references

Asylum and refugee issues, **Chapter 1.D.**
UN response to gender-based violence in conflict-related situations, **Chapter 3.B.5.b.**(3).
Trafficking in persons, **Chapter 3.B.1. and 5.**
Genocide, War Crimes, and Crimes Against Humanity., **Chapter 3.B.3.**
International Criminal Tribunals, **Chapter 3.C.**

U.S. extraterritorial jurisdiction over federal crime of torture, **Chapter 3.B.6.**
Habeas corpus jurisdiction over U.S. citizen held in Saudi Arabia, **Chapter 5.A.1.a.**
Reform of UN Commission on Human Rights, **Chapter 7.A.1.**
Claims for human rights abuses, **Chapters 8.B.2.b. and c.; 10.A.2.b.(2) and 2.d.(3)(ii).**
Enemy combatants held by the United States, **Chapter 18.A.2.**
Distinctions between humanitarian and human rights law, **Chapter 18.A.2.a.**

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. Commitment to UN Reform

On September 13, 2004, Deputy Assistant Secretary of State Mark P. Lagon, Bureau of International Organization Affairs, addressed the Hudson Institute in remarks entitled "A U.N. that Lives Up to Its Founding Principles: The U.S. Agenda at the U.N. General Assembly." Excerpts below discuss the U.S. commitment to UN reform.

The full text of Mr. Lagon's speech is available at *www.state.gov/p/io/rls/rm/2004/36318.htm*.

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Creating *successful* action by the UN is not simply a matter of consensus, but also of improving the structure of the UN. The United States has long sought reforms that make the UN more efficient and effective. Assistant Secretary Holmes has taken on the challenge of UN reform repeatedly and publicly at the Council on Foreign Relations, and most recently in the *National Interest Online*. As he notes, the U.S. recognizes that no other multilateral forum exists where nations as old and large as China and as new and small as Timor-Leste can work together as partners on such global threats as terrorism, and on such difficult problems as famine and trafficking in persons.

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New thinking and reform are necessary to address shortcomings in the United Nations. Assistant Secretary Holmes has been careful to note that when we talk of the need for UN reform, we are careful not to lump all UN bodies into one basket. Some UN technical and specialized agencies, like the World Food Program and the World Health Organization, operate relatively well. Reform in those cases generally means finding ways to improve their operations and make better use of resources.

Other parts of the UN system, like the Commission on Human Rights and the General Assembly, require more serious consideration. Such bodies often adopt resolutions that have little or no impact on the problems at hand. Reforming them will be more difficult, addressing questions that range from membership to scope of work.

To make the UN more effective, the United States has been working with other states and with the UN Secretariat on administrative and programmatic reforms. For example, we supported giving the Secretary-General more flexibility to shift positions of UN staff as needs dictate. We welcomed the establishment of Inspectors General positions, as well as the initiation of program evaluations and results-based budgeting.

Whatever is done to change the makeup of the Council, we believe it must reflect the principles of responsibility and accountability. Real accountability means those who bear the burden of implementing and funding the decisions should have more of a say in those decisions. Countries that contribute significantly to international peace and stability have a strong case for serving on the Security Council; terrorist-sponsoring states do not.

Principles for UN Reform

The place to begin for reform is with principles. With sound guiding principles in mind, reform will truly revitalize the United Nations. The principles guiding our commitment to UN reform are simple:

First, all of the UN's subsidiary bodies, offices, and programs should live up to the vision of the founders. When the decisions of an international body are out of step with its original purpose, then the desire for consensus can become the tyranny of consensus.

The body will become mired in meaningless activity or expand to areas unrelated to its original purpose.

The UN General Assembly, for example, would be far more authoritative if more of its members upheld the values of human rights and democracy enshrined in the UN Charter and the Universal Declaration on Human Rights. Similarly, when the Commission on Human Rights includes Cuba, China, Libya, Syria, and Zimbabwe, it is predictable that perverse priorities and polemics in the CHR follow.

The second principle for reform is an expectation of effectiveness. Quite frankly, we want multilateralism that is *more* than just words on paper. We want results that genuinely help those in desperate need.

The third and final principle is good stewardship of UN resources. If UN agencies and commissions do not remain tightly focused on their missions, the organization's budget will continue to expand uncontrollably. The Secretary-General should continue to strengthen results-based budgeting, best practices, and other management reforms.

Democratizing the UN and Promoting Democracy: The Democracy Caucus

From these principles flow goals for reform. One of the most important is enhancing democracy in the UN, in a *real* sense, and promoting democracy globally. The UN General Assembly has universal membership in the hope that inclusiveness will enhance the legitimacy of its decisions and make the United Nations more democratic. It is a misconception, however, that representation is the key element of democracy at the UN. "Democracy" does not come simply from including more Member States; it comes when those involved truly represent will of *their people*.

The UN charter gives all nations equal vote in the General Assembly, regardless of whether a nation rules with the consent of the governed; regardless of a nation's size in population or territory; regardless of resources; regardless of their human rights record. While the "one-nation, one-vote" principle is democratic in terms of representation, it is not democratic in terms of legitimacy. Since not all countries are committed to good governance and the rule

of law, a "one-nation, one-vote" system fails to yield a meaningfully democratic structure. That is, it does not always legitimately reflect the will of the *people* of UN Member States.

What can make the UN more democratic is including *more democracies*, and increasing cooperation among the existing democracies. The UN will continue to be more effective as the number of democracies in the world grows. As Secretary General Annan said in June of 2000, "When the founders of the United Nations met in San Francisco more than half a century ago, they knew that no foundation of peace would be sturdier than democratic government." We and the UN need to act upon his apt observation.

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On October 4, 2004, Ambassador Sichan Siv, Alternate U.S. Representative to the General Assembly, spoke on Agenda Item 54: Strengthening of the United Nations, in particular on the role of non-governmental organizations, as set forth below. The statement addresses the Report of the Secretary-General (U.N. Doc. A/59/354) issued September 13, 2004, in response to the report of the Panel of Eminent Persons on United Nations-Civil Society Relations. The report of the panel was issued June 11, 2004. U.N. Doc. A/58/817(2004).

Ambassador Siv's statement is available at *www.un.int/usa/04_175.htm.*

The United States has a long tradition of supporting civil society participation at the local, national and international level, and in particular, within the United Nations. We welcome the Secretary General's initiative in establishing the panel led by President Cardoso. We salute President Cardoso for his leadership. In public life he works to create an environment in which civil society can flourish; as a private citizen he embodies the power of civil society to promote positive change.

We are studying the Report (A/59/354) carefully. While it is not possible at this time to respond fully to all suggestions, the United States would like to present its preliminary reactions.

First, we strongly agree that Non Governmental Organizations (NGOs) provide valuable input to the work of the United Nations. NGOs are advocates and program implementers at all levels of society. They bring a grass-roots perspective which enhances the work of the UN in the social, economic and humanitarian spheres. However, a compelling case has not been made that this relationship must be broadened from ECOSOC to the General Assembly. Consistent with the UN Charter, ECOSOC and its subsidiary bodies have been—and continue to be—appropriate venues for the kind of meaningful NGO participation, which the report rightly extols. We believe that NGOs have ample opportunities to participate in the ECOSOC functional commissions, as well as in UN conferences under existing arrangements.

The United States requests further clarification on the establishment of a single trust fund for NGOs. This relates in particular to the replacement of established funds, and the legal and funding issues that would arise.

So long as responsibilities are not transferred from ECOSOC to the General Assembly, we warmly welcome any improvements to the NGO accreditation process. We support the proposals to improve the dialogue between the Secretariat and NGOs. We also encourage country level engagement with NGOs. Initiatives to facilitate the inclusion and implementation of the "local" points of view into the functional commissions should be explored.

In light of this report, we would like to reiterate our support of civil society participation in the UN System through ECOSOC and its subsidiary bodies. We agree with the Panel that multi-stakeholder partnerships are an important tool for addressing the challenges before us. While we are still reviewing the specific proposals, we welcome efforts to foster such partnerships. In particular, we acknowledge the innovative work done by the Commission on Sustainable Development in its role as a focal point for partnerships that promote sustainable development.

2. Role of European Community in UN-Sponsored Conferences

During 2004 the United States addressed European Community ("EC") efforts to obtain enhanced observer status

in conferences sponsored by the United Nations, in which UN Member States are the primary actors as provided in the UN Charter. In the May 2004 meeting of the Preparatory Committee for the World Conference on Disaster Reduction ("WCDR," Kobe, Japan, January 18–22, 2005), for instance, the United States welcomed EC participation in the conference but opposed adoption of Provisional Rules of Procedure that would have allowed the EC to have rights that would essentially be equivalent to those afforded a State, except for the right to vote. Among several EC-proposed amendments to the Provisional Rules that were opposed by the United States was a specific reference to the EC in Rule 47, which would determine who may be represented on the "Main Committee." As proposed by the EC, Rule 47 would have stated:

> Each State participating in the Conference [*and the European Community*] may be represented by one representative on the Main Committee established by the Conference.

The United States explained its objection to the EC proposal in an intervention of May 7, 2004:

> The EC is not a State, but rather an observer organization whose participation in the work of this conference, including its preparatory committees, can be fully ensured by the provisional rules that pertain to "Other Participants and Observers." The U.S. is therefore unwilling to approve rules that would allow the EC preferential status to conduct itself and to exert influence tantamount to that of a State. We are prepared to continue our discussions with the EC in further efforts to reach a mutually acceptable resolution. . . .

Following further consultations, it was agreed that the Provisional Rules would not be submitted to the Plenary for formal adoption. Instead, they would be applied without giving recognition or effect to the EC-proposed amendments; those amendments were, however, retained within brackets. The full texts of the U.S. interventions on May 6 and 7, 2004, are available at *www.state.gov/s/l/c8183.htm*.

3. Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel

On December 20, 2004, the United States joined consensus on adoption of UN General Assembly Resolution 59/211, "Safety and security of humanitarian personnel and protection of United Nations personnel." U.N. Doc. A/RES/59/211 (2004). The United States initially proposed amendments to two paragraphs of the resolution that referred to the Rome Statute of the International Criminal Court. U.N. Doc. A/59/L.52. The two amendments would have amended (1) the fourteenth preambular paragraph to read: "Recalling that attacks directed against humanitarian assistance or peacekeeping missions in accordance with the Charter are serious violations of international law" and (2) operative paragraph 7 to read: "Further calls upon all States to hold those responsible for human rights violations as well as for crimes against humanity, accountable through appropriate judicial mechanisms."

The amendments were rejected by recorded vote. Lucy Tamlyn, Counselor, U.S. Mission to the United Nations, explained the U.S. position in nevertheless supporting the resolution as follows:

> The United States strongly supports the broad principles enunciated in this resolution, especially the need to protect humanitarian workers and peacekeepers from violence directed against them. As aid workers worldwide must operate in increasingly difficult and dangerous environments, these principles remain fundamental.
>
> Based on our support for the principles of safety and security for all humanitarian personnel, and reflecting the strong U.S. role in continuing to provide humanitarian assistance, the United States has joined consensus on this resolution.

See U.N. Doc. A/59/PV.74 at 39–40 and *www.un.int/usa/04_295.htm*.

B. OTHER INTERNATIONAL ORGANIZATIONS

1. Responsibility of International Organizations

On November 5, 2004, Todd Buchwald, Assistant Legal Adviser for UN Affairs, U.S. Department of State, addressed the 22nd meeting of the UN General Assembly Sixth Committee (Legal) on the Report of the International Law Commission (A/59/10) on the issue of responsibility of international organizations. The substantive paragraphs of Mr. Buchwald's remarks are set forth below, and are summarized in U.N. Doc. A/C.6/59/SR.22, ¶¶ 69–72.

* * * *

The issue of responsibility of international organizations is a complex one. As opposed to States, which share certain fundamental qualities, international organizations vary greatly in their functions and structures. This diversity contributes to the difficulty of defining "international organization" for the purposes of this topic. It also makes difficult the application of any set of articles to this diverse body, and to offer more than general guidance on this topic that leaves room for individual analysis tailored to particular organizations and situations.

We believe that the differences between States and international organizations are significant and should be kept closely in mind in formulating draft articles on the responsibility of international organizations. For example, the relationship between an individual and his country of nationality is significantly different from the relationship between an individual and an international organization that employs him. Given these differences, it is not obvious that principles of attribution and responsibility for their actions should apply to international organizations in the same way that they apply to States.

We are reviewing the specific issues on which the Commission has sought the views of Governments, specifically relating to the scope of the ILC study, the possibility of a necessity defense for international organizations and the responsibility of international

organizations for State actions requested or authorized by an international organization. We hope to provide written views to the Commission in due course.

As the Commission continues with its study on this topic, we encourage it to place particular emphasis on relevant practice. As a number of delegations have observed, and as the Special Rapporteur has emphasized, the Commission should avoid developing rules in the area of international organizations that simply parallel the rules set forth with respect to States in the draft articles on State responsibility. Rather, the Commission should work to thoroughly and carefully assess the unique considerations relevant to this important topic as it proceeds with its valuable work.

2. North Atlantic Treaty Organization ("NATO")

On May 8, 2003 the U.S. Senate resolved to advise and consent to the ratification of the Protocols to the North Atlantic Treaty of 1949 on the Accession of Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia which were opened for signature at Brussels on March 26, 2003, and signed on behalf of the United States of America and other parties to the North Atlantic Treaty, subject to ten declarations and three conditions. 149 CONG. REC. S5885 (May 8, 2003). *See Digest 2003* at 424–26. The seven NATO invitees deposited instruments of accession to the NATO Treaty on March 29, 2004 and the NATO Treaty entered into force for these seven countries on the same day.

On February 26, 2004 consistent with condition (1)(A) of the Senate's resolution of advice and consent, the President certified that:

> (i) the inclusion of Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia in NATO will not have the effect of increasing the overall percentage share of the United States in the common budgets of NATO; and (ii) the inclusion of Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia in NATO does not detract from the ability of the United States to meet or to fund its military requirements outside the North Atlantic area.

Consistent with condition (3) of the Senate resolution, the President also certified that

> each of these governments is cooperating fully with United States efforts to obtain the fullest possible accounting of captured or missing United States personnel from past military conflicts or Cold War incidents, to include:
>
> (A) facilitating full access to relevant archival material; and
>
> (B) identifying individuals who may possess knowledge relative to captured or missing United States personnel, and encouraging such individuals to speak with United States Government officials.

Both certifications are available at 40 WEEKLY COMP. PRES. DOC. 285 (Mar. 1, 2004).

Also on February 26, the President transmitted a classified report on the "progress of the seven NATO invitees in satisfying the security sector and security vetting requirements for membership in NATO" consistent with condition 3(2)(A) of the Senate resolution, concluding that "all seven satisfy these NATO requirements." 40 WEEKLY COMP. PRES. DOC. 286 (Mar. 1, 2004).

3. International Coffee Organization

On September 15, 2004, Assistant Secretary of State for Economic and Business Affairs E. Anthony Wayne announced that the United States intended to rejoin the International Coffee Organization. *See www.state.gov/e/eb/rls/rm 36292.htm.*

On September 21, 2004, at the meeting of the ninety-first session of the International Coffee Council, September 21–24, 2004, in London, the United States submitted a statement excerpted below. The full text of the U.S. statement is available at *http://dev.ico.org/electdocs/archives/cy2003-04/english/icc/icc91-8e.pdf.*

* * * *

On behalf of the United States Government, I would like to express my pleasure at being here today as we embark on the process of returning as a full Member of the International Coffee Organization (ICO). . . .

. . . We look forward to continuing our work with producing countries in addition to our fellow consuming countries in Europe and Japan on the vital issues affecting the coffee industry.

. . . The ICO provides an important forum for promoting coherence in addressing the difficulties, and identifying the opportunities, in the coffee industry. It is also an opportunity for us to expand our dialogue on issues affecting our bilateral and multilateral partners from development to trade to foreign affairs. We intend to be active participants in this forum, and look forward to an open and productive dialogue.

The United States has started the formal process of accession to the ICA 2001, and we expect to have it completed soon. We remain concerned, however, with existing voting procedures as applied to the European Community and its Member States which we do not consider to be entirely appropriate or in keeping with normal practice in international agreements and organizations.

As the current voting rules have already been established by the current Parties to the ICA, and the United States is joining the Agreement after the fact, we are prepared to accept them, especially in view [of] the longstanding tradition in the ICO of consensus decision-making. We welcome assurances from our E.U. colleagues that this consensus approach will continue to be followed. We consider it appropriate, however, to note the United States' intention to seek modifications in these procedures in the context of negotiation of the next ICA, expected to begin in 2005, in order to bring the ICO's voting procedures into line both with the ICA's traditional rules on majority voting and with normal practice in international agreements and organizations.

In the meantime, we urge the European Commission to encourage E.U. Member States that have not yet done so to sign and ratify the 2001 ICA. We have had a number of discussions with our European colleagues on this issue, and are particularly appreciative of their openness to addressing our concerns. We look forward to working with all of our ICO partners to ensure all

Members have the fullest opportunity to participate on a basis of equality and balance of rights and obligations.

In a statement of the same date, the European Union indicated that "[f]rom previous discussions, it appears that some issues relating to E.U. membership of the ICO need further clarification, in particular the exclusive competence exerted by the European Community in the name of the European Union's Member States. We agree that resolving this issue will require a revision to some of the current provisions of the Agreement. However, due to the long and arduous procedures required to revise the Agreement, we believe that this can only realistically take place when we sit down to renegotiate the present Agreement in its entirety."

The statement also suggested that U.S. concerns about voting practices regarding the European Community could also "be better addressed in the framework of a new International Coffee Agreement. We can assure all delegations that the European Community will approach this important event with a very open mind."

The full text of the European Union statement is available at *www.ico.org/frameset/eventset.htm*.

Cross-references

UN terrorism committees, **Chapter 3.B.2.d.**(3).
Reform of UNCHR, **Chapter 6.A.5.a.**
Regional Emerging Diseases Intervention Center in Singapore, **Chapter 13.B.2.**
Role of UN bodies in Middle East Peace matters, **Chapter. 17.A.4.c.**

CHAPTER 8

International Claims and State Responsibility

A. GOVERNMENT-TO-GOVERNMENT CLAIMS

1. Iran-U.S. Claims Tribunal

As discussed in other volumes of the *Digest* (*see, e.g., Cumulative Digest 1981–88* at 3189–3245), on January 19, 1981, the United States and Iran entered into an international executive agreement embodied in two declarations of the Government of Algeria—a General Declaration and a Claims Settlement Declaration—and related instruments, known collectively as the Algiers Accords, *reprinted in* 20 I.L.M. 223 (1981). The Algiers Accords brought about the release of American hostages being held since 1979 by Iranian militants at the U.S. Embassy in Tehran and, among other things, established the Iran-U.S. Claims Tribunal ("Tribunal") at The Hague, the Netherlands. Under the Algiers Accords, the claims addressed by the Tribunal include claims of U.S. nationals against the Government of Iran, and government-to-government contract claims, often referred to as "official claims," between the United States and Iran, as well as interpretive disputes brought by either government. On September 9, 2004, the Tribunal issued awards in two cases involving the two governments, discussed below.

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a. Case No. A33

The Tribunal issued a final Decision in Case No. A33, an interpretive dispute between the United States and Iran concerning Iran's compliance with its obligation under Paragraph 7 of the General Declaration of the Algiers Accords to maintain the required minimum $500 million balance in the Security Account established to secure the payment of awards by the Tribunal against Iran. The case was the second initiated by the United States at the Tribunal in an effort to compel Iran to comply with its obligations. A/33: Iran-U.S. Cl. Trib. 2004 *The United States of America v. The Islamic Republic of Iran*, Decision No. 132-A33-FT, 2004 WL 2210705. The decision described the case as follows.

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* * * *

1. At issue in this Case is Iran's performance of its obligations under the Algiers Declarations concerning the replenishment of the Security Account established pursuant to Paragraph 7 of the General Declaration ("Security Account") "for the sole purpose of securing payment of, and paying, claims against Iran" in accordance with the Claims Settlement Declaration.

2. The Tribunal delineated Iran's Paragraph 7 replenishment obligations in *United States of America, et al. and Islamic Republic of Iran, et al.*, Decision No. DEC 130-A28-FT (19 Dec. 2000) ("Decision" or "Decision in Case No. A28"). In that Decision, the Tribunal held that Iran had been in non-compliance with its obligation to replenish the Security Account to the required level of U.S. $500 million since late 1992. . . .

3. Since the Tribunal's Decision in Case No. A28 was issued, Iran has continued to fail to replenish the Security Account, so in this Case the United States requests that the Tribunal render an award ordering Iran to replenish the Security Account immediately. The United States further requests that the Tribunal award it arbitration costs both for Case No. A28 and the present Case. Finally, the United States requests that the Tribunal suspend proceedings on Iran's remaining claims before the Tribunal until Iran has complied with its replenishment obligation.

4. Iran denies any liability for this claim, which, it contends, represents an impermissible attempt to reargue an issue that the Tribunal already decided in Case No. A28.

* * * *

The Tribunal confirmed that Iran was in breach of its replenishment obligations and ordered Iran to honor its obligations to replenish the Security Account, as excerpted below.

31. It is undisputed that, since the Tribunal's December 2000 Decision, Iran has not replenished the Security Account to the level of U.S. $500 million and thus has remained in non-compliance with its Paragraph 7 obligation, which obligation continues to run until the President of the Tribunal has certified to the Central Bank of Algeria that all awards against Iran have been satisfied. As long as Iran does not replenish the Security Account and does not thereafter maintain it at its required level until the Tribunal President's certification, Iran continues to be in non-compliance with its Paragraph 7 obligation.

32. The above conclusion is in line with international law. . . .

* * * *

35. Accordingly, the United States is entitled to assert a new claim based on Iran's non-compliance, since December 2000, with its Paragraph 7 obligation and to request that Iran's non-compliance cease. The United States' right to assert this new claim was not extinguished by the Tribunal's Decision in Case No. A28—which, in any event, only addressed Iran's non-compliance from late 1992 until December 2000.

* * * *

37. The Tribunal holds that the present claim concerns a dispute between the Parties as to the "performance of a[] provision" of the General Declaration; therefore, it falls squarely within the Tribunal's jurisdiction pursuant to Paragraph 17 of the General Declaration and Article II, paragraph 3, of the Claims Settlement Declaration and is clearly justiciable. Further, the United States Statement of Claim satisfies the requirements of Article 18 of the

Tribunal Rules. By these holdings, Iran's arguments based on revision and merger of claim . . . are necessarily dismissed.

B. Merits

38. Turning to the merits of the claim, in the more than three years since the Tribunal's Decision in Case No. A28, Iran has made no move toward complying with its replenishment obligation and has indicated that it sees no need and no justification to do so. The Tribunal is forced to conclude that its stated expectation of compliance, in paragraphs 93 and 95 of its Decision . . . , did not materialize.

39. The language used in paragraph 95, subparagraph B, of the Decision in Case No. A28 . . . leaves no doubt that the Tribunal's expectation of Iran's compliance led to the denial of the United States' request for an order mandating replenishment. Thus, the denial of that request was based solely on that expectation. Once the expectation did not materialize, the basis for the denial disappeared; therefore, the Tribunal will now consider the United States' petition for a replenishment order. Doing so does not conflict with the Tribunal's Decision in Case No. A28. A request by the Tribunal to Iran to replenish the Security Account follows naturally from Iran's Paragraph 7 obligation as delineated in the Decision in Case No. A28 once it becomes clear that the Tribunal's expectation of replenishment will not be fulfilled.

40. The Tribunal does not understand the request of the United States that the Tribunal order Iran to replenish to be a request for a separate document, such as a procedural order, but rather for the Tribunal, in the present Decision, to grant that request. The Tribunal has done so in paragraph 45A below, with the understanding that the Tribunal's orders to the Parties are regularly phrased as requests. This request should make clear to the Parties that the Tribunal has done all that it can do in this matter to promote Iran's compliance with its Paragraph 7 obligation.

41. While the Tribunal is not empowered by those Declarations to enforce its decisions, it is empowered to request a Party to take action that is required to bring it into compliance with its obligations under the Declarations. Indeed, it did so in an early Interim Award in *E-Systems*, where it requested Iran to move for a stay of

proceedings in an Iranian court. Also, in a later Award in Case No. A15(I:G), the Tribunal ordered the United States to "cause the Federal Reserve Bank of New York to transfer immediately" to Iran excess funds in Dollar Account No. 1, which had been established under the Algiers Declarations to pay off syndicated bank loans made to or guaranteed by Iran. Further, in Case A15(I:C), the Tribunal ordered action by both Parties by stating that they "shall immediately enter into negotiation, and negotiate in good faith. . . ." The conclusion that the Tribunal is empowered to fashion appropriate remedies for a Party's breach of the Algiers Declarations is also in keeping with the jurisprudence of other international courts and tribunals.

42. On the other hand, the Tribunal is not empowered to grant the request by the United States to suspend proceedings on Iran's remaining claims until Iran has complied with its replenishment obligation. The Tribunal must fulfill the mandate for which it was established, that is, adjudicating claims in accordance with the Algiers Declarations.

43. The United States' claim seeking damages for the expenditures it incurred in pursuing its claim in Case No. A28 . . . represents, in effect, a claim for arbitration costs in that Case. It is the Tribunal's longstanding practice not to award arbitration costs in disputes between the Parties concerning the interpretation or performance of the Algiers Declarations. Consequently, the United States' claims requesting costs it incurred in Case No. A28 and in the present Case are both dismissed.

* * * *

VI. DECISION

45. In view of the foregoing,

THE TRIBUNAL DECIDES AS FOLLOWS:

A. Iran is requested to comply with its obligation to replenish the Security Account, as determined by the Tribunal in its Decision in Case No. A28.

B. The request by the United States that the Tribunal suspend proceedings in Iran's remaining claims pending such compliance is denied.

C. The claim by the United States for costs incurred in presenting Case No. A28 is denied.
D. Each Party shall bear its own costs of arbitrating this claim.

b. Case No. B1 (Counterclaim)

Iran filed Case No. B1 with the Tribunal on November 18, 1981, asserting six specific claims against the United States based on contracts under the U.S. Foreign Military Sales ("FMS") program. The United States submitted a counterclaim in Case No. B1 on March 31, 1982, asserting that Iran had violated its contractual obligations to maintain the security of classified components of defense articles and related classified information. Iran raised four preliminary objections to the counterclaims: (1) that the Algiers Accords do not provide the Tribunal with jurisdiction over counterclaims submitted in response to official claims and that the United States should have filed a separate claim against Iran before January 19, 1982, the deadline for such claims; (2) that even if the Tribunal had jurisdiction to hear official counterclaims, such counterclaims had to be outstanding on January 19, 1981, and the United States has not established that fact; (3) that the claim does not arise out of the contracts that are the basis of Iran's claims in B1, but rather out of a separate 1974 agreement on safeguarding of classified information ("1974 Agreement"); and (4) that the counterclaim does not constitute a cognizable claim because it is not described with sufficient specificity and fails to meet the requirements of Article 18 of the Tribunal Rules of Procedure.

In an interlocutory award of September 9, 2004, the Tribunal found that it has jurisdiction over official counterclaims, that such claims must have been outstanding on January 19, 1981, and that they must arise out of the same contractual arrangements as the claims. B/1 Counterclaim: Iran-U.S. Cl. Trib. 2004 *The Islamic Republic of Iran v. The United States of America*, Award No. IRAN ITL 83-B1-FT, 2004 WL 2210709. Specific questions related to the U.S.

counterclaim, including whether the Tribunal actually had jurisdiction over it, were joined to the merits for consideration at a later stage as was an additional question, whether the Tribunal's jurisdiction over a counterclaim is limited to an offset. The interlocutory award provides further background of the case, the counterclaim, and the positions of the parties, as well as the procedural history of the case. Excerpts below include the analysis of jurisdiction over counterclaims and the conclusions of the Tribunal on the issues presented (footnotes omitted).

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* * * *

15. Both Parties agree that the source of the Tribunal's jurisdiction is to be found in the provisions of the Algiers Declarations, and in particular in the Claims Settlement Declaration. Moreover, both Parties agree that the Claims Settlement Declaration must be interpreted in accordance with the rules expressed in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969 ("Vienna Convention"). However, they differ in their application of these provisions. In Iran's view, the absence of an express mention of counterclaims in Article II, paragraph 2, of the Claims Settlement Declaration means that the Tribunal lacks jurisdiction to entertain official counterclaims. The United States disputes this conclusion and asserts that the Tribunal has jurisdiction to entertain official counterclaims.

* * * *

VI. REASONS FOR THE AWARD

A. *Jurisdiction over Official Counterclaims*

* * * *

85. The Tribunal cannot conclude that the text of Article II, paragraph 2, of the Claims Settlement Declaration is clear without taking into account the elements of Article 31 of the Vienna Convention. When the ICJ, in keeping with the practice of its predecessor the PCIJ, states that a "convention is sufficiently clear in itself," it always does so after an analysis of the text under

consideration. Before affirming the clear nature of the provision, the Court first rejects, explicitly or implicitly, the arguments to the contrary.

86. Accordingly, the fact that Article II, paragraph 2, of the Claims Settlement Declaration does not refer to "counterclaims" is not the end of the matter, even if it could weigh in favor of the view that official counterclaims are excluded. But even this is uncertain.

87. The Tribunal stated in Case No. A2 that "a right of counter claim is normal for a respondent." On that view, an explicit authorization of counterclaims would be unnecessary; on the contrary, express language would be necessary to exclude counterclaims. In this connection, it is noteworthy that prominent international tribunals with jurisdictional grants similar to Article II, paragraph 2, of the Claims Settlement Declaration (i.e., jurisdictional grants that permit parties to bring claims against one another on an equal footing) have considered that they could entertain counterclaims, even if their constitutive instruments did not expressly refer to counterclaims. For instance, the respective Statutes of the PCIJ, the ICJ and the International Tribunal for the Law of the Sea ("ITLOS") do not expressly refer to counterclaims. Yet, these institutions determined that they could entertain counterclaims and adopted rules governing them. Similarly, the treaties establishing the mixed arbitral tribunals after the First World War did not refer to counterclaims, but the majority of these tribunals considered that they could entertain counterclaims; the few mixed arbitral tribunals that prohibited counterclaims adopted express rules to that effect.

* * * *

89. The fact that Article II, paragraph 1, of the Claims Settlement Declaration refers to "claims" and "counterclaims," whereas paragraph 2 of the same Article refers only to "claims," does not necessarily imply that the Parties sought to exclude counterclaims in official cases, because there are particular reasons why express mention of counterclaims was required in paragraph 1 but not in paragraph 2 of Article II of the Claims Settlement Declaration. Article II, paragraph 1, of the Claims Settlement

Declaration confers on the Tribunal jurisdiction over "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States," but the Tribunal has no jurisdiction over claims of one government against the nationals of the other State. Without express mention of counterclaims in Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal would have been prevented from hearing any type of claims by a State Party against nationals of the other State. By contrast, since each State Party could file claims against the other under Article II, paragraph 2, of the Claims Settlement Declaration, the same rationale does not apply to that provision. Based on the foregoing, the Tribunal determines that the absence of any reference to counterclaims in Article II, paragraph 2, of the Claims Settlement Declaration, without more, does not warrant the conclusion that official counterclaims are not permitted under that provision.

* * * *

106. Article 31(3)(b) of the Vienna Convention provides [for] "tak[ing] into account, together with the context: . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. . . ."

* * * *

111. . . . [F]ar from playing a secondary role in the interpretation of treaties, the subsequent practice of the Parties constitutes an important element in the exercise of interpretation. In interpreting treaty provisions, international tribunals have often examined the subsequent practice of the parties. The Tribunal has also recognized the importance of the subsequent practice of the parties and has referred to it in several cases.

* * * *

116. In the Tribunal's view, the Parties have engaged in a concordant, common and consistent practice in filing counterclaims to official claims, and this practice reflects an agreement as to the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration. Iran's objections in the present Case to the Tribunal's

jurisdiction over official counterclaims have been rendered nugatory by its conduct in other cases.

117. The Tribunal holds that the filing of official counterclaims by both Parties demonstrates their common understanding that such counterclaims were allowed under Article II, paragraph 2, of the Claims Settlement Declaration.

* * * *

131. Finally, Iran argues that . . . the question of the jurisdiction of an international tribunal cannot be regarded as an *inter partes* question. Iran adds that the Tribunal must decide, *ex officio* or *proprio motu*, whether it has jurisdiction over a case, even if the litigants are not in dispute as to the Tribunal's jurisdiction.

132. These arguments miss the point. It is true that the Tribunal examines whether it has jurisdiction over a case even if none of the litigants objected to it. . . . The issue here is one of interpretation of Article II, paragraph 2, of the Claims Settlement Declaration. The Tribunal has found that Iran and the United States have interpreted the Claims Settlement Declaration as providing the Tribunal with jurisdiction to entertain official counterclaims. According to Article 31(3)(b) of the Vienna Convention, the Tribunal shall take into account this practice of the two Parties to the Algiers Declarations. . . . This does not make jurisdiction an *inter partes* question.

133. In light of the above, the Tribunal holds that there is a subsequent practice of the Parties establishing a common understanding regarding the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration as providing the Tribunal with jurisdiction to hear official counterclaims.

* * * *

2. *U.S.-India Arbitration*

On November 4, 2004, the United States initiated arbitration proceedings against the Government of India ("GOI") to recover losses incurred by the U.S. Overseas Private Investment Corporation ("OPIC") under its political risk insurance policies

extended to investors and lenders to the Dabhol Project described in excerpts below. In its Notice of Arbitration, the United States also expressed its intention to supplement its claims to include its losses arising from OPIC's direct loans to the project if the claims were not resolved by December 1, 2004. The arbitration was brought pursuant to the Investment Incentive Agreement between the Government of the United States of America and the Government of India ("Bilateral Agreement"), signed on November 19, 1997, and entered into force on April 16, 1998, which provides for the Permanent Court of Arbitration in The Hague to make arbitrator appointments if such appointments are not made within certain time limits or in the absence of any other agreement.

The background of the case and the U.S. claims are described as follows in the November 4 request for arbitration. The parties settled and the arbitration was subsequently dismissed.

* * * *

III.
FACTUAL BACKGROUND

A. Commencement of the Dabhol Project

11. Starting in the early 1990s, India began soliciting foreign investment in its power sector to overcome severe shortages, particularly in the State of Maharashtra, home to India's largest city, Mumbai. Based on these inducements and support by the Government of the State of Maharashtra ("GOM") and the GOI, the Investors [Enron, General Electric and Bechtel] agreed to form DPC, an Indian company, to develop, construct and operate a two-phase, project-financed power plant and related facilities. Phase I, which ultimately was completed and began operating in May 1999, consisted of a 740 MW power plant. Phase II, which was ninety percent complete when the entire project ground to a halt in May 2001, consisted of a 1,444 MW gas-fired power plant and a regasification facility to convert liquefied natural gas ("LNG") to useable fuel.

* * * *

14. As a project-financed project, DPC was wholly dependent upon a steady cash flow to be generated by the continuous sale of energy from the Project to service the loans, pay off trade creditors and provide a return on the investments of its shareholders. To ensure this cash flow and protect their investments and the loans of the project lenders, GE, Bechtel and Enron, through DPC, entered into a series of Project Agreements . . . that erected a multi-layered set of safeguards.

* * * *

B. OPIC's Support for the Project.

20. To provide an additional layer of security for their respective investments and loans to DPC, GE, Bechtel, Enron and the Bank of America asked OPIC to support the Dabhol Project as a lender, investment insurer and U.S. Government development agency. OPIC entered into political risk insurance contracts with GE, Bechtel, Enron and the Bank of America, providing coverage for their equity stakes and loans against political violence, inconvertibility and expropriation. OPIC also lent $160 million to DPC for Phases I and II of the Project. In keeping with its role as a development agency, OPIC worked diligently to try to facilitate a successful completion of the Project. Once that became impossible, however, OPIC began working toward the successful resolution of all legitimate stakeholder interests in the Project.

C. The Indian Government's Initial Interruption and Eventual Destruction of the Dabhol Project.

* * * *

24. Beginning in late 2000 and continuing through mid-2001 and beyond, the GOM, in concert with the MSEB [Maharashtra State Electricity Board], GOI, MDPCL [Maharashtra Power Development Corporation Limited], and other governmental entities, carried out a multi-pronged strategy to cripple the Project and fatally destroy the investments of the DPC Investors and Lenders. This strategy had the effect of expropriating the interests of all investors in the Dabhol Project.

* * * *

D. OPIC Paid Its Insureds for the Indian Government's Expropriation of DPC.

34. As a result of actions and omissions attributable to the Government of India identified above, the Investors and the Bank of America all submitted claims under their respective political risk insurance policies maintaining that their equity interests and loans had been expropriated by Indian Government authorities. OPIC delayed paying these claims until GE and Bechtel had obtained a decision from a distinguished American Arbitration Association ("AAA") panel, which reviewed the facts outlined above. The AAA panel concluded that the "concerted acts" of the Indian Government, which "effectively destroyed the investment of [GE and Bechtel] in the DPC," amounted to a "total expropriation" in violation of established principles of international law. *Bechtel Enterprises International (Bermuda) Ltd. v. Overseas Private Investment Corporation*, AAA Case No. 50 T195 00509 02 (Sept. 3, 2003) at 24–26. The Panel stated:

> From its inception to the present day, the Project has been a political lightning rod. Its existence has been defined by the push and pull of Indian politics. The expropriatory events described above were the sole and direct consequence of political decisions and competing political forces within Maharashtra and India.
>
> The acts of MSEB, MERC, the GOM, the GOI, and IFIs [Indian financial institutions] and the Indian Courts depriving DPC of its fundamental rights under the Project Agreements have rendered the Sponsors' equity in the Project valueless. DPC has been unable to meet its debt payments and has been placed in default and receivership because of the loss of its revenue stream from the PPA [Power Purchase Agreement], as well as the failure of the GOM and the GOI to perform their respective guarantees.

Id. at 20–21. The Panel held that MSEB, the GOM and the GOI violated the PPA, the GOM Guarantee, the GOI Counter-Guarantee and the State Support Agreements "for political reasons and without any legal justification." *Id.* at 24. Further, "MERC,

MSEB, the IFIs and the Indian courts have enjoined and otherwise taken away Claimants' international arbitration remedies under the PPA, all in violation of established principles of international law, in disregard of India's commitments under the U.N. Convention as well as the Indian Arbitration Act." *Id.* at 24–25. Finally, the AAA Award determined that these actions deprived the Investors of the fundamental rights and benefits of their investment in DPC. *Id.* at 25.

35. In early September 2003, the AAA Panel ordered OPIC to pay GE and Bechtel the maximum amount allowed under their respective policies. On or about October 8, 2003, OPIC tendered payments totaling $63,656,126 in settlement of their claims and received, in return, assignments of certain rights, interests and claims. On or about September 30, 2003, OPIC settled Bank of America's claim by paying $27,613,586.10. Due principally to the bankruptcy proceedings involving Enron entities, OPIC's settlement with Enron was delayed until April 2004. OPIC paid $20,390,000 in settlement of Enron's claims.

IV.
ACTS AND OMISSIONS ATTRIBUTABLE TO THE GOI VIOLATED ESTABLISHED PRINCIPLES OF PUBLIC INTERNATIONAL LAW

36. The GOI is accountable under Article 6(c) of the Bilateral Agreement for its breaches of public international law. . . .

1. The GOI Violated Public International Law by Expropriating OPIC's Rights, Interests, Use, Benefits and Control of the Dabhol Project Without Paying Compensation.

37. The GOI is responsible under public international law for all injuries sustained by OPIC from the Indian Government'suncompensated expropriation of the investments of GE, Bechtel, Bank of America and Enron in the Dabhol Project. Through actions and omissions attributable to it as detailed above, the GOI has effectively deprived GE, Bechtel, Bank of America and Enron of their rights, interests, use, benefits and control of the Dabhol Project, and has not provided compensation in violation of public international law.

2. The GOI Violated Public International Law by Denying DPC Justice.

38. The GOI is responsible for all injuries sustained by OPIC arising from the Indian Government's denying DPC justice in violation of public international law. By way of illustration, but not limitation, the GOI, GOM and MSEB each agreed in the Project Agreements to resolve disputes with DPC involving the Dabhol Project in international arbitration proceedings outside India. The GOI, directly and through its subdivisions, agencies and instrumentalities, violated its public international law obligations by failing to submit disputes involving the Project to their designated fora and by taking measures to deny access to these agreed fora. These actions and omissions, which deliberately frustrated DPC's arbitral remedies, constitute a denial of justice under international law.

3. The GOI Violated Public International Law Through Breach, for Discriminatory, Governmental, Political or Other Non-Commercial Reasons, Amounting to Repudiation of Contractual Obligations Owed to DPC.

39. The GOI is responsible under public international law for all injuries sustained by OPIC arising from the breach, for discriminatory, governmental, political or other non-commercial reasons, amounting to repudiation of contractual obligations owed to DPC, including obligations arising under the PPA, the GOM Guarantee, the GOI Counter-Guarantee and the State Support Agreements, among others.

V.
THE GOI IS LIABLE TO PAY REPARATIONS FOR THE UNLAWFUL ACTS AND OMISSIONS ATTRIBUTABLE TO IT

40. As a result of the series of actions and omissions described above, the Investors and the Bank of America each submitted claims to OPIC demanding payment under their respective political risk insurance policies. In compliance with the AAA Award, OPIC paid GE and Bechtel in settlement of their claims. OPIC also settled the claims of Enron and the Bank of America under their respective

policies. Under Article 3(b) of the Bilateral Agreement, as well as established principles of subrogation, the GOI is liable to reimburse OPIC for these payments, plus interest and costs, and otherwise to compensate OPIC to the fullest extent of the rights, interests and claims transferred to OPIC from the Investors and the Bank of America.

* * * *

3. Claims against Iraq: United Nations Claim Commission

The United Nations Compensation Commission ("UNCC") was established pursuant to UN Security Council Resolution 692, adopted following the invasion and liberation of Kuwait in 1991. The purpose of the UNCC is to resolve claims against Iraq by foreign nationals, companies, and governments that arose as a direct result of the invasion and occupation of Kuwait. *See Cumulative Digest 1991–1999* at 1099–1106.

The United States submitted to the UNCC over 3,000 individual claims for losses arising from the Iraqi invasion and occupation of Kuwait, as well as 155 claims from U.S. corporations and over a dozen claims from U.S. Government agencies for losses attributable to Iraq's invasion of Kuwait. Funds to pay successful claimants come from Iraqi oil sales. Awards are paid as funds become available in the Compensation Fund.

UN Security Council Resolution 1483 (2003), which lifted most UN sanctions against Iraq (*see Digest 2003* at 914–16), reduced contributions to the UNCC from 25 percent to 5 percent of Iraqi oil export proceeds. Throughout 2004, the 5 percent share was deposited into the UN Compensation Fund. These funds permitted the UNCC to make payments on claims and to fund the UNCC's ongoing operations. The final remaining American claims against Iraq were reviewed by the UNCC by December 2004. As of December 2004, some 3100 successful American claimants had received approximately $286 million towards UNCC awards totaling almost $740 million. All individual awards have been paid; an unpaid balance of $454 million is for corporate claims.

B. CLAIMS OF INDIVIDUALS

1. Claims Associated with Cuban Expropriations

On January 16 and July 16, 2004, President George W. Bush continued the suspension of the statutory provision giving U.S. nationals the right to bring an action in U.S. court against foreign persons who traffic in confiscated property in Cuba, a claim to which is owned by a U.S. national, under title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104–114, 110 Stat. 785 (codified as amended at 22 U.S.C. § 6021 note). 40 WEEKLY COMP. PRES. DOC. 92 (Jan. 26, 2004) and 40 WEEKLY COMP. PRES. DOC. 1323 (July 26, 2004). *See Cumulative Digest 1991–1999* at 1128–31.

2. Claims by Victims of the Nazi Era and Related Cases

a. International comity: Ungaro-Benages v. Dresdner Bank

In this case, plaintiff filed suit against two German banks to recover assets from her family's estate, alleging that the banks, through the Nazi regime's program of 'Aryanization,' stole her family's interest in its manufacturing company. The district court granted summary judgment for the defendant on multiple grounds. *See Digest 2003* at 474–75, and the Eleventh Circuit affirmed. *Ungaro-Benages v. Dresdner Bank*, 379 F.3d 1227 (11th Cir. 2004). The United States had filed Statements of Interest with both the district court and the Eleventh Circuit.

The Eleventh Circuit first stated that although the plaintiff brought state law claims, "we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."

The court then found that the case was justiciable and not barred by the political question doctrine, concluding:

> Adjudication of the present claim would not interfere with the executive's handling of foreign relations or show a lack of respect to the executive's power in foreign affairs. Indeed, the plain text of the Foundation Agreement [described in excerpts below] anticipates that federal courts will consider claims against German corporations.

The Eleventh Circuit decided, however, to abstain from exercising jurisdiction on the principle of international comity, deferring to the payment mechanism contemplated by the Foundation Agreement. Excerpts below explain the relevance of the Foundation Agreement and the basis for the court's decision to abstain (most footnotes deleted). *See also Digest 2003* at 474–75 concerning *Ungaro-Benages* and Chapter 10.A.2.b.(2)(i) of this volume concerning similar arguments by the United States in *Whiteman v. Republic of Austria* and *Garb v. Republic of Poland*.

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[Following World War II,] in addition to claims by German nationals, the West German government also faced claims based on its wartime activities by other governments and foreign nationals. Many of the post-war treaties called for reparations, but the 1953 London Debt Agreement—an effort by Western powers to reindustrialize West Germany to help fight the Cold War—suspended these obligations. The suspension of claims was viewed as a suspension of the reparations question until a final post-war treaty on Germany was concluded, which did not occur until 1990 when Germany was reunified. In the 1990s, class-action lawsuits against the German government and private German companies increased dramatically in American courts, which caused considerable concern in Germany. In an effort to stem American litigation, the German government sought to enter into an international agreement with the United States to remove this litigation to an alternative forum based in Germany.

In 2000, President Clinton entered into an [executive] agreement with the German government ("the Foundation Agreement") aimed at achieving a "legal peace." *See* Agreement concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G., 39 I.L.M. 1298. In the agreement, the German government agreed to establish a private foundation, the Foundation "Remembrance, Responsibility, and the Future" ("the Foundation"), to hear claims brought by victims of the Nazi regime. The Foundation is funded by voluntary contributions from the German government and German companies. Both the United States government and the German government argue that this fund offers compensation to victims of the Nazi regime that would not be available through traditional litigation.

In return, the United States agreed to encourage its courts and state governments to respect the Foundation as the exclusive forum for claims from the National Socialist era. The agreement, however, did not suspend or transfer lawsuits in American courts to Germany. Instead, the United States promised to file a Statement of Interest in any lawsuit dealing with WWII restitution or reparations. The statement would inform United States courts that it is in the foreign policy interests of the United States for the case to be dismissed on any valid legal ground but would not suggest that the agreement itself provides an independent legal basis for dismissal.

* * * *

B. The Foundation Agreement

To resolve the present litigation, we begin by examining the Foundation Agreement, the agreement between the United States and Germany. The plaintiff argues that the agreement does not cover her suit because the relevant transactions took place before World War II, but the treaty's scope includes any actions committed during the National Socialist era. Article 1 states:

> The parties agree that the Foundation "Remembrance, Responsibility and the Future" covers, and that it would be in their interests for the Foundation to be the exclusive

> remedy and forum for the resolution of, *all claims that have been or may be asserted against German companies arising from the National Socialist era* and World War II.

Foundation Agreement, art. I, para. 1, 39 I.L.M. at 1299 (emphasis added). Furthermore, the agreement explicitly covers property claims. In Annex B, the United States government agreed to submit a statement of interest to federal courts announcing that the Foundation is the preferred forum for "the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II, including without limitation those relating to . . . damage to *or loss of property, including banking assets* and insurance policies." Foundation Agreement, Annex B, para. 1, 39 I.L.M. at 1303 (emphasis added).

The Foundation Agreement, however, does not provide the substantive law to resolve the case before us because it neither settles the outstanding claim nor directs that all claims be transferred to the Foundation's settlement procedures. Rather, the United States simply promises to announce that such a transfer is in the United States' national interests. In Annex B, the United States government is obliged to inform domestic courts that its policy interests "favor dismissal on any valid legal ground," but "does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal." Foundation Agreement, Annex B, para. 7, 39 I.L.M. at 1304. Thus, by its own terms, the agreement does not provide a basis to dismiss or suspend litigation against German companies stemming from their actions during the National Socialist era.

* * * *

C. The Political Question Doctrine

* * * *

The political question doctrine is based on the proper relationship between the judiciary and the political branches of government. *Baker v. Carr*, 369 U.S. 186 . . . (1962). Courts refuse to adjudicate a claim under the political question doctrine where there is found a textually demonstrable constitutional

commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

Issues related to foreign affairs often are beyond the competence of the federal courts to resolve because they require judicial intervention in policy areas reserved to the political branches or could express a lack of respect due the other branches. Yet not all issues that could potentially have consequences to our foreign relations are political questions. . . .

Here, none of the factors that advise against judicial resolution are present. Adjudication of the present claim would not interfere with the executive's handling of foreign relations or show a lack of respect to the executive's power in foreign affairs. Indeed, the plain text of the Foundation Agreement anticipates that federal courts will consider claims against German corporations. The entirety of Annex B of the agreement is dedicated to explaining what the United States government will include in its Statement of Interest to American courts hearing these cases. Furthermore, the agreement itself provides that it does not provide an independent legal basis for dismissal. *See* Foundation Agreement, Annex B, para. 7, 39 I.L.M. at 1304. Thus, the executive opted not to settle these claims or to transfer the claims to the Foundation, although it had the power to do so.[11]

[11] This strategy of non-settlement distinguishes the Foundation Agreement from other claim settlement agreements previously applied by the federal courts [citing *United States v. Pink*, 315 U.S. 203, 227–28 (1942), *United States v. Belmont*, 301 U.S. 324, 326 (1937), and *Dames & Moore v. Regan*, 543 U.S. 654, 665 (1981).]

As a result, federal court consideration of the present case does not reflect a lack of respect for the executive nor does it interfere with American foreign relations. The United States is in full compliance with the Foundation Agreement so long as it files a statement of interest to courts urging respect for the Foundation as the exclusive forum to resolve these claims. This statement of interest from the executive is entitled to deference and we give the executive's statement such deference in our international comity analysis. *See Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 2255, 159 L.Ed.2d 1, 22 (2004) (stating that "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy"). A statement of national interest alone, however, does not take the present litigation outside of the competence of the judiciary.[12]

* * * *

[12] In holding that the present case is justiciable, we part ways with district courts that have also considered Nazi era claims. *See Frumkin v. JA Jones, Inc. (In re Nazi Era Cases Against German Defendants Litig.)*, 129 F. Supp. 2d 370 (D. N.J. 2001); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D. N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D. N.J. 1999). . . . In *In re Nazi Era Cases*, . . . the court decided the case after the Foundation Agreement was formed and determined that continuing to exercise jurisdiction would show a lack of respect to the executive branch. 129 F. Supp. 2d at 388–89. We disagree. Although the executive's statement of interest is entitled to deference, it does not make the litigation nonjusticiable. Moreover, the judiciary is not interfering with foreign relations or showing a lack of respect to the executive when it interprets an international agreement and follows its terms. *See Japan Whaling*, 478 U.S. at 230.

Our holding is not in conflict with the Second Circuit's decision in *In re Austrian and German Holocaust Litig.*, 250 F.3d 156 (2d Cir. 2001). There, the court instructed a district court to amend its order, which required the German government to pass additional legislation related to the Foundation Agreement. The Second Circuit used separation of powers principles to comment that the federal courts could not interfere with the executive's conduct of foreign relations by demanding that a foreign nation enact legislation. Here, we do not interfere with the executive's conduct of foreign relations by placing demands on foreign governments or requesting changes in foreign laws.

D. International Comity

International comity reflects "the extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation." *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 40 L.Ed. 95 (1895). It is an abstention doctrine: A federal court has jurisdiction but defers to the judgment of an alternative forum. *Turner Entm't Co. v. Degeto Film*, 25 F.3d 1512, 1518 (11th Cir. 1994). International comity serves as a guide to federal courts where "the issues to be resolved are entangled in international relations." *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996). The district court dismissed this case on international comity grounds in favor of resolution at the Foundation because the Foundation is a specialized system, supported by the United States government and the international community, for addressing Nazi era claims. The district court further considered that all of the relevant transactions leading to this suit took place in Germany and, thus, Germany was the most appropriate forum state for the resolution of these claims.

The doctrine of international comity can be applied retrospectively or prospectively. . . .

When applied prospectively, domestic courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum. . . .

* * * *

Applied prospectively, federal courts evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum. . . .

Here, we decide to abstain based on the strength of our government's interests in using the Foundation, the strength of the German government's interests, and the adequacy of the Foundation as an alternative forum. The United States government has consistently supported the Foundation as the exclusive forum for the resolution of litigation against German corporations related to their acts during

the National Socialist era. The President entered into negotiations with the German government and determined that the interests of American citizens, on the whole, would be best served by establishing the Foundation Agreement.[14] The agreement offers monetary compensation to nationals who were used as slave labor and were victims of insurance fraud as well as those deprived of their property. The fund to provide this compensation was established with the expectation that all such American litigation against German corporations would be resolved at the Foundation. In creating a comprehensive compensatory scheme for all remaining victims of the Nazi era, the Foundation Agreement may end up favoring the monetary interests of some American victims more than others. International agreements, however, often favor some domestic interests over others, and the President has the constitutional authority to settle the international claims of American citizens, even if the claimants would prefer litigation in American courts. *See Garamendi*, 123 S. Ct. at 2386–88; *Dames & Moore*, 453 U.S. at 688. Likewise, the 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.

* * * *

The plaintiff maintains that the forum does not provide her with a remedy because her claims are barred under the Foundation Agreement. Our reading of the Foundation Agreement, however, does not lead us to the conclusion that her claims necessarily would be barred. Annex A of the agreement specifically addresses claims of deprivation of property by German companies based on discrimination. That provision provides that the plaintiff's claims would be barred if her family could have received compensation under the German restitution laws. The plaintiff is free to argue to the Foundation, just as she has argued to this court, that her claims should not be barred because the defendant banks prevented her family

[14] Even if the governments had not engaged in negotiations on this issue, the executive's statements of national interest in issues affecting our foreign relations are entitled to deference. *See Altmann*, 124 S. Ct. at 2255.

from pursuing their property claims after the war. The Foundation is in just as good a position as this court to consider the allegedly fraudulent acts by the defendant banks and is likely to be far more familiar than this court with German law on the relevant issues.

Moreover, if we did not abstain on international comity grounds, we would have to address whether the plaintiff's claim is barred under American law based on the statute of limitations. The plaintiff's grandmother, from whom the plaintiff's claim is derivative, began proceedings to recover her family's assets in 1950 but then failed to pursue her claim. The district court, applying German law, found that the plaintiff's claim was time barred. We do not reach the issue because we defer to the Foundation, but note the plaintiff faces similar hurdles in federal court to those she would face at the Foundation. We recognize that the plaintiff would prefer to pursue her claim in federal court. She is an American citizen, and even though her claim is derivative of her grandmother, we give particular attention to her choice of forum. On balance, however, we find that the strength of the interests held by the American government and the German government outweigh the plaintiff's preference. In doing so, we note that American and German governments have entered into extensive negotiations over this subject and those negotiations affect thousands of other victims of the Nazi regime. While we do not use the Foundation Agreement as an independent legal basis to dismiss this case, we must take the governments' ongoing interests in settling claims from the National Socialist era and World War II into account in our international comity analysis. We further note that all of the relevant events implicated in this litigation took place in Germany and will involve issues of German law. Finally, the plaintiff has an alternative forum, established in part by the United States government, where she can seek redress.

b. Political question: Rozenkier v. Schering AG & Bayer AG

On September 20, 2004, the U.S. District Court for the District of New Jersey dismissed *Rozenkier v. Schering AG & Bayer AG*, 334 F. Supp. 2d 690 (D.N.J. 2004) on the ground that it

presented non-justiciable political questions. In *Rozenkier*, plaintiff alleged that defendants "participated in secret experiments, such as the one performed on him in 1944 [when he was a prisoner in the Auschwitz-Birkenau concentration camps], in order to evaluate the efficacy of 'mass sterilization' drugs" manufactured by them.

The United States filed a Statement of Interest in accordance with the terms of the Foundation Agreement (referred to here as the "Executive Agreement"), discussed in 2.a. *supra,* recommending that the action should be dismissed because "all asserted claims should be pursued through the Foundation instead of the courts" in accordance with United States foreign policy interests. Rozenkier had in fact received compensation from one of the Foundation's "partner organizations," the Conference on Jewish Material Claims Against Germany, Inc., in the amount of $5,348.36. Rozenkier argued, however, that the fact that he received a pro rata payment rather than an amount determined specifically for his claim "voided the validity of any waiver or release to which [he] purportedly agreed."

A brief excerpt below from the court's opinion explains the court's decision to dismiss (footnotes omitted).

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* * * *

If this Court adjudicated the Complaint, it would do so against the recommendation of the Executive Branch. The Statement of Interest provides: "Because of the United States' strong interests in the success of the Foundation, and because such success is predicated on the dismissal of this litigation, the United States recommends dismissal on any valid legal ground." Statement of Interest at 2. Failure to dismiss this action would consequently "express[] lack of the respect due coordinate branches of government" as well as cause "embarrassment from multifarious pronouncements by various departments on one question."

There is no compelling reason the Court should do otherwise. . . .

. . . The wrongdoings alleged against Defendants arose directly from their involvement in the Nazi era and World War II. The

history of foreign policy commitments devoted to the resolution of Holocaust-era claims, coupled with the relatively recent creation of the Foundation, renders such claims nonjusticiable in this Court. Instead, the proper forum for restitution or compensation for Holocaust survivors and other victims of the Nazi era is the Foundation.

* * * *

c. Claim under California state law: Taiheiyo Cement Corp. v. Superior Court of Los Angeles County

On March 30, 2004, the Court of Appeal of the State of California held unconstitutional a California law that had allowed certain suits arising from Nazi era claims to proceed in state courts. *Taiheiyo Cement Corp. v. Superior Court of Los Angeles County (Jae Won Jeong, real party in interest)*, 117 Cal.App.4th 380, 12 Cal.Rptr.3d 32 (Cal.App. 2 Dist., 2004), *cert. denied, Jae Won Jeong v. Taiheiyo Cement Corp.*, 125 S. Ct. 964 (2005). This decision, reversing a 2003 decision by the same court, followed an order by the California Supreme Court directing the court of appeal to vacate its decision and to reconsider the case in light of the U.S. Supreme Court decision in *American Ins. Ass'n v. Garamendi, 539 U.S. 396, reh'g denied*, 124 S. Ct. 35 (2003).

The court's introductory summary of its 2004 decision follows. *Taiheiyo* is discussed in *Digest 2002* at 440–56 and *Digest 2003* at 472–74. *American Ins. Ass'n v. Garamendi* is discussed in *Digest 2003* at 462–68; *see also Digest 2002* at 415–29 for excerpts from the U.S. amicus brief in support of the grant of certiorari.

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[California] Code of Civil Procedure section 354.6 (fn. omitted) allows certain individuals who were "slave labor" or "forced labor" victims during World War II (WWII) to recover compensation for unpaid labor and personal injuries suffered at the hands of "the

Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." (§ 354.6, subd. (a)(1) & (2).) On January 15, 2003, we decided section 354.6 was constitutional because the lawsuits authorized by the statute did not impermissibly infringe upon the federal government's exclusive power over foreign affairs, and because the Treaty of Peace with Japan that formally ended WWII between the United States and Japan (1951 Treaty) did not demonstrate a clear intent to bar the wartime claims of Korean nationals.

The California Supreme Court granted review and transferred this case back to us with instructions to vacate our opinion and reconsider it in light of *American Ins. Ass'n v. Garamendi* (2003) 539 U.S. 396 [123 S. Ct. 2374, 156 L.Ed.2d 376] (*Garamendi*), decided by the United States Supreme Court on June 23, 2003. *Garamendi* held California's Holocaust Victim Insurance Relief Act (HVIRA) was unconstitutional because it conflicted with certain executive agreements negotiated by the President with several European leaders. The executive agreements sought, among other things, to encourage European insurers to provide information about unpaid insurance policies issued to Holocaust victims and the settlement of claims brought under them. (*Id.* at pp. 2381–2383.) The Court held HVIRA's requirement that insurers publicly disclose information concerning Holocaust-era policies conflicted with, and thus was preempted by, the President's foreign policy embodied in the agreements that such information and claims be resolved voluntarily rather than through a state system of economic compulsion. (*Id.* at pp. 2391–2393.)

In light of *Garamendi*, we vacate our prior opinion and hold section 354.6 is unconstitutional because it conflicts with the federal policy embodied in the 1951 Treaty. While the 1951 Treaty does not expressly preempt Jeong's claims under section 354.6, it embodies the federal government's foreign policy that claims against Japan and its nationals are to be resolved diplomatically. By encouraging coercive litigation of claims against Japanese nationals, section 354.6 conflicts with the federal policy of diplomacy embodied in the treaty.

* * * *

As to the specific issue raised in this case, a claim by a national of Korea, which was not a party to the 1951 treaty, the court explained as follows (footnotes omitted).

* * * *

Korea was not a signatory to the 1951 Treaty because, as part of the Empire of Japan until the end of WWII, it had not been at war with Japan. (*See In re: World War II Era Japanese Forced Labor Litigation* (N.D.Cal. 2001) 164 F.Supp.2d 1160, 1167–1168.) Thus, Article 14's waiver provision did not specifically apply to Korean claims. Nonetheless, Article 4(a) addresses the handling of such claims: "[T]he disposition of property of Japan and of its nationals . . . and their claims, including debts, against [Korea] . . . , and the disposition in Japan of property of [Korean] authorities and residents, and of claims, including debts, of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. . . . (The term nationals . . . includes juridical persons.)" (1951 Treaty, supra, art. 4(a), 3 U.S.T. at p. 3173.) Similarly, with respect to other non-signatory nations, Article 26 provides: "Japan will be prepared to conclude with any State . . . which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty." (*Id.* at p. 3190.) In other words, Articles 4(a) and 26 indicated the claims of non-signatory nations were to be negotiated separately by the government of Japan with the governments of those nations.

In our original opinion in this case, we concluded the 1951 Treaty did not preempt section 354.6 because Articles 4(a) and 26 did not evidence a sufficiently clear intent to foreclose claims by individuals of non-signatory nations against Japanese nationals, like those alleged by Jeong against Taiheiyo. . . . For the majority of the Court [in *Garamndi*], however, it was sufficient for pre-emption purposes that the executive agreements embodied the federal purpose and foreign policy of dealing with Holocaust insurance claims through diplomacy, and that this foreign policy conflicted with HVIRA's "regulatory sanctions to compel disclosure and payment." (*Id.* at pp. 2390–2392.)

We must therefore agree with Taiheiyo and the United States that similar to the executive agreements in *Garamendi*, Articles 4(a) and 26 embody the federal purpose and foreign policy that WWII claims by individuals of non-signatory nations were to be resolved through diplomacy. Article 4(a) expresses the federal policy that claims by Korean nationals against Japanese nationals were to be "the subject of special arrangements" between the Korean and Japanese governments. While neither Japan nor Korea was required to implement any specific resolution, and Korea was under no obligation to even negotiate with Japan concerning the settlement of war claims, the treaty nonetheless expressed the foreign policy determination of the Allied Powers, including the United States, that such claims should be resolved diplomatically between the Japanese and Korean governments.

Indeed, *Garamendi*'s conclusion that the President's agreements embodied his foreign policy is far more compelling in this case. After all, rather than unilateral presidential agreements, we are dealing with federal policy expressed through a ratified treaty, the ultimate formal expression of the federal executive and legislative branches in matters of foreign policy. (*See* U.S. Const., art. VI [treaties made "under the Authority of the United States, shall be the supreme Law of the Land," thus overriding any conflicting state law]; *see Mitsubishi, supra*, 113 Cal.App.4th at pp. 61 & 75–76, 6 Cal.Rptr.3d 159; *Missouri v. Holland* (1920) 252 U.S. 416, 432, 40 S. Ct. 382, 64 L.Ed. 641; *United States v. Belmont* (1937) 301 U.S. 324, 57 S. Ct. 758, 81 L.Ed. 1134; *Zicherman v. Korean Air Lines Co.* (1996) 516 U.S. 217, 226, 116 S. Ct. 629, 133 L.Ed.2d 596.)

* * * *

We must further agree with Taiheiyo and the United States that the 1951 Treaty's expression of foreign policy sufficiently conflicts with section 354.6 so as to require its preemption. . . .

* * * *

Finally, Jeong argues that preempting his claims under section 354.6 would be unconstitutional because it would result in taking his property rights without just compensation and violate his right

to equal protection of the laws. . . . These arguments have no merit because *Garamendi* specifically upheld the federal government's ability to constitutionally resolve wartime claims of private parties by executive agreement.

* * * *

d. Claim against the United States: Hungarian Gold Train

On December 20, 2004, the parties in a class-action case against the United States, *Rosner v. United States of America*, Case No. 01-1859-CIV (S.D. Fl.), announced an agreement in principle to settle. The claims concerned what came to be known as the Hungarian Gold Train, a train of approximately 24 freight cars that contained personal property taken by the Hungarian government from Jews deported to Auschwitz. Plaintiffs filed their original complaint in May 2001, and the court dismissed that complaint in part in August 2002. *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002). Plaintiffs filed an amended complaint in October 31, 2003.

One of the issues raised in the case before it was settled was the effect of the 1947 Treaty of Peace with Hungary and the 1973 Claims Settlement Agreement between the United States and Hungary. Excerpts below from the U.S. Reply Memorandum in Support of Its Motion to Dismiss Plaintiffs' First Amended Complaint, filed August 31, 2004, explain the issue and the U.S. view of the proper interpretation of the treaties (most footnotes omitted). The full text of the reply brief is available at *www.state.gov/s/l/c8183.htm*.

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1. The Treaty of Peace Bars Plaintiffs' Claims

The Treaty of Peace unambiguously waives "all claims of any description" against the United States and its allies that (1) belong to "the Hungarian Government or Hungarian nationals," and (2) arise "out of actions taken because of the existence of a state of war in Europe after September 1, 1939." Treaty of Peace

Art. 32.1.[54] This waiver includes (but is not limited to) claims based on "acts of forces or authorities" of the United States. *Id*. The claims Plaintiffs assert in this litigation fall within this clear waiver.

First, the claims belong to Hungary (Plaintiffs contend that the United States had a legal duty to return property to the Hungarian government) and (with regard to the majority of Plaintiffs) the claims are being asserted by persons who were Hungarian nationals at the time the Treaty of Peace went into effect. Second, the claims arise directly out of actions taken because of a state of war in Europe after September 1, 1939. As Plaintiffs do not deny, the Army seized the Gold Train only because of the state of war in Europe. (Opp'n at 63.) Indeed, the Army would not have been in Austria at all but for the state of war. For that matter, the Gold Train would not have been in Austria, fleeing the advancing Soviet army, but for the war in Europe. And certainly, the United States would not have had motive or ability to use property for the benefit of displaced persons as Plaintiffs allege the United States did, were it not for the state of war in Europe that led to the large number of refugees.

Plaintiffs contend that the alleged United States actions at issue "did not occur 'in Hungarian territory' or as an 'exercise of purported belligerent rights.'" (Opp'n at 63.) But the broad waiver in the Treaty of Peace does not require that the acts take place in Hungary, *see S.N.T. Fratelli Gondrand v. United States*, 166 Ct. Cl. 473, 479 (1964); *Pauly v. United States*, 152 Ct. Cl. 838 (1961) (Treaty of Peace with Hungary barred claim for seizure of civilian horses *in Germany*), nor that they comprise the exercise of

[54] *See also id*. Arts. 29.1, 29.2 (granting the United States and other allied powers "the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals," and providing that "[t]he liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned [and] [t]he Hungarian owner shall have no rights with respect to such property except those which may be given him by that law").

purported belligerent rights, *see Neri v. United States*, 204 F.2d 867 (2d Cir. 1953) (treaty barred claim based on voluntary towing of vessel after combat had ceased). Rather, as the Treaty text makes clear, claims for acts in Hungary and claims arising out of the exercise of belligerent rights are only two subcategories on a non-exhaustive list of claims that fall within the broad category of "all claims of any description" that are extinguished by the Treaty. Plaintiffs cannot deny that their claims fall into another subcategory on that list, as the claims are based on "acts of forces or authorities" of the United States; the securing and handling of the Gold Train property was done by United States forces and the decision to provide the property to the IGCR for the benefit of refugees was made by United States authorities.

Because the treaty text is clear, Plaintiffs' non-textual arguments, (Opp'n at 63–66), are inapposite. *See Duarte-Acero*, 208 F.3d at 1285. Even if they were relevant, however, they would not support Plaintiffs' position. Plaintiffs suggest that the phrase "Hungarian nationals" should be read to exclude Hungarian Jews because the "Jews of Hungary were not enemies of the Allied Powers." (Opp'n at 63.) This antitextual reading is wrong for numerous reasons. For one, an individual's personal views or even actions during a war do not affect his or her status under laws relating to war; nationality is what is relevant. Additionally, the purpose of a claims waiver provision is not, as Plaintiffs imply, to punish the defeated nation. Rather, it is to protect the Allies, "to free the United States from any claim resulting from the war and/or occupation," *Neri v. United States*, 102 F. Supp. 718, 720 (S.D.N.Y. 1951), and to create a state of repose. And third, Plaintiffs no longer contend that the United States' fault was failure to return the Gold Train property to individual owners. They now contend that the United States breached an alleged duty to return the property *to Hungary*. As such, they are asserting claims that are derivative of Hungary's alleged right to receive the property, and Hungary's rights were extinguished.

Plaintiffs next contend that applying the plain meaning of Article 32.1 would render Article 27 of the treaty a "cruel nullity." (Opp'n at 64.) This is incorrect. Article 27 provides:

> Hungary undertakes that in all cases where the property, legal rights or interests in Hungary of persons under Hungarian jurisdiction have, since September 1, 1939, been the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons, the said property, legal rights and interests shall be restored together with their accessories or, if restoration is impossible, that fair compensation shall be made therefor.

Treaty of Peace Art. 27.1. Contrary to Plaintiffs' suggestion, Article 27 is complimentary with the claims waiver provision of Article 32. Article 27 required *Hungary* to make restitution to all of those who, like Plaintiffs, had property stolen during the war because they are Jewish. As the Treaty extinguishes claims against the Allies in Article 32, it provides, in Article 27, a legal right to compensation for all Hungarian Jews (and Jews from occupied areas) by *Hungary*, the perpetrator of the despoliation. Notably, Hungary's obligation to make "fair compensation" for property stolen exists even if Hungary cannot restore the actual property. Thus, victims of the pro-Nazi Hungarian regime should have been made whole for the thefts by the thief (or, more accurately, its successor).

Plaintiffs claim that Article 20 of the Treaty of Peace supports their contention. In fact, the language they quote is (1) from Article 30, (2) taken out of context, and (3) irrelevant. The clause actually states that "[i]dentifiable property of Hungary and of Hungarian nationals *removed by force or duress* from Hungarian territory *to Germany by German forces* or authorities after January 20, 1945, shall be eligible for restitution." Treaty of Peace Art. 30.2. The Gold Train and its contents are not covered by this provision as they were removed by *Hungarian*, not German, forces to *Austria*, not Germany, where they were surrendered to the Army (and the Hungarian forces had rendered the property's ownership unidentifiable).

Finally, Plaintiffs' contention that "neither U.S. nor Hungarian officials at the time the treaty was in the process of adoption thought that it controlled the pending restitution discussions or claims," Pl. Br. at 64–66, is similarly irrelevant. The United States

is not contending that Article 32 of the Treaty of Peace prevented the United States from providing the Gold Train property to Hungary or determined what property was eligible for restitution. Rather, Article 32 protects the United States from civil liability to the extent it made any errors in the process of handling the Gold Train property or making decisions about it. Civil liability for such handling and decisions is "extinguished" by the Treaty. Treaty of Peace Art. 32.2.

2. The 1973 Settlement Agreement Bars Plaintiffs' Claims

While the Treaty of Peace barred initial liability for the claims Plaintiffs now assert, even if such liability had existed, it would have been extinguished by settlement by the 1973 Agreement between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, 24 U.S.T. 522. (*See* Opening Mem. at 49–50.) Despite Plaintiffs' strained reading of the 1973 Agreement, the text of that Agreement makes clear that Hungary settled all claims for "Hungarian property lost as a result of World War II." 1973 Agreement, at Art. 6. It is clear that the Gold Train property was property lost as a result of World War II. *See* supra. Moreover, for purposes of the 1973 Agreement, Plaintiffs' nationalities are not relevant. Because the Plaintiffs are asserting that the United States should have returned the Gold Train property to Hungary, they are asserting Hungary's claims which, if they ever existed, were explicitly settled by the 1973 Agreement.

* * * *

Cross-references

Claims under Alien Tort Statue and Torture Victims Protection Act, **Chapter 6.G.6.**

Claims affected by immunities and act of state doctrine, **Chapters 6.G.7.b.(ii) and 10.A.2., B., and C.**

Claims under NAFTA and WTO, **Chapter 11.C. and D.**

CHAPTER 9

Diplomatic Relations, Succession and Continuity of States

A. ESTABLISHMENT OF U.S. DIPLOMATIC POSTS

1. Liaison Office in Libya

U.S. diplomatic personnel reopened the U.S. Interest Section in Tripoli on February 8, 2004. On June 28, 2004, Assistant Secretary of State for Near Eastern Affairs Bill Burns issued a statement formally inaugurating a new U.S. Liaison Office in Tripoli and resuming active diplomatic ties. *See www.state.gov/r/pa/prs/ps/2004/34000.htm*. Libya re-established its diplomatic presence in Washington with the opening of an Interest Section on July 8, 2004, which was subsequently upgraded to a Liaison Office in December 2004. *See www.state.gov/r/pa/ei/bgn/5425.htm*.

2. Embassy and Regional Offices in Iraq

On June 28, 2004, sovereign authority was transferred to the interim government in Iraq, and the Coalition Provisional Authority ceased to exist. On the same date the United States established diplomatic relations with the Iraqi Government and established the U.S. Embassy in Baghdad. Iraq opened its embassy in Washington, D.C., on June 30, 2004. The United States has four regional offices in Iraq, in Mosul, Kirkuk, Hillah, and Basrah. *See www.state.gov/r/pa/prs/ps/2004/34761.htm*.

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The United States had severed relations with the regime of Saddam Hussein in 1990. *See http://iraq.usembassy.gov/iraq/040628relations.html*.

B. EXECUTIVE BRANCH CONSTITUTIONAL AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORTS

On August 31, 2004, the U.S. District Court for the District of Columbia dismissed suits challenging the refusal by the Department of State to grant requests to list the birthplace of infants born in Jerusalem as "Jerusalem, Israel," rather than "Jerusalem." *Zivotofsky v. Secretary of State*, Civ. Nos. 03-01921 and 03-2048 (D.D.C. 2004). The district court consolidated *Zivotofsky* and *Odenheimer v. U.S. Dep't of State* on February 5, 2004, and dismissed both in an unpublished opinion.

The statutory provision at issue in the case, in keeping with Pub. L. No. 107–228, § 214(d), provided: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

Excerpts from the opinion set forth below address the court's decision to grant dismissal for lack of standing and because the cases presented nonjusticiable political questions involving the recognition of states. The court found it unnecessary to reach several other arguments made by the United States, including its view that the President had properly interpreted § 214(d) as permissive rather than mandatory in order to be consistent with the U.S. Constitution. *See Digest 2003* at 485–501 for discussion of the U.S. motion to dismiss in *Zivotofsky*. The case was on appeal to the U.S. Court of Appeals for the District of Columbia Circuit at the end of the year.

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

* * * *

A. Plaintiffs Lack Article III Standing

* * * *

Defendant argues that Plaintiffs lack standing because they have suffered no injury in fact. . . . Defendant asserts that Plaintiffs have neither a legally protected interest in particular passport wording nor a concrete injury based on the failure to obtain that wording. Defendant argues that Plaintiffs' claims are actually a thinly veiled objection to the Executive Branch's policy toward Jerusalem.

Plaintiffs respond that they have suffered a concrete injury because they have been denied a statutory right conferred by Section 214(d). . . .

Plaintiffs' argument is not persuasive. . . .

. . . Plaintiffs have valid U.S. passports with no restrictions and are citizens of both the United States and Israel. If Plaintiffs' requested relief were granted, they still would have valid passports and would be citizens of both the United States and Israel. They would gain no rights they did not have to begin with. If, as they allege, they have suffered the loss of some "psychological benefit," that loss still does not rise to the level of a cognizable injury in fact. The alleged injury therefore is not sufficiently concrete, particularized, or actual to constitute an injury in fact and does not confer standing upon the Plaintiffs in this case.

B. Plaintiffs Present a Nonjusticiable Political Question

Federal courts . . . lack [U.S. Constitution] Article III jurisdiction over cases that present political questions. Cases present a political question if, among other things, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Thus, if an issue is committed by the Constitution to either the Executive Branch or the Legislative Branch, it is outside the Court's jurisdiction.

According to Defendants, the issue in this case is territorial sovereignty and state recognition, which is a Constitutional responsibility of the Executive and thus is nonjusticiable. Defendant notes that the Supreme Court has specifically held that recognition of foreign governments is an executive power.

Defendant, therefore, argues that recognition of foreign governments is constitutionally committed to the Executive. Plaintiffs argue that the issue before the Court is passport policy, not recognition of sovereigns. According to Plaintiffs, the decision to place "Jerusalem" versus "Jerusalem, Israel," is a simple administrative matter with little or no effect on foreign relations. This argument borders on the disingenuous. The status of Jerusalem is without question one of the most sensitive foreign policy issues to have confronted the world in recent years. The desired passport wording in this case would confer recognition in an official, diplomatic document that Israel has sovereignty over Jerusalem. To argue that this is merely a routine administrative issue ignores the last fifty to sixty years of violence in the Middle East. The question at hand involves the authority to recognize sovereigns and conduct foreign policy, not the bureaucratic procedures for issuance of passports.

The caselaw makes clear that the recognition of sovereigns is constitutionally committed to the Executive. "It is undisputed that the Constitution gave the President full constitutional authority to recognize the [People's Republic of China] and to derecognize the [Republic of China]." *Goldwater v. Carter*, 617 F.2d 697, 707–08 (D.C. Cir. 1979) (en banc), vacated on other grounds, 444 U.S. 996 (1979); *see also United States v. County of Arlington, Virginia*, 669 F.2d 925, 929 (4th Cir. 1982) ("the President is empowered to recognize the government of a foreign state"); *Ams. United for Separation of Church and State*, 786 F.2d 194, 202 (2nd Cir. 1986) (referring to recognition of sovereigns as "one of the rare governmental decisions that the Constitution commits exclusively to the Executive Branch").

Because the recognition of governments is constitutionally committed to the Executive, this case falls squarely within the framework set forth in *Baker v. Carr*, and, therefore, falls outside the jurisdiction of this Court. 369 U.S. 186, 217 (1962).

* * * *

CHAPTER 10

Immunities and Related Issues

A. SOVEREIGN IMMUNITY

1. Convention on Jurisdictional Immunities of States and their Properties

On October 25, 2004, Eric Rosand, Deputy Legal Adviser, U.S. Mission to the United Nations, addressed the UN General Assembly Sixth Committee (Legal) on the draft Convention on Jurisdictional Immunities of States and their Properties. The convention was adopted by consensus in the UN General Assembly on December 2, 2004; the text of the convention is annexed to the resolution. A/RES/59/38 (2004).

The full text of Mr. Rosand's statement, excerpted below, is available at *www.un.int/usa/04_206.htm*.

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* * * *

. . . The text of the Convention reflects the emerging global consensus that States and State enterprises can no longer claim absolute, unfettered immunity from the proper jurisdiction of foreign courts and agencies, especially for their commercial activities.

Most significantly, the Convention embodies the so-called restrictive theory of state immunity, which generally is based on the classic distinction in international law between acts *jure imperii* and acts *jure gestionis*. Under that distinction, stated broadly, States cannot engage in commercial transactions with foreign nationals only to invoke their sovereign immunity with respect to disputes based upon

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their commercial activity. Nor may immunity be invoked against claims for compensation for personal injury or damage to property caused by acts or omissions of a private law nature occurring within the foreign State where the damage is suffered, or claims with respect to rights or interests in real property within that foreign State.

These exceptions to the general rule of foreign state immunity are widely recognized. They have worked well. They provide courts a reliable means of balancing the legitimate interests of States when acting in their sovereign capacity, on the one hand, with the need to provide appropriate means of recourse for those who deal with or are affected by States when acting in a private capacity. A testament to their success is that they are increasingly followed in domestic and international practice. They should be endorsed by the United Nations.

* * * *

No international legal instrument is perfect or comprehensive, however, and it ought not to be surprising that the proposed Convention does leave some issues to be resolved another day. Over the course of the negotiations, the United States has expressed a number of concerns in specific areas. In some instances, our concerns result from the fact that the specific wording of the text lacks the necessary clarity and precision. In others, the articles still contain gaps, omissions, ambiguities and inconsistencies. Let me offer four short but important examples.

First, in the area of remedies, we believe the articles were not intended to disturb the general rule that a court in one State has no enforcement jurisdiction to issue coercive equitable relief, such as injunctions, to dictate the conduct of a foreign sovereign. At the same time, the draft articles are not to be understood as limiting the use of such remedies by a court to protect the integrity of its own proceedings, or when the foreign State has dropped its mantle of sovereignty by appearing as a claimant.

Second, with respect to immunity from liability for personal injury and property damage, we believe the formulation adopted by the Convention leaves open questions with respect to the further evolution of public international law in those specific circumstances where the conduct complained of contravenes other widely accepted

international conventions which obligate the States to [provide] remedies to victims of prohibited conduct, for example the UN Conventions Against Torture or Hostage-Taking.

We also believe that the language of Article 12, concerning jurisdiction over non-commercial torts, must be interpreted and applied consistently with the time-honored distinction between acts *jure imperii* and acts *jure gestionis*. It is entirely appropriate for States to be held accountable—not to be able to invoke immunity—with regard to their tortious acts or omissions in circumstances where private persons would be—this is in fact what our own domestic law provides, and the law of many other States does likewise. But extending this jurisdiction without regard to the accepted private/public distinction under international law would be contrary to existing principles of international law, and it would likely lead to more, not fewer, disagreements and conflicts in domestic court, which could better be resolved—as they are now—through State-to-State mechanisms. Article 12 must, in other words, be read in light of established State practice, to concern tortious acts or omissions of a private nature which are attributable to the State, while preserving immunity for acts of a strictly sovereign or governmental nature.

Third, we have the same sort of difficulties with regard to the precise scope of Article 10(1) as it relates [to] proceedings "arising out of" commercial activities. The essence of this Convention, and one which my government strongly supports, is the principle that when States act in the marketplace in a commercial capacity they should be subject to the same jurisdiction as private parties. We believe, accordingly, that the "arising out of" jurisdiction provided in this article extends to conduct which is itself commercial in nature or is "related to" such conduct, and not to acts of a public or sovereign nature. Again, this is what the law provides in most states whose laws incorporate the so-called restrictive theory of immunity, and what we believe the negotiators have intended with this Convention. We identify similar [concerns] with the possible reach of host State jurisdiction into the internal operations of foreign embassies and consulates in Article 11.

Finally, Mr. Chairman, we believe there are a few significant omissions from the scope of the Convention. One that should

concern us all affects the time limit for States to respond to lawsuits in foreign courts. Although several articles address aspects of service of process on foreign States, the text does not incorporate the generally accepted rule of customary international law that a defendant State is entitled to at least 60 days notice of a suit before it must file its first response in a foreign court. This minimum 60-day rule has long been recognized internationally, in court decisions dealing with the question as well as in national codifications of foreign State immunity. The rule is well-grounded in international public policy and is intended to provide all States with the necessary time to evaluate their obligations and their options before responding to a complaint in a foreign court[]. It is the rule we follow in the United States. We are not aware of any basis in international law or practice to the contrary. And although the Convention does not explicitly endorse the 60-day rule, which we would have favored, we do not consider that the Convention adopts or endorses a contrary or more restrictive practice.

In other words, my delegation believes our work in this area is not entirely complete, and that in due course, and with the benefit of time and experience, we may well need to revisit some of these issues in the appropriate forum.

* * * *

2. U.S. 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 exemptions 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 sovereign in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). For a number of years before enactment of the FSIA, courts abided by "suggestions of immunity" from

the State Department. When no suggestion was filed, however, the courts made the determination. The FSIA was enacted "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to '[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process,' H.R. Rep. No. 94–1487, at p. 7 (1976)." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

In the FSIA Congress codified the "restrictive" theory of sovereign immunity, referred to in A.1. *supra*, 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. As discussed in the Supreme Court decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), *see* A.2.c.(1), the United States had previously adopted the "restrictive theory" in the so-called "Tate Letter" of 1952, reproduced at Dep't State Bull. No. 26 at 984–85 (1952). *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711–715 (1976). Generally speaking, a state engages in commercial activity when it exercises "only those powers that can also be exercised by private citizens" as distinct from "powers peculiar to sovereigns." *Id.* at 704. The test for making this distinction is the nature of the transaction in question (the nature of the conduct which the foreign state performs or agrees to perform) as opposed to the intent behind it (the reason why the foreign state engages in the activity). *See Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992).

From the beginning the FSIA has provided certain other exceptions to immunity, such as by waiver or agreement to arbitrate. Over time, amendments to the FSIA incorporated additional exceptions. In 1996 Congress enacted the "terrorism" exception. The various statutory exceptions, set forth at §§ 1605(a)(1)–(7), have been subject to significant judicial interpretation. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. Government is not a party and participates, if at all, as *amicus curiae*. The following items represent only a selection of the relevant decisional material during 2004.

a. Scope of application

In a suit against the Government of Indonesia, the National Defense Security Council of Indonesia ("NDSC"), and certain Indonesian officials in their official capacities, the U.S. Court of Appeals for the Fourth Circuit concluded that the commercial activity exception to immunity under the FSIA could not be invoked against the defendants where the officials responsible lacked "actual authority" for the acts in question. *Velasco v. Government of Indonesia*, 370 F.3d 392 (4th Cir. 2004). In this case, Velasco sought to compel the payment of a $2.8 million promissory note issued by former staff members of the NDSC. The question of "foreign state" arose in determining whether the unauthorized acts of government officials in issuing the promissory notes constituted an act of a "foreign state" for purposes of invoking the commercial activity exception to immunity against the state. The commercial activity exception is discussed in A.2.d.(1) below. Excerpts below provide the factual context for the litigation and the court's analysis in affirming dismissal of the claims (footnotes omitted).

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* * * *

On October 27, 1985, former NDSC Deputies for Development and Long-Term Planning, Ibnu Hartomo and Soebagyo Soedewo, issued a series of 505 Indonesian promissory notes collectively valued at US$3.2 billion. . . . At a signing ceremony . . . in Damascus, Syria, . . . Hartomo signed the notes, and [H.A. Chalid Mawardi, Indonesia's former Ambassador to Syria] certified that they were "Official/Governmental." . . .

Hartomo admitted that at the time he issued the notes, he knew he was not authorized to do so. Similarly, Ambassador Mawardi . . . lacked the authority to confirm or legalize the notes. The notes themselves contain numerous facial irregularities and are distinguishable from notes issued by Bank Indonesia or the Indonesian Ministry of Finance, the only agents under Indonesian law with authority to issue promissory notes binding on the Government. . . .

In late 1985, the NDSC became aware of reports that the notes were in circulation. . . .

. . . On January 21, 1986, February 4, 1986, and March 2, 1987, Bank Indonesia issued circulars by telex alerting all foreign exchange banks in Jakarta, Bank Indonesia's branch offices, and Bank Indonesia's Representative Offices worldwide of the unauthorized notes and advising them the issuance of such notes was conducted at the risk and responsibility of the individual issuers. . . . On April 30, 1987, the NDSC issued a press release confirming that it was not authorized to issue promissory notes and that the purported NDSC notes were unauthorized and illegal. Subsequently, the international press. . . reported widely on the fake notes and Bank Indonesia's repeated repudiation of them. It is undisputed that these events occurred prior to the time Velasco purchased his Note . . . on September 14, 1987. . . .

* * * *

Velasco and the Defendants agree that the sole exception pertinent to this case is the "commercial activity" exception set forth at 28 U.S.C. § 1605(a)(2) . . . The Defendants apparently do not contest that the issuance of the Note was a commercial activity that caused a direct effect in the United States. Rather, they argue that the issuance of the Note was not a commercial activity *of a foreign state*. We must determine, therefore, whether the unauthorized acts of Hartomo and Mawardi in issuing the notes under color of authority from the NDSC are sufficient to deprive the Government of Indonesia or the NDSC of their sovereign immunity.

* * * *

Although the [FSIA] is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state. . . . The FSIA, however, does not immunize an official who acts beyond the scope of his authority. *Id.* at 1106.

This narrow, judicially-created expansion of foreign sovereign immunity models federal common law relating to derivative U.S. sovereign immunity. . . . Because the power of governmental officials

is both prescribed and limited by constitutional or statutory law, courts analyzing the sovereign immunity of the United States have held consistently that the act of an agent beyond what he is legally empowered to do is not binding upon the government. . . .

Moreover, courts have imposed an affirmative obligation upon a person transacting business with an agent of the United States to determine whether the agent is vested with authority to bind the Government. . . .

The Ninth Circuit, in *Phaneuf* [*v. Republic of Indonesia*, 106 F.3d 302 (9th Cir. 1997), a case dealing with the same issuance of promissory notes], specifically held that "an agent must have acted with actual authority in order to invoke the commercial activity exception against a foreign state." 106 F.3d at 308. We acknowledge that the Second Circuit has taken a different view. It has held, without substantial explanation, that jurisdiction exists over a foreign state if its agents act with either actual or apparent authority. *See First Fidelity Bank, N.A. v. Government of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189, 194–96 (2d Cir. 1989); *Storr*, 1997 U.S. Dist. LEXIS 15890, 1997 WL 633405, at *2–3. Whether a third party reasonably perceives that the sovereign has empowered its agent to engage in a transaction, however, is irrelevant if the sovereign's constitution or laws proscribe or do not authorize the agent's conduct and the third party fails to make a proper inquiry. We conclude that a foreign official's manifestation of authority to bind the sovereign is insufficient to bind the sovereign.

[W]e concur with the position of the Ninth Circuit and hold that the commercial activity exception may be invoked against a foreign state only when its officials have actual authority. . . . We turn, then, to the question of whether Hartomo and Mawardi possessed actual authority to issue Velasco's Note to determine whether they acted in their official, as opposed to their individual, capacities.

* * * *

In examining the role of Hartomo and Mawardi, the court found that the NDSC "is prohibited from seeking or accepting offers of foreign credit"; that "the Ministry of Finance is the only agency authorized to issue promissory notes on behalf of the Republic of Indonesia in connection with borrowing

from foreign sources"; that the Minister of Finance "cannot delegate his authority to the NDSC"; that "because the NDSC did not have the authority to issue Velasco's note, it could not delegate any authority to Hartomo"; and that Ambassador Mawardi . . . "lacked the authority to confirm or legalize the notes." The court concluded:

> By issuing the notes, the individual Defendants acted ultra vires and in violation of Indonesian law. As a consequence, the issuance of the notes cannot be characterized as the commercial activity of a foreign state which divests the NDSC or the Government of Indonesia of their sovereign immunity. Because Velasco did not sue the individual Defendants in their individual capacities, but rather sued Hartomo and Mawardi in their official capacities, the District Court properly dismissed the claims.

* * * *

b. Retroactivity of the Foreign Sovereign Immunities Act

(1) Republic of Austria v. Altmann

On June 7, 2004, the U.S. Supreme Court decided, based on its reading of the statute's language and its understanding of Congressional intent, that the provisions of the Foreign Sovereign Immunities Act apply retroactively even with respect to events prior to U.S. adoption of the restrictive theory of sovereign immunity in 1952, noting that sovereigns at no time had a "right" to such immunity. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). Excerpts below from the Court's decision explain the basis for its conclusions as to retroactivity. Also included are the Court's views that (1) the act of state doctrine remains available as a possible defense and (2) the United States can notify the court of foreign policy concerns in a particular case. (Most footnotes have been omitted). *See also Digest 2003* at 515–20 for excerpts from the U.S. brief *amicus curiae* to the Supreme Court in this case

arguing against retroactive application of the FSIA. The decision of the district court on remand concerning the applicability of the takings exception in *Altmann* is discussed in 2.e.(4) below.

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In 1998 an Austrian journalist, granted access to the Austrian Gallery's archives, discovered evidence that certain valuable works in the Gallery's collection had not been donated by their rightful owners but had been seized by the Nazis or expropriated by the Austrian Republic after World War II. The journalist provided some of that evidence to respondent, who in turn filed this action to recover possession of six Gustav Klimt paintings. Prior to the Nazi invasion of Austria, the paintings had hung in the palatial Vienna home of respondent's uncle, Ferdinand Bloch-Bauer, a Czechoslovakian Jew and patron of the arts. Respondent claims ownership of the paintings under a will executed by her uncle after he fled Austria in 1938. She alleges that the Gallery obtained possession of the paintings through wrongful conduct in the years during and after World War II.

The defendants (petitioners here)—the Republic of Austria and the Austrian Gallery (Gallery), an instrumentality of the Republic—filed a motion to dismiss the complaint asserting, among other defenses, a claim of sovereign immunity. The District Court denied the motion, 142 F. Supp. 2d 1187 (CD Cal. 2001), and the Court of Appeals affirmed, 317 F.3d 954 (CA9 2002), as amended, 327 F.3d 1246 (2003). We granted certiorari limited to the question whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. § 1602 et seq, which grants foreign states immunity from the jurisdiction of federal and state courts but expressly exempts certain cases, including "cases . . . in which rights in property taken in violation of international law are in issue," § 1605(a)(3), applies to claims that, like respondent's, are based on conduct that occurred before the Act's enactment, and even before the United States adopted the so-called "restrictive theory" of sovereign immunity in 1952. 539 U.S. 987, 156 L.Ed.2d 703, 124 S. Ct. 46 (2003).

* * * *

Petitioners filed a motion to dismiss raising several defenses including a claim of sovereign immunity. Their immunity argument proceeded in two steps. First, they claimed that as of 1948, when much of their alleged wrongdoing took place, they would have enjoyed absolute immunity from suit in United States courts. Proceeding from this premise, petitioners next contended that nothing in the FSIA should be understood to divest them of that immunity retroactively.

* * * *

The Court of Appeals agreed [with the district court] that the FSIA applies to this case. Rather than endorsing the District Court's reliance on the Act's jurisdictional nature, however, the panel reasoned that applying the FSIA to Austria's alleged wrongdoing was not impermissibly retroactive because Austria could not legitimately have expected to receive immunity for that wrongdoing even in 1948 when it occurred. The court rested that conclusion on an analysis of American courts' then-prevalent practice of deferring to case-by-case immunity determinations by the State Department, and on that Department's expressed policy, as of 1949, of "'reliev[ing] American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.'" (317 F.3d at 965. . . .)

We granted certiorari, . . . and now affirm the judgment of the Court of Appeals, though on different reasoning.

Chief Justice Marshall's opinion in *Schooner Exchange v. M'Faddon*, 7 Cranch 116, 11 U.S. 116, 3 L.Ed. 287 (1812), is generally viewed as the source of our foreign sovereign immunity jurisprudence. In that case, the libellants claimed to be the rightful owners of a French ship that had taken refuge in the port of Philadelphia. The Court first emphasized that the jurisdiction of the United States over persons and property within its territory "is susceptible of no limitation not imposed by itself," and thus foreign sovereigns have no right to immunity in our courts. Id., at 136, 11 U.S. 116, 3 L.Ed. 287. Chief Justice Marshall went on to explain, however, that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as

those involving foreign ministers or the person of the sovereign . . . . Until 1952 the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns. 461 U.S., at 486, 76 L.Ed.2d 81, 103 S. Ct. 1962. In that year, however, the State Department concluded that "immunity should no longer be granted in certain types of cases." In a letter to the Attorney General, the Acting Legal Adviser for the Secretary of State, Jack B. Tate, explained that the Department would thereafter apply the "restrictive theory" of sovereign immunity:

> ". . . According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). . . . [I]t will hereafter be the Department's policy to follow the restrictive theory . . . in the consideration of requests of foreign governments for a grant of sovereign immunity."

As we explained in our unanimous opinion in *Verlinden*, the change in State Department policy wrought by the "Tate Letter" had little, if any, impact on federal courts' approach to immunity analyses: "As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department," and courts continued to "abid[e] by" that Department's "'suggestions of immunity.'" 461 U.S., at 487, 76 L.Ed.2d 81, 103 S. Ct. 1962. The change did, however, throw immunity determinations into some disarray, as "foreign nations often placed diplomatic pressure on the State Department," and political considerations sometimes led the Department to file "suggestions of immunity in cases where immunity would not have been available under the restrictive theory." Id., at 487–488, 76 L.Ed.2d 81, 103 S. Ct. 1962. . . .

In 1976 Congress sought to remedy these problems by enacting the FSIA, a comprehensive statute containing a "set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." Id., at 488, 76 L.Ed.2d 81, 103 S. Ct. 1962. The Act

"codifies, as a matter of federal law, the restrictive theory of sovereign immunity," ibid., and transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch. The preamble states that "henceforth" both federal and state courts should decide claims of sovereign immunity in conformity with the Act's principles. 28 U.S.C. § 1602.

* * * *

. . . Although the FSIA's preamble suggests that it applies to preenactment conduct, see *infra*, at ____, 195 L.Ed.2d at 19, that statement by itself falls short of an "expres[s] prescri[ption of] the statute's proper reach." Under *Landgraf* [*v.Usi Film Prods., (511 U.S. 244 1994)*], therefore, it is appropriate to ask whether the Act affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or addresses only matters of procedure (and thus may be appied to all pending cases regardless of when the underlying conduct occurred). But the FSIA defies such categorization. . . . Prior to 1976 foreign states had a justifiable expectation that, as a matter of comity, United States courts would grant them immunity for their public acts (provided the State Department did not recommend otherwise), but they had no "right" to such immunity. Moreover, the FSIA merely opens United States courts to plaintiffs with pre-existing claims against foreign states; the Act neither "increase[s those states'] liability for past conduct" nor "impose[s] new duties with respect to transactions already completed." 511 U.S., at 280, 128 L.Ed.2d 229, 114 S. Ct. 1483. Thus, the Act does not at first appear to "operate retroactively" within the meaning of the *Landgraf* default rule.

* * * *

. . . The aim of the presumption [against retroactivity] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct. But the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some

present "protection from the inconvenience of suit as a gesture of comity." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479, 155 L.Ed.2d 643, 123 S. Ct. 1655 (2003). Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the "decisions of the political branches . . . on whether to take jurisdiction." *Verlinden*, 461 U.S., at 486, 76 L.Ed.2d 81, 103 S. Ct. 1962. In this *sui generis* context, we think it more appropriate, absent contraindications, to defer to the most recent such decision—namely, the FSIA—than to presume that decision *inapplicable* merely because it postdates the conduct in question.

This leaves only the question whether anything in the FSIA or the circumstances surrounding its enactment suggests that we should not apply it to petitioners' 1948 actions. Not only do we answer this question in the negative, but we find clear evidence that Congress intended the Act to apply to pre-enactment conduct.

To begin with, the preamble of the FSIA expresses Congress' understanding that the Act would apply to all post-enactment claims of sovereign immunity. That section provides:

> "*Claims* of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (emphasis added).

. . . [T]his language is unambiguous: Immunity "claims"—not actions protected by immunity, but assertions of immunity to suits arising from those actions—are the relevant conduct regulated by the Act; those claims are "henceforth" to be decided by the courts. As the District Court observed, see supra, at ____, 159 L.Ed.2d, at 12 (citing 142 F. Supp. 2d, at 1201), this language suggests Congress intended courts to resolve all such claims "in conformity with the principles set forth" in the Act, regardless of when the underlying conduct occurred.

The FSIA's overall structure strongly supports this conclusion. Many of the Act's provisions unquestionably apply to cases arising out of conduct that occurred before 1976. . . . And there has never been any doubt that the Act's procedural provisions relating to venue, removal, execution, and attachment apply to all pending

cases. Thus, the FSIA's preamble indicates that it applies "henceforth," and its body includes numerous provisions that unquestionably apply to claims based on pre-1976 conduct. In this context, it would be anomalous to presume that an isolated provision (such as the expropriation exception on which respondent relies) is of purely prospective application absent any statutory language to that effect.

Finally, applying the FSIA to all pending cases regardless of when the underlying conduct occurred is most consistent with two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims. We have recognized that, to accomplish these purposes, Congress established a comprehensive framework for resolving any claim of sovereign immunity:

> "We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity. As we said in *Verlinden*, the FSIA 'must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.'" *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–435, 102 L.Ed.2d 818, 109 S. Ct. 683 (1989) (quoting *Verlinden*, 461 U.S., at 493, 76 L.Ed.2d 81, 103 S. Ct. 1962).

The *Amerada Hess* respondents' claims concerned conduct that postdated the FSIA, so we had no occasion to consider the Act's retroactivity. Nevertheless, our observations about the FSIA's inclusiveness are relevant in this case: Quite obviously, Congress'

purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in post-enactment cases concerning pre-enactment conduct, courts were to continue to follow the same ambiguous and politically charged "'standards'" that the FSIA replaced. See *supra*, at ____, 159 L.Ed.2d, at 15 (quoting *Verlinden*, 461 U.S., at 487, 76 L.Ed.2d 81, 103 S. Ct. 1962).

We do not endorse the reasoning of the Court of Appeals. Indeed, we think it engaged in precisely the kind of detailed historical inquiry that the FSIA's clear guidelines were intended to obviate. Nevertheless, we affirm the panel's judgment because the Act, freed from *Landgraf*'s anti-retroactivity presumption, clearly applies to conduct, like petitioners' alleged wrongdoing, that occurred prior to 1976 and, for that matter, prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity.

We conclude by emphasizing the narrowness of this holding. To begin with, although the District Court and Court of Appeals determined that § 1605(a)(3) covers this case, we declined to review that determination. See *supra*, at . . . 159 L.Ed.2d, at 9, 13, and n.8. Nor do we have occasion to comment on the application of the so-called "act of state" doctrine to petitioners' alleged wrongdoing.

Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits. Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts. See *Underhill v. Hernandez*, 168 U.S. 250, 252, 42 L.Ed. 456, 18 S. Ct. 83 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 11 L.Ed.2d 804, 84 S. Ct. 923 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory"). Petitioners principally rely on the act of state doctrine to support their assertion that foreign expropriations are public acts for which, prior to the enactment of the FSIA, sovereigns expected immunity. Applying the FSIA in this case would upset that settled expectation, petitioners argue, and thus the Act "would operate retroactively"

under *Landgraf*. 511 U.S., at 280, 128 L.Ed.2d 229, 114 S. Ct. 1483. But because the FSIA in no way affects application of the act of state doctrine, our determination that the Act applies in this case in no way affects any argument petitioners may have that the doctrine shields their alleged wrongdoing.

Finally, while we reject the United States' recommendation to bar application of the FSIA to claims based on pre-enactment conduct, Brief for United States as *Amicus Curiae*, nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity. The issue now before us, to which the Brief for United States as *Amicus Curiae* is addressed, concerns interpretation of the FSIA's reach—a "pure question of statutory construction . . . well within the province of the Judiciary." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448, 94 L.Ed.2d 434, 107 S. Ct. 1207 (1987). While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference. See, *e.g., ibid.* In contrast, should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.[23] See, *e.g., Verlinden*, 461 U.S., at 486, 76 L.Ed.2d 81, 103 S. Ct. 1962; *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414, 156

[23] Mislabeling this observation a "constitutional conclusion," the dissent suggests that permitting the Executive to comment on a party's assertion of sovereign immunity will result in "[u]ncertain prospective application of our foreign sovereign immunity law." *Post*, at . . . 159 L.Ed.2d, at 43, 44–45. We do not hold, however, that executive intervention could or would trump considered application of the FSIA's more neutral principles; we merely note that the Executive's views on questions within its area of expertise merit greater deference than its opinions regarding the scope of a congressional enactment. Furthermore, we fail to understand how our holding, which requires that courts apply the FSIA's sovereign immunity rules in *all* cases, somehow injects greater uncertainty into sovereign immunity law than the dissent's approach, which would require, for cases concerning pre-1976 conduct, case-by-case analysis of the status of that law at the time of the offending conduct—including analysis of the existence or nonexistence of any State Department statements on the subject.

L.Ed.2d 376, 123 S. Ct. 2374 (2003) (discussing the President's " 'vast share of responsibility for the conduct of our foreign relations' "). We express no opinion on the question whether such deference should be granted in cases covered by the FSIA.

(2) Other cases vacated and remanded by the Supreme Court for reconsideration in light of Altmann

The Supreme Court granted certiorari and vacated and remanded several additional cases for further consideration in light of *Altmann*: *Hwang Geum Joo v. Japan, Republic of Austria v. Whiteman, Republic of Poland v. Garb,* and *Abrams v. Société Nationale des Chemins de Fer Francais. See* 124 S. Ct. 2835 (2004).

(i) Whiteman, Garb, *and* Hwang Geum Joo

In these three cases, the United States filed supplemental briefs as *amicus curiae* on the effect of *Altmann.* In each of the cases the United States elaborated on earlier legal arguments in light of the Court's statements on the relevance of U.S. foreign policy concerns. At the end of 2004, the courts had not acted in any of these cases. The full texts of the briefs are available at *www.state.gov/sl/c8183.htm*.

In *Whiteman v. Republic of Austria*, for instance, the U.S. letter brief filed September 9, 2004, reiterated the U.S. view that "it is in the foreign policy interests of the United States for this action to be dismissed on any valid legal ground." The U.S. brief explained, as excerpted below, the relevance of the foreign policy interests in this case involving "Austrian Jews and their descendants, who have brought claims against the Republic of Austria, Osterreichische Industrieholding AG (a state-owned company), and numerous other Austrian companies for injuries arising out of Nazi atrocities."

The U.S. briefs in *Whiteman* and in *Garb* also argued that the takings exception to sovereign immunity under the

FSIA does not apply; *see* 2.d.(3). below; *see also Digest 2002* at 492–94, *Digest 2003* at 521–22.

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* * * *

A. *This Court should consider and defer to the United States's foreign policy interests in determining whether to exercise jurisdiction over plaintiffs' claims under the FSIA.*

1. Although *Altmann* makes clear that the FSIA governs the inquiry whether a court has jurisdiction over a foreign state, it also confirms the relevance of the government's statement of its foreign policy interests to the court's decision whether to exercise jurisdiction in a particular case. In *Altmann*, the Court held that courts must "apply the FSIA's sovereign immunity rules in *all* cases," 124 S. Ct. at 2240 n.23, but emphasized that it was not deciding what the outcome should be when the State Department files statements of interest "express[ing] its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct." *Id.* at 2255 (emphasis added). The Court contrasted the Executive's views on a purely legal question like the retroactive application of the FSIA, which, while "of considerable interest to the Court, * * * merit no special deference," with the filing of a statement of interest as to the foreign affairs ramifications of exercising jurisdiction over a particular case, which "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Id.* at 2256 & n.23 (noting "President's vast share of responsibility for the conduct of our foreign relations" (quotation marks omitted)); *see also id.* at 2262 (Breyer, J., concurring) (recognizing that "United States may enter a statement of interest counseling dismissal" on sovereign immunity grounds or under various abstention doctrines).

The Supreme Court returned to this theme in *Sosa*, which considered the availability of a private remedy under the Alien Tort Statute for violations of customary international law. The Supreme Court emphasized that several principles protected against the exercise of federal court jurisdiction in a manner that would impinge on the foreign policy interests of the United States. 124

S. Ct. at 2766 n.21. One of those limitations, the Court explained, was "a policy of case-specific deference to the political branches." *Ibid.* Where the State Department asserts its view that litigation in United States courts could harm this country's interests—the Court provided the example of litigation challenging South Africa's apartheid regime, where the United States had agreed with South Africa that the cases interfered with the policy embodied by that country's Truth and Reconciliation Commission—"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."*Ibid.*

Altmann thus preserves the important role of the Executive in the judicial determination whether to exercise jurisdiction in a case implicating foreign policy interests. Both *Altmann* itself, and the Court's subsequent decision in *Sosa*, envision that courts will give serious weight and deference to the Executive's view of an individual case's impact on foreign policy.

2. As we explained in our prior amicus brief to this Court and the Statement of Interest in the district court, it is in the foreign policy interests of the United States for this action to be dismissed on any valid legal ground. The United States and Austria have entered into an executive agreement, which led to the establishment of Austria's General Settlement Fund (GSF) to make payments to certain victims of the Nazi era whose property was confiscated, including members of the proposed plaintiff class. *See* U.S. Am. Br., Addendum. It would be in the interests of the United States for the GSF to be the exclusive remedy for all such claims, and our foreign policy interests favor an all-embracing and enduring legal peace for Austria and Austrian companies with respect to claims such as plaintiffs'. Payments under the GSF will not begin until all prior litigation pending in United States courts has been dismissed. This is the final case remaining. The continued pendency of plaintiffs' claims thus impedes the success of this important foreign policy initiative, and threatens the foreign policy interests of the United States.[1]

[1] The United States's general foreign policy interest in resolution of international law claims through available domestic remedies rather than lawsuits in U.S. courts (absent agreement otherwise by the states involved) is

There are several abstention doctrines under which the United States' foreign policy interests are potentially relevant to a court's determination whether to exercise jurisdiction. . . .

Like the Foundation Agreement at issue in *Ungaro-Benages* [*v. Dresdner Bank*, 379 F.3d 1227 (11th Cir. 2004), discussed in Chapter 8.B.2.b.], the GSF Agreement does not by its own force extinguish plaintiffs' claims. It does, however, represent a definitive statement of U.S. foreign policy that the GSF provides the best mechanism for resolving claims such as plaintiffs', by assuring "broad coverage of victims and broad participation by companies, which could not be possible through judicial proceedings," and providing "as expeditious as possible a mechanism for making fair and speedy payments to now elderly victims." . . . To the extent that these policy interests are relevant to any legal arguments advanced by the defendants in seeking dismissal, they must be considered and given deference by this Court. . . .

* * * *

Plaintiffs in *Hwang Geum Joo v. Japan* are "Philippine, Korean, and Chinese 'comfort women,' who were forcibly abducted and subjected to rape and torture by the Japanese military during World War II." The U.S. supplemental brief on remand in the U.S. Court of Appeals for the District of Columbia

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reflected in many sources apart from the Executive Agreement. Congress has repeatedly indicated that our courts should be the forum of last resort for international law claims. *See, e.g.*, 28 U.S.C. § 1350, note (court should decline to hear claim under Torture Victims Protection Act if claimant "has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."); 28 U.S.C. § 1605(a)(7)(B)(1) (FSIA torture exception, denying jurisdiction over certain cases where claimant "has not afforded the foreign state a reasonable opportunity to arbitrate the claim"). Customary international law, the basis of the immunity exception plaintiffs invoke, itself reflects this preference for domestic remedies. *See, e.g., Altmann*, 124 S. Ct. at 2262 (Breyer, J., concurring) ("Under international law, ordinarily a state is not required to consider a claim by another state for 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."); *see also Sosa*, 124 S. Ct. at 2766 n.21. Here, the claims are those of a state's own nationals at the time of the taking.

Circuit argued that "[t]he foreign policy determination of the political branches that wartime claims against Japan should be resolved exclusively through government-to-government negotiations may properly be given full effect in accord with the Supreme Court's decision in *Altmann* and subsequent cases." As explained in the supplemental U.S. brief:

> More than 50 years ago, the Executive, with the advice and consent of the Senate, made a foreign policy determination that all wartime claims against Japan should be resolved exclusively by diplomacy. In waiving the claims of the nationals of Allied Powers and "express[ing] a clear policy of resolving the claims of other nationals through government-to-government negotiation," the 1951 Treaty reflects the common understanding that Japan "would not be sued in the courts of the United States for actions it took during the prosecution of World War II." 332 F.3d at 685, 681. The ratified treaty is, as one court recently noted, "the ultimate formal expression of the federal executive and legislative branches in matters of foreign policy." *Taiheiyo Cement Corp. v. Superior Court*, 12 Cal. Rptr. 3d 32, 41 (Cal. Ct. App. 2004). . . .

See also Digest 2001 at 430–57, *Digest 2002* at 494–503, and *Digest 2003* at 514–15 and 522–23. Arguments that claims in *Joo* do not come within the commercial activity exception under the FSIA are provided in 2.d.(1) below.

(ii) Abrams v. Société Nationale des Chemins de Fer Francais

In *Abrams v. Société Nationale des Chemins de Fer Francais ("SNCF")*, 389 F.3d 61 (2d Cir. 2004), plaintiffs had argued, contrary to plaintiffs in other cases, that the FSIA did not apply retroactively to their claims involving alleged complicity in the deportation of Jews and others from France to Nazi death camps during World War II and that SNCF was not immune because "it was organized as a corporate entity separate and distinct from the French government" at the time of the events.

On remand from the Supreme Court, the Second Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction, as excerpted below. A letter brief filed by the United States as *amicus curiae*, filed at the request of the court following remand on August 10, 2004, and supporting dismissal is available at *www.state.gov/s/l/c8183.htm*. *See also Digest 2003* at 520–21.

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* * * *

The named plaintiffs brought suit, individually and on behalf of other Holocaust victims and their heirs and beneficiaries, against the French national railroad company, Société Nationale des Chemins de Fer Francais (SNCF or railroad). Plaintiffs allege that SNCF has committed war crimes and crimes against humanity, under customary international law and the law of nations, by knowingly transporting tens of thousands of French civilians to Nazi death and slave labor camps. During the time when these atrocities were committed, SNCF remained under independent civilian control. It has since been wholly acquired by the French government.

* * * *

Appellants misapprehend the *Altmann* holding by stating that it "turns upon the fact that the foreign government enjoyed no settled expectation in avoiding suit." Appellants maintain that *Altmann* analyzed the relevant historical expectations of the parties and that we should do the same to find that SNCF, as a private entity at the time of the alleged wrongdoing, had no expectation of immunity. The Supreme Court stated, to the contrary, that reliance interests are inapplicable in assessing the retroactivity of sovereign immunity principles because immunity simply "reflects current political realities and relationships." *Altmann*, 124 S. Ct. at 2252.

Finally, appellants contend that principles of grace and comity do not apply to SNCF because it was a private entity. Yet, government instrumentalities are entitled to these international norms, and the *Dole Food* [*v. Patrickson*, 538 U.S. 468 (2003)] Court's holding eviscerates any possibility that SNCF could escape

characterization as such. *See* 538 U.S. at 480. In fact, appellant's emphasis upon the narrow "*sui generis*" context of *Altmann* overlooks the fact that the FSIA now encompasses separate entities that have since been acquired by government entities. *See Altmann*, 124 S. Ct. at 2252 ("In this *sui generis* context, we think it more appropriate, absent contraindications, to defer to the most recent such decision—namely, the FSIA—than to presume that decision inapplicable merely because it postdates the conduct in question.").

While appellants may be correct in asserting that "applying the FSIA to impair plaintiff's rights against a separate corporation engaged in commercial activity would be impermissibly retroactive," the same cannot be said for the case of a separate corporation that has since been acquired by a sovereign. We are bound by the Supreme Court's decision to defer to comity rather than to approach the situation from the perspective of the injured plaintiffs whose rights have now been altered. Accordingly, the evil actions of the French national railroad's former private masters in knowingly transporting thousands to death camps during World War II are not susceptible to legal redress in federal court today, because defendant has since become a part of the French government and is therefore immunized from suit by the Foreign Sovereign Immunities Act. Nonetheless, the railroad's conduct at the time lives on in infamy.

* * * *

c. Pre-existing international agreements

Section 1604 of the FSIA provides:

> *Subject to existing international agreements to which the United States is a party at the time of enactment of this Act* a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

(emphasis added).

In *Moore v. The United Kingdom*, 384 F.3d 1079 (9th Cir. 2004), the U.S. Court of Appeals for the Ninth Circuit affirmed

a district court decision holding that the North Atlantic Treaty Organization Status of Forces Agreement ("NATO-SOFA"), was a pre-existing international agreement barring jurisdiction in a suit brought against the United Kingdom and members of the British military, acting within the scope of their employment, for damages arising from a bar fight in 1997. The United States had filed a brief as *amicus curiae* supporting affirmance in the case on September 3, 2002, available at *www.state.gov/s/l/c8183.htm*.

Excerpts below from the court's opinion explain its conclusion that the italicized language modifies both immunity and the exceptions set forth in the statute (footnotes omitted). While the court concluded that plaintiff's only recourse is a suit against the United States, it also found that such a claim would be time-barred and that, in any event, claims for assaults would be precluded under the Federal Tort Claims Act ("FTCA") applicable to such suits.

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Although [the language of § 1604] is critical, its meaning is not entirely transparent. . . .

In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 102 L.Ed.2d 818, 109 S. Ct. 683 (1989), however, the Supreme Court provided some guidance. *Amerada Hess* held that the "treaty exception" intended by the "subject to existing international agreements" phraseology "applies when international agreements 'expressly conflict' with the immunity provisions of the FSIA." *Id.* at 442 (quoting H.R. Rep. No. 94–1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616) (alteration in original). This language suggests that any conflict with the FSIA immunity provisions, whether toward more or less immunity, is within the treaty exception.

* * * *

This "conflict" reading of § 1604 is the only sensible one. Under this interpretation of the FSIA, preexisting international agreements could either expand or contract a foreign nation's

amenability to suit as compared to that provided under the FSIA. To read § 1604 otherwise, as permitting pre-existing international agreements only to expand a foreign state's exposure to suit but not to limit it, would allow the FSIA implicitly to trump treaties precluding certain kinds of suits against foreign nations. Given the lack of any specific indication that Congress intended this alternate construction, we follow the canon of statutory interpretation that "acts of Congress should not be construed to conflict with international treaty obligations." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441–42 (9th Cir. 1996) (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 n.35, 125 L.Ed.2d 128, 113 S. Ct. 2549 (1993)). We therefore hold that the FSIA in its entirety is subject to such "existing international agreements." If there is a conflict between the FSIA and such an agreement regarding the availability of a judicial remedy against a contracting state, the agreement prevails.

The NATO-SOFA pre-dated the FSIA, and is therefore one of the "existing international agreements" covered by the caveat in § 1604. *See* H.R. Rep. No. 94–1487, at 17, *reprinted in* 1976 U.S.C.C.A.N. at 6616 ("The [FSIA] would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries. . . ."). Because the FSIA is subject to the NATO-SOFA, whether Moore's FSIA claim may go forward turns on two inquiries: Does the NATO-SOFA apply in this case? If so, does it "expressly conflict," *Amerada Hess*, 488 U.S. at 442 (alteration in original) (internal quotation marks omitted), with the FSIA? If the NATO-SOFA applies and conflicts with the FSIA, then the defendants may not be sued under the FSIA.

2. Application of the NATO-SOFA

Two provisions of the NATO-SOFA are central to this case. First, Article I, paragraph 1 defines "force" for purposes of the agreement to mean "the personnel belonging to the land, sea, or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connexion with their official duties. . . ." NATO-SOFA, art. I, P1(a), 4 U.S.T. at 1794. . . .

Under the basic definition, Southall and the other ten Doe defendants were all members of a "force" at the time of the Tacoma incident: The complaint alleges that they were active members of the British military present within the United States on active duty for the purposes of training exercises. They therefore were here "in connexion with their official duties."

* * * *

3. The Assimilation Provision

The other key provision of the NATO-SOFA appears in Article VIII, paragraph 5:

> Claims . . . arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission, or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:—
> (a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of *its own armed forces*.

NATO-SOFA, art. VIII, P5, 4 U.S.T. at 1806 (emphasis added). We observed some time ago that "this provision does suggest . . . that the foreign serviceman is 'assimilated' into the United States military for this limited consideration." *Daberkow v. United States*, 581 F.2d 785, 789 (9th Cir. 1978). *Daberkow* thus assumed that subparagraph (a) does not simply provide that suit can be filed against the foreign nation on the same basis that suit could be filed against the United States were the defendants our armed forces or members thereof. Instead, *Daberkow* suggested that, as the district court put the matter in this case, "under this treaty, foreign servicemen are effectively considered members of the United States military for purposes of claims arising out of acts or omissions of the servicemen."

Although we have never squarely so held, the NATO-SOFA's ratification history supports this conclusion. *See* S. EXEC. REP. NO. 1, 83d Cong., 1st Sess., at 13–14 (1953) . . . So do the decisions of every district court that has looked at this question. . . .

The decisive support for construing this part of the NATO-SOFA as a merger provision comes from a contemporaneous Act of Congress—the International Agreement Claims Act of 1954, Pub. L. No. 83–734, 68 Stat. 1006 (codified as amended at 10 U.S.C. §§ 2734a–2734b). . . . Enacted specifically to codify the cost-sharing reimbursement procedures of the NATO-SOFA, . . . the Act "implements article VIII [of the NATO-SOFA] by authorizing funds for payment of SOFA claims, be they NATO SOFA or other SOFAs. The United States pays a pro rata share of awards as determined by the relevant SOFA." *Niedbala*, 37 Fed. Cl. at 46. Thus, Congress, in "enabling" the NATO-SOFA claims procedures by enacting them into federal law, . . . understood article VIII as a merger provision, an interpretation we follow today.

Moore's complaint alleges that Southall and the other ten unnamed defendants were acting within their official capacity. This suit is therefore governed by Article VIII, paragraph 5 of the NATO-SOFA, and Moore "must pursue such claims as though he . . . were injured by the armed forces of the host nation itself." *Greenpeace*, 946 F. Supp. at 788. In short, "the effect of [NATO-]SOFA is to make the United States the only appropriate defendant in this suit." *Lowry*, 917 F. Supp. at 291.

d. Exceptions to immunity

(1) Commercial activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial

activity of the foreign state elsewhere and that act causes a direct effect in the United States."

A supplemental brief filed by the United States as *amicus curiae* in *Hwang Geum Joo v. Japan*, discussed in 2.b.(2)(i) *supra*, reiterated the U.S. views that the claims of the "comfort women," held by the Japanese military during World War II, do not fall within the commercial activity exception:

> The gravamen of plaintiffs' complaint is that the Japanese military forcibly enslaved foreign women and subjected them to mass rape and torture. That conduct is not "commercial activity" within the meaning of the FSIA—i.e., "a regular course of commercial conduct or a particular commercial transaction or act." . . . To accept plaintiffs' argument that conduct is commercial so long as it is carried out by a criminal enterprise would mean that virtually any type of wrongdoing "could be thought commercial including isolated acts of assassination, extortion, blackmail, and kidnapping." *Cicippio*, 30 F.3d at 168. "That can hardly be what Congress meant by commercial activity * * *." *Ibid.*

The full text of the supplemental brief is available at *www.state.gov/s/l/c8183.htm*; *see also Digest 2001* at 443–45 and *Digest 2002* at 502–03.

See also, e.g., Daventree v. Republic of Azerbaijan, 349 F. Supp. 2d 736 (S.D.N.Y. 2004) (Republic of Azerbaijan was not immune under the FSIA as to "extortion claims" related to a program to privatize a government-owned oil company in Azerbaijan because the "nature of [the] activity was private and commercial") and *Globe Nuclear Services and Supply GNSS, Limited v. AO Technsnaabexport ("Tenex")*, 376 F.3d 282 (4th Cir. 2004)(Company owned by Russian Federation was not entitled to immunity under the FSIA because its conduct in regard to a contract related to the 1993 U.S.-Russian agreement "Concerning the Disposition of Highly Enriched Uranium (HEU) Extracted from Nuclear Weapons" was "the very type of action by which private parties engage in 'trade and traffic or commerce.'")

(2) Acts of terrorism

(i) Material support: Kilburn v. Socialist People's Libyan Arab Jamahiriya

On July 30, 2004, the U.S. Court of Appeals for the District of Columbia Circuit affirmed on interlocutory appeal a district court decision finding jurisdiction in a case brought under FSIA § 1605(a)(7). *Kilburn v. Socialist People's Libyan Arab Jamahiriya,* 376 F.3d 1123 (D.C. Cir. 2004). Excepts below from the D.C. Circuit opinion describe § 1605(a)(7) and include its analysis upholding the district court decision that, at the stage when the court is determining jurisdiction, plaintiffs need show only that the defendant state's material support for a terrorist group was the "proximate cause" of the plaintiff's injury rather than the "but for" cause. As to the case before it, the court concluded:

> In this case, there is no doubt that the plaintiff's allegations satisfy the proximate cause standard. The complaint alleges that, after the United States bombed Tripoli, "Libyan agents in Lebanon made it known that they wanted to purchase an American hostage to murder in retaliation." . . . It specifically asserts that Peter Kilburn "was purchased and killed by members of the Arab Revolutionary Cells ['ARC']," *id.* P 21, "whose acts were funded *and directed* by Libya," *id.* P 26 (emphasis added). A subsequent declaration makes clear that the plaintiff's allegation is not just that ARC was "supported" and "funded" by the Libyan government, but that it was "directed" by that government "and acted as its agent in Lebanon to carry out terrorist activities, including the purchase and assassination of Peter Kilburn." Decl. of Ambassador Robert Oakley (Ret.). . . . If proven, these allegations are more than sufficient to establish that the acts of the Libyan defendants were the proximate cause of Peter Kilburn's injury and death.

The statute at issue and the court's analysis are set forth in excerpts below (footnotes have been omitted). *See also* discussion of cause of action, 2.e. below.

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* * * *

Congress amended the FSIA in the Antiterrorism and Effective Death Penalty Act of 1996, adding an additional exception colloquially known as the "terrorism exception." That exception denies sovereign immunity in any case:

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an 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 . . .

28 U.S.C. § 1605(a)(7). This exception applies only if three additional criteria are also satisfied: the foreign state was designated a "state sponsor of terrorism" at the time the act occurred; the foreign state was given a reasonable opportunity to arbitrate a claim regarding an act that occurred within the state's borders; and the claimant or victim was a national of the United States. Id. § 1605(a)(7)(A), (B). There is no dispute that these criteria are satisfied here. The only question is whether the plaintiff's claims fall within the main body of the exception, upon which the jurisdiction of the district court depends.

* * * *

The Libyan defendants maintain that, even if the allegations of the complaint are true, they fail to bring this case within the compass of the terrorism exception. That contention is founded on two legal arguments regarding the scope of the exception.

A

The defendants' first argument is that § 1605(a)(7) requires, as a matter of jurisdiction, a causal connection between the foreign state's alleged acts and the victim's alleged injuries. Stated at that level of generality, the defendants are plainly right. . . .

. . . They contend not merely that § 1605(a)(7) requires a causal connection, but that it specifically requires "but for" causation: that is, an allegation (and, ultimately, evidence) that "but for" Libya's actions, Peter Kilburn would not have been purchased, tortured, or killed. The defendants apparently regard "but for" as a particularly restrictive standard of causation, and insist that nothing less will do.

As a moment's inspection of § 1605(a)(7) makes clear, there is no textual warrant for this claim: the words "but for" simply do not appear; only "caused by" do. Cf. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618, 119 L.Ed.2d 394, 112 S. Ct. 2160 (1992) (rejecting the suggestion that the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), which requires a "direct effect" in the United States for acts performed elsewhere, "contains any unexpressed requirement of 'substantiality' or 'foreseeability' "). In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536–38, 130 L.Ed.2d 1024, 115 S. Ct. 1043 (1995), the Supreme Court interpreted "caused by" in another jurisdictional statute to require only a showing of "proximate cause." We follow the Court's example here.

In *Grubart*, jurisdiction turned on the meaning of the Extension of Admiralty Jurisdiction Act, which provides that the admiralty jurisdiction of the United States "shall extend to . . . all cases of damage or injury . . . caused by a vessel on navigable water." 46 U.S.C. app. § 740 (emphasis added). Rejecting the contention that "caused by" means that the damage must be close in time and space to the activity that caused it, the Court held that the phrase means only "what tort law has traditionally called 'proximate causation.' " *Grubart*, 513 U.S. at 536. As the Court explained, "this classic tort notion normally eliminates the bizarre." . . . "There is no need or justification," the Supreme Court said, "for imposing an additional nonremoteness hurdle in the name of jurisdiction." *Grubart*, 513 U.S. at 538.

The essence of the Libyan defendants' argument is that here there is a "need or justification" for imposing an additional hurdle beyond proximate cause, and that "but for" cause is the appropriate hurdle. They offer the following hypothetical:

> A terrorist organization is supported by two foreign states. One specifically instructs the organization to carry out an attack against a U.S. citizen. Can the state which only provides general support, but was not involved with the act giving rise to the suit, also be stripped of its immunity?

Reply Br. at 13. "The answer" to this hypothetical, the defendants assert, "clearly must be no." Id. Libya's argument fails to persuade for several reasons.

First, we are not moved by the plight of Libya's hypothetical foreign state. . . . After all, the only defendants that are subject to § 1605(a)(7) in the first place are those that the State Department has designated as "state sponsor(s) of terrorism." 28 U.S.C. § 1605 (a)(7)(A).

Second, § 1605(a)(7) permits actions for injuries caused by "material support" of terrorist acts by such state sponsors, and, as Congress recognized, such support is difficult to trace. . . . Accordingly, the more likely situation is not Libya's hypothetical, involving one direct and one general state sponsor, but rather the case in which multiple foreign states claim to be providing only "general support." Such a case, in which application of a "but for" standard to joint tortfeasors could absolve them all, is precisely the one for which courts generally regard "but for" causation as inappropriate. See PROSSER & KEETON, at 266–67.

Third, Libya's hypothetical (and its argument) deals solely with a claim based on a state's general "material support" for a terrorist organization. But "the provision of material support" for a terrorist act is only one of the predicates for the § 1605(a)(7) exception. Foreign states also lose immunity for acts (of torture, extrajudicial killing, or hostage taking) "engaged in by an official, employee, or agent" of the state itself. 28 U.S.C. § 1605(a)(7). Libya makes no argument at all as to why a restrictive standard of causation should

be imposed in direct action cases, yet the statutory phrase "caused by" applies equally to every § 1605(a)(7) case.

Finally, we underline that the only issue before us here is jurisdictional causation, because § 1605(a)(7) is solely a jurisdictional provision. *Cicippio-Puleo*, 353 F.3d at 1032. To succeed in the end, the plaintiff must go beyond jurisdiction and provide proof satisfying a substantive cause of action. Id. The plaintiff has alleged a number of sources that could provide a cause of action, including state, federal, foreign, and international law. Whatever the ultimate source may be, it will no doubt carry with it—as a matter of substantive law—its own rules of causation. Of these, there are a large variety. See PROSSER & KEETON, at 266–68, 273. Any concerns about reaching too far to charge foreign states with the attenuated impact of their financial activities are better addressed as questions of substantive law. Indeed, to go further as a matter of jurisdiction—to accept Libya's contention that § 1605(a)(7) requires a single causation standard that is more restrictive than the base-line standard of proximate cause—runs afoul of the FSIA's injunction that a nonimmune "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

* * * *

The court also rejected defendants' argument, among others, that the statutory language denying sovereign immunity related to "an act . . . or the provision of material support or resources . . . for such an act," requires that the state's material support must be shown to go "directly for the specific act (e.g., torture) that gives rise to the claim." The court also noted the plaintiff "asserts that ARC was not just some independent organization that Libya provided with funds, but rather an 'agent' of Libya" and stated that "Libya is responsible for the acts of its agent within the scope of . . . [its] agency."

Finally, the court "decline[d] to pass on the rulings of the district court that are not related to the question of the defendants' immunity." The court determined that defendants' challenges to the existence of a cause or causes

of action in plaintiff's case "is not a question separate from the merits; it is the merits."

See also discussion of cases involving efforts to collect judgments awarded pursuant to the antiterrorism exception, 28 U.S.C. § 1605(a)(7) in A.2.f. below.

(ii) *Effect of legislative and executive actions:* Acree v. Republic of Iraq

On June 4, 2004, the District of Columbia Circuit vacated a district court judgment and dismissed claims brought by 17 American soldiers (and their family members) who were captured and held as prisoners of war by the Iraqi Government while serving in the Gulf War in early 1991. *Acree v. Republic of Iraq*, 370 F.3d 41 (2004), *reh'g en banc denied*, 2004 U.S. App. LEXIS 17830 (D.C. Cir. 2004). The court also reversed the district court's dismissal of a U.S. motion to intervene for the purpose of contesting the district court's subject matter jurisdiction filed after the judgment was entered.

In the course of its 2004 decision, the court addressed the effect of 2003 legislative and executive actions relevant to the case. In its brief on appeal to the D.C. Circuit, the United States argued that the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108–11, § 1503, 117 Stat. 559, 579 (2003), and a May 7, 2003, Presidential Determination (No. 2003–23, 68 Fed. Reg. 26,459 (May 16, 2003)), issued pursuant to § 1503 of that act "are essential components of the Nation's new foreign policy toward Iraq. Through them, Congress and the President have rendered inapplicable to Iraq the numerous statutory provisions that had applied to it as a state sponsor of terrorism. Both the text and purpose of the EWSAA confirm that section 1605(a)(7) is among the provisions that no longer apply to Iraq." *See Digest 2003* at 543–49, 554–57, and 909–23.

The court of appeals upheld the exercise of jurisdiction by the district court, finding that relevant language in EWSAA applied only to certain sanctions provisions and "does not

encompass the terrorism exception to the FSIA." Excerpts below address this issue. The court concluded, however, that it was required to vacate the *Acree* judgment and dismiss the lawsuit for failure to state a cause of action, on the same grounds as *Cicppio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). *See* A.2.e.(2) below.

The reply brief for the United States in *Acree*, filed in the D.C. Circuit in February 2004 is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

The controversy in this case concerns the second proviso of § 1503 [of the EWSAA], authorizing the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other provision of law that applies to countries that have supported terrorism*." *Id.* (emphasis added). The United States argues that this language embraces the authority to make § 1605(a)(7) inapplicable to Iraq, and that the President carried out that authority in the May 7 Presidential Determination.

The logic of this interpretation is straightforward: Section 1605(a)(7) creates an exception to the sovereign immunity normally enjoyed by foreign states in American courts for suits based on acts of torture or other terrorist acts. This exception applies only if the defendant foreign state was designated as a sponsor of terrorism at the time the acts took place. Section 1605(a)(7) is thus a "provision of law that applies to countries that have supported terrorism." The EWSAA authorizes the President to make such provisions inapplicable to Iraq, which authority the President exercised in the May 7 Determination. Section 1605(a)(7) therefore no longer applies to Iraq and cannot provide a basis for jurisdiction in appellees' case. *Quod erat demonstrandum.*

The difficulty with this view is that it focuses exclusively on the meaning of one clause of § 1503, divorced from all that surrounds it. . . .

* * * *

. . . [W]e conclude that the scope of § 1503 is narrower than the Government suggests. The primary function of the EWSAA was to provide emergency appropriations in support of the United States' military operations in Iraq. . . . Each program funded in Chapter 5 of the EWSAA addresses matters of bilateral economic assistance to Iraq and other countries. The United States points to nothing in this portion of the Act—or elsewhere in the EWSAA, for that matter—that addresses the jurisdiction of the federal courts.

* * * *

Section 1503 itself authorizes the President to suspend the application of any provision of the Iraq Sanctions Act of 1990 ["ISA"], subject to eight provisos. . . .

The second proviso of § 1503—which lies at the heart of the controversy in the instant case—provides that "the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism." Just like the other provisos in § 1503, this language is responsive to a particular section of the ISA. As we have seen, the ISA required that certain enumerated provisions of law, including § 620A of the Foreign Assistance Act of 1961, and "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism" be fully enforced against Iraq. *See* ISA § 586F(c), 104 Stat. 1979, 2051. The second proviso in § 1503 thus makes clear that the authority in § 1503 to suspend the ISA includes the authority to make inapplicable to Iraq § 620A of the FAA and those additional provisions of law incorporated into § 586F(c) of the ISA.

. . . Each of these provisions calls for the imposition of economic sanctions on countries that are determined to have supported international terrorism, including restrictions on exports, aviation boycotts, and prohibitions on loans, credits, or other financial assistance. Read within this context, the reference in the ISA to "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism" is best read to denote provisions of law that call for

economic sanctions and prohibit grants of assistance to state sponsors of terrorism.

* * * *

Although sparse, the legislative history of § 1503 of the EWSAA likewise supports our interpretation of the disputed language in § 1503. . . .

* * * *

The United States contends that, even if the disputed clause in § 1503 must be construed to reach only those provisions of law that are similar in nature to the legal restrictions on assistance to Iraq that are enumerated elsewhere in § 1503, the terrorism exception to the FSIA still falls within the scope of provisions the President is authorized to make inapplicable to Iraq. Specifically, the United States points out that § 1605(a)(7) shares a "criterion of similarity" with the other provisions mentioned in § 1503, Reply Br. at 17, namely, that it is a provision of law that imposes penalties on foreign nations as a result of their designation as sponsors of terrorism. . . .

. . . Because § 1503, the EWSAA as a whole, and the relevant legislative history all reflect an overriding concern for economic assistance, trade, and reconstruction in Iraq, we find that this context counsels against a reading of § 1503 that stretches so far as to reach a law, like the FSIA, that is largely dissimilar to all of the "look-alike" provisions affected by § 1503.

We conclude that when § 1503 is read in the context of the other provisions of the EWSAA and its legislative history, as it must be, that provision is best understood as applying only to legal restrictions on assistance and funding for the new Iraqi Government. There is nothing in the language of § 1503, the EWSAA as a whole, or its legislative history to suggest that Congress intended by this statute to alter the jurisdiction of the federal courts under the FSIA. We acknowledge that this is a close question. We nevertheless conclude that § 1503 was not intended to apply to § 1605(a)(7). The scope of the May 7 Presidential Determination is immaterial, because it cannot exceed the authority granted in § 1503. We therefore affirm the District

Court's exercise of jurisdiction over appellees' claims under 28 U.S.C. § 1605(a)(7).

* * * *

The court of appeals explained its decision to reverse the district court's dismissal of the U.S. motion to intervene as excerpted below.

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* * * *

In this case, the District Court denied the United States' motion to intervene largely because it came after the court had already entered judgment in the case. *See Acree II*, 276 F. Supp. 2d at 98–99. The District Court noted that approximately two months had intervened between the May 7 Presidential Determination and the entry of final judgment for appellees, during which time the United States could have filed its motion. *See id.* However, in reaching this judgment, the District Court failed to consider adequately the unique circumstances of this case.

In particular, the District Court failed to weigh the importance of this case to the United States' foreign policy interests and the purposes for which the Government sought to intervene. This is not a case in which the United States was simply seeking to weigh in on the merits. Rather, the Government's sole purpose in intervening was to raise a highly tenable challenge to the District Court's subject matter jurisdiction in a case with undeniable impact on the Government's conduct of foreign policy and to preserve that issue for appellate review.

In the face of these weighty interests, appellees assert no prejudice arising from the United States' intervention. Nor could they, given the District Court's independent obligation to assure itself of its own jurisdiction. The only result achieved by denial of the motion to intervene in this case is the effective insulation of the District Court's exercise of jurisdiction from all appellate review. In these circumstances, we find that the District Court abused its discretion in denying the United States' motion as untimely. . . . We therefore reverse the decision of the District Court denying the United States' motion to intervene . . .

* * * *

(3) Expropriation

In claims for takings of property, courts examine whether an exception to immunity exists under the FSIA—either the commercial activities exception in § 1605(a)(2), A.3.c. *supra*, or the international takings exception in § 1605(a)(3), or both. Section 1605(a)(3) provides an exception to immunity in cases "in which rights in property taken in violation of international law are in issue and the property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or . . . owned or operated by an agency or instrumentality of the foreign state . . . engaged in a commercial activity in the United States."

(i) Exhaustion of remedies: Altmann v. Austria

On remand from the Supreme Court, the District Court for the Central District of California denied Austria's motion to dismiss. *Altmann v. Austria*, 335 F. Supp. 2d 1066 (C.D. Cal. 2004). The district court noted that although two questions had been presented to the Supreme Court, the Court addressed only the first, concerning retroactivity of the FSIA. This left unreviewed the second question:

> 2. Can jurisdiction over a foreign state or its agency or instrumentality be asserted under the FSIA's expropriation exception when due process minimum contacts requirements have not been met, *there has been no violation of international law because the claimant failed to exhaust her legal remedies in the foreign state*, and the activity that is the basis for jurisdiction is the limited, non-commercial promotion of a not-for-profit national museum?

(Emphasis added in the district court opinion.)

The district court first explained that it was bound by the earlier Ninth Circuit's opinion in the case that Austria was not immune under the expropriation exception in the FSIA. *See Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002). As to the exhaustion of remedies aspect, the district court explained:

> . . . The Ninth Circuit affirmed [the district court decision, 142 F. Supp. 2d 1187 (C.D. Cal. 2001)], clearly holding that a claim was stated. The Ninth Circuit so held notwithstanding Austria's argument that Plaintiff failed to exhaust her administrative remedies, and notwithstanding its own holding that Plaintiff's domestic remedies were not inadequate for the reasons set forth by the district court. Implicit in the Ninth Circuit's holding is the recognition that either exhaustion is not required, or exhaustion was excused on some other grounds, perhaps not articulated. . . .

As to the Supreme Court decision, the district court noted that in a concurring opinion, "Justice Breyer, joined by Justice Souter, both of whom also joined in the majority opinion, suggested that a plaintiff would have to exhaust domestic remedies before filing suit under the expropriation exception:

> [A] plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking. A plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the expropriating state may have trouble showing a taking in violation of international law.

Id. at 1068–69. Furthermore, the district court observed that in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), "the Court suggested that it would one day consider the issue of whether a plaintiff must exhaust her domestic and, possibly, international remedies, before filing an action in a foreign state." 335 F. Supp. 2d at 1069. *Sosa* is discussed in Chapter 6.G.6.a.(1).

The district court concluded that nothing in these statements in Supreme Court opinions, neither of which constituted a holding of the Court on this issue, affected its earlier conclusion that "exhaustion was required, but was excused because the domestic remedies were inadequate."

At the end of 2004, *Altmann* had been submitted to binding arbitration by agreement of the parties.

(ii) Expropriations of aliens' property: Garb *and* Whiteman

The U.S. letter briefs in *Garb* and *Whiteman*, *see* 2.b.(2)(i) *supra*, filed following the Supreme Court's decision on retroactivity in *Altmann*, for the first time addressed the scope of the takings exception in those cases, arguing that "jurisdiction under the FSIA's takings exception, § 1605(a)(3), is limited to expropriations of aliens' property," and "does not encompass the broader range of property deprivations in violation of international human rights law." The United States also argued that the exception permits jurisdiction over a foreign state "only where its own contacts with the United States satisfy the first prong of the exception, i.e., the state holds seized property in the United States in connection with its own commercial activity here. A court may not base jurisdiction over the state itself on the less extensive contacts of a juridically distinct instrumentality, on the basis that those contacts would allow jurisdiction over the instrumentality under the terms of the exception's second prong."

The full text of the U.S. supplemental statement in *Garb*, excerpted below (footnote omitted) is available at *www.state.gov/s/l/c8183.htm*, as is the similar statement in *Whiteman*.

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* * * *

1. *Section 1605(a)(3) applies only to takings in violation of the international law of state responsibility and expropriation.* The FSIA's takings exception was intended to deny immunity for violations of the international law of state responsibility and expropriation, which governs a state's seizure of property belonging to nationals of another state. Absent a clear directive from Congress, the exception should not be interpreted to substantially expand the universe of legal principles relating to property rights that can serve as a basis for U.S. courts' jurisdiction, to include the full range of international human rights law affecting nationals as well as aliens.

The legislative history of the FSIA explains that the takings exception was intended to govern "Expropriation claims," encompassing "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law," as well as "takings which are arbitrary or discriminatory in nature." *Foreign Sovereign Immunities Act of 1976*, H.R. Rep. No. 94–1487, at 19, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618. This characterization of the exception's scope parallels the Restatement's description of the international law principles of state responsibility, which bar a state's discriminatory expropriation of the property of aliens and its expropriation of foreign nationals' property without the payment of adequate, reasonably prompt, and effective compensation. *See* Restatement (2d) of Foreign Relations Law §§ 165–166, 185–187 (1965); *see also* Restatement (3d) of Foreign Relations Law § 712 (1986) ("A state is responsible under international law for injury resulting from (1) a taking by the state of the property of a national of another state that * * * (b) is discriminatory, or (c) is not accompanied by provision for just compensation."). As the Restatement makes clear, international law of state responsibility does not regulate a state's treatment of its own nationals, but rather is limited to certain "taking[s] by the state of the property of a *national of another state*." Restatement (3d) § 712(1) (emphasis added). There is no evidence that Congress intended to confer jurisdiction over the entire range of potential deprivations of property in violation of international human rights principles.

Consistent with this, the takings exception has been interpreted by every court to have considered the question not to apply to the expropriation by a country of the property of its own nationals. *E.g., Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1328 n.3 (11th Cir. 2003); *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711–712 (9th Cir. 1992); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395–1398 (5th Cir. 1985); *see also Altmann*, 124 S. Ct. at 2262 (Breyer, J., concurring) (noting lower courts' "consensus view * * * that § 1605(a)(3)'s reference to 'violation of international law' does

not cover expropriations of property belonging to a country's own nationals"). Notably, Congress has never overridden that uniform interpretation.

In their prior briefs, plaintiffs relied on the legislative history reference to "discriminatory" takings as evidence that the takings exception was intended to encompass a sovereign's racial or religious discrimination against its own nationals. *E.g.*, Appellants' Br. at 54. When viewed in context, however, the reference in the legislative history is to discrimination against aliens—*i.e.*, the very subject on which the law of state responsibility and expropriation is focused. See Restatement (2d) § 166. Indeed, many of the sources cited by plaintiffs as evidence of the customary international law norm against "discriminatory" expropriations address the taking of non-nationals' property, and thus lend support to a more limited interpretation of the takings exception. *See, e.g.*, Appellants' Reply at 14 ("to comply with international law, nationalization 'must not discriminate against *aliens* or any particular kind of *alien*'" (emphasis added)); *ibid.* ("the minimum standard of justice * * * means the right of *foreign nationals* to receive full compensation" (emphasis added)).

The interpretation of § 1605(a)(3) as limited to the international law of expropriation is further confirmed by the statutory backdrop against which it was enacted—in particular, the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2). That statute, originally enacted in 1964, bars a federal court from invoking the "act of state" doctrine to dismiss a suit challenging a state "taking * * * in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection." The statute has consistently been interpreted to apply only in cases involving the taking of alien property, not that of a state's own national. *E.g., Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1294 (11th Cir. 2001) (collecting cases). The FSIA takings exception was intended to harmonize the scope of foreign sovereign immunity with the act of state doctrine under U.S. law. *See Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico, S.A.*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984).

Limiting the takings exception to a foreign government's seizure of aliens' property is also consistent with courts' general reluctance to construe the FSIA exceptions to confer jurisdiction over claims that a foreign state violated human rights, particularly where the conduct took place within the state's own borders. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 361–363 (1993) (commercial activity exception does not confer jurisdiction over claims involving torture by foreign government's police and penal officers); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173–1176 (D.C. Cir. 1994) (waiver exception does not confer jurisdiction over Nazi-era slave labor case); *cf. Smith v. Socialist People's Libyan Arab Hamahiriya*, 101 F.3d 239, 244–245 (2d Cir. 1996) (waiver exception does not confer jurisdiction over terrorism bombing alleged to violate *jus cogens* norms). Congress has also set careful limits on federal jurisdiction over tort claims against foreign sovereigns arising out of conduct occurring outside of the United States, providing that, as a general matter, noncommercial tort claims can be brought against foreign states only if the damage or injury occurred in this country. *See* 28 U.S.C. § 1605(a)(5); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439–441 (1989). Although Congress amended the FSIA in 1996 to allow for certain extraterritorial tort claims relating to terrorism, it strictly limited and defined the permissible claims and the class of potential defendants. *See id.* § 1605(a)(7). Construing § 1605(a)(3) to allow for international human rights claims would undermine these careful limitations.

Finally, courts' consensus interpretation of the takings exception as not encompassing claims against a state by its nationals is consistent with international expropriation law, which was the premise of numerous claims settlement agreements entered into by the United States over the last century, including a 1960 agreement between the United States and Poland. As we described in our supplemental amicus filing on May 2, 2003, the United States and Poland entered into that agreement to settle claims arising out of the Polish government's nationalization of property. *See* Agreement Between the Government of the United States of America and the Government of the Polish People's Republic

Regarding Claims of Nationals of the United States (July 16, 1960), U.S.T. 1953. Although the United States undertook in that agreement to settle the claims of U.S. nationals, it did not purport to settle or address claims relating to property that was not owned at the time of the taking by a U.S. national. The limited scope of the U.S.-Poland settlement agreement reflects the circumscribed nature of international law and practice concerning state responsibility for the expropriation of aliens' property. At that time, the sole recourse for expropriation claims was espousal. It was a well-established principle of international law that states could espouse only claims relating to wrongs done to their own citizens, absent the consent of the state both of the third-party national and also the respondent state. Congress removed immunity in certain cases, but there is no indication—much less a clear one—that it intended to include nationals of the expropriating state among those whose claims could be asserted in U.S. courts.

To the extent that there is any remaining ambiguity about the scope of the takings exception, the foreign policy interests of the United States weigh against inferring the dramatic expansion of federal court jurisdiction that plaintiffs seek. As the Supreme Court recognized in its post-*Altmann* decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), serious "risks of adverse foreign policy consequences" are created when U.S. courts attempt to set "limit[s] on the power of foreign governments over their own citizens." *Id.* at 2763. As the Court held, "the potential implications for the foreign relations of the United States of recognizing" causes of action for violations of customary international law should make courts reluctant to exercise jurisdiction over such claims absent a "clear mandate" from Congress to do so. *Id.* at 2763. The FSIA contains no such "clear mandate"; to the contrary, Congress enacted the FSIA with the statement that it was intended to "codify" sovereign immunity principles "presently recognized in international law." H.R. Rep. No. 94–1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. This Court should reject the suggestion that Congress nonetheless intended to significantly expand U.S. courts' jurisdiction over previously-barred claims brought by foreign citizens against their own governments.

* * * *

e. Cause of action

In 2004 the U.S. Court of Appeals for the District of Columbia Circuit dismissed two cases brought under § 1605(a)(7) for failure to state a cause of action. As discussed below, the court ruled that the FSIA itself creates no cause of action and that a separate legislative provision, enacted the same year as the antiterrorism exception to the FSIA, entitled "Civil Liability for Acts of State Sponsored Terrorism" created a private right of action only against officials, employees, and agents of foreign states acting in their individual capacity. The latter provision (§ 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, in Pub. L. No. 104–208, 110 Stat. 3009–172 (1996), reprinted at 28 U.S.C.A. § 1605 note) is referred to as the "Flatow Act"* in recognition of the family of Alisa Flatow, who died as the result of a terrorist bombing in Gaza. *See Cumulative Digest 1991–1999* at 1334–35.

(1) Cicippio-Puleo v. Islamic Republic of Iran

In *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), the District of Columbia Circuit affirmed a judgment of the district court that the FSIA creates no cause of action and that "although the Flatow Amendment creates a private right of action against officials, employees, and agents of foreign states, the cause of action is limited to claims against those officials in their *individual*, as opposed to their official, capacities." The court stated:

> Section 1605(a)(7) of the FSIA abrogates foreign sovereign immunity and provides jurisdiction in specified circumstances, but it does not create a private cause of action. By its clear terms, the Flatow Amendment provides a private

* In the cases that follow, the courts refer to the Flatow Act as the "Flatow Amendment"; the provision in fact was not enacted as an amendment to the FSIA or any other law.

> right of action only against individual officials, employees, and agents of a foreign state, but not against a foreign state itself. Plainly, neither section 1605(a)(7) nor the Flatow Amendment, separately or together, establishes a cause of action against foreign state sponsors of terrorism. Therefore, the Cicippios' suit cannot proceed on these grounds.

The court remanded to the district court, explaining its decision to do so as follows:

> . . . [B]ecause the Cicippios' suit was filed in the wake of judgments in favor of Mr. and Mrs. Cicippio and other hostage victims, they may have been misled in assuming that the Flatow Amendment afforded a cause of action against foreign state sponsors of terrorism. We therefore affirm the judgment of the District Court, but remand the case to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law. We reserve judgment, however, on whether the Cicippios have any viable basis for an action against Iran, leaving that issue to the District Court in the first instance.

The court described the legislation and background of this suit, as excerpted below.

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* * * *

This case involves a lawsuit brought against the Islamic Republic of Iran ("Iran") under the terrorism exception, 28 U.S.C. § 1605(a)(7), to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–11 (2000). The plaintiffs in the suit are the adult children and siblings of Joseph J. Cicippio, a victim of terrorist hostage-taking. Joseph Cicippio was abducted in 1986 by Hizbollah, an Islamic terrorist organization that receives material support from Iran. He was held hostage until 1991, confined in inhumane conditions and frequently beaten. In 1996, Joseph Cicippio and his wife [among others] sued Iran for the tortious injuries they sustained as a result of Mr. Cicippio's kidnaping, imprisonment, and torture. Iran failed to respond to the complaint

and default was entered on November 13, 1997. The case was tried *ex parte* and, on August 27, 1998, the District Court entered judgment against Iran in favor of Mr. and Mrs. Cicippio in the amount of $30 million. *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64, 70 (D.D.C. 1998). No appeal was taken.

In 2001, Joseph Cicippio's children and siblings sued Iran for the intentional infliction of emotional distress and loss of solatium they suffered as a result of Mr. Cicippio's ordeal. On June 21, 2002, the District Court . . . *sua sponte* dismissed the Cicippios' complaint under Federal Rules of Civil Procedure 12(b)(6) and 12(h)(3), holding that "the FSIA, as amended, does not confer subject matter jurisdiction upon it to entertain claims for emotional distress and solatium brought by claimants situated as are these plaintiffs upon the allegations of their complaint." *Cicippio-Puleo v. Islamic Republic of Iran*, 2002 U.S. Dist. LEXIS 27050, *Civ.* No. 01-1496, slip op. at 2, (D.D.C. June 21, 2002), *reprinted in* Appendix ("App.") 3, 4. Joseph Cicippio's children and siblings now appeal. Responding to our request, the Justice Department has filed a brief as *amicus curiae* stating the position of the United States. The Government's position is that neither section 1605(a)(7) of the FSIA nor the Flatow Amendment, 28 U.S.C. § 1605 note, creates a private cause of action against foreign governments for acts of hostage taking or torture.

* * * *

Five months after the passage of AEDPA, Congress enacted a separate provision, titled *Civil Liability for Acts of State Sponsored Terrorism*, which created a private right of action against officials, employees, and agents of foreign states for the conduct described in § 1605(a)(7). . . .

It is undisputed that the Flatow Amendment permits U.S. nationals to pursue a private right of action for terrorism against officials, employees, and agents of designated foreign states acting in their personal capacities. At issue here is whether section 1605(a)(7) and the Flatow Amendment similarly provide a cause of action against a *foreign state*.

* * * *

The court noted that the United States had taken the position in *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, that the Flatow Act does not provide a cause of action against a foreign state itself. On December 3, 2003, the United States filed a brief as *amicus curiae* in response to the *Cicippio* court's request for its views in this case reiterating that position. *See Digest 2003* at 537–43. The court reached the same conclusion as to the law, as excerpted below.

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* * * *

This court . . . has never affirmed a judgment that the Flatow Amendment, either alone or in conjunction with section 1605(a)(7), provides a cause of action against a foreign state. . . .

We now hold that neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government. Section 1605(a)(7) merely waives the immunity of a foreign state without creating a cause of action against it, and the Flatow Amendment only provides a private right of action against officials, employees, and agents of a foreign state, not against the foreign state itself. Because we hold that there is no statutory cause of action against Iran under these provisions, we affirm the District Court's judgment without deciding whether the evidence presented by the plaintiffs is sufficient to recover for intentional infliction of emotional distress or loss of solatium.

* * * *

There is a clearly settled distinction in federal law between statutory provisions that waive sovereign immunity and those that create a cause of action. It cannot be assumed that a claimant has a cause of action for damages against a government agency merely because there has been a waiver of sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 483–84, [1004]. . . .

The Supreme Court has also made it clear that the federal courts should be loath[] to "imply" a cause of action from a jurisdictional provision that "creates no cause of action of its own force and effect . . . [and] imposes no liabilities." *See Touche Ross*

& Co. v. Redington, 442 U.S. 560, 577, 61 L.Ed.2d 82, 99 S. Ct. 2479 (1979). "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 578. In adhering to this view, the Supreme Court has declined to construe statutes to imply a cause of action where Congress has not expressly provided one. . . .

Unsurprisingly, the Supreme Court has applied the distinction between immunity and liability in interpreting the FSIA itself, explaining that "the language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 77 L.Ed.2d 46, 103 S. Ct. 2591 (1983). With this case law to guide us, there can be little doubt of the outcome in this case.

* * * *

The language of section 1605(a)(7) and the Flatow Amendment—the only provisions upon which plaintiffs rely—is clear. In declaring that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States . . . ," 28 U.S.C. § 1605(a)(7) merely abrogates the immunity of foreign states from the jurisdiction of the courts in lawsuits for damages for certain enumerated acts of terrorism. It does not impose liability or mention a cause of action. The statute thus confers subject matter jurisdiction on federal courts over such lawsuits, but does not create a private right of action.

As noted above, the Flatow Amendment imposes liability and creates a cause of action. But the liability imposed by the provision is precisely limited to "an official, employee, or agent of a foreign state designated as a state sponsor of terrorism." "Foreign states" are not within the compass of the cause of action created by the Flatow Amendment. In short, there is absolutely nothing in section 1605(a)(7) or the Flatow Amendment that creates a cause of action against foreign states for the enumerated acts of terrorism.

We also agree with the United States that, insofar as the Flatow Amendment creates a private right of action against officials,

employees, and agents of foreign states, the cause of action is limited to claims against those officials in their *individual*, as opposed to their official, capacities:

> As the Supreme Court repeatedly has explained, an *official*-capacity claim against a government official is in substance a claim against the government itself. See, *e.g., Kentucky v. Graham*, 473 U.S. 159, 165, 87 L.Ed.2d 114, 105 S. Ct. 3099 (1985) . . . By definition, a damages judgment in an official-capacity suit is enforceable against the state itself (and only against the state). See *Graham*, 473 U.S. at 166 . . . ; see also Fed. R. Civ. P. 25(d) . . . Thus, to construe the Flatow Amendment as permitting official-capacity claims would eviscerate the recognized distinction between suits against governments and suits against individual government officials . . . The text of the Flatow Amendment and Section 1605(a)(7), as well as all relevant background interpretive principles . . . foreclose any such construction.

Br. for the United States as *Amicus Curiae* at 17.

The plaintiffs and amicus curiae dispute both the meaning and relevance of the legislative history of the FSIA or the Flatow Amendment in support of their competing arguments to the court. The legislative history is largely irrelevant, however, because the statutory language is clear—nothing in section 1605(a)(7) or the Flatow Amendment establishes a cause of action against foreign states. And, as we explain below, there is nothing in the legislative history that raises any serious doubts about the meaning of the statute.

* * * *

There is nothing anomalous in Congress's approach in enacting the Flatow Amendment. As we noted in *Price* [*v. Socialist People's Libyan Arab Jamahiriya*, 352 U.S. App. D.C. 284, 294 F.3d 82 (D.C. Cir. 2002)], the passage of § 1605(a)(7) involved a delicate legislative compromise. While Congress sought to create a judicial forum for the compensation of victims and the punishment of terrorist states, it proceeded with caution, in part due to executive

branch officials' concern that other nations would respond by subjecting the American government to suits in foreign countries. See *Price*, 294 F.3d at 89 (citing John F. Murphy, Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution, 12 HARV. HUM. RTS. J. 1, 35–37 (1999)).

. . . What § 1605(a)(7) does is to make it clear that designated foreign state sponsors of terrorism will be amenable to suits in United States courts for acts of terrorism in cases in which there is a viable cause of action.

Clearly, Congress's authorization of a cause of action against officials, employees, and agents of a foreign state was a significant step toward providing a judicial forum for the compensation of terrorism victims. Recognizing a federal cause of action against foreign states undoubtedly would be an even greater step toward that end, but it is a step that Congress has yet to take. And it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states. Therefore, we decline to imply a cause of action against foreign states when Congress has not expressly recognized one in the language of section 1605(a)(7) or the Flatow Amendment.

* * * *

(2) Acree v. Islamic Republic of Iraq

As noted in A.2.d.(2)(ii) *supra*, on June 4, 2004, the District of Columbia Circuit vacated the judgment in *Acree v. Islamic Republic of Iraq* for failure to state a cause of action and dismissed the claim. *Acree v. Islamic Republic of Iraq*, 370 F.3d 41 (2004), *reh'g en banc denied*, 2004 U.S. App. LEXIS 17830 (D.C. Cir. 2004). The court explained:

> In *Cicippio*, we held that neither § 1605(a)(7) nor the Flatow Amendment, nor the two together, creates a cause of action against foreign states themselves. . . . This holding applies also to suits against "agencies or instrumentalities" of a foreign state, which are included in the FSIA's definition of "foreign state," *see* 28 U.S.C.

§ 1603(a), (b); . . . *Cicippio* also made clear that any suit against an official of a foreign state must be a suit in that official's *personal* capacity. . . .

In response to our order to consider this issue in preparation for oral argument, appellees did not advance any alternative causes of action. At oral argument, counsel for appellees gestured again toward generic common law torts, *see* Oral Argument Tr. at 23–29, but generic common law cannot be the *source* of a federal cause of action. The shared common law of the states may afford useful guidance as to the rules of decision in a FSIA case where a cause of action arises from some specific and concrete source of law. *See Bettis*, 315 F.3d at 333 (assuming, *arguendo*, that plaintiffs stated a cause of action under the Flatow Amendment and then turning to generic common law to flesh out the controlling substantive law). But there is no support for the proposition that generic common law itself may furnish the cause of action. Rather, as in any case, a plaintiff proceeding under the FSIA must identify a particular cause of action arising out of a specific source of law. Appellees failed to do so in this case.

(3) Kilburn v. Islamic Republic of Iran

In *Kilburn v. Islamic Republic of Iran*, 376 F.3d 1123 (D.C. Cir. 2004), discussed in 2.d.(2)(i) *supra*, the court of appeals did not reach the question of whether plaintiffs had a cause of action to bring the claim, confining its decision to jurisdictional issues at that stage of the litigation. In an *amicus* brief filed in *Kilburn* in March 2004, the United States argued that the *Cicippio* decision was controlling as to the unavailability of the Flatow Act as a cause of action against a foreign state but stated that the court should "allow the plaintiffs here an opportunity to show in the district court whether state or local foreign law would provide them a cause of action against a private individual in similar

circumstances." The U.S. brief refuted both (1) Kilburn's argument that *Cicippio* was not controlling because the court should find that a combination of the Flatow Act and 28 U.S.C. § 1606 (rather than § 1605(a)(7)) creates a federal cause of action and (2) Libya's argument that the Flatow Act "implicitly preempted the very state or local foreign law causes of action that, only months before, it had voted to allow" under § 1605(a)(7). Those portions of the brief, including a discussion of other potential causes of action, are excerpted below (most footnotes omitted).

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* * * *

Notably, in the context of both the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), and domestic tort exception, id. § 1605(a)(5), courts frequently apply substantive state or local foreign law. . . .

There is nothing unique about Section 1605(a)(7) that would, in contrast to the other FSIA exceptions, altogether preclude state or local foreign law causes of action. As the Court held in *Cicippio-Puleo*, Section 1605(a)(7), like the FSIA's other immunity exceptions, "merely abrogates the immunity of foreign states from the jurisdiction of the courts." 353 F.3d at 1034. Though Section 1605(a)(7) does not, itself, create a cause of action against foreign states, ibid., its legislative history negates any inference that Congress intended to preclude application of independently existing causes of action. See H.R. Conf. Rep. No. 104–518, 112 (1996) (section "permits U.S. federal courts to hear claims seeking money damages for personal injury or death against [designated terrorist] nations"). Similarly, Congress's provision that the amendment would "apply to any cause of action arising before, on, or after the date of the enactment of this Act," Pub. L. 104–132, § 221(c), indicates its recognition that such causes of action existed prior to Section 1605(a)(7)'s enactment, and would continue to do so.

The potential for overlap between Sections 1605(a)(5)—domestic torts—and 1605(a)(7) offers further reason to reject Libya's argument that state common law has been preempted as a source for causes of action in litigation under Section 1605(a)(7).

For example, in cases of terrorism on U.S. territory, such as the September 11 attacks, jurisdiction might properly be founded on both paragraphs (a)(5) and (a)(7). If state law provides the cause of action for a suit under paragraph (a)(5), there is no reason to believe that Congress intended to foreclose state law from providing a cause of action merely because the plaintiff invoked paragraph (a)(7) rather than paragraph (a)(5).

B. Libya argues that Congress's creation, in the Flatow Act, of a cause of action for the kinds of acts encompassed within Section 1605(a)(7), but which is available only against foreign state officials, reflects Congress's intent to replace foreign state liability entirely with the liability of individual foreign officials. But nothing in the Flatow Act compels, or even supports, such a conclusion. That provision does not, by its terms or structure, occupy the entire field of claims arising out of state-sponsored terrorism. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Nor does the existence of claims directly against foreign states in any way impair Congress's objectives in making foreign officials individually liable. *Cf. Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (federal law preempts state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal policy); *American Insurance Association v. Garamendi*, 123 S. Ct. 2374, 2391–92 (2003).

The Flatow Act is simply silent with respect to the liability of foreign states. And there is no indication that Congress intended to diminish the remedies it had permitted plaintiffs to pursue only months before when it lifted foreign states' immunity for claims of state-sponsored terrorism. To the contrary, the Conference Report accompanying the Flatow Act states: "The conference agreement inserts language expanding the scope of monetary damage awards available to American victims of international terrorism." H.R. Conf. Rep. No. 104–863, 985 (1996) (emphasis added).

There is no inherent inconsistency in limiting the new federal cause of action in the Flatow Act to suits against individual foreign officials, while leaving foreign states subject to the same generally-applicable rules of liability that apply to private individuals. The

remedy against the individual serves an additional deterrent effect, while the remedy against the state may, in some cases, offer the injured party a greater likelihood of recovery. Cf. 28 U.S.C. § 2679(b)(2)(A) (availability under the [Federal Tort Claims Act ("FTCA")] of claim against the United States based on state law does not foreclose Bivens suit against federal official).

The Flatow Act's particularly broad definition of recoverable damages, coupled with its retroactive application, see H.R. Conf. Rep. No. 104–863, 985 ("this section shall apply to cases pending upon enactment of this Act"), could also explain why Congress chose to extend the new cause of action only to foreign officials, while leaving existing remedies against foreign states in place. Congress might well have been willing to take the "significant step" of subjecting individual foreign officials to expansive, retroactive liability while deciding not to take the "even greater step" of subjecting foreign states to such liability. *See Cicippio-Puleo*, 353 F.3d at 1036.

While Congress plainly chose not to subject foreign states to additional liability under the Flatow Act, the continued viability of state or local foreign causes of actions against foreign states in no way undermines the federal statutory scheme.

C. While neither Section 1605(a)(7) nor the Flatow Act categorically precludes application of state law causes of action against foreign countries, we note that the FSIA and various constitutional principles may constrain application of state law in a given suit that, like this one, arises in a foreign country's territory.

As previously noted, the FSIA contemplates that, at least in some circumstances, the applicable law will be "the law of the place where the action or omission occurred," 28 U.S.C. § 1606, which, in this case, is Lebanon. On remand, the district court may have to decide whether the law of Lebanon or some other jurisdiction applies and, moreover, whether the choice of law analysis is governed by the law of the forum or by uniform federal principles—a question as to which the circuits are in disagreement. *See Karaha Bodas Co.*, 313 F.3d at 84 ("the FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law"); *Liu*

v. Republic of China, 892 F.2d 1419, 1425–26 (9th Cir. 1989) ("the federal choice of law rule controls the applicable law of respondeat superior both for jurisdiction under the FSIA and on the merits"), cert. dismissed, 497 U.S. 1058 (1990); *Harris*, 820 F.2d at 1003 (same). *See also DuMont v. Saskatchewan Government Insurance*, 258 F.3d 880, 886 (8th Cir. 2001) ("there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern").[6]

Where, as here, the injury occurred abroad, the FSIA and constitutional principles limiting the power of the states might independently prevent a U.S. state from applying its domestic law. Even in the domestic context, several constitutional provisions limit a state's ability to project its substantive law extraterritorially. . . .

Projection by a state of its legal norms onto foreign nations when the relevant actions occur abroad could present even greater problems of extraterritoriality, disuniformity, and interference with United States foreign policy. *Cf. Garamendi*, 123 S. Ct. at 2390–92; *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447–449 (1979); *Zschernig v. Miller*, 389 U.S. 429, 434–35 (1968). Indeed, even federal statutes are presumed not to apply extraterritorially in other nations, unless Congress clearly indicates otherwise. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (rule "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord").

Furthermore, while some of these constitutional limitations do not protect foreign states directly, *see, e.g., Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95–100 (D.C. Cir. 2002) (foreign states not entitled to Due Process Clause protection), the FSIA itself may well prevent states from applying to foreign sovereigns substantive rules that would not apply to "private individuals in like circumstances." 28 U.S.C. § 1606.

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[6] Plaintiffs' research . . . indicates that they may have causes of action under both Lebanese law and the law of the potentially relevant U.S. jurisdictions. On remand, the district court will have to determine whether the elements of the respective causes of action and damages available under the laws of the various jurisdictions differ. If they do, the court may need to resolve the choice of law issue.

D. Significantly, however, to the extent that foreign law applies, Section 1606 would also prevent a foreign state from invoking the foreign equivalent of sovereign immunity. *Cf. Feres v. United States*, 340 U.S. 135, 141 (1950) (nearly identical language in the FTCA indicates "not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence").[7]

II. THE FSIA DOES NOT PROVIDE PLAINTIFFS WITH A CAUSE OF ACTION AGAINST FOREIGN STATES UNDER STATUTES THAT, BY THEIR TERMS, APPLY ONLY TO FOREIGN STATE OFFICIALS.

Whereas Libya mistakenly reads this Court's decision in *Cicippio-Puleo* far too broadly as preempting existing state and local foreign law causes of action, plaintiffs commit the opposite error of construing that decision to be virtually meaningless. *Cicippio-Puleo* resolved the important question, left open in several prior cases, "whether the Flatow Amendment, which does not refer to 'foreign state,' may be construed, either alone or in conjunction with section 1605(a)(7), to provide a cause of action against a foreign state." . . .

Despite the *Cicippio-Puleo* opinion's express statement that it was resolving this important question of law, plaintiffs contend that the decision represents only an irrelevant technicality turning on the fact that plaintiffs there invoked the wrong "tandem"—the Flatow Act and Section 1605(a)(7), rather than the Flatow Act and Section 1606. Neither the Court's reasoning, nor its holding can be so circumscribed.

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[7] Plaintiffs here do not rely upon federal common law, which this Court rejected as a source of liability under the FSIA in *Bettis*, 315 F.3d at 333 (Section 1605(a)(7) "does not . . . 'authorize the federal courts to fashion a complete body of federal [common] law' "). They also concede that the question of the availability of a claim under international law, which does not generally provide private rights of action, see, e.g., *United States v. Li*, 206 F.3d 56, 67 (1st Cir.) (en banc) ("treaties do not generally create rights that are privately enforceable in the federal courts"), cert. denied, 531 U.S. 956 (2000), is not ripe for review at this time, Pls. Br., 51. Thus, we do not address either as a potential source of causes of action under Section 1605(a)(7).

Notably, plaintiffs do not suggest that the Court in *Cicippio-Puleo* was unaware of Section 1606 or plaintiffs' proffered construction of it. Indeed, the Court's opinion quotes the very language from this provision upon which plaintiffs rely. *See Cicippio-Puleo*, 353 F.3d at 1029. Further, plaintiffs here, who appeared as amicus curiae in *Cicippio-Puleo*, made the same argument regarding Section 1606 that they advance here, which the Court well understood. See Addendum 6–7 (Tr. of Oral Argument). While, as plaintiffs note, it is clear that the Court reserved the question "whether some other source of law, including state law, as the Kilburn *amici* have suggested," might provide a viable cause of action, 353 F.3d at 1035 (emphasis added), the Court most definitely did decide whether this source of law, the Flatow Act, provides such a cause of action. It does not.

Even if *Cicippio-Puleo* did not directly foreclose plaintiffs' theory of a cause of action against foreign states under the Flatow Act or the TVPA, the decision's reasoning compels the conclusion that they do not. As the Court there noted, the Flatow Act reflects a "significant step" by Congress to authorize a cause of action, 353 F.3d at 1036, but Congress "precisely limited [that cause of action] to an official, employee, or agent of a foreign state," id. at 1034. See also H.R. Rep. No. 102–367 ("[o]nly 'individuals,' not foreign states, can be sued under the [TVPA]"). Congress specifically did not take the "even greater step" of "[r]ecognizing a federal cause of action against foreign states" themselves. 353 F.3d at 1036.

Indeed, the Court further held that, in order to give effect to Congress's decision only to subject foreign officers, and not states, to liability under the Flatow Act, it must be construed to apply only to officials "in their *individual*, as opposed to their official, capacities." Id. at 1034. Plaintiffs' proffered construction of the Flatow Act and Section 1606 is directly contrary to, and would render meaningless, this important distinction.

Significantly, the Court's conclusion that Section 1605(a)(7) does not create an implied cause of action was based in large part upon the Court's understanding of the function of the FSIA more generally. The Court noted that, as previously discussed, the FSIA's legislative history clarifies that "the FSIA was 'not intended to affect the substantive law of liability,'" including "whether an entity sued is liable in whole or in part for the claimed

wrong." 353 F.3d at 1034 (quoting H.R. Rep. No. 94–1487, 12 (1976)). . . .

More specifically, there is nothing in the text or history of Section 1606 that supports plaintiffs' assertion that it creates a cause of action. Plaintiffs rely upon the language of Section 1606 that provides "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. § 1606. As noted above, this language is nearly identical to the similar provision in the Federal Tort Claims Act that, in tort suits under that title as to which immunity is waived, "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The Supreme Court has held that "this [language] is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence." *Feres*, 340 U.S. at 141. Thus, Section 1606's nearly identical language does not create a cause of action either.

As the section's title, "Extent of Liability," suggests, Section 1606 does not alter existing causes of action, but rather addresses the kinds of remedies that may be imposed once liability is established under otherwise applicable law. Section 1606 specifies that, with certain identified exceptions, foreign states that are liable "[a]s to any claim for relief" (i.e., a claim that arises independent of Section 1606) are "liable in the same manner" (i.e., subject to the same kinds of remedies) and "to the same extent" as private individuals in like circumstances. 28 U.S.C. § 1606. The legislative history of Section 1606, which, aside from paraphrasing the provision, discusses the provision only in terms of the remedies and measures of damages that may be imposed upon a foreign state, further supports this view.

Rather than creating a new cause of action, Section 1606 confirms that a plaintiff must demonstrate that the cause of action relied upon in a suit under the FSIA is one that applies to private individuals generally and that the foreign state has violated its substantive elements. . . .

Under the same rationale [as applied by the Supreme Court in the domestic context in *FDIC v. Meyer*, 510 U.S. 471 (1994)] a

foreign state cannot be liable under either the Flatow Act or the TVPA. These statutes do not create general causes of action applicable to all "private individuals" as to which foreign states are also subject in light of the abrogation of immunity. By their specific terms, each statute provides a cause of action only against officials of a foreign state. See id. § 1605 note ("an official, employee, or agent of a foreign state"); id. § 1350 note ("[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation"). This is a substantive element of these statutes that excludes mere "private individuals" as well as foreign states from their reach. See H.R. Rep. No. 102–367, 5 (TVPA "does not attempt to deal with torture or killing by purely private groups"); S. Rep. No. 102–249, 8 (TVPA "does not cover purely private criminal acts by individuals or nongovernmental organizations").

* * * *

f. Collection of judgments

(1) Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.

In *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MOD") v. Cubic Defense Systems, Inc.*, 385 F.3d 1206 (9th Cir. 2004), the U.S. Court of Appeals for the Ninth Circuit addressed the distinction under the FSIA between immunity to jurisdiction and immunity of property from attachment. This case involved, among other things, efforts by judgment creditors in *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97 (D.D.C. 2000) (a default judgment against Iran and the Ministry of Information and Security ("MOIS") for the assassination of Dr. Cyrus Elahi in Paris on October 23, 1990) to execute that judgment against an arbitral award in favor of MOD. MOD brought this action in 2002 seeking a judicial determination that its judgment against Cubic, obtained in arbitration with the International Chamber of Commerce in Zurich, Switzerland, and confirmed by the District Court for the Southern District of California in 1998, was immune from attachment.

The Ninth Circuit reversed the district court's conclusion that because MOD had waived its immunity to jurisdiction by seeking to enforce an arbitral award in U.S. court, it had also waived immunity to attachment of that award under FSIA § 1610(b)(2). The court of appeals concluded, however, that the MOD award was subject to attachment on other grounds:

> In sum, to determine whether the property of a foreign state agency or instrumentality can be attached to enforce a judgment against a foreign state, we apply a two-step analysis. First, we look at whether the judgment is one for which the agency is not immune from attachment under FSIA; and second, if so, we determine whether the foreign agency or instrumentality should be held liable for attachment under *Bancec*. Applying this two-step analysis to this case, we find that a) MOD's *Cubic* judgment falls under the exception to foreign sovereign immunity from attachment set out in 28 U.S.C. § 1610(b)(2); and b) MOD is liable for attachment of its property to enforce a judgment against Iran under *Bancec*.

In addition, the court rejected arguments by MOD that the judgment fell under exemptions to attachment, including an argument that it constituted "military property" or property of a foreign central bank. Furthermore, the court concluded that although the *Cubic* judgment is regulated by the United States through the Iranian Asset Control Regulations, a general license under those regulations provides that "transactions involving property in which Iran or an Iranian entity has an interest are authorized where . . . the interest in the property . . . arises after January 19, 1981." Defendants filed a petition for writ of certiorari in the Supreme Court and the Court has asked for the views of the United States.

(2) Hegna v. Islamic Republic of Iran

In 2004 four courts dismissed attempts to execute a judgment in *Hegna v. Islamic Republic of Iran*, No. 1:00CV00716 (D.D.C. Feb. 7, 2002) (amended order and judgment) against

properties in Chicago, New York, Maryland, and Texas. As discussed in the excerpts below, attachments were vacated in these cases pursuant to statutory provisions either because (1) the Hegnas had accepted compensation provided under the Victims of Trafficking and Violence Protection Act, Pub. L. No. 106–386, 114 Stat. 1464, as amended, and had thus relinquished punitive damages and rights to attach "property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal"; or (2) the properties were found not to constitute "blocked assets" subject to attachment under the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, 116 Stat. 2322.*

Excerpts below from the last of the four 2004 decisions, dated August 11, 2004, *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000 (7th Cir. 2004), describe the statutory framework and the decision in that case (footnotes omitted).

Edwena A. Hegna, Craig Hegna, Lynn Marie Hegna Moore and Paul Hegna, the plaintiffs-appellants, are the wife and children

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* Section 201(a) of TRIA provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

28 U.S.C. § 1610 note. "Blocked asset" is defined by TRIA as "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)." TRIA § 201(d)(2)(A). Expressly excluded from the definition of a "blocked asset" is "property subject to the Vienna Convention on Consular Relations . . . that . . . is being used exclusively for . . . consular purposes." *See* TRIA § 201(d)(2)(B). *See also Digest 2003* at 552–57 and *Digest 2002* at 410–13.

of Charles Hegna, an American who was murdered during a 1984 terrorist hijacking of a Kuwaiti Airlines flight. The hijacking was undertaken by Hezbollah, a terrorist group sponsored by the Islamic Republic of Iran and the Iranian Ministry of Information and Security (collectively "Iran"). The appellants brought suit under 28 U.S.C. § 1605(a)(7) against Iran in the United States District Court for the District of Columbia seeking money damages for the death of Charles Hegna. The district court entered a default judgment in January 2002 in the amount of $42 million in compensatory damages and $333 million in punitive damages.

The Hegnas registered the judgment in the United States District Court for the Northern District of Illinois in November 2002. [Invoking TRIA § 201(a),] [i]n January 2003, the Hegnas obtained writs of attachment seeking the levy and sale or turnover of two condominium units owned by the Iranian government located at 155 N. Harbor Drive in Chicago, Illinois ("Chicago properties") in aid of execution of the judgment. The condominiums are currently in the custody of the United States government. . . .

* * * *

In addition to pursuing attachment and execution of the Chicago properties in aid of execution of their judgment, the Hegnas also pursued relief under the Victims of Trafficking and Violence Protection Act ("VTVPA"), Pub. L. No. 106–386, § 2002(a)(2)(A), 114 Stat. 1,464, 1,542 (2002), *amended by* TRIA § 201(c)(1). . . .

. . . Recognizing that the funds allocated for making payments under § 2002 might be inadequate to cover the full amount of compensatory damages awarded to each of the newly eligible judgment-creditors, TRIA § 201(c)(4) authorized partial payment to judgment-creditors on a pro rata basis, to be calculated in proportion to the amount of compensatory damages awarded to each claimant. *See* TRIA § 201(c)(4) (amending VTVPA § 2002(d)(1)). In light of the possibility that these judgment-creditors might collect only a pro rata payment, TRIA excused these judgment-creditors from the preexisting VTVPA § 2002 requirement that they forgo other attempts to collect compensatory damages owed on the judgment. *See* TRIA § 201(c)(4) (amending VTVPA § 2002(d)(5)). However, in exchange for receiving a pro rata payment in an

amount "less than the full amount of compensatory damages awarded," . . . judgment-creditors were required to relinquish their rights to collect punitive damages and to enforce their judgments "against property that is at issue in claims against the United States before an international tribunal." *See* TRIA § 201(c)(4) (amending VTVPA § 2002(d)(5)(A), (B)).

On or about March 20, 2003, the Hegnas applied for payment under VTVPA § 2002(a)(2)(A)(ii), as amended by TRIA § 201(c)(1). . . . [T]he OFAC application required the Hegnas to submit the following disclosures regarding their statutory relinquishment of rights in the event of a pro rata payment:

> In the event that . . . the payment that I receive will be less than the full amount of compensatory damages awarded to me . . . I hereby relinquish (1) all rights and claims to punitive damages awarded in connection with the claim or claims I brought under 28 U.S.C. 1605(a)(7) . . . and (2) all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal. I understand that the relinquishment that I make in the event of any pro rata distribution is irrevocable once the payment is credited to the bank account I have identified in this application. . . .

Id.

While the Hegnas' applications for payment from OFAC were pending, they continued to pursue relief through the attachment of the Chicago properties. . . .

. . . In June 2003, following the receipt of the Hegnas' applications and disclosures, R. Richard Newcomb, the Director of OFAC, sent a letter to them reiterating that their statutory relinquishment of rights would "take[] effect on the date upon which OFAC issues a pro rata payment." On or about July 30, 2003, the Hegnas collected the first installment of their partial payment under VTVPA. . . . [O]n August 11, 2003, the United States filed a supplemental memorandum [in the Northern District of Illinois] arguing that the Hegnas had relinquished their rights

to attach the Chicago properties upon receipt of the VTVPA payments, by operation of the relinquishment provisions of the amended § 2002(d)(5). The United States urged that the Chicago properties were at issue before an international tribunal, and that the Hegnas' receipt of VTVPA funds had therefore precluded them from attaching those properties in aid of execution of their § 1605(a)(7) judgment. The district court agreed with the United States and dismissed the enforcement action on the ground that the Hegnas had relinquished their rights to attach the Chicago properties in aid of execution of their judgment. *Hegna v. Islamic Republic of Iran*, 2003 U.S. Dist. LEXIS 25795, No. 02 C 8643 (N.D. Ill. Dec. 3, 2003) (order dismissing enforcement action with prejudice). The district court quashed the writs of attachment on December 5, 2003, and this appeal followed.

* * * *

The court of appeals rejected plaintiffs' arguments based on proposed interpretations of relevant federal and state statutes that would have preserved their right of attachment despite having accepted VTVPA compensation. Furthermore, the court concluded that the Chicago properties were "at issue in claims against the United States before an international tribunal." Noting that Iran had filed a claim in the Iran-United States Claims Tribunal in 1982, "alleging that the United States had breached its obligations under the Algiers Declarations by failing to grant Iran custody of its diplomatic and consular properties in the United States," the court rejected the Hegnas' argument that the "Chicago properties are not truly 'at issue' before the Claims Tribunal" because the United States has challenged the tribunal's subject matter jurisdiction in the case. The court concluded:

> Regardless of the eventual outcome of the dispute over the Claims Tribunal's subject matter jurisdiction, the lawsuit filed before that court concerns the United States' obligations under the Algiers Accords to grant Iran custody of its consular properties. It is of no moment that the Claims Tribunal has not yet reached the merits of the underlying dispute.

Footnote three of the Seventh Circuit opinion described the other decisions during 2004 as follows:

> The Hegnas have also pursued the attachment of properties in New York, Maryland, and Texas. *See, respectively, Hegna v. Islamic Republic of Iran*, 299 F. Supp. 2d 229 (S.D.N.Y. 2004) (denying the Hegnas' application for attachment [of former New York residence of Iranian consul general, which the court found to be "at issue" before the Iran-United States Claims Tribunal]); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226 . . . (4th Cir. . . . 2004) (holding that the writs of attachment at issue were properly quashed because the Hegnas' acceptance of partial payment from the United States effected a relinquishment of all rights to execute against or attach tribunal property [property used as residences by diplomatic employees of the Iranian embassy]); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 . . . (5th Cir. . . . 2004) (holding that the writ of execution against one property was properly quashed because the Hegnas' acceptance of partial payment from the United States effected a relinquishment of their right to attach against tribunal property [home of then-Crown Prince of Iran while receiving pilot training at Reese Air Force Base in Lubbock, Texas], and that the writ of execution against the other property at issue was properly quashed because the property was not a "blocked asset" within the meaning of TRIA § 201(d)(2)(B)(ii)) [residence of Iranian consul general in Houston].

The Fifth Circuit analysis of "blocked assets," an issue not decided in the other cases, is excerpted below (footnote omitted). 376 F.3d 485 (5th Cir. 2004). Because the court determined that "the TRIA would [not] allow the Hegnas to attach or execute against the property in the first place," it did not address the effect of compensation from the VTPTA.

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* * * *

TRIA § 201(a) empowers an individual who secures a judgment pursuant to 28 U.S.C. § 1605(a)(7) to attach and execute against "blocked assets . . . to satisfy such judgment to the extent of any compensatory damages." Section 201(d)(2) defines "blocked asset" in such a way that it includes the Houston property. Section 201(d)(2)(B)(ii), however, exempts otherwise-attachable property from the "blocked asset" category. To fall within the exemption, the property must satisfy two criteria. First, the property must be "subject to the Vienna Convention on . . . Consular Relations[.]" TRIA § 201(d)(2)(B)(ii). Secondly, the property must be "used exclusively for diplomatic or consular purposes." *Id.* Because we answer both queries in the affirmative, the Houston property does not qualify as a "blocked asset" for purposes of TRIA § 201(a).

A.

As to the first matter, a consul's residence falls within the sweep of the Vienna Convention on Consular Relations ("VCCR"), April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 8638. The signatories to the VCCR pledge that, if one country severs consular relations with another, the severing countries will "respect and protect the consular premises, together with the property of the consular post and the consular archives" of one another. VCCR, art. 27(1)(a).

* * * *

. . . [T]he language of the VCCR and the government's reasonable interpretation of that language lead us to conclude that, under the VCCR, the United States has an obligation to "respect and protect" property that served as the residence of the Iranian General Consul. The Houston property is within the ambit of the VCCR.

Although the government has rented the Houston property to private parties and has used some of those rental proceeds to satisfy domestically-created obligations [to victims of terrorism pursuant to a statutory requirement under the VTVPA], it has used the consular residence "exclusively for diplomatic or consular purposes." . . .

* * * *

The United States purportedly has attempted to fulfill the obligations of the VCCR. By not selling the Houston property and by using rental proceeds to carry out routine maintenance, the government "respects and protects" the property presumably for the time when the two countries might resume diplomatic and consular relations.

* * * *

(3) Weinstein v. Islamic Republic of Iran

In *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63 (E.D.N.Y. 2004), the U.S. District Court for the Eastern District of New York concluded that assets of three Iranian banks in accounts with the U.S. Federal Bank of New York ("BNY") were not subject to attachment under TRIA. The BNY brought the matter for determination of the respective rights of certain bank accounts maintained by BNY belonging to the respondent banks. Plaintiffs in the case were attempting to execute on a default judgment for damages in the death of Ira Weinstein, who died from injuries in a suicide bombing by the Hamas terrorist organization in Jerusalem in 1996. *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13 (D.D.C. 2002).

Finding that the accounts did not constitute "blocked assets" under the statute, the court did not reach the question, noted in the excerpt below, of whether the Banks are "agencies or instrumentalities" of Iran.

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* * * *

II. DISCUSSION

The parties urge the Court to determine, on the record presented, whether the TRIA allows plaintiffs to enforce their judgment against the assets in the Banks' BNY accounts. Plaintiffs argue that they are entitled to enforce their judgment against these assets under the TRIA because the Banks' accounts hold "blocked assets" and each of the Banks is an "agency or instrumentality" of Iran. The

Banks argue that the assets in their BNY accounts are not "blocked assets" and that, in any event, none of the Banks is an "agency or instrumentality" of Iran under the TRIA. The government supports the Banks' assertion that the Banks' assets in question are not "blocked assets" under the TRIA and, therefore, not subject to attachment under the TRIA.

A. Blocked Assets

The parties do not dispute that the Banks' BNY accounts are covered by the general license authorizing transactions with Iran under IACR § 535.579, as the assets undisputedly came within U.S. jurisdiction after January 19, 1981; and that the accounts are authorized by the specific licenses issued in March 1996. Rather, the parties dispute, inter alia, the effect of the general and specific licenses on the status of the assets in the Banks' accounts for purposes of determining whether they are "blocked assets" under the TRIA.

* * * *

Upon consideration, the Court rejects plaintiffs' arguments that all Iranian assets which entered U.S. jurisdiction after the 1979 blocking order, i.e., EO 12170, are "blocked assets" within the meaning of the TRIA, and that the term "blocked assets" includes all assets "regulated" or "licensed" under IEEPA by OFAC. Although, as the parties agree, EO 12170 has not been revoked, the blocking prohibition imposed by that order was removed on most Iranian assets pursuant to the Algiers Accords and relevant executive orders and OFAC regulations, including IACR § 535.579, which removed the blocking prohibition on property entering into U.S. jurisdiction after January 19, 1981. Contrary to plaintiffs' argument that the general license merely authorized the use of such assets but did not change the status of those assets, § 535.502(c) specifically provides that the license "has the effect of removing a prohibition," i.e., the blocking prohibition. *See* IACR § 535.502(c) (providing that a "license authorizing a transaction otherwise prohibited under this part has the effect of removing a prohibition or prohibitions in Subpart B from the transaction"). Thus, assets subject to the general license that entered into U.S. jurisdiction after

January 19, 1981 are not necessarily "blocked." Indeed, as the government points out, the general license allows the Banks to close their accounts and remove the assets from U.S. jurisdiction, *see* 31 C.F.R. § 560.517(a)(3).

Moreover, the Court does not agree with plaintiffs that the term "blocked assets," as defined, must be construed as an "omnibus" term extending to all assets "regulated" or "licensed" by the OFAC under the IEEPA. . . . [T]he term "block" is not defined; nor are the terms "seize" or "freeze." "Blocking" is defined, however, by OFAC as a "freezing" of assets that imposes an "across-the-board prohibition against transfers or transactions of any kind with regard to the property." U.S. Treasury Dep't, Foreign Assets Control Regulations for the Financial Community, at 4 (Dec. 27, 2002). And while neither the parties nor the government point to an OFAC definition of the term "seize," the Second Circuit, in construing the TRIA, recently observed that "to seize or freeze assets transfers possessory interest in the property." *Smith*, 346 F.3d at 272 (emphasis in original). Similarly, as used in the law, the word "seize," in relevant context, means "to forcibly take possession of . . . property." Black's Law Dictionary 1363 (7th ed. 1999). Given that not every type of action authorized by the IEEPA necessarily involves a seizing or freezing of property, it follows that not every action regarding property under the authority of the IEEPA, including assets that may be "regulated" or "licensed," results in the property being "blocked" under the TRIA. As noted, the term "blocked" under the TRIA is specifically limited to assets that are "seized or frozen"—a limitation that this Court cannot ignore. *Cf. Smith*, 346 F.3d at 271–72 (concluding that "the term 'blocked assets' reaches broadly to include any property seized or frozen by the United States. But it does not reach so broadly as to encompass confiscated property. To seize or freeze assets transfers possessory interest in the property. But confiscation, pursuant to IEEPA § 203(a)(1)(C) [i.e., 50 U.S.C. § 1702(a)(1)(C)], transfers ownership of terrorist property by vesting right, title, and interest as the President deems appropriate." (citation omitted)).

Furthermore, plaintiffs' reliance on FSIA § 1610(f)(1)(A) is misplaced, as that provision contains a notably different definition

of attachable assets than specified in the TRIA. That provision, unlike the TRIA provision, clearly authorizes attachment or execution of property "regulated" under the IEEPA.

* * * *

Consequently, the Court also rejects plaintiffs' interpretation of the § 201(d)(2)(B)(i) exception, as that interpretation would necessarily require a broader definition of "blocked asset" than is provided. There is no indication in the TRIA, as the government argues, that this exception sweeps into the definition of "blocked assets" all licensed transactions, even as to property that has never been "seized or frozen."

* * * *

B. HEAD OF STATE IMMUNITY

In *Wei Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir. 2004), the Seventh Circuit held that "[w]e are required to defer to the decision of the Executive Branch" that former President of China Jiang Zemin is immune from suit for acts committed while head of state. Jiang Zemin had stepped down from his role as President of China while the case was pending before the district court.

Excerpts below provide the court's analysis of head of state immunity in this case (most footnotes omitted). The Brief of the United States as *Amicus Curiae* Supporting Affirmance, filed with the Seventh Circuit on March 5, 2004, is available at *www.state.gov/s/l/c8183.htm; see also Digest 2002* at 547–52 *and Digest 2003* at 558–69. The court's holding on inviolability to service of process is discussed in F.2.(1) below.

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* * * *

Jiang Zemin served as President of China for approximately ten years, from March 1993 to March 15, 2003. During part of his tenure as President, he also served as the Secretary General of the

Central Committee of the Chinese Communist Party (the head of the Party). President Jiang stepped down as head of the Party on November 15, 2002.

Beginning in 1999, the Chinese government and the Party took steps to crack down on Falun Gong. . . .

To that end, on June 10, 1999, President Jiang established, as part of the Party's apparatus, the Falun Gong Control Office. The Office is known as "Office 6/10" after the date of its creation. In July 1999, President Jiang issued an edict outlawing Falun Gong. This edict was followed by mass arrests, allegedly farcical trials, torture, forced labor, "re-education," and the killing of members.

The appellants filed this lawsuit against President Jiang and Office 6/10 on October 18, 2002. The appellants' complaint, recites, *inter alia*, claims of torture, genocide, arbitrary arrest and imprisonment, as well as other claims related to the appellants' freedom of conscience, movement, and religion. The appellants argued that the district court had jurisdiction to hear their case pursuant to the Alien Tort Claim Act, 28 U.S.C. § 1350, as well as, in part, 28 U.S.C. §§ 1343(a)(4) and 1331.

Because President Jiang was scheduled to be in Chicago on October 22 and 23 on his way to visit with United States President George W. Bush in Washington, D.C., the appellants moved *ex parte* for leave from the district court to effect service on President Jiang (and by extension Office 6/10) while he was in Chicago. The district court granted this motion and entered an order permitting service by delivery of a copy of the summons and complaint "to any of the security agents or hotel staff helping to guard" President Jiang. The appellants contend that service was complete when they delivered a copy of these documents to a Chicago police officer and agents of the United States Secret Service detail stationed at the hotel at which President Jiang was staying in Chicago.

Neither President Jiang nor a representative of the Chinese government or Office 6/10 responded to the complaint, and the appellants moved for an entry of default. The United States, however, intervened pursuant to 28 U.S.C. § 517 and moved to vacate the service order or, in the alternative, to assert head-of-state immunity for President Jiang. The United States further argued that President Jiang was personally inviolable and, therefore, incapable of being

served in any capacity. Specifically, the government argued that President Jiang could not be served as an agent of Office 6/10.

* * * *

A. *Head-Of-State Immunity—Some Background*

The appellants' first argument relates to the assertion by the United States, which the district court took as dispositive, that President Jiang was immune from the appellants' suit. The appellants argue that the actions President Jiang is accused of amount to violations of "*jus cogens*" norms of international law and that immunity may not be conferred upon a person accused of violating these norms.

The Supreme Court recognized the immunity of foreign sovereigns from suits brought in United States courts nearly 200 years ago. In *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812), Chief Justice Marshall reasoned that although "the jurisdiction of the United States over persons and property within its territory 'is susceptible to no limitation not imposed by itself,' . . . as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign." *Republic of Austria v. Altmann*, 541 U.S. ___, 541 U.S. 677, 124 S. Ct. 2240, 2247, 159 L.Ed.2d 1, 13 (2004) (quoting *M'Faddon*, 11 U.S. at 136). Following *M'Faddon*, courts have been expected to "defer[] to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 76 L.Ed.2d 81, 103 S. Ct. 1962 (1983).

* * * *

In 1976, Congress enacted the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. §§ 1602 et seq. . . .

The FSIA does not, however, address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders. The FSIA defines a foreign state to include a political subdivision,

agency or instrumentality of a foreign state but makes no mention of heads of state. 28 U.S.C. § 1603(a). Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch. *Noriega*, 117 F.3d at 1212. . . .

B. The Present Case

In this case the Executive Branch entered a suggestion of immunity. The appellants argue, however, that the Executive Branch has no power to immunize a head of state (or any person for that matter) for acts that violate *jus cogens* norms of international law. We have explained *jus cogens* norms before:

> A *jus cogens* norm is a special type of customary international law. A *jus cogens* norm "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (*quoting* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679). Most famously, *jus cogens* norms supported the prosecutions in the Nuremberg trials. . . .

Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149–50 (7th Cir. 2001).

The appellants' position, therefore, is that, in at least a particular class of cases (those involving *jus cogens* norms), a court cannot defer to the position of the Executive Branch with respect to immunity for heads of states. The Supreme Court has held, however, that the Executive Branch's suggestion of immunity is conclusive and not subject to judicial inquiry. *See Ex Parte Republic of Peru*, 318 U.S. 578, 589, 87 L.Ed. 1014, 63 S. Ct. 793 (1943) ("The certification and the request that the vessel be declared immune *must be accepted by the courts as a conclusive determination* by the political arm of the Government that the continued

retention of the vessel interferes with the proper conduct of our foreign relations.") (emphasis added); . . . .

The appellants present their argument as one of international law—under customary international law, a state cannot provide immunity to a defendant accused of violating *jus cogens* norms. Our first concern, however, is to ascertain the proper relationship between the Executive and Judicial Branches insofar as the immunity of foreign leaders is concerned. The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff. *See Spacil*, 489 F.2d at 618 ("We are analyzing here the proper allocation of functions of the branches of government in the scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.").

Our deference to the Executive Branch is motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved. . . .

* * * *

C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

1. Diplomatic Envoy to Mission to the United Nations and Wife

On October 29, 2004, the United States responded to an order of the U.S. District Court of the Southern District of New York "requesting that the Government advise the Court as to whether defendants' status triggers full or functional immunity from suit." *Vishranthamma v. Badar Al-Awdi and Halal Muhammad Al-Shaitan*, 02 Civ. 3710 (PKL)(MHD). Attached to the letter submission was a certification by the Department of State explaining that defendant Al-Awdi "was accepted by the Department of State as a diplomat from the Permanent Mission of Kuwait to the Nations" from September 1995 through July 15, 2004, and that his wife

Alshettan "was notified as a member of Al-Awdi's family, forming part of his household." Excerpts below from the letter to the court explain the consequences of these facts.

Both Al-Awdi and Alshettan were entitled to immunity from suit pursuant to Article IV, Section II of the Convention on Privileges and Immunities of the United Nations, 21 UST 1418, TIAS 6900, and Article V, Section 15 of the Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations, 12 Bevans 956, TIAS 1676. Under both of these treaties, Al-Awdi and Alshettan were entitled to the same privileges and immunities in the United States as the United States accords to diplomatic envoys and members of their families who are accredited to it. Such diplomatic immunity is defined by the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502, 500 UNTS 95, which embodies customary international law governing the extension of privileges and immunities. Because Al Awdi served as Third, then Second, then First Secretary, at the Kuwaiti Mission, neither he nor his wife are limited to functional immunity, but are entitled to the full immunity accorded diplomatic agents. *See id.* at *4; *see also Tachiona v. Mugabe*, _F.3d__, 2004 WL 2240401, at *7 (2d Cir. Oct. 6, 2004). . . .

The Vienna Convention, Article 31, provides that a diplomatic agent shall enjoy immunity from the civil and administrative jurisdiction of the receiving state, in this case the United States. As the Second Circuit has recently emphasized, Article 31, with exceptions not relevant here, "broadly immunizes diplomatic representatives from the civil jurisdiction of the United States courts." *Tachiona*, 2004 WL 2240401, at *7 Moreover, Article 37(1) of the Vienna Convention provides that the members of the family of a diplomatic agent forming part of his or her household (a category that includes Alshettan) shall, if they are not nationals of the receiving State, enjoy the same privileges and immunities as the diplomatic agent. The immunities established by the Vienna Convention reflect a centuries-old practice in international law, recognizing that the absolute independence and security of diplomatic envoys and their dependents was essential to fulfillment of

their critical role in international relations, and that full diplomatic immunity was a necessary guarantor of that independence. *See Generally 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire*. 988 F.2d 295, 299–300 (2d Cir.), *cert. denied*, 510 U.S. 819(1993). Under these principles, Al-Awdi and Alshettan are entitled to full diplomatic immunity for the period that they were accredited at the Kuwaiti Mission.[2]

The Certification is a binding determination of the individual's status. As the Fourth Circuit has recently ruled, the State Department's certification, based upon a reasonable interpretation of the Vienna Convention, "is conclusive evidence as to the diplomatic status of an individual." *United States v. Al-Hamdi*, 356 F.3d 564, 573 (4th Cir. 2004). . . .

As defendants' functions as individuals enjoying privileges and immunities came to an end on July 15, 2004, their privileges and immunities ceased to exist on that date, except as to acts performed in the exercise of Mr. Al-Awdi's functions as a member of the mission. This action, however, was filed and pursued while these privileges and immunities were extant, so that defendants were immune from service of process and assertion of jurisdiction by the Court.

Courts in this district have uniformly declined to proceed with actions against representatives to the United Nations entitled to diplomatic immunity, particularly where, as here, the Department of State has certified that immunity should be accorded. . . .

Service of process upon defendants was also invalid, as Articles 29 and 37 of the Vienna Convention render diplomats and their dependents immune from service. *See Tachiona*, 2004 WL 2240401,

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[2] Article 39 of the Vienna Convention speaks to the immunities of diplomats, such as defendants, who have terminated their diplomatic functions. That article provides in part:

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

at *15. . . . Because this action was commenced while defendants were entitled to diplomatic immunity, the service of process was invalid.

This case presents allegations of serious abuses of diplomatic privileges. The United States does not intend to minimize the harm allegedly suffered by plaintiff, and is currently reviewing the matter now that it has been brought to its attention. Yet even if diplomatic immunities of representatives to the United States might preclude litigation in our courts, those immunities must be respected because they are vital to the conduct of peaceful international relations. The importance of standing behind these universal norms of international law "is even more true today given the global nature of the economy and the extent to which actions in other parts of the world affect our own national security." *Boos v. Barry*, 485 U.S. 312, 323(1988). The conduct of the United States with respect to the United Nations and representatives of its members in this country is a particularly visible portion of the international relations of the United States. The reason to respect diplomatic immunity is not "a blind adherence to a rule of law in an international treaty, uncaring of justice at home, but that by upsetting existing treaty relationships American diplomats abroad may well be denied lawful protection of their lives and property to which they would otherwise be entitled" *767 Third Avenue*, 988 F.2d at 296.

* * * *

2. Adult Son of Diplomat: *United States v. Al-Hamdi*

In *United States v. Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004), cited in 1. *supra*, the court examined a certification of loss of immunity from the Department of State based on the Department's interpretation and application of the term "dependent" as used in the Vienna Convention on Diplomatic Relations. In this case, the defendant, the son of a diplomat, was charged and convicted in 2003 for possessing a firearm as a non-immigrant alien; he appealed claiming that he possessed diplomatic immunity at the time of his arrest as a family member of a diplomat.

The State Department certified to the court that the defendant lost his diplomatic immunity on November 12, 1998, the date of his twenty-first birthday. Excerpts below from the court's decision explain the court's acceptance of the State Department's certification over Al-Hamdi's objections that it represented an impermissible interpretation of the VCDR. Footnotes have been deleted.

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* * * *

In pertinent part, the Vienna Convention states that a "diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." Vienna Convention at art. 31.1. Article 37.1 reads "members of the family of a diplomatic agent forming part of his household shall . . . enjoy the privileges and immunities specified in Articles 29 to 36." Vienna Convention at art 37.1. The Diplomatic Relations Act, which made the Vienna Convention applicable to the United States, *see Tabion*, 73 F.3d at 536 n. 1, provides that the phrase "members of the family" means the "members of the family of a member of a mission . . . who form part of his or her household." 22 U.S.C.A. § 254a(2)(A) (West 1990). That Act also provides, quite clearly, that "any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding . . . shall be dismissed." 22 U.S.C.A. § 254d (West 1990). Thus, under the plain language of the statute, if, at the time he was arrested, Al-Hamdi was entitled to diplomatic immunity under Article 37.1 of the Vienna Convention, the criminal proceedings against him must be dismissed.

In its May 15, 2003 letter, the State Department certified that Al-Hamdi lost his diplomatic immunity in November 1998. The State Department based its certification on a Circular Diplomatic Note that it issued in 1989. United States Department of State, Circular Diplomatic Note of November 15, 1989. (S.A. at 3.) That Circular Note articulated the State Department's position that the phrase "members of the family," as set forth in the Vienna Convention and the Diplomatic Relations Act, did not include children over the age of twenty-one. (S.A. at 5.) The 1989 Circular Note provided, however, that children of certified diplomats still

enrolled in school are considered family members until their twenty-third birthday. *Id.* (S.A. at 5). The 1989 Circular Note was provided to all foreign missions and remains in force, but because the Republic of Yemen was not formed until 1990, it did not receive the Circular Note during 1989.

In 1998, the State Department published guidelines for administrative officers that restated the age limitations on children who are considered members of the diplomatic family as had been originally stated in the 1989 Circular Note and explained that "it is generally agreed that host States may formulate reasonable definitions" of the phrases used in the Vienna Convention. United States Department of State, *Foreign Diplomatic and Career Consular Personnel in the United States-Guidance for Administrative Officers* (1998). (S.A. at 25–28.) The State Department provided that publication to all foreign embassies in the United States, including the Yemeni embassy.

The Government forcefully argues that the State Department's certification of Al-Hamdi's lack of immunity is conclusive and thus judicially unreviewable. The Government concedes, however, that the State Department cannot act outside the Vienna Convention in issuing a certification and also admits that in this case the State Department's certification is based upon its own interpretation of the Vienna Convention, not the plain language of that document. Thus, we believe we first must ensure that the State Department's certification was not based on an impermissible interpretation of the Vienna Convention. Then, we will examine the evidentiary effect of the State Department's certification made pursuant to that interpretation.

When interpreting a treaty, we "first look to its terms to determine its meaning." *United States v. Alvarez-Machain*, 504 U.S. 655, 663, 119 L.Ed.2d 441, 112 S. Ct. 2188 (1992). When the text is ambiguous or unclear, we turn to nontextual sources for guidance. *See United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000) (en banc); *Tabion v. Mufti*, 73 F.3d 535, 537–538 (4th Cir. 1996). When looking at nontextual sources, we are reminded that "although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc. v.*

Avagliano, 457 U.S. 176, 184–185, 72 L.Ed.2d 765, 102 S. Ct. 2374 (1982); *see also Iceland Steamship Co. v. United States Dep't of the Army*, 340 U.S. App. D.C. 1, 201 F.3d 451, 458 (D.C. Cir. 2000) (giving "great weight" to the State Department's interpretation of a U.S.-Iceland defense treaty). Therefore, because the State Department is charged with the responsibility of enforcing the Vienna Convention, we give "substantial deference" to the State Department's interpretation of that treaty's provisions. *Tabion*, 73 F.3d at 538; *see also Li*, 206 F.3d at 63.

The phrase "members of the family of a diplomatic agent forming part of his household" is not free from ambiguity, as seen by the differing interpretations offered by both Al-Hamdi and the Government. As mentioned, the State Department, since 1989, has consistently interpreted the "member of the family" provision of Article 37.1 to include only children under the age of twenty-one as forming part of the household unless they are continuing their education. Al-Hamdi argues that diplomatic immunity extends to all "members of the family" and contends that the Vienna Convention does not allow for an age restriction. At its core, Al-Hamdi's argument asks us to find that his interpretation of the Vienna Convention's language is more reasonable than the State Department's interpretation. . . . Although Al-Hamdi's interpretation is not unreasonable, given the substantial deference we owe the State Department and the lack of any showing that the State Department's interpretation either infringes on the purpose of the Vienna Convention or is disconsonant with its plain language, we hold that the phrase "member of the family" can reasonably be interpreted to exclude children who have reached twenty-one years of age and children still in school who have reached the age of twenty-three. *See also Iceland Steamship*, 201 F.3d at 458 (holding that where State Department has "wide latitude" in interpreting a treaty, a court should "defer to [the agency's] reasonable interpretation") (quotation marks omitted).

B.

Having concluded that the State Department's certification was based on a reasonable interpretation of the Vienna Convention, we address the issue of its evidentiary weight. The Government, as

discussed above, argues that such certifications are conclusive on the matter of diplomatic immunity. For support, the Government relies upon two Supreme Court cases from the nineteenth century and more recent circuit court precedent. In *In re Baiz*, the Supreme Court relied upon a State Department certification in finding that an individual was not a foreign minister. *In re Baiz*, 135 U.S. 403, 34 L.Ed. 222, 10 S. Ct. 854 (1890). The Court stated that because Article II of the Constitution gave the executive branch the power to send and receive ambassadors, "the certificate of the Secretary of State . . . is the best evidence to prove the diplomatic character of a person accredited as a minister." *Id.* at 421. The Court concluded, "we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister." *Id.* at 432. Six years prior, in *Ex Parte Hitz*, 111 U.S. 766, 28 L.Ed. 592, 4 S. Ct. 698 (1884), the Supreme Court denied a writ requesting original jurisdiction in the Supreme Court. At that time, the Supreme Court possessed original, mandatory jurisdiction over all cases involving ambassadors, but the Court relied upon the State Department's finding that Hitz was no longer an accredited diplomat to conclude that the writ was discretionary with the Court and denied the writ. *Ex Parte Hitz*, 111 U.S. at 768.

In cases of more recent vintage, circuit courts have continued to find the State Department's certification conclusive. . . . In fact, it appears that no reviewing court has ever held that the State Department's certification is anything but conclusive.

For the foregoing reasons, we hold that the State Department's certification, which is based upon a reasonable interpretation of the Vienna Convention, is conclusive evidence as to the diplomatic status of an individual. . . . Lacking diplomatic immunity, Al-Hamdi was subject to the criminal laws of the United States on February 25, 2003, when he was found in possession of a firearm.

C.

Al-Hamdi next argues that, even assuming the State Department was correct that his diplomatic immunity should have expired in 1998, the State Department continued to issue him A-1 visas after November 1998, and thus continued to certify his diplomatic

status. This argument is unavailing. A 1985 Circular Note stated that possession of an A-1 visa, standing alone, did not prove the diplomatic status of an immigrant. United States Department of State, Circular Note of October 23, 1985. (S.A. at 43–44.) Moreover, a 1998 publication explained, "the only authoritative [diplomatic] identity document is the identity card issued by the United States Department of State." *See* United States Department of State, *Diplomatic and Consular Immunity-Guidance for Law Enforcement and Judicial Authorities* (1998) (the 1998 *Guidance*). (J.A. at 47.) An A-1 visa, the 1998 *Guidance* explained, was merely a document that allowed non-immigrant foreigners linked to diplomatic or humanitarian missions to enter the United States. *Id.* (J.A. at 47.) We conclude that Al-Hamdi's possession of an A-1 visa, standing alone, cannot confer diplomatic immunity upon him. . . .

* * * *

3. Visitor for a UN Conference: *Tachiona v. Mugabe*

In *Tachiona v. Mugabe*, 386 F.3d 205 (2d Cir. 2004), the Second Circuit re-examined at some length and affirmed the district court's ruling that the two named defendants, as visitors to the United States for a UN conference, enjoyed diplomatic immunity under the UN Convention on Privileges and Immunities and the Vienna Convention on Diplomatic Relations. In light of this conclusion, the court found that it had no occasion to decide whether the named defendants were protected from suit by head-of-state immunity. *See* discussion of inviolability to service of process discussed in F.2.a.(2) below.

D. INTERNATIONAL ORGANIZATIONS

Host Country Relations

In a statement to the Sixth Committee (Legal) on November 17, 2004, Ambassador Patrick Kennedy, U.S. Representative for United Nations Management and Reform, commented as

follows on the Report of the Committee on Relations with the Host Country (A/59/26) and draft resolution A/C.6/59 L.15.

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* * * *

The United States, as always, is proud to serve as Host Country to the United Nations; remains proud of its record in this respect; and is grateful to those delegations whose remarks have positively recognized the Host Country's efforts. Along with the honor of hosting the United Nations and the world's largest and most diverse diplomatic community comes a broad range of treaty obligations and commitments under international law. Since 1946, the United States Government has fulfilled those obligations and commitments in every respect, and we remain committed to doing so in the future.

We believe that the Committee on Relations with the Host Country is a valuable forum in which to discuss all issues relating to the presence of this large, diverse, and dynamic diplomatic community in New York City, one of the largest, most diverse and most dynamic cities on the globe. The Committee's meetings and those of its working group—provide the host country with an opportunity to assess the United Nations community's concerns, allowing us to address those issues together.

* * * *

A principal focus of the Committee's deliberations over the course of the past year has been the implementation of the new Diplomatic Parking Program. We regard this program as a success. The number of parking tickets received by the diplomatic and consular corps in New York during 2004 is a very small fraction of what it was in 2002 before the creation and implementation of the Program. Congestion caused by illegal parking in the vicinity of the United Nations has been markedly reduced, making it easier and safer for all residents of New York City to carry out their business. The Program has also made it easier for Permanent Representatives and their designees to conduct important mission business.

That said, a relatively small number of missions have noted that they have experienced problems with some aspects of the implementation of the program. The United States Mission remains firmly

committed to working with the authorities of the City of New York to ensure that the program functions as it was written and intended. The United States Mission pledges to uphold all of its obligations to the United Nations community under international law—including on questions related to parking and registration of vehicles—just as we expect each member of the diplomatic community to respect local laws. The United Nations Legal Counsel has found the Diplomatic Parking Program, as written, to be consistent with international law and practice; and we will ensure that it continues to be implemented to conform to such law and practice.

Mr. Chairman, some members of the Committee have objected to restrictions on private non-official travel on members of certain Missions. Such restrictions do not, repeat do not, violate international law. Let us be clear about the obligations of the host country under the Headquarters Agreement. We must—and we do—provide mission members and delegations with unimpeded access to the Headquarters District. The United States is not required to permit these individuals to travel to other parts of the country unless they do so on official UN business. Travel to unofficial events, such as those hosted by universities, are not governed by international agreements. These restrictions do not interfere with travel for UN business. Noting this, we are pleased to report that we have been able to modify some restrictions imposed on certain affected delegations.

* * * *

The new diplomatic parking program referred to in Ambassador Kennedy's remarks is based on a memorandum of understanding ("MOU") between the U.S. Department of State and the City of New York, signed August 22, 2002. The MOU addressed long-standing difficulties in efforts by New York City to enforce parking regulations and to collect fines against diplomatic and consular officials. In a press conference on that date, New York City Mayor Michael R. Bloomberg and Ambassador Kennedy announced the new program, as excerpted below. The full text of the press release, which includes a summary of the terms of the MOU, is available at *www.nyc.gov/cgi-bin/misc/pfprinter.cgi?action=print&sitename=OM.*

The text of the MOU is available at *www.un.int/usa/host_parking_program.htm.*

Mayor Michael R. Bloomberg and US Ambassador to the United Nations for Management and Reform Patrick F. Kennedy today announced a historic Diplomatic Parking Program that will improve traffic flow and safety and make it easier for missions and consulates to conduct their official business. The Parking Program, which finalizes an agreement reached in principle on August 9, requires Diplomatic and Consular officials to pay future parking tickets and a substantial portion of the parking debt that has accrued since 1997. The agreement will sharply reduce the total number of Diplomatic and Consular vehicles in New York City with on-street parking privileges by approximately 75%, from 2,600 to 530. In addition, if Diplomatic and Consular officials do not pay their future parking tickets the State Department will suspend or refuse to renew their registrations and the City will reduce or eliminate the parking spaces assigned to each mission or consulate. . . .

E. ACT OF STATE DOCTRINE

See Chapter 6.G.7.b.(ii).

F. OTHER ISSUES

1. Tax Issues

On October 13, 2004, the Superior Court of the State of California, County of Los Angeles, West District, Santa Monica Branch ruled that Denmark's sale of consular property was tax exempt under the Vienna Convention on Consular Relations. *Foreign Ministry of the Kingdom of Denmark v. Los Angeles*, Case No. SC079161. The court ordered the refund of city and county taxes that had been assessed on the sale of Danish consular property. The court's judgment of October 13 adopted the tentative ruling in the case, issued August 18, 2004, and

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

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* * * *

Plaintiff Foreign Ministry of the Kingdom of Denmark seeks a refund of $56,800 in City transfer taxes and documentary transfer taxes. Plaintiff contends that it purchased real property in the city of LA in 1988 as a consular residence and sold that property in 2002 to the Petersen Trust. Pursuant to the terms of the sales agreement, the plaintiff assumed responsibility for the payment of the transfer taxes and was charged and paid a real property transfer tax of $47,250 (by City) and a documentary transfer tax of $11,550 (by County). Plaintiff made administrative claims seeking a refund of such taxes on the grounds that the transaction was tax-exempt under the Vienna Treaty, but those claims were denied. This action followed, Defendants City and County of LA answered and cross-complained against Plaintiff and Wolfgang Petersen and Maria Petersen, as trustees of the W/M Petersen Living Trust, the buyer of Plaintiff's property, contending that either Plaintiff or Petersen Trust is liable for the tax.

In asserting that the plaintiff is exempt from the documentary and property transfer taxes, plaintiff relies on Section 32 of the Vienna Convention and Consular Relations and Optional Protocols dated April 24, 1963, which provides as follows:

> Consular Premises and the residence of the career head of consular post of which the sending state or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional, or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

Defendants claim that Article 32(2) requires the Petersens to pay the transfer taxes and that plaintiff cannot contractually assume the Petersen's liability and then seek an exemption. Subsection (2) reads as follows:

> The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the Sending State or with the person acting on its behalf.

Defendants assessed the transfer taxes pursuant to the state, county, and city transfer tax statutes, which tax the deed, instrument or writing and impose the tax liability on the person who makes, signs, or issues the instrument, or for whose use or benefit the instrument is made. Rev. & Tax. Code §§ 11911, 11912; LACC §§ 4.60.030; LAMC § 21.9.2, 21.9.3. Plaintiff, as the maker of the deeds, and the Petersen Trust, for whose benefit the deed is made, are both subject to imposition of the transfer tax under the municipal statutes. However, plaintiff would be exempt from payment under Article 32 as the property was undisputedly the consular residence. Defendants argue that the Petersen Trust nonetheless remains subject to tax liability under the City and County laws and the plaintiff cannot by contract exempt the Petersens.

In interpreting a treaty, its plain meaning controls unless such meaning effects a result inconsistent with the intent or expectations of its signatories. Chan v. Korean Airlines, Ltd. (1989) 490 U.S. 122, 135 n.5; In re Hogan (1986) 187 Cal.App.3d 819, 823. The Vienna Convention on the Law of Treaties (which is recognized by the US as a codification of customary international law although it has not been adopted by the US) is in accord and states that "a treaty shall be interpreted in good faith accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose." Id. Art. 31 . . . The Supremacy clause requires adherence to federal construction of the international law. United States v. Curtiss-Wright Corp. (1935) 299 U.S. 304.

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations

> between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under and the other enlarging it, the more liberal construction is to be performed.

United States v. County of Arlington (1983) 702 F.2d 485, 488, n.8. "In resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight." Id. at 488, n.5.

The object and purpose of the Vienna Treaty of 1963 is apparent from its introductory language: "Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security and the promotion of friendly relations among nations, . . . [we] have agreed as follows: . . .". As a starting point, this court must assume that inclusion of Article 32, which exempts consular property of foreign governments from local taxation, was intended to advance the treaty's stated purpose, i.e., international comity and regard for another State's sovereignty. In addition, the Courts have recognized the practical reality behind such exemptions. Generally, "it would be difficult if not impossible to enforce the collection of any tax levied against a friendly foreign government if the latter were not disposed to pay it." Republic of Argentina v. City of New York (1969) 25 N.Y.2d 252, 261. Concededly, here, enforcement is not an issue, as the deeds cannot be recorded until the transfer taxes are paid. The municipality holds all of the cards. However, the principles of comity and sovereignty support a "more fundamental reason which prevents a municipality from levying a tax on the property of a foreign nation using it in its governmental capacity. The same respect for the 'perfect equality and absolute independence of sovereigns' (citations omitted), which exempts a nation and its property from the interference of another state's judicial process, also demands that it be immune from any obligation to support the functioning of another government through the payment of taxes." Id. at 263. An exaction of taxes

presupposes superior political authority "and there is a general acceptance of the view that such tribute is not eligible, consistently with the principles of the law of nations." Id. at 263 (citations omitted). To require, as defendants argue here, the non-exempt purchaser of the foreign state's property to pay the transfer tax is analogous to the imposition of a lien on the property, which indirectly attempts to enforce the law of the municipality over the property of the foreign state. See Id. at 262. Both methods of enforcing the tax adversely affect the price of the property and interfere with the foreign state's property. The foreign state is hampered in the sale of its property in that the requisite transfer documents cannot be recorded until the tax is paid. The payment of the transfer tax, in the case of a $10 million dollar property, is not an insignificant sum and clearly encumbers the sale price.

Yet, defendants point to subsection (2) as authority for allowing the municipality to collect the transfer tax from the non-exempt purchaser in a sale from a foreign state. As a broad application of that subsection appears to "effect a result inconsistent with the intent or expectations of its signatories", (See Chan v. Korea Airlines, Ltd., supra at 135 n.5; In re Hagan (1986) 167 Cal.App.3d 819, 823), the court looks to the drafting history, the intent of the signatories and the opinion of the political branch. The notes of the Eleventh Meeting on the draft articles related to Article 31 (Exemption from taxation of consular premises) record the statement of the French delegate as noting for the record "that the unanimous view of the meeting was that paragraph 1 of article 31 should be interpreted as including exemption from property transfer taxes" and according to the notes "It was so agreed." (Apparently Article 31 was renumbered 32.) The message of the President of the United States to the Senate transmitting the treaty for ratification includes a report from the State Department and the United States delegation to the treaty conference. The report of the delegation recites that Article 32 "exempts from real estate taxes the consular premises of which the Sending State is the owner or lessee." The report notes that the language exempting "consular premises" was substituted for an exemption of the "sending State" to include a broader category of taxes levied against property as opposed to persons. Significantly, it further notes that the second

paragraph of Article 32 "contains the qualification that where the premises are leased by the sending State and here under local law the owner rather than the tenant is obligated to pay the tax there is no exemption in favor of the owner." The above-referenced sources support the position of the Foreign Ministry that the exclusion applies to the transfer tax here and the subsection (2) caveat was intended to apply where the premises were leased so as not to exempt the landlord from the payment of real estate taxes. To apply subsection (2) to the transfer tax here would effect a result inconsistent with the principles of comity and sovereignty and the intent of the signatories to the treaty.

2. Service of Process

a. On visiting foreign officials

(1) Wei Ye v. Jiang Zemin

In *Wei Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir. 2004), discussed in B.1. *supra*, the Seventh Circuit concluded that it was appropriate to defer to the decision of the "Executive Branch . . . that service of process by the appellants on President Jiang in order to reach an intended co-defendant . . . could frustrate this Nation's diplomatic objectives," as excerpted below. As noted above, the co-defendant, the Falun Gong Control Office, ("Office 6/10") was founded by President Jiang as part of the Party's apparatus. *See also Digest 2002* at 585–95, *Digest 2003* at 564–67.

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* * * *

C. *Service of Process on President Jiang to Reach Third Parties*

We turn next to Office 6/10. The appellants maintain that service on Office 6/10 was complete when President Jiang was served during his stay in Chicago. As recounted above, the United States argues that President Jiang's immunity extends to service aimed not at him, but at a third party.

The district court rejected the United States' immunity argument but, nonetheless, held that service on President Jiang was insufficient to reach Office 6/10 because the appellants had provided only conclusory evidence that President Jiang was, at the time of service, an officer or agent of Office 6/10. The district court also held that "even if Jiang was an agent or officer of Office 6/10 and thus capable of receiving service on its behalf, such service was insufficient to confer personal jurisdiction over Office 6/10 because the Office is not subject to the jurisdiction of Illinois courts."

Although the district court reached the correct result, it erred when it rejected the United States' argument concerning the scope of President Jiang's immunity. Because the Executive Branch has recognized President Jiang's immunity from suit, President Jiang could not be used as an involuntary agent of the appellants to effect service on Office 6/10. We need not therefore consider whether President Jiang was acting as an agent or officer of Office 6/10 or whether the district court had personal jurisdiction over Office 6/10.

We agree with the Executive Branch that its power to recognize the immunity of a foreign head of state includes the power to preclude service of process in that same suit on the head of state even where that service is intended to reach third parties.

Recognizing the immunity of a head of state and precluding service of process on a head of state are motivated by the same concern for the effective conduct of this nation's foreign affairs. As emphasized above, this responsibility is left to the political branches of this government. The Executive Branch has represented to this court that permitting service of process is often viewed by foreign governments and their heads of state "as an affront to the dignity of both the leader and the state." The Executive Branch has also indicated that "the potential for insult is the same, regardless of whether the service relates to the visiting head of state himself, or to service on the visiting leader in some purported representational or agency capacity." Finally, the Executive Branch has indicated that "such attacks on the dignity of a visiting head of state can easily frustrate our President's ability to reach this Nation's diplomatic objectives. . . ." The deference we extend the Executive Branch with regard to its determination of immunity, see pages 8–13 *supra*, is equally appropriate here. The Executive Branch is better

equipped than this court or the district court to assess the consequences for our foreign policy of permitting service of process on visiting heads of state, and it is the Executive Branch in its dealings with China that will confront, in the first instance, the consequences of that determination. . . .

Also important to our decision is the treatment accorded the President of the United States in his travels abroad. The Executive Branch has stated that it would be a "great offense if foreign states and their courts were to encourage process servers to hound our President when he is abroad to conduct important negotiations with his foreign counterparts." Such concerns must weigh heavily in our determination that service of process should not be permitted on foreign heads of state visiting this country in the circumstances of this case.

The district court pointed to three factors when it rejected the United States' argument. First, the district court reasoned that service on a head of state where that service is directed towards a third party does not implicate the justifications for inviolability and immunity to the same degree as service on a head of state when that service is directed towards the head of state himself. As we have just stated, however, we believe the Executive Branch is better equipped to make that determination.

Second, the district court noted that "the service provisions of the FSIA suggest that personal inviolability does not present an absolute bar to service in an agency capacity." The district court reasoned that "because the FSIA does not foreclose the possibility that a diplomat may receive process as an agent, the statute lends weight to the proposition that inviolability does not bar service under all circumstances."

We are not concerned here, however, with "all circumstances" or whether there is an "absolute bar" to service of process on a diplomat or a head of state. We are concerned only with a narrow set of circumstances—whether a head of state may be the subject of service directed at a third party where the United States has recognized that head of state's immunity from suit in the action the service is related to, and the Executive Branch has indicated that permitting service would have a deleterious effect on the conduct of foreign affairs. There may be circumstances where it

is permissible to serve a visiting head of state. For instance, the Executive Branch may not choose to recognize the immunity of a visiting head of state. In that case, service of process on the head of state would be permissible to reach the head of state himself and would, we suggest, be permissible where the service of process is also aimed at a third party (assuming, of course, an agency or similar relationship between the head of state and the third party).

The third factor cited by the district court is that "heads of state may not be immune in all situations." Citing *M'Faddon*'s discussion of the exceptions to the immunity of foreign heads of state, *see M'Faddon*, 11 U.S. at 145, the district court held that "these limited exceptions to immunity presuppose that a head of state is amenable to service of process, even in instances when his presence in court may be required. Service of process therefore cannot be seen under all circumstances to be an affront to a head of state's inviolability."

The district court is correct that there are exceptions to the immunity a head of state (as well as a foreign nation) is granted in this country's courts. As we have discussed above, however, and the district court recognized elsewhere in its opinion, the determination that these exceptions apply to a head of state is left to the Executive Branch. Likewise, the determination that service in the circumstances of this case would be detrimental to the Nation's foreign policy should be left to the Executive Branch.

* * * *

In footnote five, the court stated:

> We express some concern at the enlistment of agents of the Executive Branch, particularly those charged with providing security for President Jiang's visit, to effectuate service. Our concern is grounded in separation of powers principles as well as the policy ramifications inherent in requiring a Secret Service agent to serve simultaneously as a security guard for a foreign dignitary and a *de facto* process server. Given the outcome of this case we need not thoroughly explore the matter, however, as the problem should not recur.

The United States had argued in its *amicus* brief in support of affirmance, filed in the Seventh Circuit on March 5, 2004, that the district's service order was "fundamentally flawed because it required federal officers to serve process on a foreign leader they were charged with guarding," an issue the court did not explicitly reach. The full text of the U.S. brief, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

The Government appeared in the district court not simply to assert immunity for President Jiang, but also to challenge the validity of the district court's alternative service order, which constitutes an improper and dangerous precedent. By requiring federal security officers charged with the crucial task of guarding the safety of President Jiang also to serve him with process, the district court violated the United States' sovereign immunity and placed the Executive Branch in an intolerable position by seriously undermining the Government's ability to protect foreign leaders when they visit this country. That order was thus centrally flawed and service could not therefore be premised on this invalid order.

1. The district court order was erroneous because the courts have no authority to order federal officials to carry out tasks unless those officials have some legal duty to act. No such responsibility to act existed here, and the district court's order identified none.

Congress has granted the federal courts the power to compel Executive Branch officials to act if those officials owe a nondiscretionary duty to a particular plaintiff. See, e.g., 28 U.S.C. § 1361. . . . But the federal officers assigned to guard President Jiang plainly owed no nondiscretionary duty to the plaintiffs in this case to facilitate service of process on the very official they were charged with protecting from unwanted intrusions. Moreover, although courts also can remedy a federal official's violation of the law, see, . . . no such violation is shown here.

At the same time, it is equally clear that, absent a nondiscretionary duty or a violation of law, federal courts lack authority to compel Executive Branch to act, unless the United States has waived its sovereign immunity. . . .

* * * *

2. Even if courts had the power to require federal agents to serve foreign leaders they are guarding, critical public policy concerns demonstrate that the district court here plainly abused its discretion by ordering federal officials ensuring President Jiang's safety to act instead as the instruments for service of process on him.

The overriding responsibility of federal agents charged with protecting visiting dignitaries is to shield these foreign officials from danger. As the declaration of Peter E. Bergin from the State Department Bureau of Diplomatic Security makes clear, this responsibility would be grievously undermined were courts to require federal agents to effect service. *See* D. Ct. Docket No. 11, Attach. C (Decl. of Peter E. Bergin, Principal Deputy Assistant Secretary of State, Bureau of Diplomatic Security, and Dir. of the Diplomatic Security Serv., Dep't of State).

In order to effectively protect a visiting dignitary, federal agents must be able to obtain unfettered information from the dignitary, including a detailed itinerary, and must "enjoy the trust and confidence of the protectee." *Id.* ¶ 2. But "should foreign dignitaries come to view their United States Government and other protective personnel (including local police and private security) as potential process servers, they would likely withdraw from and otherwise limit cooperation with such personnel." *Id.* ¶ 5. This could prove "catastrophic," both to the agents' ability to protect the visiting official, and, consequently, to the United States' foreign relations. *Id.* at ¶ 6. "Should death or injury occur to a foreign leader during a visit to the United States, there would be lasting damage to our relations with that leader's government." *Id.*; *see also* D. Ct. Docket No. 11, Attach. D (Decl. of Donald A. Flynn, Assistant Dir. of the United States Secret Service for the Office of Protective Operations).

As Mr. Bergin's declaration makes clear, requiring a security official to serve a visiting dignitary seriously undermines the United States Government's ability to protect the dignitary, whether that agent is a federal or local officer. In addition, we note that, if a district court can order federal officials to serve process on visiting foreign heads of state, there would seem to be little reason why the court could not instead simply order the Secretary of State, or some other official with access to the foreign head of state to accomplish

this task. Obviously, such an order would be devastating to effective diplomacy. The special alternative service order issued here was comparably damaging because such orders will seriously hamstring the ability of the President to convince foreign leaders to travel to the United States for high-level consultations. Accordingly, the alternative service order here should not have been used as a basis for concluding that service could have been accomplished on President Jiang.

* * * *

(2) Tachiona v. Mugabe

In *Tachiona v. Mugabe*, 386 F.3d 205 (2d Cir. 2004), the U.S. Court of Appeals for the Second Circuit affirmed a district court decision dismissing claims against defendants Zimbabwean President Robert Mugabe and Foreign Minister Stan Mudenge. The Second Circuit reversed the lower court's entry of a default judgment against ZANU-PF, a private political party, however, which relied on a finding that ZANU-PF was properly served by serving legal process on Mugabe and Mudenge on its behalf. The service of process issue was appealed by the United States as intervenor. The appellate court first addressed the standing of the United States to appeal this decision and to defend against cross-appeals as to the immunity of Mugabe and Mudenge:

> We conclude that the asserted adverse effects of the district court's decision on the Government's interests in (1) ensuring that the United States does not violate its treaty obligations, and (2) guarding its authority to set the terms upon which foreign ambassadors are received, are sufficient to confer standing on the Government to appeal the district court's ruling upholding the service of process on Mugabe and Mudenge as agents for ZANU-PF. Assuming arguendo that the Government must also establish that it has standing to defend the district court's ruling concerning Mugabe and Mudenge's immunity

> from suit, *cf. Roeder*, 333 F.3d at 233, the two interests it has asserted suffice for that purpose as well; the cross-appeal, no less than the appeal, implicates the executive branch's constitutional powers and responsibilities in the arena of international relations. . . .
>
> Holding first that the district court was correct that the defendants were entitled to diplomatic immunity, as noted in C.3, *supra*, the Second Circuit reversed the lower court's decision on service of process on the basis of their inviolability, as excerpted below. At the end of 2004 a request for rehearing *en banc* filed by plaintiffs in the case November 29, 2004, was pending.

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* * * *

[T]he U.N. Convention on Privileges and Immunities extends to Mugabe and Mudenge the immunities that diplomats enjoy under the Vienna Convention. These include not only the immunity from legal process set forth in Article 31, but also the "inviolability" of the person:

> The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Vienna Convention, supra, 23 U.S.T. 3227, art. 29. The Government argues that the district court erred in holding that Article 29 of the Vienna Convention did not protect Mugabe and Mudenge from service of process as agents of process for ZANU-PF. *See Tachiona I*, 169 F. Supp. 2d at 309. We agree.

Although the term "inviolable" is not defined in the Vienna Convention, we have described it as "advisedly categorical" and "strong." *767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 298 (2d Cir. 1993) (discussing inviolability of mission premises under Article 22 of the Vienna Convention).

The text of Article 29 makes plain that a person entitled to diplomatic immunity may not be arrested or detained. The scope of inviolability, however, extends further; Article 29 also protects against "attack[s]" on the "person, freedom or dignity" of the diplomatic envoy. Vienna Convention, supra, 23 U.S.T. 3227, art. 29. For example, courts have held that the inviolability principle precludes service of process on a diplomat as agent of a foreign government, *see Hellenic Lines, Ltd. v. Moore*, 120 U.S. App. D.C. 288, 345 F.2d 978, 979–81 (D.C. Cir. 1965), and, as applied to missions, prevents a landlord from seeking to evict a diplomatic mission from its premises for non-payment of rent, *see 767 Third Ave. Assocs.*, 988 F.2d at 302.

* * * *

As the district court observed, the FSIA permits service of process on "an officer, a managing or general agent, or . . . any other agent authorized by appointment or by law to receive service of process in the United States" on behalf of an agency or instrumentality of a foreign state. 28 U.S.C. § 1608(b)(2). While it is true that, in the abstract, this category of persons could include agents or officers who are otherwise entitled to diplomatic immunity, we decline to construe the FSIA as a license to serve process on diplomatic and consular representatives, even as agents for private, non-immune entities. As a preliminary matter, § 1608(b)(2) permits personal service on an agent or officer of an agency or instrumentality of the foreign state (e.g., the president of a foreign bank) only; absent special agreement, the FSIA does not permit personal service on agents or officers of the foreign state itself. See 28 U.S.C. § 1608(a); *Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816, 819–21 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978). While one can perhaps envision a situation in which the officer of the agency or instrumentality (like the bank president) is also a state official entitled to diplomatic immunity, such a coincidence is not so likely as to warrant the presumption that Congress intended, when it sanctioned service of process on agents and officers of an agency or instrumentality of a foreign state, to also permit service of process on state officials entitled to diplomatic immunity. Indeed, the

legislative history of the FSIA demonstrates unequivocally that the Act was not intended to affect the immunity of "diplomatic or consular representatives." House Report, supra, at 21, 1976 U.S.C.C.A.N. at 6620. Congress expressly stated that persons entitled to diplomatic immunity would not be proper agents for service under the FSIA:

> It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd. v. Moore*, 120 U.S. App. D.C. 288, 345 F.2d 978 (D.C. Cir. 1965), or upon consular representatives, *Oster v. Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd*, 238 F.2d 400 (2d Cir. 1956).

House Report, supra, at 25, 1976 U.S.C.C.A.N. at 6624. In light of these unambiguous statements, it was error for the district court to rely on the service-of-process provision of the FSIA as circumstantial evidence that service of process on individuals entitled to diplomatic immunity would not violate international law.

We also disagree with the district court's interpretation of the interplay between Articles 29 and 31 of the Vienna Convention. . . . [T]he fact that service of process is allowed in order to initiate the actions permitted by the express exceptions to inviolability does not mean that service of process on a diplomat is otherwise permissible under Article 29. If anything, that fact indicates that service of process on a diplomat in any action not specified in Article 31 would be improper; *767 Third Avenue Associates* mandates that unless the Article 31 exceptions apply, the term "inviolable" must be accorded its fullest meaning, untempered by Article 31. *Id.* at 298–99.

In line with *767 Third Avenue Associates*, the State Department forcefully argues that Article 29 of the Vienna Convention should be interpreted to preclude service of process on persons entitled to diplomatic immunity, even where such persons are served on behalf of a non-immune, private entity. *See* J.A. at 336–39 (letters from the State Department to the Department of Justice). Not only is the Government's interpretation entitled to "great weight," *Sumitomo Shoji Am.*, 457 U.S. at 185, but it is also supported by authority and sound reasoning.

"Personal inviolability is of all the privileges and immunities of missions and diplomats the oldest established and the most universally recognised." Satow's Guide to Diplomatic Practice 120 (Lord Gore-Booth ed., 5th ed. 1979). It is "essential to ensure inviolability of the person of the ambassador in order to allow him to perform his functions without hindrance from the government of the receiving state, its officials and even private persons." Sen, A Diplomat's Handbook of International Law and Practice 107 (3d ed. 1988); *see also 767 Third Ave. Assocs.*, 988 F.2d at 298–99 (giving broad interpretation to the term "inviolable").

It was with the foregoing considerations in mind that the District of Columbia Circuit ruled, in the *Hellenic Lines* case, that service of process on a diplomat as agent for a foreign government violated international law. *See* 345 F.2d at 980–81. The court noted four ways in which service of process might impair the performance of diplomatic functions or otherwise impinge upon a diplomat's dignity. First, diplomats would feel "obliged to restrict [their] movements to avoid finding [themselves] in the presence of a process server." *Id.* at 980 n.5 (quoting submission of State Department). Second, they would be diverted from their duties "by the need to devote time and attention to ascertaining the legal consequences" of the service of process. *Id.* Third, the manner in which process is served could be "publicly embarrassing." *Id.* at 981 n.5. Finally, permitting service of process on foreign diplomats could be construed as a hostile act and, thus, could invite retaliatory practices in otherwise friendly countries. *Id.*

* * * *

Like the court in *Hellenic Lines*, we have no reason to doubt the Government's assertion that, as a practical matter, service of process on a person entitled to diplomatic immunity both interferes with that person's representative functions and constitutes an affront to his or her dignity. *See id.; see also* Vienna Convention, *supra*, 23 U.S.T. 3227, art. 29. In light of this court's own admonition that the inviolability principle be construed broadly, *see 767 Third Ave. Assocs.*, 988 F.2d at 298–99, we hold that Article 29 of the Vienna Convention, as applied to Mugabe and Mudenge through Article IV, section 11(g) of the U.N. Convention

on Privileges and Immunities, protected Mugabe and Mudenge from service of process as agents for ZANU-PF. Therefore, ZANU-PF was not properly served, and the claims against it should have been dismissed.

* * * *

b. On other foreign defendants

On July 30, 2004, the United States filed a Statement of Interest in *Abdullah K. Alkhuzai v. Ali Hasan Al-Majid Al-Tikriti*, Civil Action No. 03–1719 before the U.S. District Court for the Western District of Pennsylvania. The suit, brought under the Alien Tort Statute and the Torture Victims Protection Act against named Iraqi defendants, including Saddam Hussein, and the Republic of Iraq, sought compensatory and punitive damages for injuries allegedly suffered when the plaintiff was captured, imprisoned, and tortured by the former Iraqi regime of Saddam Hussein. All defendants were sued in their individual, not official, capacities. The plaintiff claimed to have effected service of process on the named Iraqi individuals because the Department of Defense and the Department of State accepted delivery of certified mail addressed to Secretaries Rumsfeld and Powell, allegedly as "agent[s] authorized to accept service of process" on behalf of the named defendants. Plaintiff also filed a Return of Service indicating that an official at the Office of the Coalition Provisional Authority in Baghdad had accepted delivery of certified mail. In its Statement of Interest, the United States refuted the assertion that service had been effected, as follows (footnotes omitted):

> Neither the now-dissolved Coalition Provisional Authority ("CPA") nor the Departments of State or Defense are authorized agents for service of process on the named defendants sued in their individual capacities. Certainly, neither agency was authorized "by appointment" to accept service on behalf of these defendants [as required under the Federal Rules of Civil Procedure]. Nor has plaintiff—who bears the burden of proving that proper service was

> effected—pointed to any source of law requiring these agencies to act as agents for the purposes of accepting service of process on foreign individuals when they are sued for civil damaged. . . .
>
> * * * *
>
> Because no official of the Federal Government is authorized to accept service of process on behalf of foreign defendants—in whatever capacity they might be sued—the service attempted in this case was improper. . . .

By unpublished order of the court dated September 1, 2004, the case was closed.

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

3. Location of Diplomatic and Consular Buildings in the United States

In *Appeal of Sheridan-Kalorama Neighborhood Council*, BZA Appeal No. 17086, the Board of Zoning Adjustment of the District of Columbia denied an appeal from the administrative decision of the General Counsel, Department of Consumer and Regulatory Affairs, allowing the transfer of a chancery from Jordan to Yemen without the approval of the Foreign Mission Board of Zoning Adjustment ("FMBZA"). The property in question had been used by Jordan as a chancery from 1958 until its transfer to the Republic of Yemen for use as a chancery in October 2001.

The BZA rejected the Department of State's preliminary challenge to the BZA's jurisdiction, in which the Department argued that the FMBZA had exclusive jurisdiction in the case because it pertained to a foreign mission. The BZA found that it had jurisdiction over this appeal because it was brought by a citizens group. The BZA denied the appeal, however, on the ground that, as urged by the Department of State, 22 U.S.C. § 4306(h)(2), was controlling in this transfer and that therefore no approval of the use of the property as a chancery was required. Section 4306(h)(2) provides:

> (h) Approval of Board of Zoning Adjustment or Zoning Commission not required. Approval by the Board of Zoning Adjustment or the Zoning Commission or, [with exception not relevant here] by any other agency or official is not required—
>
> * * * *
>
> (2) for continuing use of a chancery by a foreign mission to the extent that the chancery was being used by a foreign mission on the effective date of this section [October 1, 1982].

As stated by the Department of State in its Memorandum of Points and Authorities submitted in the case:

> The law itself is explicit and unambiguous. In simple English, it states that if a property was utilized for chancery purposes as of the date of the [Foreign Missions Act's ("FMA's")] enactment (October 1, 1982), that property may continue to be used for chancery purposes by any foreign government. . . . It further says that for one chancery to succeed another at such a location requires no official approval or other action on the part of the Board of Zoning Adjustment, the Zoning Commission or any other agency or official. The Department of State, charged by Congress with administering the FMA, has always understood that the law means what its plain words say, and has acted accordingly in its instructions to foreign missions wishing to use such properties. . . .

At the end of 2004 the BZA had not issued a written opinion in the case.

4. Bilateral Employment Agreements

In 2004 the Department of State initiated its Global Employment Strategy, a new approach to addressing the career aspirations of spouses and members of household of Foreign Service employees assigned to an overseas post.

The new program includes efforts to establish more bilateral work agreements with host governments, resulting in close to 90 such agreements at the end of 2004. The United States also has de facto work arrangements with approximately 50 additional countries. A fact sheet provided by the Department of State, Family Liaison Office, explains as follows concerning the two types of arrangements:

> To increase opportunities for employment in foreign countries for spouses of USG employees assigned to an Embassy or Consulate overseas, bilateral work agreements are established through a formal exchange of diplomatic notes between the United States and an individual country. Such agreements help expedite the work permit process for our spouses in the host country. And because these agreements are reciprocal, spouses of diplomats from that country currently on assignment in the United States can obtain work permits for employment on American soil.
>
> * * * *
>
> In countries where bilateral work agreements do not exist, spouses may still be able to obtain work permits. If a host country issues a work permit to a spouse of a USG employee assigned to that Mission overseas, then the precedent is established and the country is added to the list of de facto work arrangements. Then, on the basis of reciprocity, established by precedent, diplomatic spouses of that host country may apply for work permits in the United States.

One of the conditions that must be met for both agreements and de facto arrangements is that "working spouses give up only civil and administrative immunity and only for actions arising out of such employment and none other . . . in accordance with the standards of the Vienna Convention on Diplomatic Relations." The full text of the fact sheet and links to listings of bilateral work agreements and de facto work arrangements are available at *www.state.gov/m/dghr/flo/rsrcs/pubs/16261.htm*.

For spouses and other dependents, the bilateral agreements are preferable since they make available work authorization at the outset of job hunting rather than only after a job has been offered. The model bilateral agreement as proposed in negotiations by the United States during 2004 is excerpted below.

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* * * *

The Embassy of the United States of America proposes to the Government of _____ that, on a reciprocal basis, dependents of employees of the United States Government assigned to official duty in _____ and dependents of employees of the Government of _____ assigned to official duty in the United States be authorized to be employed in the receiving country.

For the purpose of this agreement, "dependents" shall mean the following members of the household: spouses; unmarried dependent children under 21 years of age; unmarried dependent children under 23 years of age who are in full-time attendance as students at a post-secondary educational institution; and unmarried children who are physically or mentally disabled.

* * * *

The United States Government and the Government of _____ confirm that the privileges and immunities of dependents who obtain employment under this agreement are governed either by the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as relevant. Dependents are responsible for payment of income and social security taxes on any remuneration received as a result of employment in the receiving state.

* * * *

Cross-references

U.S. sovereign immunity, **Chapter 6.G.6.a.(1) and (2)(v).**
Act of state, **Chapter 6.G.6.b.(ii).**
Privileges and immunities for arms control delegations in Geneva, **Chapter 18.B.2.b.**

CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Warsaw Convention: "Accident" as Used in Article 17

On February 24, 2004, the U.S. Supreme Court upheld a decision by the Ninth Circuit that a flight attendant's failure to act in circumstances resulting in the death of Dr. Hanson, an airline passenger on an international flight, constituted an "accident" as used in Article 17 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934), note following 49 U.S.C. § 40105. *Olympic Airways v. Husain*, 540 U.S. 644 (2004), *reh'g denied*, 124 S. Ct. 2065 (2004). As explained by the Supreme Court, when Dr. Hanson and his wife first learned that Olympic Airways allowed passengers to smoke on international flights, she requested and obtained seats away from the smoking section on the flight from the United States "[b]ecause Dr. Hanson had suffered from asthma and was sensitive to secondhand smoke." On the return flight from Athens, however, despite several requests from his wife, the flight attendant refused to move Dr. Hanson from a seat close to the smoking section. Several hours into the flight Dr. Hanson suffered a respiratory crisis and died. The U.S. *amicus* brief to the Supreme Court in the case supporting affirmance of the Ninth Circuit opinion is available at *www.usdoj.gov/osg/briefs/2003/3mer/1ami/2002-1348.mer.ami.html; see Digest 2003* at 589–96.

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Excerpts below from the Supreme Court's opinion explain the basis for the Court's holding (footnotes omitted).

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* * * *

We begin with the language of Article 17 of the Convention, which provides:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018.

In [*Air France v. Saks*, 470 U.S. 392 (1985)], the Court recognized that the text of the Convention does not define the term "accident" and that the context in which it is used is not "illuminating." 470 U.S., at 399, 84 L.Ed.2d 289, 105 S. Ct. 1338. The Court nevertheless discerned the meaning of the term "accident" from the Convention's text, structure, and history as well as from the subsequent conduct of the parties to the Convention.

Neither party here contests *Saks'* definition of the term "accident" under Article 17 of the Convention. Rather, the parties differ as to which *event* should be the focus of the "accident" inquiry. The Court's reasoning in *Saks* sheds light on whether the flight attendant's refusal to assist a passenger in a medical crisis is the proper focus of the "accident" inquiry.

* * * *

. . . [T]he Court held in *Saks* that an "accident" under Article 17 is "an unexpected or unusual event or happening that is external to the passenger," and not "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Id.*, at 405, 406, 84 L.Ed.2d 289, 105 S. Ct. 1338. The Court emphasized that the definition of "accident" "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id.*, at 405, 84 L.Ed.2d 289, 105 S. Ct. 1338. The Court

further contemplated that intentional conduct could fall within the "accident" definition under Article 17, an interpretation that comports with another provision of the Convention. As such, *Saks* correctly characterized the term "accident" as encompassing more than unintentional conduct.

The Court focused its analysis on determining "what causes can be considered accidents," and observed that Article 17 "embraces causes of injuries" that are "unexpected or unusual." *Id.*, at 404, 405, 84 L.Ed.2d 289, 105 S. Ct. 1338. The Court did not suggest that only one event could constitute the "accident," recognizing that "[a]ny injury is the product of a chain of causes." *Id.*, at 406, 84 L.Ed.2d 289, 105 S. Ct. 1338. Thus, for purposes of the "accident" inquiry, the Court stated that a plaintiff need only be able to prove that "some link in the chain was an unusual or unexpected event external to the passenger." *Ibid.*

* * * *

. . . [O]ther provisions of the Convention suggest that there is often no distinction between action and inaction on the issue of ultimate liability. For example, Article 25 provides that Article 22's liability cap does not apply in the event of "wilful misconduct or . . . such *default* on [the carrier's] part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." 49 Stat. 3020 (emphasis added). Because liability can be imposed for death or bodily injury only in the case of an Article 17 "accident" and Article 25 only lifts the caps once liability has been found, these provisions read together tend to show that inaction can give rise to liability. Moreover, Article 20(1) makes clear that the "due care" defense is unavailable when a carrier has *failed* to take "all necessary measures to avoid the damage." *Id.*, at 3019. These provisions suggest that an air carrier's inaction can be the basis for liability.

* * * *

For the foregoing reasons, we conclude that the conduct here constitutes an "accident" under Article 17 of the Warsaw Convention. Accordingly, the judgment of the Court of Appeals is affirmed.

2. Aviation Agreements

a. People's Republic of China

On July 24, 2004, the United States and China signed a protocol liberalizing their air services agreement. Protocol to the Agreement between the Government of the United States of America and the Government of the People's Republic of China Relating to Civil Air Transport, signed at Beijing. A press release issued by the U.S. Department of Transportation on June 18, the date on which the parties reached agreement, explained the significance of the protocol. *See www.dot.gov/affairs/dot10404.htm.*

The full text of the June 18 press release, excerpted below, is available at *www.dot.gov/affairs/dot09004.htm.*

U.S. Transportation Secretary Norman Y. Mineta today announced a landmark air services agreement between the United States and China that will more than double the number of U.S. airlines that may serve China and will permit a nearly five-fold increase in weekly flights between the two countries over the next six years. The agreement will also substantially increase the "doing business" freedoms of U.S. carriers in China, including the right for U.S. cargo airlines to establish hubs in China. The agreement was reached in Washington, D.C. after four rounds of talks starting last February.

* * * *

The last agreement to expand U.S.-China air services was concluded in April 1999, when each country's carriers were allowed to increase their weekly flights in the market from 27 to 54, and each side was allowed to designate one additional airline—for a total of four—to serve the market.

Today's agreement will allow five additional airlines from each country to serve the U.S.-China market. The United States may name one additional all-cargo airline, while China may name either a passenger or cargo airline, to start service later this year. The other

four new-entrant airlines may be either passenger or cargo carriers, with one new carrier entering the market in each of the years 2005, 2006, 2008 and 2010. United Airlines, Northwest Airlines, Federal Express and United Parcel Service currently serve China.

The agreement also will allow an additional 195 weekly flights for each side—111 by all-cargo carriers and 84 by passenger airlines —resulting in a total of 249 weekly flights at the end of a six-year phase-in period. A total of 14 of these flights will be available for new U.S. passenger services later this year.

The two sides also agreed to allow each country's carriers to serve any city in the other country. Currently, Chinese carriers are limited to 12 U.S. cities, and U.S. passenger carriers may fly to only five Chinese cities. The agreement also will permit unlimited code-sharing between U.S. and Chinese airlines, thus expanding on the current agreement, which allows code-sharing only to a limited number of cities.

The agreement also provides that when carriers establish cargo hubs in the other country, they will be afforded a high degree of operating flexibility, and expands charter opportunities beyond those provided by the existing agreement.

The two sides will resume talks in 2006 to review the aviation relationship and make further progress on liberalizing the agreement.

While the terms of the agreement take effect immediately, formal signing of the agreement is expected within the next month.

b. Indonesia

On July 26, 2004, the United States and Indonesia signed an open-skies air services agreement. Air Transport Agreement between the Government of the United States of America and the Government of the Republic of Indonesia, signed at Denpasar. A press release of that date stated that the agreement

> removes all restrictions on air services to, from and beyond each other's territory. As a result of the new agreement, the United States now enjoys Open-Skies relationships with 65 partners.

> The new agreement, which replaces an outdated agreement from the 1960s that provided only limited commercial opportunities, eliminates restrictions on how often carriers can fly, the kind of aircraft they can use, and the prices they can charge. In addition to both passenger and cargo services, the agreement covers scheduled and charter operations.

The full text of the press release is available at *www.dot.gov/affairs/dot10604.htm*.

c. Uruguay

A press release of October 21, 2004, announced the signing of an open skies air transport agreement with Uruguay. The agreement "modernizes U.S.-Uruguayan aviation relations by allowing airlines to make commercial decisions with minimal government intervention." *See www.state.gov/r/pa/prs/ps/2004/37317.htm*.

3. Violation of United States-Argentina Air Transport Agreement

On January 15, 2004, the U.S. Department of Transportation ("Department") issued a final order announcing countermeasures with respect to discriminatory user fees imposed on U.S. carriers at Buenos Aires International Airport ("Ezeiza"). Order 2004-1-15, *In the Matter of Aerolineas Argentinas, S.A.*, Docket OST-2003-15092-34. Four American carriers had complained that the fees paid by U.S. carriers were triple those paid by Aerolineas Argentinas, S.A. ("Aerolineas"), in violation of the United States-Argentina Air Transport Agreement. U.S. carriers were required to pay such fees in U.S. dollars or in pesos at the market rate (approximately 1-to-3), while an Argentine court order allowed Aerolineas to pay them in pesos at a 1-1 rate. The countermeasure, set forth in a tentative Department order dated November 25, 2003 (Order 2003-11-26), required Aerolineas

to "remit into a U.S. escrow account, on a per-flight basis, the difference between what it actually pays for services at the Buenos Aires airport and the higher amounts it would be paying if it were not benefiting from discriminatorily favorable treatment vis-à-vis U.S. carriers." The November 2003 order is excerpted below (most footnotes deleted). All orders in Docket OST-2003-15092 are available at *http://dms.dot.gov.*

* * * *

On May 1, 2003, American Airlines (American), Federal Express Corporation (FedEx), United Air Lines (United), and United Parcel Service (UPS) (joint complainants) filed a joint complaint under former section 2(b) of the International Air Transportation Fair Competitive Practices Act, as amended (49 U.S.C. 41310(d)), against the Government of Argentina and Aerolineas, Air Plus Argentina, S.A. (Air Plus), and Southern Winds, S.A. (Southern Winds). The joint complainants maintained that the Government of Argentina violated the Air Transport Agreement between the United States and Argentina by imposing unreasonable airport charges (for landing fees, parking, and air traffic control) at Buenos Aires International Airport (Aeropuerto Internacional Ministro Pistarini de Ezeiza—EZE)(Ezeiza) and requiring the joint complainants to pay airport charges approximately three times higher than those paid by Aerolineas, which had obtained judicial relief that permitted it to pay in pesos at the more favorable one-to-one exchange rate.[1] The joint complainants requested the Department to issue a show-cause order providing that, unless the Government of Argentina immediately ended the collection of discriminatory, unjust, and unreasonable airport charges at Ezeiza, the authority held by the Argentine carriers to serve the United States would be curtailed or suspended, or such other countermeasures as the Department found to be in the public interest would be placed in force.

[1] The exchange rate for international fights at Ezeiza is set in U.S. dollars or at pesos at the market exchange rate at the time of payment. At the time the complaint was filed, the value of the peso on the open market fell to approximately 3 Pesos to 1 USD. (See Order 2003-6-33 at 2)

By Order 2003-6-33, the Department found that the imposition of higher fees at Ezeiza airport on U.S. carriers than those paid by Aerolineas Argentinas constituted a violation of the Air Transport Agreement between the United States and the Republic of Argentina. The Department noted that the issue of user charges had been the subject of informal discussions for several months between the Governments of the United States and Argentina, and that the Department anticipated further discussions regarding user charges. In those circumstances, the Department deferred on the issue of countermeasures, noting that the IATFCPA [International Air Transportation Fair Competitive Practices Act] legislative approach favors, under prescribed parameters, negotiated resolution and that the public interest would be best served if we deferred action at that time on the issue of countermeasures while the negotiated process continued.

Subsequent to the issuance of our order, formal consultations were held between the United States and Argentina on the user charges paid by U.S. carriers serving Ezeiza airport. Those consultations did not prove successful. There has been no satisfactory resolution to the problems facing U.S. carriers serving Ezeiza; the Argentine carrier Aerolineas Argentinas continues to be permitted to pay lesser fees than those assessed on U.S. carriers serving the same airport. Furthermore, informal communications following the consultations offered no basis to conclude that a satisfactory resolution would be forthcoming.

* * * *

. . . [B]oth Aerolineas and the Government of Argentina acknowledge in their submissions that treatment of U.S. carriers and of Aerolineas is different. Although the Executive Branch argues that it is not responsible for and cannot alter a decision of the Argentine judiciary, nevertheless, both the Executive and the Judiciary are components of the Government of Argentina, and the Government of Argentina is a signatory to an agreement with the Government of the United States which states that "airlines shall not be required to pay charges higher than those paid by airlines of the charging Party."

. . . [W]e find that finalization of our tentative decision in Order 2003-10-18 is warranted and is in the public interest, and hereby impose and attach the following condition to the Foreign Air Carrier Permit of Aerolineas Argentinas, S.A.:

> Until further order of the Department, Aerolineas Argentinas S.A. must establish and remit into an escrow account with a U.S. Bank payments in the amounts and in the prescribed manner set forth by the U.S. Department of Transportation, in Docket OST-2003-15092.

This condition requires Aerolineas Argentinas, within 10 days of the effective date of this order, to set up an escrow account with a U.S. Bank and take certain other steps as prescribed in the Appendix to this order. Implementation of this escrow agreement is subject to approval in advance by the Department of Transportation, Office of International Aviation. The terms and conditions for escrow payment are set forth in the attached Appendix.

B. INTERNATIONAL BORDER CROSSINGS

On May 5, 2004, President George W. Bush issued Executive Order 13337, "Issuance of Permits with Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States." 69 Fed. Reg. 25,299 (May 5, 2004). The executive order was issued to

> amend Executive Order 11423 of August 16, 1968, as amended, and to further the policy of my Administration as stated in Executive Order 13212 of May 18, 2001, as amended, to expedite reviews of permits as necessary to accelerate the completion of energy production and transmission projects, and to provide a systematic method for evaluating and permitting the construction and maintenance of certain border crossings for land transportation, including motor and rail vehicles, that do not require construction or maintenance of facilities

> connecting the United States with a foreign country, while maintaining safety, public health, and environmental protections. . . .

Section one of the order "designate[s] and empower[s] [the Secretary of State] to receive all applications for Presidential permits, as referred to in Executive Order 11423, as amended, for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country." Most importantly, the order establishes updated and expedited procedures for the processing of such applications, in accord with the President's energy policy under Executive Order 13212.

Prior to Executive Order 13337, Presidential permits issued by the State Department under Executive Order 11423 were only required for bridges (to the extent that Congressional authorization was not required) and "facilities" of various kinds (pipelines, monorails, etc.). Executive Order 13337 requires State Department-issued Presidential permits for "border crossings for land transportation, including motor or rail vehicles, to or from a foreign country, whether or not in conjunction with the facilities" previously covered by Executive Order 11423. The new procedures facilitate control and coordination of the process for approval of such land border crossings, both within the United States Government and with foreign countries, and provide continuing authority (through any permit issued) to oversee the operation and maintenance of such crossings.

C. NORTH AMERICAN FREE TRADE AGREEMENT

Information and documentation concerning claims under NAFTA Chapter 11 is made available online by the Office of International Claims and Investment Disputes, Office of the Legal Adviser, U.S. Department of State, at *www.state.gov/s/*

l/c3439.htm. Selected cases reflecting U.S. practice are discussed below. This includes cases against the United States and against Mexico, but none of those pending against Canada in 2004.

1. Chapter Eleven Claims Against the United States

a. Loewen Group, Inc. and Raymond L. Loewen v. United States

On September 13, 2004, the NAFTA tribunal considering *Loewen Group, Inc. and Raymond L. Loewen v. United States* issued its Decision on Respondent's Request for a Supplementary Decision. The United States had originally requested the supplementary decision on August 11, 2003, stating:

> Although the reasoning of the Tribunal's Award disposes of all of the claims in the case—and the operative part of the Award dismisses the claims of both Claimants "in their entirety"—the Award does not expressly recite its disposition of Raymond Loewen's Article 1116 claims. To avoid any doubt on the subject, the United States respectfully requests that the Tribunal issue a supplementary decision clarifying its disposition of that claim.

As explained in the September 13 decision, Raymond Loewen in response took the position that the tribunal had not decided his Article 1116 claim and that it was obligated to render a supplementary decision. The tribunal denied the request by both parties because "the dismissal of all the claims 'in their entirety' following the examination of the merits was necessarily a resolution of the art. 1116 claim."

On December 13, 2004, Raymond Loewen filed in the District Court for the District of Columbia notice of a petition to vacate the tribunal's award. The arbitration is discussed at *Digest 2002* at 623–42 and *Digest 2003* at 610–15. Filings and pleadings are available at *www.state.gov/s/l/c3755.htm*.

b. Methanex Corporation v. United States

Methanex, a Canadian marketer and distributor of methanol, submitted a claim to arbitration under the UNCITRAL Arbitration Rules on its own behalf and on behalf of its investments for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE. Methanol is an ingredient used to manufacture MTBE. The United States denied that the tribunal has jurisdiction over the claims and that any of the alleged measures violated the NAFTA. *See Digest 2001* at 574–611, *Digest 2002* at 616–23, and *Digest 2003* at 615–36.

During 2004 the United States completed its submissions in *Methanex Corporation v. United States*. A hearing in *Methanex* was held from June 7–18, 2004. In July and August the United States and Methanex filed submissions on costs pursuant to an order of the tribunal. A decision in the case was pending at the end of 2004. Documents and hearing transcripts in the *Methanex* case are available at *www.state.gov/s/l/c5818.htm*.

(1) Rejoinder of the United States

On April 23, 2004, the United States filed its Rejoinder to Methanex's Reply to the U.S. Amended Statement of Defense, which had been submitted on February 19, 2004. As noted in the U.S. preliminary statement, the submission of the rejoinder "mark[ed] the completion of the evidentiary record in this case, subject only to cross-examination of witnesses. Each of the disputing parties has now submitted all of the evidence in support of its case-in-chief and all of its rebuttal evidence. . . . [R]eview of the record confirms that Methanex has not sustained its burden of proving the facts upon which it relies, or rebutting the United States' evidence. Methanex's claims are without factual or legal merit . . . [T]he evidence of record requires dismissal of Methanex's claims with prejudice."

Excerpts below from the U.S. rejoinder address: (1) the proximate cause standard in the NAFTA; (2) the national treatment standard in the NAFTA, including the inapplicability of GATT Article XX, and (3) the expropriation standard in the NAFTA, specifically the legality of non-discriminatory measures to protect the public health (most footnotes omitted). The full text of the rejoinder is available at *www.state.gov documents/organization/31977.pdf.*

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II. THE RECORD ESTABLISHES NO LOSS PROXIMATELY CAUSED BY THE BAN

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A. Methanex's Alleged Losses Are Too Remote And Speculative

117. There is no dispute between the parties as to the nature of the causal chain on which Methanex's claim depends. The Amended Statement of Defense established that Methanex's claim depends on the alleged effects of the ban on *suppliers to suppliers* to the parties regulated. Methanex's Reply offers neither evidence nor argument to suggest the contrary. Nor is there any dispute that, under established principles of international law, a claim based on an action's effects on a claimant's contractual counter-party is too remote to establish proximate cause.

118. The only contested issues of law on causation are: (i) whether Articles 1116 and 1117 incorporate the proximate cause standard or some lower, undefined standard; and (ii) whether Methanex's allegations of intentional harm exempt it from proving causation altogether. We address each of these issues in turn below.

1. Chapter Eleven Incorporates The Proximate Cause Standard

119. In its reply and rejoinder submissions on jurisdiction and its Amended Statement of Defense, the United States demonstrated the fallacies in Methanex's contention that "arising out of" in Articles 1116(1) and 1117(1) embodies a broad and undefined causation standard. Methanex simply ignores these arguments and restates the same baseless contentions it made in its counter-memorial on jurisdiction.

120. Notably, it does not address the fact that the municipal law decisions it cites concerning insurance contracts are irrelevant to a treaty governed by international law. Nor does it even attempt to distinguish the numerous authorities cited by the United States applying the proximate cause standard under similar, or even broader, treaty language (except to repeat its discredited argument that one of those authorities should be ignored because the case in which the treaty interpretation question was presented contained "bizarre" facts.) Methanex does not respond to the United States' arguments for a simple reason: there is no response.

121. Nor, critically, does Methanex take into account two important developments intervening since 2001 that undo its arguments. *First*, all three NAFTA Parties have now agreed, through their submissions to this Tribunal under Article 1128, that Articles 1116 and 1117 incorporate the proximate cause standard.[159] As the United States established in earlier submissions, Article 31(3)(a) of the Vienna Convention on the Law of Treaties requires that such a subsequent agreement of the parties to a treaty be taken into account by a tribunal interpreting the relevant treaty language.

122. If ever there was any doubt that Articles 1116 and 1117 incorporate the standard of proximate causation, the agreement of the NAFTA Parties on the subject dispels it.

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[159] *See* Mexico Fourth Article 1128 Submission ¶ 2 ("Mexico agrees with the United States' Amended Statement of Defense (at paragraphs 218–22) that Chapter Eleven incorporates a standard of proximate cause through the use of the phrase 'has incurred loss or damage by reason of, or arising out of' a Party's breach of one of [the] NAFTA provisions listed in Articles 1116 and 1117."); Canada Second Article 1128 Submission ¶ 47 ("The ordinary meaning of the words 'by reason of, or arising out of' establishes that there must be a clear and direct nexus between the breach and the loss or damage incurred."); *see also Pope & Talbot Inc. v. Canada, Counter-Memorial of Canada (Damages—Phase 3)*, dated Aug. 18, 2001 at 9–10 ("Due to Articles 1116 and 1117, only damages with a direct and causal relation to the breach found by the Tribunal are compensable. Article 1116 requires a clear and direct nexus between the breach and the loss by expressly stating that damages must be "by reason of, or arising out of" the breach. International law also requires that damages be the proximate, direct and immediate consequence of the breach.")

123. *Second*, the only other NAFTA Chapter Eleven tribunal to address the question contravenes Methanex's argument. Interpreting Articles 1116(1) and 1117(1), the tribunal in *S.D. Myers v. Canada* concluded that "the breach of the specific NAFTA provision must be the *proximate* cause of the harm."[161]

124. *Finally*, Methanex's contention that California *foresaw* harm to Methanex does not make its remote claims actionable. Even if there was competent evidence to support that allegation—and, as noted above, there is none—foreseeability is not the test of proximate cause applied by international tribunals.[164] As noted, holding democratic governments accountable for all foreseen consequences of their decision-making would have dire policy consequences. There is no evidence or reason to believe that the Parties intended to subject themselves to such consequences in consenting to investor-State arbitration.

2. Methanex's Intentional Harm Allegations Are Insufficient

125. Methanex's new contention that remote losses are recoverable merely because it has alleged intentional harm on the part of California is without merit. . . . [T]he evidentiary record is lacking on that score. . . .

126. *Second*, even if Methanex could support its intent allegations, it would not be relieved of the burden of proving losses proximately caused by the breach.

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[161] *S.D. Myers Inc. v. Canada* ¶ 140 (Second Partial Award) (Oct. 21, 2002) ("[D]amages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm.") (emphasis in original).

* * * *

[164] *See, e.g., S.D. Myers* ¶¶ 153–54 (Second Partial Award) (rejecting foreseeability test as a measure of contractual damages under municipal law); *see also Behring Int'l, Inc. v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 238, 271–72 (June 21, 1985) (reasonable forseeability is an *additional* jurisdictional requirement to proximate cause) (emphasis added).

127. *Finally*, Methanex's own authority suggests that intentional harm is relevant to the causation analysis (if at all) only where it is directed both at the claimant and at the specific harm alleged. . . . Methanex has not discharged that burden.

* * * *

III. THE RECORD ADMITS NO NATIONAL TREATMENT VIOLATION

148. In its Reply, Methanex abandons any attempt to prove the elements of a breach set out in the text of Article 1102. Article 1102 is clear: to establish a national treatment violation Methanex must prove that it or an investment has been accorded less favorable treatment than that accorded to U.S. investors and investments in like circumstances.

149. Because the record supports no such showing, Methanex invents a three-step analysis designed to shift the burden of proof to the United States to justify California's ban. Methanex's three-part "test," however, finds no support in the text of Article 1102 and cannot be reconciled with other relevant NAFTA provisions.

A. The Undisputed Facts Establish That Canadian-Owned Methanol Producers Received National Treatment

150. The uncontested evidence of record establishes the existence of a substantial U.S.-owned methanol industry in the territory of the United States. The undisputed facts also demonstrate that Methanex is in like circumstances with those U.S. investors and Methanex US and Methanex Fortier are in like circumstances with those U.S.-owned investments. The uncontested record establishes that, to the extent that the California measures accorded the methanol industry any treatment, they did not differentiate between methanol producers, marketers or investors on the basis of their nationality of ownership.

151. This record by itself is more than sufficient to establish that there was no breach of Article 1102 here. The record shows that California accorded Canadian-owned investments "treatment no less favorable than that it accords, in like circumstances, to investments of its own investors." Article 1102, by its plain terms, requires no more than this.

152. Methanex's argument in response—based on the observation that one need not be in identical circumstances to be considered to be "in like circumstances"—misses the mark. As the title of the Article, "National Treatment," and its text make clear, the function of the national treatment provision is to address discrimination on the basis of nationality of ownership of an investment.[204] The function of addressing nationality-based discrimination is served by comparing the treatment of the foreign investor to the treatment accorded to a domestic investor that is most similarly situated to it. In ideal circumstances, the foreign investor or foreign-owned investment should be compared to a domestic investor or domestically-owned investment that is like it in all relevant respects, but for nationality of ownership. When nationality is the only variable, such a comparison serves the Article's purpose of ascertaining whether the treatment accorded differed on the basis of nationality of ownership. In the words of the Government of Canada, expressed in its most recent Article 1128 submission, in a national treatment case, a tribunal ought to examine "an investor or investment where *all* the circumstances of the according of the treatment are 'like', *except* that the investor or investment is domestic."

153. In this case, the treatment accorded is precisely the same for foreign and domestic investors in identical circumstances. There is no differentiation on the basis of nationality of ownership and, thus, no discriminatory treatment. In terms of the ordinary meaning of Article 1102 in its context, "National Treatment" has been accorded in such a case and the "Party [has] accorded[ed] to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors. . . ."

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[204] *See* NAFTA art. 1102(1) ("Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors. . . ."); *id.* art. 1102(1) ("The objectives of this Agreement, as elaborated more specifically through its principles and rules, *including national treatment*. . . .") (emphasis added); *see also Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, ¶ 181 (Award) (Dec. 16, 2002) ("It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or 'by reason of nationality.'")(citation omitted).

154. By contrast, Methanex's approach, which would compare it and its investments to ethanol producers, does not accord with the function of Article 1102 or its ordinary meaning and context. The United States agrees that the phrase "in like circumstances" allows for a certain degree of flexibility in the national treatment analysis, such as where there is no identical domestically-owned counterpart to the foreign-owned investment. In such a case, a tribunal may look farther afield and expand the scope of domestically-owned comparators as long as they are similar enough to justify considering their circumstances to be "like" that of the foreign investor or investment. Where, however, there are substantial domestically-owned investments in identical circumstances, tribunals should not look farther afield for less similar comparators.

155. Accepting Methanex's approach would compel a tribunal to ignore the treatment accorded the identical domestic investor and investment and, instead, compare a foreign investor's treatment to the treatment accorded a less similar group that is in some respects arguably "like" the foreign investor. This reading of Article 1102 would prevent a NAFTA Party from according different treatment to distinct groups of its own nationals whenever an investor or investment of another NAFTA Party forms part of one of those groups. For example, in this case, such a reading would prevent the United States from according different treatment to domestically-owned methanol and domestically-owned ethanol producers. Such a reading does not accord with the function of Article 1102 as addressing nationality-based discrimination.

156. Another Chapter Eleven tribunal has rejected Methanex's approach, recognizing that such a reading would transform Article 1102 into a provision addressing treatment of unlike groups of domestic investors, and defeat the ability of the NAFTA Parties to adjust their regulation to take into consideration the different circumstances of similar but distinct national groups. In *Pope & Talbot v. Canada*, the U.S. owner of a softwood lumber producer located in British Columbia challenged Canada's imposition of export fees on softwood lumber exports to the United States from certain Canadian provinces, including British Columbia. The claimant argued, among other things, that it was in like circumstances with Canadian-owned lumber producers located in other

Canadian provinces that were not subject to the export fees. In dismissing the claimant's national treatment claim, the tribunal found that the claimant was not "in like circumstances" with the Canadian-owned lumber producers in non-fee provinces precisely because there were more than 500 Canadian-owned producers that, like claimant, were located in provinces where they were subject to the export fees. Similarly, here, where there are substantial domestically-owned investors and investments in precisely the same circumstances as Methanex and its investments, those investors and investments are appropriate comparators for a national treatment analysis.

157. Adopting Methanex's reading, in sum, would mean that it and its investments would receive *better* treatment than *all* U.S.-owned methanol producers and marketers. The treaty sanctions no such result. When compared with domestic investors and domestically-owned investments in like circumstances, the evidence demonstrates that Methanex and its investments were accorded national treatment.

B. Methanex Is Not In Like Circumstances With ADM

158. Methanex's argument that it should be deemed to be in like circumstances with ethanol producers and marketers because they allegedly "compete" with one another fails on the law and the facts in any event. As the Government of Canada recognizes, while a competitive relationship may be one factor to be taken into account in determining whether investors and investments are in like circumstances with one another, that factor is not determinative. Rather, account must be taken of all of the relevant circumstances, which will inevitably vary depending on the nature of the measure at issue.

159. For instance, regulations limiting business activities in certain environmentally sensitive areas or imposing additional limitations on emissions where air pollution is more severe will not *ipso facto* violate national treatment even though some of these regulations may be applied to some operations and not to other, competing operations. In those cases, direct competitors may be deemed not to be in like circumstances for the purpose of the measure at issue because of their operations' differing locations.

160. Thus, in *Feldman v. Mexico*—a Chapter Eleven case concerning a tax rebate available for manufacturers, but not resellers, of cigarettes—the tribunal rejected competition as determinative in an analysis of whether investments are "in like circumstances." Taking into account the nature of the measure at issue, the tribunal considered foreign resellers of Mexican cigarettes to be in like circumstances with domestic resellers of Mexican cigarettes, notwithstanding the fact that such resellers do, in fact, compete with cigarette manufacturers. The tribunal recognized that focusing exclusively on competition could impede States from enacting legitimate regulation and would not serve Article 1102's purpose of prohibiting discrimination *on the basis of nationality*.

161. The WTO likewise has eschewed relying on competition as the sole factor in determining whether products are "like." As noted in the United States' Amended Statement of Defense, the WTO Appellate Body reversed a panel's findings that cement-based products containing chrysotile asbestos fibres and cement-based products containing PVC fibres were like products. A primary reason given by the WTO Appellate Body in support of its determination was that the asbestos-containing products—but not their non-asbestos containing substitutes—had been demonstrated to pose risks to human health. Methanex's reliance on competition between companies as the sole factor for determining whether investments are in like circumstances is unsustainable.

162. Moreover, the *S.D. Myers* case, on which Methanex relies extensively, does not support its claim that it and its investments should be considered to be "in like circumstances" with ethanol manufacturers. The tribunal in that case found the claimant, a U.S. company that remediates PCB waste in the United States, to be in like circumstances with a Canadian company that remediates PCB waste in Canada.[212] There, however, it was undisputed that the claimant and the Canadian-owned comparator engaged in *precisely* the same business, *i.e.*, remediation of PCB waste and,

[212] *S.D. Myers v. Canada* ¶ 251 (Partial Award) (Nov. 13, 2000). As the United States noted in *ADF Group Inc. v. United States of America*, the *S.D. Myers* tribunal erred in comparing the treatment accorded to investments with that accorded to investors. That criticism, however, is immaterial to the point addressed in the text.

therefore, were direct competitors. The differences between the companies relevant to the tribunal's analysis were the location of the respective companies and the nationalities of their owners.

163. Here, by contrast, that is not the case. As the United States demonstrated in its Amended Statement of Defense and in Part I above, Methanex and its investments do not compete with ADM. Methanex Fortier is an idled factory that once produced methanol, and Methanex US is a marketing company whose sole function is to market methanol in the United States. Methanex's role as an investor in the United States is its alleged ownership and control of both Methanex Fortier and Methanex US. ADM, on the other hand, is an agricultural conglomerate that procures, transports, stores, processes and sells a wide-range of agricultural products, one of which is ethanol. ADM cannot be said to compete with an idled methanol factory or with a company whose sole purpose is to market methanol, which ADM does not produce. Nor can ADM be said to compete with the investor that owns either of these enterprises. In sum, Methanex's argument that it and its investments are "in like circumstances" with ADM because they compete is legally and factually without merit.

C. The GATT Analysis Advanced By Methanex Is Legally Irrelevant And Does Not Support Its Claim

164. As the United States demonstrated in its Amended Statement of Defense, the national treatment provision of Article 1102 addresses discrimination on the basis of the nationality of investors and their investments. The Article does not address discrimination based on the origin of goods. All three NAFTA Parties have now stated that they share this view, and concur that jurisprudence interpreting provisions governing the national treatment of *goods* in the GATT is inapposite in ascertaining whether an *investor* or an *investment* has been accorded less favorable treatment within the meaning of Article 1102 of the NAFTA.[214]

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[214] [Amended Statement of Defense ¶¶ 300–04]; *accord* Canada Fourth Article 1128 Submission ¶ 7 ("Canada disagrees with any interpretation [of Article 1102] that relies largely on authorities relating to [GATT] Article III. . . . The GATT 'like products' test is not the same as the 'in like circumstances' test in Article 1102."); *id.* n.3 ("[T]he decisions respecting Article III of the GATT 1994 and its predecessor have, at best, very limited

165. Such an agreement among all of the Parties to a treaty "shall be taken into account" in the interpretation of the meaning of the treaty's terms.[215] Thus, despite Methanex's reluctance "to take seriously" the United States' contention in this regard, there can no longer be any doubt that the NAFTA Parties did not intend GATT jurisprudence interpreting the phrase "like products" to govern the interpretation of the phrase "in like circumstances" in NAFTA Article 1102.

166. Despite its demonstrated inapplicability to NAFTA Chapter Eleven cases, Methanex continues to rely on GATT jurisprudence interpreting a different phrase in a different agreement. In its Amended Statement of Defense, the United States demonstrated that application of the GATT jurisprudence that Methanex relies upon would result in the conclusion that methanol and ethanol would *not* be considered like products. Methanex does not offer evidence to refute the United States' conclusions in this regard. Instead, and despite the WTO's admonition that in a "like products" analysis, *all* of the evidence must be taken into account,[219]

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application to the provisions of Chapter Eleven and certainly cannot be applied *mutatis mutandis*."); Mexico Fourth Article 1128 Submission ¶ 16 ("Mexico agrees with the U.S. submissions at paragraphs 300–304 of the Amended Statement of Defense."); *see also* IISD Amicus Submission ¶ 35 ("IISD does not agree with the broader viewpoint that trade law approaches can simply be transferred to investment law."); *id.* ¶ 36 ("[T]he differences [in the terms 'like products' and 'in like circumstances'] reflect the different nature of trade in goods as compared to the making of investments."); Bluewater Network, et al. Amici Submission ¶ 30 ("As the United States has rightly noted, [the phrase 'like products' as used in GATT] has a different meaning from 'like circumstances.'"); *id.* ¶ 35 (noting that WTO rules and decisions concerning a "least trade-restrictive" requirement are irrelevant to a NAFTA Article 1102 analysis).

[215] Vienna Convention art. 31(3)(a)–(b); PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 73 (1989) ("If the parties to a treaty agree on a common interpretation either by a formal treaty or otherwise,this interpretation acquires an authentic character and prevails over any other.").

* * * *

[219] European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R ¶ 102 (Mar. 12, 2001); *see also id.* ¶ 109.

Methanex focuses exclusively on one factor—end use—and incorrectly concludes that this factor favors its position. Review of the record on all four of the factors advanced by Methanex, however, establishes that methanol and ethanol would not be considered to be "like products" under the GATT.

* * * *

D. Methanex Has Not Proven "Less Favorable" Treatment

174. Not only has Methanex failed to meet its burden of demonstrating that it or its investments are in like circumstances with ethanol producers, Methanex has also failed to show that it or its investments have received any less favorable treatment that could constitute the basis for a national treatment violation. . . .

* * * *

E. GATT Article XX Does Not Shift The Burden Of Proof To The United States

177. Methanex's reliance on Article XX of the GATT is misplaced. NAFTA Article 2101(1) explicitly provides that GATT Article XX is incorporated into certain chapters of the NAFTA, including those governing trade in goods (Part Two), "*except* to the extent that a provision of that Part applies to . . . *investment*." Article 2101 does not incorporate GATT Article XX into Chapter Eleven, which is in Part Five of the NAFTA. If the NAFTA Parties had intended for GATT Article XX to apply to *investment*, there is every indication that they knew how to achieve that result. The NAFTA Parties did not, however. Under the clear terms of the treaty, GATT Article XX has no application to NAFTA Article 1102.

178. Nor do the authorities Methanex cites support the proposition that the United States bears the burden of proof in Article 1102 claims and that "exceptions to national treatment are narrowly construed." The case of *Ethyl Corporation v. Canada* was settled before any award on the merits was issued. That tribunal made no determinations regarding the legitimacy of the challenged regulation and propounded no view on whether a "narrow exception" for environmental measures exists under Article 1102. Nor did the *Metalclad* tribunal opine on NAFTA Article 1102: the award in that case addressed only NAFTA Articles

1105(1) and 1110. Finally, the *S.D. Myers v. Canada* case supports a conclusion opposite to that asserted by Methanex: the tribunal there found environmental impacts to be part of the "like circumstances" that an investor must prove, not a narrowly construed defense that the Party may assert, as Methanex contends.

179. In sum, contrary to Methanex's contention, it is not the United States' burden under Article 1102 to justify California's ban by "showing that the measures . . . implement valid environmental goals." And, Article 1102 certainly does not require the United States to bear the burden of demonstrating that the California ban does not "constitute a disguised restriction on international trade." Rather, it is Methanex that must shoulder the burden of demonstrating that it or its investments are in like circumstances with domestic investors and investments—taking into account *all* of the relevant circumstances, including environmental and public health impacts—and that they have received less favorable treatment than those domestic investors or investments. This Methanex has failed to do.

* * * *

V. METHANEX'S EXPROPRIATION CLAIM LACKS MERIT

190. Methanex fails to prove an investment expropriated by the California measures. As demonstrated below, no evidence in this case suggests an expropriation.

* * * *

B. The California Ban Is Not Expropriatory

194. There is agreement among the disputing parties that "as a general matter, States are not liable to compensate . . . for economic loss incurred as a result of a nondiscriminatory action to protect the public health."[256] This principle in public international law is not an exception that applies after an expropriation has been found

[256] Reply ¶ 208 (quoting Amended Statement of Defense ¶ 411 (internal quotations omitted)); *see also* Mexico Fourth Article 1128 Submission ¶ 13 (stating that Mexico agrees that Article 1110 "incorporates the principle that States generally are not liable to compensate aliens for economic loss resulting from non-discriminatory regulatory measures taken to protect the public interest, including human health."); Canada Fourth 1128 Submission

but, rather, is a recognition that certain actions, by their nature, do not engage State responsibility.[257]

195. Methanex errs, however, in denying that California's ban of MTBE in gasoline is a non-discriminatory action to protect public health. *First*, there is no merit to Methanex's assertion that the California ban is not a legitimate public health measure because

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¶ 14 ("At international law, expropriation does not result from *bona fide* regulation: a state is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure protecting legitimate public welfare objectives."); *Accord* IISD Amicus Submission ¶ 86 ("The initial formulation of the United States, which IISD submits is correct, leaves *bona fide* public health and welfare measures, traditionally understood as measures under the police powers of a state, *outside* the concept of an expropriation: they are not expropriations of any kind.").

[257] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 712, cmt. g (1987) ("A state is *not responsible* for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory, . . . and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.") (emphasis added); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 539 (1998) ("Cases in which expropriation is allowed to be *lawful* in the absence of compensation are within the narrow concept of public utility prevalent in *laissez-faire* economic systems, i.e. exercise of police power, health measures, and the like.") (emphasis added); Louis B. Sohn and R.R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens, Final Draft with Explanatory Notes*, art. 10(5) (1961), *reprinted in* F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974) ("An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results . . . from the action of the competent authorities of the State in the maintenance of public order, health, or morality; . . . *shall not be considered wrongful*, provided . . . it is not a clear and discriminatory violation of the law of the State concerned, [and] it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world. . . .") (emphasis added); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L., 307, 338 (1962) ("If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that *there has been no 'taking'* of property.") (emphasis added).

it addressed an environmental threat. The evidence in the record makes clear that California banned the use of MTBE in California gasoline because MTBE was contaminating the state's drinking water supply, rendering it unpotable. Methanex does not dispute that potable drinking water is critical to public health, and that protecting drinking water supplies is an essential function of government. The 1999 Executive Order's characterization of MTBE as "an environmental threat to groundwater and drinking water" is fully consistent with the ban's nature as a measure to protect the public health.

196. *Second*, there is no merit to Methanex's suggestion that because the ban was not implemented immediately it cannot be deemed a public health measure. When public health measures are implemented varies depending on both the nature of the risk and the attendant consequences of acting. As the 2002 Executive Order indicates, California's MTBE ban was made effective at the earliest possible date. An immediate ban would have substantially increased gasoline prices and severely harmed California's economy. Methanex offers no authority to support its suggestion that a State must act precipitously, even if doing so would imperil its economy, in order for a measure to be deemed for the public health. And, indeed, none of the authorities on the police power under international law before this Tribunal suggest otherwise.

197. Nor do the examples cited by Methanex of States responding to outbreaks of disease by slaughtering the infected animals support this contention. States indeed have slaughtered animals suspected of carrying disease within days of discovering the problem where there was a grave risk of infection—but where there was also a minimal risk of resulting starvation. By contrast, other actions with clear public health purposes—such as eliminating lead from gasoline and banning asbestos in the United States—have taken years to implement. Although the public health risks of lead and asbestos were well documented, it would have been infeasible to implement a ban of those products immediately after discovering their adverse health effects. The fact that certain actions may take longer than others to implement thus does not exclude their being public health measures.

* * * *

198. *Finally*, as demonstrated above, Methanex's argument that the California ban is discriminatory lacks foundation. California's ban of MTBE is a non-discriminatory regulatory action taken to protect the public health, which may not be deemed expropriatory.

(2) Exclusion of evidence

On May 18, 2004, the United States filed a Motion to Exclude Certain of Methanex's Evidence. Among other things, the United States stated that "several documents offered by Methanex were illegally copied from the private files of Richard Vind. Mr. Vind authorized neither the disclosure of these documents to Methanex nor the use of these documents in this arbitration." The United States argued that "Methanex's submission of documents illegally obtained from the private files of Richard Vind contravenes fundamental motions of fairness," contrary to Article 65(1) of the UNCITRAL arbitration rules. The text of the motion is available at *www.state.gov/documents/organization/32696.pdf.* The tribunal ruled on the motion orally on day 7 of the June 2004 hearings, upholding the U.S. challenge to the admissibility of the documents. The tribunal indicated it would give reasons for its order later, presumably at the time it renders its final award in the case. The transcript that includes the oral ruling is available at *www.state.gov/documents/organization/33714.pdf.*

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(3) Tribunal's authority to reconsider partial award

On March 30, 2004, the United States responded to an assertion by Methanex that the UNCITRAL Arbitration Rules authorize the tribunal to reconsider its First Partial Award in the case. Excerpts below from the U.S. submission, as requested by the tribunal's second procedural order of March 16, 2004, explain its view that "the UNCITRAL rules provide no

> authority for the Tribunal to reconsider" the award. The full text of the submission is available at *www.state.gov/documents/organization/31040.pdf*

* * * *

Contrary to Methanex's suggestion, Article 15(1) does not authorize the Tribunal to reconsider a partial award. That article reads as follows:

> *Subject to these Rule*s, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case. (fn. omitted)

* * * *

As its introductory clause indicates, Article 15(1) is a gap filling provision. It is the UNCITRAL rules that "govern the arbitration."[2] Where, however, the rules are silent—"[s]ubject to the[] Rules"—Article 15(1) allows for "'flexibility during the proceedings and reliance on the expertise of the arbitrators.'"[3]

Conversely, where other provisions of the UNCITRAL rules address a topic, Article 15(1) does not authorize deviation from those provisions. The Tribunal recognized this important limitation on the operation of Article 15(1) in its January 15, 2001 Decision on Petitions from Third Persons to Intervene as "Amici Curiae."[4] Methanex argued that the Tribunal should reject the request of the petitioners to attend oral hearings in the case, noting that Article 25(4) specifically addressed the subject.[5] The Tribunal

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[2] *Id.* art. 1(2) . . .

[3] JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 102 (1991) (quoting *travaux préparatoires* to rules, A/CN.9/112/Add. 1 (1975), 7 U.Y.B. at 172).

[4] *Methanex Corp. v. United States of America*, 13:3 WORLD TRADE & ARB. MAT'L 97 (June 2001).

[5] *See id.* at 115–16 ¶ 41.

agreed. It found that its authority under Article 15(1) did not extend to matters addressed by other provisions of the UNCITRAL rules: "The Tribunal must therefore apply Article 25(4); and it has no power (or inclination) to undermine the effect of its terms."[6]

Similarly, here specific provisions address the issue at hand. Most notably, Article 32(2) of the UNCITRAL rules provides in pertinent part as follows:

> The award shall be made in writing and shall be final and binding on the parties. (fn. omitted)

Article 32(2) can be seen as reflecting the general principle that a judgment of a court of competent jurisdiction is entitled to *res judicata* effect. Thus, similarly, an award by a competent tribunal is "final and binding" and is, therefore, necessarily, not one that can be reconsidered. Because the First Partial Award is such an award, it is final and binding and thus not subject to reconsideration. To borrow from the Tribunal's January 15, 2001 Decision, the Tribunal must apply Article 32(2)'s mandate that the award shall be final; it has no power to undermine the effect of that article's terms by invoking Article 15(1) to reconsider the award.

* * * *

Methanex's attempt to draw negative conclusions concerning the finality of the First Partial Award from the withdrawal of Mr. Christopher is without merit.

The UNCITRAL rules provide no exception to the finality of awards mandated by Article 32(2) for instances where an arbitrator withdraws after being challenged. It is notable that, although the rules modify the finality of awards to a limited extent by permitting interpretation, correction and supplementation of awards on specified grounds, none of those articles permits such action based on the withdrawal of an arbitrator after a challenge.[11] And, as the Tribunal itself has recognized, the rules' provision for interpretation

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[6] *Id.* at 116 ¶ 42; *see also id.* at 115 ¶ 40 . . .

[11] *See* UNCITRAL Arbitration Rules arts. 35, 36 & 37.

of the award does not allow reconsideration such as that requested by Methanex here.[12]

Moreover, the UNCITRAL rules do not permit the negative conclusion that Methanex urges. To the contrary, Article 11(3) specifies that the withdrawal of an arbitrator after challenge does *not* "imply acceptance of the validity of the grounds for the challenge." And the record before this Tribunal establishes no basis whatsoever to question Mr. Christopher's impartiality or independence in any event. (fn. omitted)

* * * *

(4) Amicus submissions

In a letter of March 26, 2004, the United States addressed the filing of amicus submissions in *Methanex.* The United States "respectfully submit[ted] that the Tribunal should grant the applications for leave to file non-disputing party submissions, dated March 9, 2004, made by the International Institute for Sustainable Development ('IISD') and Bluewater Network, Communities for a Better Environment, the Center for International Law, and Earthjustice (collectively, 'Applicants')." The U.S. letter, excerpted below (most footnotes omitted), is available in full at *www.state.gov/documents/organization 30962.pdf.*

* * * *

Section B of the Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation (the "FTC Statement"), which governs the acceptance of non-disputing party submissions in this case, provides in pertinent part as follows:

[12] *See* Letter from Tribunal to Parties (Sept. 25, 2002) at 3 ¶ 2 ("It is well settled that such a request [under Article 35] is limited to an interpretation of the award in the form of clarification; and that it cannot extend to a request to modify or annul the award or take the form of an appeal or review of the award."); *see also* UNCITRAL Arbitration Rules arts. 36–37 (providing for correction or supplementation of award on limited grounds).

> [T]he Tribunal will consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address matters within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the arbitration; and
>
> (d) there is a public interest in the subject matter of the arbitration.

The United States agrees with the Applicants that consideration of these four factors compels acceptance of their non-disputing party submissions.

First, the Applicants offer a perspective, particular knowledge or insight that is different from that of the disputing parties. The Applicants address the issues in this case from the perspective of non-governmental organizations with expertise in sustainable development and environmental protection. As the Applicants point out, their analyses of the issues differ from the arguments offered by the disputing parties. Thus, these submissions may assist the Tribunal in its determination of the issues related to the arbitration.

Second, the Applicants' submissions address matters within the scope of this dispute. Each addresses issues framed by the pleadings of the disputing parties.

Third, it is clear from the content of their submissions that the Applicants have stated a significant interest in the arbitration. IISD has expressed that its interest in the arbitration stems from its commitment to sustainable development and environmental protection. Bluewater Network, et al. share an interest in this arbitration based on their dedication to "strengthening health and environmental protections. . . ."

Finally, as the Tribunal has already recognized, "[t]here is undoubtedly a public interest in this arbitration." When considering the benefits and burdens of allowing non-disputing party

submissions in 2001, the Tribunal was already inclined to allow such submissions. The United States agrees with the IISD that "nothing has in any way diminished the legitimate public interest in this arbitration that the Tribunal recognized three years ago."

Each of the FTC factors thus weighs in favor of granting leave to the Applicants to file non-disputing party submissions in this case. The United States respectfully submits, for the foregoing reasons, that the Tribunal should grant the Applicants' submissions.

c. Tembec v. United States

On December 3, 2003, Tembec Inc., a Canadian forest products company, and its wholly-owned subsidiaries, Tembec Investments Inc. and Tembec Industries Inc., ("Tembec") submitted a claim to arbitration under the UNCITRAL Arbitration Rules on behalf of themselves and their U.S. enterprises. Tembec claims damages for alleged injuries resulting from certain U.S. antidumping, countervailing duty, and threat of material injury determinations on softwood lumber. The U.S. Department of Commerce had issued final antidumping and countervailing duty determinations on softwood lumber effective April 2, 2002. *See* 67 Fed. Reg. 15,545 (Apr. 2, 2002) and 67 Fed. Reg. 15,539 (Apr. 2, 2002). In May 2002 the U.S. International Trade Commission had issued a final determination that the U.S. softwood lumber industry was threatened with material injury by reason of imports from Canada of softwood lumber. USITC, *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414 & 731-TA-928 (Final), Pub. 3509 (May 2002). *See also* 67 Fed. Reg. 36,068 (May 22, 2002) and 67 Fed. Reg. 36,070 (May 22, 2002). Pursuant to those orders, Tembec's lumber has been subject to antidumping and countervailing duties on importation into the United States.

Tembec's notice of arbitration alleges that the United States, by virtue of these determinations, has breached NAFTA Chapter Eleven by not according it national treatment (Art. 1102) or most-favored nation treatment (Art. 1103); by not according it treatment in accordance with international

law (Art. 1105); and by expropriating its investment without compensation (Art. 1110). The notice claims damages of not less than $200 million.

On December 15, 2004, the United States filed its Statement of Defense, requesting that the tribunal dismiss Tembec's claims and require Tembec to bear all costs of the arbitration. The U.S. submission argued that (1) article 1901(3) bars Tembec's claims; (2) the measures at issue do not relate to Tembec as an investor or to Tembec's alleged investments in the United States; and (3) Tembec has acted inconsistently with its waiver of its rights to pursue other proceedings with respect to the same measures. The Statement of Defense, excerpted below, is available at *www.state.gov/s/l/c11070.htm*.

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* * * *

2. Article 1901(3), which is in Chapter Nineteen of the NAFTA, provides as follows:

Except for Article 2203 (Entry into Force), no provision of any other Chapter of [the NAFTA] shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law.

3. Tembec alleges in its Notice of Arbitration that certain preliminary and final antidumping and countervailing duty determinations made by the United States Department of Commerce and the International Trade Commission, as well as certain amendments to Title VII of the Tariff Act of 1930, violate NAFTA Articles 1102, 1103, 1105 and 1110.

4. Requiring the United States to arbitrate Tembec's claims under Chapter Eleven, and challenging the United States' administration of its antidumping and countervailing duty laws under the substantive obligations in that chapter, would "impos[e] obligations on [the United States] with respect to [its] antidumping law or countervailing duty law" in violation of Article 1901(3).

5. The United States did not consent to arbitrate Tembec's claims under the investmen chapter of the NAFTA. Tembec's claims are barred by Article 1901(3) and must therefore be dismissed.

* * * *

7. The only manner in which Tembec has been treated by the United States—and the only way the United States' antidumping and countervailing duty law has allegedly harmed Tembec—is through the imposition of antidumping and countervailing duties on Tembec's imports of softwood lumber into the United States. The measures complained of do not relate to Tembec as an investor in the United States. Nor do the measures relate to any of Tembec's alleged investments in the United States. Chapter Eleven, therefore, does not apply to Tembec's claims.

* * * *

9. Article 1121(1)(b) requires that claimants, as a condition precedent to the submission of a claim to arbitration under Chapter Eleven, waive their rights "to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116. . . ."

10. After providing written waivers on April 6, 2004, Tembec has continued to pursue claims with respect to the same final antidumping and countervailing duty determinations at issue in this arbitration before bi-national panels constituted under Chapter Nineteen of the NAFTA. Tembec thus has failed to comply with the waiver requirement in Article 1121 of the NAFTA and its claims must therefore be dismissed for lack of jurisdiction.

* * * *

2. Chapter Eleven Claims Against Mexico: *International Thunderbird Gaming Corporation v. United Mexican States*

International Thunderbird Gaming Corporation ("Thunderbird"), a Canadian company that owns and operates gaming and entertainment facilities, submitted a notice of arbitration under the UNCITRAL Arbitration Rules against Mexico, seeking damages for alleged injuries resulting from the regulation and closure of its gaming facilities by the Mexican

government agency that has jurisdiction over gaming activity and enforcement.

Thunderbird claims that Mexico's regulation and closure of its gaming facilities violate the national treatment obligation under Article 1102; the most-favored-nation treatment obligation under Article 1103; the Article 1104 obligation to accord the better of the treatment required under Articles 1102 and 1103; the obligation to provide treatment in accordance with international law under Article 1105(1); and the Article 1110 prohibition on expropriation. Thunderbird seeks damages of $100 million.

On May 21, 2004, the United States filed a submission under NAFTA Article 1128 addressing an issue identified by the tribunal, "whether an investor that submits a claim under Article 1117 of the NAFTA on behalf of its enterprise, but not under Article 1116 on behalf of itself, is precluded from obtaining compensation under Article 1110." As in all Article 1128 submissions, the United States made clear that "[n]o inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretations it offers below apply to the facts of this case." The full text of the U.S. submission, excerpted below, is available at *www.state.gov/s/l/c7666.htm*.

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Articles 1116 And 1117 Of The NAFTA

4. Articles 1116 and 1117 provide separate jurisdictional bases and serve distinct functions. Article 1116 provides for claims for loss or damage incurred by an investor of a Party. Article 1117 addresses claims for loss or damage to an enterprise in the territory of the respondent State that is owned or controlled by an investor.[1]

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[1] *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103–159, Vol. I (1993) at 145 ("Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor.").

5. The derivative right of action provided by Article 1117 is unavailable under customary international law for two reasons. First, it is well established that corporations have a legal existence separate from that of their shareholders. That a wrong done to the corporation also indirectly injures the shareholders does not in and of itself give the latter standing to bring a claim for compensation.[2]

6. Second, it is well established under customary international law that an international claim may not be asserted against a State on behalf of the State's own nationals.[3]

7. The NAFTA was drafted with this background in mind. The drafters of the NAFTA were aware of the difference between direct injury to an investor and injury to an investment.

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[2] In *Barcelona Traction*, for example, the International Court of Justice held that Belgium had no standing to bring a claim against Spain for the alleged expropriation of assets of a Canadian limited liability company, the shareholders of which were overwhelmingly Belgian. The Court held that Belgium, the State of the shareholders, had no right to take action on behalf of the corporation; if the corporation was injured, only Canada, the State of the corporation itself, could espouse the claim. *See Barcelona Traction*, 1970 I.C.J. 3, 34 ¶ 41; see also Eduardo Jimenez de Arechaga, Diplomatic *Protection of Shareholders in International Law*, 4 PHILLIPINE INT'L. L. J. 71,75 (1965) ("[I]f the acts complained of are directly aimed at the corporation as such and not directed against the shareholders' own rights, . . . then it is only the corporation as such which will be called upon to act in municipal law and the State of nationality of the corporation [is] the only one which may take up its case in the international plane."); Frenkel (U.S. v. Aus.) Tripartite Claims Commission: Final Report of the Commissioner 111 (U.S.-Aus.-Hung 1929).

[3] *See, e.g., Forets du Rhodope Central (Fond)* (Greece v. Bulg.), 3 R.I.A.A. 1389, 1421 (Mar. 29, 1933) . . . ("At the time of the occurrence of the wrongful act—the supposed confiscation of forests—[two of the persons on whose behalf the claim was presented] were indisputably nationals of the country that adopted the challenged measures. In these conditions, it would be impermissible, according to customary international law, to recognize in the claimant Government the right to present claims on their behalf for actionable damages, given that such damages were caused by their own Government.") (translation by counsel); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 483 (5th ed. 1998) (stating that in order for a claim to be admissible under international law, a claimant must "(a) hav[e] the nationality of the State by whom it is put forward, and (b) not hav[e] the nationality of the State against whom it is put forward.")

The drafters also recognized that investors often choose to carry out their investment activities in a State through a locally-incorporated entity. However, because of the customary international law principle of non-responsibility, customary international law remedies were not available to remedy injuries to such locally-incorporated entities.

8. To address this situation, the drafters of Chapter Eleven created a derivative right of action under Article 1117 that derogates from customary international law. The language of the article provides that it can be exercised only in cases where "*the enterprise* [not the investor] has incurred loss or damage by reason of, or arising out of, the breach."[4] Article 1117 thus addresses the situation where the alleged violation of Chapter Eleven causes loss or damage to a locally-organized enterprise.[5]

9. Without Article 1117, the investor would be denied a remedy where a locally-organized enterprise that it owns or controls has suffered an injury, because the enterprise itself does not have standing to bring a claim against the respondent State. The inclusion of Article 1117 in the NAFTA remedies this problem without eliminating the distinction between direct and derivative injuries or altering the general principle that the corporation, as opposed to its individual shareholders, may alone take action on behalf of the corporation.

Article 1117 Claims For Breach Of Articles 1105(1) Or 1110

10. Article 1105(1) of the NAFTA prescribes the minimum standard of treatment to be afforded to investments of investors of another Party. Under Article 1110, a Party may not expropriate

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[4] NAFTA art. 1117(1) (emphasis added).

[5] *See* Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 165, 177 (Judith H. Bello et al. eds., 1994) ("Article 1117 is intended to resolve the *Barcelona Traction* problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.").

an investment of an investor other than for a public purpose, on a non-discriminatory basis and in accordance with due process of law. Both articles address treatment of an "investment" of an investor of another Party, not the investor itself.

11. Article 1139 defines "investment" as an enterprise, certain interests in an enterprise, debt or equity securities of, or loans to, an enterprise, and various other interests.

12. As it pertains to Articles 1105(1) and 1110, Article 1116 provides a right of action for claims of loss to the investor based on the treatment of an investment that is owned or controlled, directly or indirectly, by the investor. Thus, for example, a claim that real property owned by the investor in the territory of the Party was expropriated can be submitted only under Article 1116.

13. Where an investor that is a shareholder in a locally-organized enterprise suffers a direct injury to its interest in the enterprise—for example, where the investor is denied its right to a declared dividend or its right to vote its shares—the investor has standing to bring a claim under Article 1116 in accordance with customary international law principles.

14. Finally, Article 1116 provides a right of action for claims by the investor that the entire enterprise has been expropriated and, therefore, its interest in the enterprise has been taken without compensation as well.

15. Where, however, the alleged loss or damage is suffered by the investor's locally-organized enterprise—for example, where an investment controlled by the enterprise is expropriated without compensation—Article 1117 provides a right of action for the injury to the local enterprise. In such an instance, each of the requirements of Article 1117(1) is met: (a) an investor of a Party asserts a claim (b) on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly (c) that the other Party has breached Section A—in the example, breaching Article 1110 by expropriating an investment indirectly controlled by the investor through the enterprise—and (d) the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

16. To read Article 1117 as precluding such a claim would be to provide no remedy at all for a breach of Section A of Chapter

Eleven whenever an investment is indirectly controlled by an investor through a locally-organized enterprise. Under such a reading, the investor would have no claim under Article 1116 because the injury would be to the enterprise and any loss to the investor would be derivative. Reading Article 1117 as precluding a claim on behalf of an enterprise for injury caused by expropriation of an investment controlled through that enterprise would, therefore, preclude any remedy under the investment chapter. The ordinary meaning of Article 1117, however, supports no such result.

D. WORLD TRADE ORGANIZATION

1. Dispute Settlement

A review of U.S. participation in WTO negotiations, implementation, and dispute settlement as of the end of 2004 is provided in Chapter II of the 2005 Trade Policy Agenda and 2004 Annual Report of the President of the United States on the Trade Agreements Program ("2004 Annual Report of the President"), available at *www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/Section_Index.html.* Panel and Appellate Body reports are available on the WTO website; *see www.wto.org/English/tratop_e/dispu_e/dispu_subjects_index_e.htm.*

Selected disputes are discussed below.

a. Disputes brought by the United States

(1) Chinese value-added tax on integrated circuits

On March 18, 2004, the United States requested consultations with the People's Republic of China regarding its value-added tax ("VAT") on integrated circuits ("ICs"). *China—Value-added tax on integrated circuits (WT/DS309).* On July 8, 2004, the United States and China announced that the dispute had been resolved and notified the WTO of their agreement on July 14, 2004. Excerpts below from the 2004

Annual Report at 105 describe the dispute. *See also* press statement of July 8, 2004, issued by USTR concerning the agreement, available at *www.ustr.gov/Document_Library/Press_Releases/2004/July/Section_Index.html.*

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. . . While China provides for a 17 percent VAT on ICs, enterprises in China are entitled to a partial refund of the VAT on ICs that they have produced. Moreover, China allows for a partial refund of the VAT for domestically-designed ICs that, because of technological limitations, are manufactured outside of China. As a result of the rebates, China appears to be according less favorable treatment to imported ICs than it accords to domestic ICs. China also appears to be providing for less favorable treatment of imports from one WTO Member than another and discriminating against services and service suppliers of other Members. The United States considers these measures to be inconsistent with China's obligations under Articles I and III of the GATT 1994, the Protocol on the Accession of the People's Republic of China, and Article XVII of the GATS. Consultations were held on April 27, 2004 in Geneva, and additional bilateral meetings were held in Washington and Beijing.

On July 14, 2004, the United States and China notified the WTO of their agreement to resolve the dispute. Effective immediately, China will not certify any new IC products or manufacturers for eligibility for VAT refunds, China will no longer offer VAT refunds that favor ICs designed in China, and, by April 1, 2005, China will stop providing VAT refunds on Chinese-produced ICs to current beneficiaries.

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(2) Japanese import restrictions on U.S. apples

On December 10, 2003, the WTO Dispute Settlement Body ("DSB") adopted panel and Appellate Body reports finding that Japanese restrictions on imports of apples from the United

States are not justified and violate Japan's WTO obligations. *Japan—Measures Affecting the Importation of Apples (DS245)*. *See Digest 2003* at 652–54. Excerpts below from the 2004 Annual Report at 107 describe implementation issues during 2004.

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. . . Japan notified its intention to implement the recommendations and rulings of the DSB on January 9, 2004. Japan and the United States agreed that the reasonable period of time for implementation [would] expire on June 30, 2004.

On expiration of the reasonable period of time, Japan proposed revised measures which made limited changes to its existing measures, and which continued to include an orchard inspection and a buffer zone. On July 19, 2004, the United States requested the establishment of a [Dispute Settlement Understanding ("DSU")] Article 21.5 compliance panel to evaluate Japan's revised measures. Simultaneously, the United States requested authorization to suspend concessions or other obligations under DSU Article 22.2 in an amount equal to $143.4 million. Japan objected to this amount on July 29, 2004, referring the matter to arbitration. The parties suspended the arbitration pending completion of the compliance proceeding. The compliance panel was established on July 30, 2004. The original three panelists agreed to serve on the compliance panel.

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(3) European Communities subsidies on large civil aircraft

On October 6, 2004, the United States requested consultations with the EC, as well as with Germany, France, the United Kingdom, and Spain, with respect to subsidies provided to Airbus, a manufacturer of large civil aircraft. *European Communities—Subsidies on large civil aircraft (DS316)*. As described in the 2004 Annual Report at 109–110:

> The United States alleged that such subsidies violated various provisions of the [Agreement on Subsidies and

Countervailing Measures ("SCM Agreement")], as well as Article XVI:1 of the GATT. Consultations were held on November 4, 2004.

See D.1.b.(5) below concerning EC request for consultations relating to alleged U.S. subsidies on the same date.

(4) Mexican treatment of telecommunications services

On August 17, 2000, the United States requested consultations with Mexico regarding its commitments and obligations under the General Agreement on Trade in Services ("GATS") with respect to basic and value-added telecommunications services. *Mexico—Measures affecting telecommunications services (DS204)*. On June 1, 2004, the DSB adopted a panel report agreeing with most of the U.S. claims and the two countries reached agreement on implementation. Excerpts below from the 2004 Annual Report at 108 describe the issues in the dispute.

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. . . The U.S. consultation request covered a number of key issues, including the Government of Mexico's failure to: (1) maintain effective disciplines over the former monopoly, Telmex, which is able to use its dominant position in the market to thwart competition; (2) ensure timely, cost-oriented interconnection that would permit competing carriers to connect to Telmex customers to provide local, long-distance, and international service; and (3) permit alternatives to an outmoded system of charging U.S. carriers above-cost rates for completing international calls into Mexico. Prior to such consultations, which were held on October 10, 2000, the Government of Mexico issued rules to regulate the anticompetitive practices of Telmex (Mexico's major telecommunications supplier) and announced significant reductions in long-distance interconnection rates for 2001. Nevertheless, given that Mexico still had not fully addressed U.S. concerns, particularly with respect to international telecommunications services, on

November 10, 2000, the United States filed a request for establishment of a panel as well as an additional request for consultations on Mexico's newly issued measures. Those consultations were held on January 16, 2001. The United States requested the establishment of a panel on March 8, 2002. The panel was established on April 17, 2002. . . .

On April 2, 2004, the panel released its final report, siding with the United States on most of the major claims in this dispute. Specifically, the panel found that: (1) Mexico breached its commitment to ensure that U.S. carriers can connect their international calls to Mexico's major supplier, Telmex, at cost-based rates; (2) Mexico breached its obligation to maintain appropriate measures to prevent its dominant carrier from engaging in anticompetitive practices, by granting Telmex the exclusive authority to negotiate the rate that all Mexican carriers charge U.S. companies to complete calls originating in the United States; and (3) Mexico breached its obligations to ensure that U.S. carriers operating within Mexico can lease lines from Mexican carriers (and thereby provide services on a resale basis). The panel concluded, however, that Mexico may prohibit U.S. carriers from using leased lines in Mexico to complete calls originating in the United States.

Mexico did not appeal the panel report, which the DSB adopted on June 1, 2004. At that DSB meeting, Mexico and the United States informed the DSB that they had reached agreement on the steps required to implement the panel report. Mexico and the United States subsequently agreed that the reasonable period of time for implementation of the DSB's recommendations and rulings will expire on July 1, 2005.

* * * *

b. Disputes brought against the United States

(1) Foreign sales corporation tax provisions

In response to a European Union challenge to the Foreign Sales Corporation ("FSC") provisions of U.S. tax law, in March 2000 the DSB adopted reports finding that the FSC tax

exemption was inconsistent with U.S. WTO obligations. *United States—Foreign Sales Corporation Tax Provisions (DS108)*. In January 2002 the DSB adopted reports finding that the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 ("ETI Act"), which repealed and replaced the FSC provisions, failed to bring the United States into compliance with its WTO obligations and in May the DSB authorized the EU to impose countermeasures on up to $4.043 billion of U.S. exports. On December 8, 2003, the Council of the European Union adopted Council Regulation (EC) No. 2193/2003, providing for the graduated imposition of sanctions authorized by the DSB, effective March 1, 2004. For further discussion of the history of the case, *see Digest 2001* at 653–63, *Digest 2002* at 677–93, and *Digest 2003* at 660–61. On October 22, 2004, the President signed the American Jobs Creation Act of 2004 ("AJCA").

As explained in the 2004 Annual Report at 111,

> The AJCA repealed the FSC/ETI regime and, consistent with standard legislative practice regarding major tax legislation, contained a transition provision and a "grandfather" provision for pre-existing binding contracts. On November 5, 2004, the EU requested consultations regarding the transition and grandfather provisions.

(2) U.S. Continued Dumping and Subsidy Offset Act of 2000

On December 21, 2000, eight countries and the European Union requested consultations with the United States regarding an amendment to the Tariff Act of 1930 that provided for transfer of import duties collected under U.S. antidumping and countervailing duty orders to the companies that filed or supported the antidumping and countervailing duty petitions. *United States—Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) (DS217 and DS234)*. Two additional countries requested consultations on the same matter in May 2001. On January 27, 2003, the DSB adopted the panel

and Appellate Body reports rejecting certain claims but finding that the CDSOA was an impermissible specific action against dumping and subsidies. The United States stated its intention to implement the DSB recommendations and rulings, and an arbitrator determined that a reasonable period of time for U.S. implementation would end December 27, 2003. S*ee Digest 2003* at 655–57. Subsequent developments in 2004 following the failure of the United States to enact legislation to meet its implementation obligations are described in excerpts below from the 2004 Annual Report at 116.

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On January 15, 2004, eight complaining parties (Brazil, Canada, Chile, EU, India, Japan, Korea, and Mexico) requested WTO authorization to retaliate. The remaining three complaining parties (Australia, Indonesia and Thailand) agreed to extend to December 27, 2004, the period of time in which the United States has to comply with the WTO rulings and recommendations in this dispute. On January 23, 2004, the United States objected to the requests from the eight complaining parties to retaliate, thereby referring the matter to arbitration. On August 31, 2004, the Arbitrators issued their awards in each of the eight arbitrations. They determined that each complaining party could retaliate, on a yearly basis, covering the total value of trade not exceeding, in U.S. dollars, the amount resulting from the following equation: amount of disbursements under CDSOA for the most recent year for which data are available relating to antidumping or countervailing duties paid on imports from each party at that time, as published by the U.S. authorities, multiplied by 0.72.

Based on requests from Brazil, the EU, India, Japan, Korea, Canada, and Mexico, on November 26, 2004, the DSB granted these Members authorization to suspend concessions or other obligations, as provided in DSU Article 22.7 and in the Decisions of the Arbitrators. The DSB granted Chile authorization to suspend concessions or other obligations on December 17, 2004.

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(3) Cotton subsidies

On September 8, 2004, a panel established in response to a request by Brazil pertaining to alleged subsidies related to upland cotton circulated its report. *United States—Subsidies on upland cotton (DS267). See Digest 2003* at 663. On October 18, 2004, the United States filed a notice of appeal. A hearing before the Appellate Body was held December 13–15, 2004. Excerpts below from the 2004 Annual Report at 120 describe the findings of the panel.*

* * * *

. . . The panel made some findings in favor of Brazil on certain of its claims and other findings in favor of the United States:

> The panel found that the "Peace Clause" in the WTO Agreement on Agriculture did not apply to a number of U.S.

* A USTR press release of September 8, 2004, on the ruling, available at *www.ustr.gov/Document_Library/Press_Releases/2004/September/WTO_Panel_Issues_Mixed_Verdict_in_Cotton_Case.html*, provided the following definitions of relevant terms:

> **Peace Clause**—Article 13 of the WTO Agreement on Agriculture is commonly referred to as the Peace Clause. Generally, as long as a WTO Member is meeting the criteria set out in Article 13, such as domestic support and export subsidy reduction commitments, other WTO Members are prohibited during the implementation period of the Agreement from challenging those domestic support or export subsidy measures through the WTO dispute settlement process.
>
> **Unscheduled commodities**—products for which the United States is not permitted to provide export subsidies because they are not set out in the export subsidy part of the final U.S. WTO schedule which the United States filed in 1994. "Scheduled commodities" are set out in the U.S. schedule, and the United States is permitted to provide export subsidies up to the scheduled level. Besides rice, U.S. "scheduled commodities" are wheat, skim milk powder, coarse grains, butter, bovine meat, other milk products, poultry meat, vegetable oils, live dairy cattle, cheese, eggs, and pigmeat.

The Peace Clause expired on December 31, 2003.

measures, including (1) domestic support measures and (2) export credit guarantees for "unscheduled commodities" and rice (a "scheduled commodity"). Therefore, Brazil could proceed with certain of its challenges.

The panel found that export credit guarantees for "unscheduled commodities" (such as cotton and soybeans) and for rice are prohibited export subsidies. However, the panel also found that Brazil had not demonstrated that the guarantees for other "scheduled commodities" exceeded U.S. WTO reduction commitments and therefore breached the Peace Clause. Further, Brazil had not demonstrated that the programs threaten to lead to circumvention of U.S. WTO reduction commitments for other "scheduled commodities" and for "unscheduled commodities" not currently receiving guarantees.

Some U.S. domestic support programs (i.e., marketing loan, counter-cyclical, market loss assistance, and Step 2 payments) were found to cause significant suppression of cotton prices in the world market in marketing years 1999–2002 causing serious prejudice to Brazil's interests. However, the panel found that other U.S. domestic support programs (i.e., production flexibility contract payments, direct payments, and crop insurance payments) did not cause serious prejudice to Brazil's interests because Brazil failed to show that these programs caused significant price suppression. The panel also found that Brazil failed to show that any U.S. program caused an increase in U.S. world market share for upland cotton constituting serious prejudice.

The panel did not reach Brazil's claim that U.S. domestic support programs threatened to cause serious prejudice to Brazil's interests in marketing years 2003–2007. The panel also did not reach Brazil's claim that U.S. domestic support programs per se cause serious prejudice in those years.

The panel also found that Brazil had failed to establish that FSC/ETI tax benefits for cotton exporters were prohibited export subsidies.

Finally, the panel found that Step 2 payments to exporters of cotton are prohibited export subsidies, not protected by the Peace Clause, and Step 2 payments to domestic users are prohibited import substitution subsidies because they were only made for U.S. cotton.

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(4) Gambling and betting services

On November 10, 2004, a panel established at the request of Antigua and Barbuda circulated its final report regarding Antigua and Barbuda's claim that U.S. federal, state, and territorial laws on gambling violate U.S. specific commitments under the GATS, as well as Articles VI, XI, XVI, and XVII of the GATS, to the extent that such laws prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS285). See Digest 2003* at 663–64. The 2004 Annual Report at 122 explained:

> The panel's final report, circulated on November 10, 2004, found that the United States breached Article XVI (Market Access) of the GATS by maintaining three U.S. federal laws (18 U.S.C. §§ 1084, 1952, and 1955) and certain statutes of Louisiana, Massachusetts, South Dakota, and Utah. It also found that these measures were not justified under exceptions in Article XIV of the GATS.

A statement by USTR Spokesman Richard Mills, released on the same date, provided the U.S. views of the flaws in the report's analysis and stated the U.S. intention to appeal tothe WTO Appellate Body. The statement is set forth below in full.

This panel report is deeply flawed. In 1995, the Clinton Administration clearly intended to exclude gambling from U.S. services commitments when the Uruguay Round negotiations were

completed. Throughout our history, the United States has had restrictions on gambling, like many other countries. Given these restrictions, it defies common sense that the United States would make a commitment to let international gambling operate within our borders. Antigua is arguing for a result that was never imagined, much less bargained for, in the Uruguay Round negotiations.

Separately, the panel inappropriately found that our regulations on gambling services were a prohibited quota based on a faulty new legal theory that places unwarranted restrictions on the ability of all WTO Members to regulate their services sector.

In addition, contrary to what the panel asserted, there is no obligation for WTO members to conduct international consultations before taking action to protect public morals and public order and enforce criminal laws. WTO members were already restricting gambling and other activities affecting public morals and public order long before they created the WTO. The WTO agreements confirmed the rights of Members to protect public morals and public order. Nothing in any WTO agreement requires Members to seek approval from their trading partners before exercising those rights. Indeed, on these grounds alone, this panel report should be of great concern to every single WTO member.

We will vigorously appeal this deeply flawed report to the WTO Appellate Body and remain confident in the basis for reversing this panel report.

(5) Subsidies on large civil aircraft

On October 6, 2004, the European Communities requested consultations related to alleged subsidies provided to U.S. producers of large civil aircraft. *United States—Subsidies on large civil aircraft (WT/DS317)*. As explained in the 2004 Annual Report, "[t]he EC alleged that such subsidies violated several provisions of the SCM Agreement on Subsidies and Countervailing Measures, as well as Article III:4 of the GATT. Consultations were held on November 5, 2004."

As noted in D.1.a.(3) *supra*, the United States requested consultations relating to alleged EC subsidies on the same date.

(6) 1916 Revenue Act

On December 3, 2004, the United States repealed § 801 of the act entitled "An Act to increase the revenue, and for other purposes," approved September 8, 1916 (15 U.S.C. § 72). Miscellaneous Trade and Technical Corrections Act of 2004, § 2006, Pub. L. No. 108–429, 118 Stat.2434 (2004). The repeal brought the United States into compliance with the WTO Appellate Body finding that the 1916 Act was inconsistent with WTO rules. *See United States—Antidumping Act of 1916, Report of the Appellate Body*, (DS136/14 or DS162/17). An excerpt below from the 2004 Annual Report at 111 describes the issues in that dispute.

Title VII of the Revenue Act of 1916 (15 U.S.C. §§ 71–74, entitled "Unfair Competition"), often referred to as the Antidumping Act of 1916, allows for private claims against, and criminal prosecutions of, parties that import or assist in importing goods into the United States at a price substantially less than the actual market value or wholesale price. . . . On January 29, 1999, the panel found that the 1916 Act is inconsistent with WTO rules because the specific intent requirement of the Act does not satisfy the material injury test required by the Antidumping Agreement. The panel also found that civil and criminal penalties in the 1916 Act go beyond the provisions of the Antidumping Agreement . . . The Appellate Body report, issued August 28, 2000, affirmed the panel reports. This ruling, however, has no effect on the U.S. antidumping law, as codified in the Tariff Act of 1930, as amended. The panel and Appellate Body reports were adopted by the DSB on September 26, 2000. . . .

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2. Implementation of China Textile Safeguard Mechanism

Quotas on textiles worldwide expired on January 1, 2005, for WTO member countries. As explained on the WTO website:

> The Agreement on Textiles and Clothing (ATC) and all restrictions thereunder terminated on January 1, 2005. The expiry of the ten-year transition period of ATC implementation means that trade in textile and clothing products is no longer subject to quotas under a special regime outside normal WTO/GATT rules but is now governed by the general rules and disciplines embodied in the multilateral trading system.

See www.wto.org/english/tratop_e/texti_e/texti_e.htm.

For imports of Chinese origin textile and apparel products, however, the Report of the Working Party on the Accession of China to the World Trade Organization established a textile and apparel safeguard mechanism for the United States and other WTO members that believe imports of such products are, due to market disruption, threatening to impede the orderly development of trade. Report of the Working Party on the Accession of China, paras. 241–42, 342, WT/MIN(01)/3 (Nov. 10, 2001).

In the United States, the interagency Committee for the Implementation of Textile Agreements ("CITA"), chaired by the U.S. Department of Commerce, issued a Federal Register notice on May 21, 2003, setting forth the procedures CITA would follow in considering requests from the public for such textile-specific safeguards. 68 Fed. Reg. 27,787 (May 21, 2003); *see also* clarification of procedures, 68 Fed. Reg. 49,440 (Aug. 18, 2003). During 2004 CITA published Federal Register notices soliciting public comments on requests for a number of textile categories in preparation for the expiration of quotas in 2005.

On December 1, 2004, the U.S. Association of Importers of Textiles and Apparel brought suit against the United States and named U.S. agencies, including CITA, asking the court to enjoin CITA from further accepting, considering, or otherwise proceeding with requests for safeguard measures based solely on the threat of market disruption posed by expected increases in imports of textiles from China (in advance of an actual increase in such imports). A December 30, 2004, decision granting plaintiff's motion for a preliminary

injunction described the controversy as excerpted below. *U.S. Ass'n of Importers of Textiles and Apparel v. United States*, 350 F. Supp. 2d 1342 (Ct. Int'l Trade 2004).

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From July to August 2004, CITA and U.S. Department of Commerce officials made statements to various publications indicating that the China Textile Safeguard Regulations "were intended for cases of actual market disruption rather than the threat of such disruption." BNA Daily Report for Executives, No. 141, China Textile Safeguards to Focus on Market Disruption Cases, Official Says, at A-28 (July 23, 2004). Then, in September 2004, CITA announced that "existing US regulations would allow safeguards based on threat of a possible surge in imports, rather than an actual surge." China Trade Extra, Aldonas Insists China Textile Regs Can Handle Import Threat Cases (Sept. 3, 2004). None of these statements were made in the Federal Register.

Since October 2004, CITA has accepted for consideration 12 requests for safeguards under the China Textile Safeguard Regulations which allege threat of market disruption (rather than actual market disruption) by Chinese textile imports ("threat-based requests"). See 69 Fed. Reg. 64,034 (Nov. 3, 2004); 69 Fed. Reg. 64,911 (Nov. 9, 2004); 69 Fed. Reg. 64,912 (Nov. 9, 2004); 69 Fed. Reg. 64,913 (Nov. 9, 2004); 69 Fed. Reg. 64,914 (Nov. 9, 2004); 69 Fed. Reg. 64,915 (Nov. 9, 2004); 69 Fed. Reg. 68,133 (Nov. 23, 2004); 69 Fed. Reg. 70,661 (Dec. 7, 2004); 69 Fed. Reg. 71,781 (Dec. 10, 2004); 69 Fed. Reg. 75,516 (Dec. 17, 2004); 69 Fed. Reg. 77,232 (Dec. 27, 2004); 69 Fed. Reg. 77,998 (Dec. 29, 2004). CITA has not yet acted on any of these requests.

Plaintiff commenced this action by filing a complaint on December 1, 2004. In its complaint, plaintiff alleges that its members made their business plans for 2005 in reliance on CITA's rules and public representations that it would not consider threat-based requests. However, given CITA's recent acceptance of threat-based requests, plaintiff's members have felt compelled to reconfigure their sourcing plans for 2005, since they fear that

China will be subject to extremely tight quota restrictions earlier than they had anticipated. As a result, plaintiff asks the Court to enjoin CITA from further accepting, considering, or otherwise proceeding with requests for safeguard measures based on a threat of market disruption.

> In its December 30 decision, the court granted plaintiff's motion for a preliminary injunction. In addition to finding that the plaintiff had "suffered, and will continue to suffer irreparable injury if the Court does not enjoin CITA from accepting, considering, or taking any further action on threat-based requests," that the balance of hardships weighed in favor of granting the preliminary injunction, and that plaintiff had demonstrated a likelihood of success on the merits, the court concluded: "In this case, the public interest would be served by granting the requested relief. It is clearly in the public interest that the trade laws be properly administered."

E. OTHER TRADE AND INVESTMENT AGREEMENTS

1. Free Trade Agreements

During 2004 a number of free trade agreements ("FTAs") were signed or entered into force, as discussed below.

a. United States-Australia FTA

The United States-Australia FTA was signed in Washington, D.C., by U.S. Trade Representative Zoellick and Australian Minister Mark Vaile on May 18, 2004. They met again in Santiago, Chile, on November 17, 2004 to finalize arrangements to bring the FTA into force on January 1, 2005. As explained in a USTR press release of that date, "[t]he United States had raised concerns with Australia that its FTA implementing legislation, which its Parliament passed in August 2004, did not fully implement

a number of the FTA commitments it made on intellectual property. Australia has committed to take steps, including legislative and regulatory changes, to address these issues." *See http://www.ustr.gov/assets/Document_Library/Press_Releases/2004/November/asset_upload_file236_6752.pdf.* The FTA entered into force January 1, 2005.

The full text of the agreement, notes exchanged at the meeting in Chile, fact sheets, and other related documents are available at *www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Implementation/Section_Index.html.*

b. United States-Morocco FTA

On June 15, 2004, U.S. Trade Representative Zoellick and Minister-Delegate of Foreign Affairs and Cooperation Taib Fassi-Fihri signed the United States-Morocco Free Trade Agreement at Washington, D.C. The final text of the FTA and fact sheets on various aspects of its provisions are available at *www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Section_Index.html.*

c. United States-Bahrain FTA

On September 14, 2004, U.S. Trade Representative Zoellick and Bahrain's Minister of Finance and National Economy Abdulla Hassan Saif signed the United States-Bahrain Free Trade Agreement. The full text of the agreement as well as fact sheets and related documents are available at *www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/Section_Index.html.*

d. Dominican Republic in CAFTA Agreement

On August 5, 2004, U.S. Trade Representative Zoellick, Dominican Republic Secretary for Industry and Commerce Sonia Guzman, and representatives of five Central American

nations signed the Dominican Republic—Central America—United States Free Trade Agreement ("CAFTA"). Excerpts below from a statement issued by the Office of the U.S. Trade Representative describe the agreement and provide a status summary of U.S. FTAs.

The full text of the agreement, fact sheets, and other related documents are available at *www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Section_Index.html.*

. . . [CAFTA] is an historic agreement that creates the second-largest free trade zone in Latin America for U.S. exports. The agreement will eliminate eighty percent of the tariffs immediately, with the remaining tariffs phased out over 10 years.

With this agreement, the Dominican Republic joins the Central American Free Trade Agreement signed earlier this year with Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. Trade ministers and senior officials of those countries attended the event and signed the agreement on behalf of their nations.

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Negotiations with the five Central American countries began in January 2003. . . .

[CAFTA] has been endorsed by every national business association and virtually every farm association. Zoellick notified Congress on August 4, 2003, of the Administration's intent to negotiate an FTA with the Dominican Republic. Negotiations were launched in January 2004 and concluded on March 15. President Bush formally notified Congress of his plan to sign an FTA with the Dominican Republic on March 25.

The [CAFTA] is a regional trade agreement among all seven signatories, and will contribute to the transformation of a region that was consumed in internal strife and border disputes just a decade ago but is now a successful regional economy with flourishing democracies. The Administration plans to submit a single legislative package to Congress to implement the new trade agreement with the five Central American countries and the Dominican Republic.

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The U.S. is also strengthening ties with the [CAFTA] countries by entering into an Environmental Cooperation Agreement. This agreement will promote environmental cooperation as a complement to the trade liberalization efforts.

* * * *

Background

The U.S. Congress recently approved free trade agreements with Australia and Morocco by wide margins (Australia passed the House 314 to 109 and the Senate 80 to 16; Morocco passed the House 323 to 99 and the Senate 85 to 13). In addition, Congress also recently passed the African Growth and Opportunity Act (AGOA) Acceleration Act, a duty-free preference program designed to promote economic development in sub-Saharan Africa[] by expanding access to the U.S. market.

Adding to the three FTAs ratified under this Administration (Jordan in 2001, Chile and Singapore in 2003), the United States has completed FTAs with nine countries—Australia, Bahrain, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Morocco and Nicaragua—over the past eight months. The [legislation implementing the] agreement with Australia was signed into law by President Bush earlier this week and the [legislation implementing the] agreement with Morocco was approved by Congress recently and is next in line to be signed into law.

Negotiations are under way with ten countries—Colombia, Ecuador, Peru, Panama, Thailand, and the five nations of the Southern African Customs Union (SACU). New and pending FTA partners, taken together, would constitute America's third largest export market and the sixth largest economy in the world. The United States has FTAs in force with Israel, Canada and Mexico (NAFTA), Jordan, Chile and Singapore.

The United States is working to open markets globally in the Doha World Trade Organization (WTO) negotiations. On July 31, WTO negotiations were moved ahead in Geneva with an agreement that puts the WTO on course to open markets for agriculture, goods and services. The agreed framework provides structure and direction to the ongoing trade talks, which are designed to promote global economic growth and development in developed

and developing countries. The U.S. is also working to open markets regionally with the Free Trade Area of the Americas (FTAA) negotiations.

2. Bilateral Investment Treaties

a. Bilateral Investment Treaty Program

On September 15, 2004, the Bureau of Economic and Business Affairs released a fact sheet explaining the U.S. Bilateral Investment Treaty ("BIT") Program. The United States currently has BITs in force with 39 countries. The fact sheet, excerpted below, contains a current list of all BITs signed by the United States. The full text is available at *www.state.gov/e/eb/rls/fs/22422.htm.*

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The BIT program's basic aims are to:

- Protect investment abroad in those countries where investors' rights are not already protected through existing agreements (such as modern treaties of friendship, commerce and navigation, or FTAs);
- Encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and
- Support the development of international law standards consistent with these objectives.

U.S. Bilateral Investment Treaties provide investments with six basic benefits, which we often refer to as the "core" BIT principles:

- First, our BITs provide that investors and their "covered investments" (that is, investments of a national or company of a Party in the territory of the other Party) are entitled to be treated as favorably as the host Party treats its own investors and their investments or investors and investments from any third country. The BIT generally affords the better

of national treatment (NT) or most favored nation (MFN) treatment for the full life cycle of investment, i.e., from its establishment or acquisition, through its management, operation and expansion, to its disposition.

- Second, BITs establish clear limits on the expropriation of investments and provide for payment of prompt, adequate and effective compensation when expropriation takes place.
- Third, BITs provide for the transferability of funds into and out of the host country without delay using a market rate of exchange. This covers all transfers related to a covered investment and creates a predictable environment guided by market forces.
- Fourth, the circumstances in which performance requirements can be imposed are limited. The performance requirement disciplines apply to specific circumstances that would require covered investments to adopt inefficient and trade distorting practices (e.g., local content requirements or export quotas) as a condition for establishment, acquisition, expansion, management, conduct, or operation.
- Fifth, BITs give investors from both Parties the right to submit an investment dispute with the treaty partner's government to international arbitration. There is no requirement to use that country's domestic courts.
- Sixth, BITs give covered investments the right to engage the top managerial personnel of their choice, regardless of nationality.

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b. New model BIT

In November 2004 the Department of State and the Office of the United States Trade Representative ("USTR"), working with other U.S. government agencies, completed an update of the U.S. model bilateral investment treaty ("BIT"). A notice posted November 22, 2004, on the State Department website described the new model as follows:

> The new model contains provisions developed by the Administration to address the investment negotiating objectives of the Bipartisan Trade Promotion Authority Act of 2002, which incorporated many of the principles from existing U.S. BITs. The model is substantively similar to the investment chapters of the free trade agreements the United States has concluded since the 2002 Act. The State Department and USTR consulted their respective advisory committees and relevant congressional committees in the development of the new model. The United States last updated its model BIT in 1994.

The notice and a link to the text of the 2004 model are available at *www.state.gov/e/eb/rls/othr/38602.htm*.

c. New BITs

On September 7, 2004, Department of State and USTR officials, together with their Uruguayan counterparts, concluded negotiation of a U.S.-Uruguay BIT, the first to be based on the new U.S. model text. *See www.ustr.gov/Document_Library/Press_Releases/2004/September/United_States,_Uruguay_Conclude_Bilateral_Investment_Treaty.html.*

The agreement was signed on October 25, 2004. The USTR press release of that date, excerpted below, is available at *www.ustr.gov/Document_Library/Press_Releases/2004/October United_States,_Uruguay_Sign_Bilateral_Investment_Treaty.html*. The text of the BIT is available at *www.state.gov/e/eb/tpp/2004*.

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Deputy United States Trade Representative Peter F. Allgeier and Uruguayan Minister of Economy and Finance Isaac Alfie today signed the United States—Uruguay Bilateral Investment Treaty (BIT) in Montevideo, Uruguay. Following the signing, Deputy USTR Allgeier met with Uruguayan President Jorge Batlle.

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"This BIT agreement is only one example of the numerous ways that the United States government is actively engaged in Latin America. We have just finished our 5th round of negotiations for a U.S.—Panama Free Trade Agreement, this week we begin the fifth round of a U.S.—Andean FTA and we have recently completed negotiations of an FTA with five Central American nations. The FTA with Chile, that went into effect earlier this year, has resulted in significant growth in trade with Chile and our decade long trade agreement with Mexico, under the North American Free Trade Agreement, continues to flourish. Taking into account FTAs in effect, completed or that are in ongoing negotiations, the United States' free trade efforts involve two-thirds of the Western Hemisphere's population who represent two-thirds of non-hemispheric U.S. GDP," continued Allgeier.

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Background

The United States and Uruguay announced their intention to negotiate a Bilateral Investment Treaty on November 18, 2003, at the conclusion of the Free Trade Area of the Americas Ministerial in Miami, Florida. The decision to negotiate this agreement sprang from the work of the United States-Uruguay Joint Commission on Trade and Investment. The Joint Commission was established following President Jorge Batlle's February 2002 visit to the White House. Since April 2002, the Commission has pursued an ambitious work plan designed to strengthen the U.S.—Uruguay trade relationship. This BIT was concluded on September 7, 2004 in Washington, DC.

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U.S. BITs level the playing field and ensure that U.S. investors are protected when they establish businesses in other countries. By safeguarding foreign subsidiaries of U.S. firms, BITs help promote new U.S. exports to the markets of BIT partners. BITs also protect the interests of average American investors, whose stock and bond portfolios often include stakes in foreign-invested firms.

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The United States currently has BITs in force with 39 countries, providing protection for thousands of U.S.-owned businesses and their U.S. investors. As treaties, BITs require the advice and consent of the Senate before they can enter into force. Responsibility for BIT policy and negotiations is shared by the Office of the U.S. Trade Representative and the Department of State.

On September 28, 2004, the United States and Pakistan announced their decision to negotiate a BIT, as noted in G.1.c. below. *See www.state.gov/e/eb/rls/prsrl/2004/36573.htm.*

d. BIT amendments

During 2004 six protocols amending BITs with acceding and candidate European Union countries entered into force.

Additional Protocol Between the United States of America and the Czech Republic to the Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment of October 22, 1991, S. Treaty Doc. No. 108–18 (2003), entered into force August 10, 2004;

Protocol between the Government of the United States of America and the Government of the Republic of Estonia to the Treaty for the Encouragement and Reciprocal Protection of Investment, S. Treaty Doc. No. 108–17 (2003), entered into force August 10, 2004;

Additional Protocol between the Government of the United States of America and the Government of the Republic of Latvia to the Treaty for the Encouragement and Reciprocal Protection of Investment of January 13, 1994, S. Treaty Doc. No. 108–20 (2003), entered into force July 14, 2004;

Additional Protocol between the Government of the United States of America and the Government of the Republic of Lithuania to the Treaty for the Encouragement and Reciprocal Protection of Investment of January 14, 1998, S. Treaty Doc. No. 108–21 (2003), entered into force July 13, 2004;

Additional Protocol between the United States of America and the Republic of Poland to the Treaty Concerning

Business and Economic Relations of March 21, 1990, S. Treaty Doc. No. 108–22 (2003), entered into force August 20, 2004; and

Additional Protocol Between the United States of America and the Slovak Republic to the Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment of October 22, 1991, S. Treaty Doc. No. 108–19 (2003), entered into force July 13, 2004.

The amendments, consistent with the Understanding Concerning Certain U.S. Bilateral Investment Treaties, signed by the United States, the European Commission, and eight acceding and candidate countries on September 2, 2003, preserve bilateral BITs with these countries. They do so, as explained in the report of the Department of State submitting one of the new instruments to the President for transmittal to the Senate for advice and consent, "by establishing a framework for avoiding or remedying present and possible future incompatibilities between our BITs with these eight countries and their future obligations of EU membership." Additional Protocol between the Government of the United States of America and the Government of Romania to the Treaty Concerning the Reciprocal Encouragement and Protection of Investment of May 28, 1992, S. Treaty Doc. No. 108–13 (2003). The Understanding and related BIT negotiations are discussed in *Digest 2003* at 687–97.

3. Customs Agreement

On June 17, 2004, the Senate Foreign Relations Committee held a hearing on four treaties to consider providing advice and consent to ratification. Three of the treaties, dealing with law-enforcement issues, are discussed in Chapter 3.B.1.

Excerpts below from testimony by Samuel M. Witten, Deputy Legal Adviser, U.S. Department of State, address the Protocol of Amendment to the International Convention

on the Simplification and Harmonization of Customs Procedures. *See also* S. Treaty Doc. No. 108–3 (2003) transmitting the protocol to the Senate for advice and a consent to ratification.

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. . . [T]he Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures . . . amends the original Convention done at Kyoto on May 18, 1973, which entered into force for the United States on January 28, 1984, and replaces the Annexes to the 1973 Convention with a General Annex and 10 Specific Annexes, all of which I will refer to as the "Revised Customs Convention."

Over the past two decades, changes in technology and patterns of international trade have made the original Convention outdated. The United States took an active role in negotiating these amendments in order to produce the kind of modernization and customs harmonization that is becoming increasingly necessary to U.S. exporters and other traders alike. The revision process also included participation by the private sector through various groups such as the International Chamber of Commerce, the International Federation of Customs Brokers Association and the International Express Couriers Conference. On June 26, 1999, after 4 years of study and deliberation, the members of the World Customs Organization adopted the Protocol in Brussels, Belgium.

The Revised Customs Convention aims to meet the needs of international trade and customs services through the simplification and harmonization of customs procedures. It responds to the modernization in business and administrative methods and to the growth of international trade, without compromising standards of customs control.

Accession to the Protocol by the United States would contribute to important U.S. interests. First, accession would benefit the United States and U.S. businesses by facilitating greater economic growth, increasing foreign investment, and stimulating U.S. exports through more predictable, standard and harmonized customs procedures governing cross-border trade transactions. These achievements can

best be pursued by the United States as a Party to the Revised Customs Convention.

Second, acceding to the Protocol will enable the United States to continue its leadership role in the areas of customs and international trade facilitation. Accession signals to our trading partners that the U.S. is committed to an international Convention that establishes a blueprint for modern customs procedures throughout the world.

By acceding to the Protocol, we also encourage other countries to sign on and implement procedures that will make trade in goods across our borders more predictable and, therefore, potentially more secure. Our understanding from U.S. Customs and Border Protection is that the Revised Customs Convention will not limit the U.S. Government's ability to institute necessary measures to provide for our own national security.

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By acceding to the Protocol, the United States would consent to be bound by the amended 1973 Convention and the new General Annex. At the same time, or anytime thereafter, Parties have the option of accepting any of the Specific Annexes (or Chapters thereof), and may enter reservations with respect to any Recommended Practices contained in the Specific Annexes. After careful study, we have proposed that the United States accept most of the Specific Annexes, and enter the reservations to certain Recommended Practices proposed by U.S. Customs and Border Protection as set forth in the Report by the Secretary of State, attached to the President's transmittal of the Protocol. We have made these recommendations with current U.S. legislation or regulations in mind. With them, no new implementing legislation would be necessary for the United States to implement the Revised Customs Convention. . . .

The Protocol will enter into force three months after 40 contracting parties have consented to be bound by it. As of last month, 32 countries have consented to be bound, including some of our largest trading partners (Australia, Canada, China, Japan, and most members of the European Union).

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F. COMMUNICATIONS

1. *Internet*

The Declaration of Principles adopted at the first phase of the World Summit on the Information Society ("WSIS"), held in Geneva, Switzerland in December 2003, requested the Secretary-General of the United Nations "to set up a working group on internet governance, in an open and inclusive process that ensures a mechanism for the full and active participation of governments, the private sector and civil society from both developed and developing countries, including relevant intergovernmental and international organizations and forums, to investigate and make proposals for action, as appropriate, on the governance of the internet by 2005." The WSIS Declaration of Principles is available at *www.itu.int/wsis.*

In connection with consultations on the establishment of the Working Group on Internet Governance ("WGIG"), held in Geneva in September 2004, the United States submitted a position paper that outlines the U.S. position on "internet governance." The position paper, released on September 14, 2004, by the Department of State, is set forth below and is available at *www.state.gov/e/eb/rls/othr/36166.htm.* Subsequently, the Secretary-General announced the establishment of the WGIG and named Nitin Desai, the Special Adviser to the Secretary-General for the WSIS, as its chairman. *See www.un.org/News/Press/docs/2004/pi1620.doc.htm.* Further information on the WGIG is available at *http://www.itu.int/wsis/wgig/index.html.*

Introduction

In the Declaration of Principles and Plan of Action produced during Phase I of the World Summit on the Information Society (WSIS), governments, the private sector and civil society joined together to recognize that information and communication technologies (ICTs) are a key element of political progress, economic growth, and social

development. Integral to these discussions was the emergence, for the first time, of a global consensus identifying the importance of a multi-stakeholder, multi-partnership approach to the development of ICTs and, in particular, the Internet.

The WSIS agreed upon a work program to continue discussions on the difficult topic of international public policy issues related to "Internet governance." The Summit recognized the importance of full and active stakeholder involvement as a pre-requisite for the successful international coordination and cooperation needed to meet our shared goal of ensuring all the world's inhabitants realize the benefits afforded by the Internet. The United States fully supports this activity as directed by the WSIS to the UN Working Group on Internet Governance (WGIG) and offers the following guiding principles with respect to Internet development for participants to consider and adopt.

Guiding Principles

The Internet and the variety of applications that it supports provide tremendous opportunities for economic and social development around the world. What started as a small-scale, experimental system of links among U.S. academic institutions is now a gigantic global network connecting all users from any access point, regardless of national or geographic borders, that has flourished as a medium for the free flow of information and ideas. The Internet continues to expand in terms of size and scope and has become a significant and important means of doing research, for communicating with others, and for conducting business. It is natural, and in fact a healthy sign, that as this "experiment" continues and this medium evolves into a global facility, the world community considers carefully the roles and responsibilities of all stakeholders in ensuring its continued development and success.

In the United States, the advancement of Internet technologies and applications continues to flourish to the benefit of consumers and the broader economy. High speed Internet is placing personal and economic power into the hands of individuals. The increased reliance of the health, education and business sectors on the Internet is shrinking geographic, economic and cultural boundaries. The

following six principles should guide Internet related public policy discussions:

- **Promoting an enabling environment through effective and efficient competition**: To maximize the economic and social benefits of the Internet, a clear, market-based, legal framework and supportive policy environment that promotes and ensures effective and efficient competition. The United States believes that full competition is the cornerstone of a healthy, robust Internet market. Innovation, expanded services, broader participation, and lower prices will arise most easily in a market-driven arena, not in an environment that operates under substantial regulation.
- **Recognizing the roles of all stakeholders**: One of the main drivers of the success of the Internet has been its distributed nature. This open architecture has allowed for and encouraged innovation by all stakeholders. The United States believes that cooperation and partnership among all stakeholders is fundamental to building a people-centred Information Society. Public-private partnerships are essential to this effort.
- **Supporting continued private sector leadership**: The private sector is the primary investor in and innovator of Internet infrastructure, products, content, and services. They are the primary stakeholders who build, operate and maintain the IP based networks that collectively form the Internet and are largely responsible for its commercial success. Consequently, it is imperative that private sector leadership in these areas be maintained and encouraged.
- **Avoiding overly prescriptive or burdensome regulation**: The Internet exists in a dynamic, fast-changing environment. Competitive market forces, rather than prescriptive rules, continue to respond to public needs. While being cautious not to use outdated regulatory models on the Internet, the United States recognizes that each country needs to address its domestic public policy objectives. However, often the costs of regulation can outweigh the benefits of regulation. Therefore, we encourage countries to examine the pros and

cons of regulation prior to adoption, on a case-by-case basis, in a full and open process.

- **Ensuring the stability and security of networks**: Ensuring security and confidence: Security of and confidence in Internet protocol (IP) based networks and systems are essential if the economic and social potential of the Internet is to be achieved. Building this trust framework requires that all stakeholders take action, appropriate to their roles, to assess and address risks; understand and accept their responsibilities; and cooperate at the individual, national, regional, and international levels.
- **Embracing the global, collaborative and cooperative nature of the network**: The Internet is intrinsically global in nature and national efforts need to be supported by effective international and regional cooperation. The United States believes that efforts should be made to enhance existing synergies and not duplicate the extensive body of work already underway in the global and regional bodies.

Conclusion

As we approach the issue of Internet governance, the United States is mindful of the paramount goal of building an open, empowering Information Society. Communications technologies link the peoples of the world; therefore, a major challenge that we face—governments and the private sector alike—is to ensure that all persons can harvest the benefits that these technologies unleash. As we approach the issue of Internet governance, it is critical that we take no steps that endanger the ongoing rapid expansion of the Internet around the globe, particularly in developing countries. We believe that the goal of universal access is most effectively advanced by promoting competition, private sector led investment, free flow of information and good governance.

The Internet is one key that can unlock the door to limitless opportunities for all stakeholders in society, including individual consumers, businesses, social and public interest organizations and local and national governments. It can bring us together in ways that never existed before. It has the power to promote the exchange

of information and ideas for mutual benefit. Given the Internet's potential to drive economic growth, foster information-exchange, benefit cultures, and spread democracy, we must implement sound decisions and strategies to enable it to grow and achieve its promise of development and prosperity for the benefit of all mankind.

2. *Broadband communications*

On October 5, 2004, Edward V. O'Brien, Office of International Communications and Information Policy, Bureau of Economic and Business Affairs, U.S. State Department, addressed the International Broadband Communications Conference in Bucharest, Romania. Excerpts below from his remarks reflect the views of the United States on the role of government in development of broadband communications.

The full text of Mr. O'Brien's remarks is available at *www.state.gov/e/eb/rls/rm/37376.htm.*

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It is the policy of the United States Government to promote innovation and economic security through broadband technology. As part of this strategy announced in April, President Bush has called for universal, affordable access for broadband technology by the year 2007. While the choice of technology is key, as many Americans have the option to choose among cable or DSL competitors, that is a choice that our consumers rather than the government will make.

Broadband technology will be harnessed to enhance American economic competitiveness. Broadband provides high-speed Internet access connections that improve economic productivity and offer life-enhancing applications, such as distance learning, remote medical diagnostics, and the ability to work from home more effectively.

As in most economic domains, the U.S. Government has a preference for allowing the private sector to take the initiative in further development of the internet and related industries. We have found, however, that there are three key areas in which government can foster broadband growth and development:

creating economic incentives,
removing regulatory barriers, and
promoting technological innovation to help make broadband affordable.

The economic incentives take the form of both accelerated depreciation for capital equipment used for broadband deployment and a two-year extension of the Internet Access Tax moratorium, a moratorium that the federal government has proposed to make permanent.

The removal of regulatory barriers includes deregulating new broadband infrastructure to private homes as well as rights-of-way reforms to streamline the process for broadband providers to get access to Federal lands to build the necessary high-speed infrastructure. Use of power lines is under consideration. Promoting innovation has in the American context meant releasing greater amounts of spectrum for innovative wireless broadband applications such as Wi-Fi and Wi-Max. Some of our localities, Philadelphia for example, are also encouraging investment and economic development by contributing to the cost of constructing Wi-Fi networks.

How can governments act as champions of progress? It is the policy of the United States Government to support a free-market approach and permit service suppliers the flexibility to choose their operating technology, particularly for telecom services. We actively encourage open, market-driven approaches to standards setting and spectrum allocation, which will allow multiple standards to co-exist and compete in the marketplace, rather than give preference to one technology over another.

We believe that standards should not be used as obstacles to trade, that governments should be transparent and nondiscriminatory when making decisions regarding spectrum allocation, and that they should rely on market-driven solutions rather than attempt to pick what they think is the most appropriate technology standard.

Despite the increase in telecommunications competition worldwide over the past 20 years, recently we have seen resurgence in some countries in the use of standards to prevent the full participation of competitive companies in those markets. We see the use of non-market-driven standards in some situations as attempts

by governments to control their national markets, and in other instances as attempts by some developed countries to ensure that closed markets exist for their companies' goods and services, to use the French expression, a sort of "*chasse guardée*," a private hunting ground.

In the end, both of these moves are self-defeating:

In the first instance, they will hinder the influx of needed investment capital and deny developing markets the benefits of market-driven standards.

In the second instance, they will create national champions who will be unable to compete effectively on international markets.

As we speak, the question of standards is now under discussion at the International Telecommunication Union World Telecommunication Standardization Assembly (WTSA) in Florianópolis, Brazil. This meeting is addressing the development of those standards that will define the next generation of services, network and systems architecture. WTSA is expected to oversee the creation of a Next Generation Network Study Group, which will be asked to develop standards for the future convergence of existing telecommunication network architectures into a broadband, multimedia, packet-switched network. These standards will lay the very foundation for the next generation of telecommunications equipment.

But what about the internet itself? Debate continues regarding the appropriate role of governments and intergovernmental organizations in the Internet space with some favoring a much stronger role for the ITU or other international bodies.

These divergent views have been highlighted as we engage in preparations for the second session of the UN World Summit on the Information Society, which will take place in November 2005. The phrase commonly used in these discussions is "Internet Governance."

The U.S. view is that no single stakeholder can and should govern the Internet. All stakeholders—governments, the private sector and civil society—each have a role to play in the development of the Internet, and none should be excluded. The success of the Internet has been in part based on the fact that no one single entity controls it, allowing entrepreneurs, scientists and academics to continually innovate.

No discussion of broadband and related technologies would be complete without an earnest assessment of the impact that such high-tech progress can ultimately have on the lives of ordinary people in developing nations. Creating digital opportunity needs to be an integral component of any development strategy. The first session of the World Summit on the Information Society recognized in Geneva last December that information and communication technologies are a key element of political progress, growth, and social development.

As we look to the concluding session in Tunis next year, we need to be thinking about how this important conference will help encourage the creation of a truly connected world. In our view, this conference should support:

> ***freedom of expression***,
> ***continued growth and stability of the Internet***,
> ***scientific research and development***, and
> the ***creation of digital opportunities*** through the promotion of democracy, transparency, accountability and good governance.

* * * *

3. *Radio regulations*

On December 7, 2004, President George W. Bush transmitted to the Senate for advice and consent to ratification the 1995 Revision of the Radio Regulations, with appendices, signed by the United States at Geneva on November 17, 1995 ("1995 Revision"), together with declarations and reservations of the United States as contained in the Final Acts of the World Radiocommunication Conference of the International Telecommunication Union ("WRC-95"). The accompanying report of the Department of State submitting the treaty to the President is excerpted below. S. Treaty Doc. No. 108–28 (2004).

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The 1995 Revision was adopted at the World Radiocommunication Conference (WRC-95), held under the auspices of the International Telecommunication Union (ITU) at Geneva from October 23 to November 17, 1995. . . .

The ITU is the United Nations specialized telecommunication agency with over 180 member countries. It is the principal forum for agreements on telecommunication standardization activities, management and use of the radio spectrum, and efforts to develop and expand worldwide telecommunications. Radio conferences often had limited agendas, and the consequent Radio Regulations had grown in patchwork fashion. The Voluntary Group of Experts (VGE) was established by the 1989 Plenipotentiary Conference with the task of simplifying the Radio Regulations without making substantive alterations. The VGE produced a comprehensive report that contained an extensive number of recommendations for revision of the Radio Regulations. At the same time, advances in technology producing new operating requirements, as well as the need to simplify and provide consistency in the wording of the specialized provisions of the Radio Regulations, also had to be accommodated. The United States was an active participant in the work of the VGE and supported its recommendations for simplification of the Radio Regulations and improvement of the frequency allocation process while retaining existing rights and obligations of members. WRC-95 was convened as a wide-ranging conference to address international spectrum allocations and to simplify the Radio Regulations in accordance with the Report of the Voluntary Group of Experts. WRC-95 resulted in simplified, more cohesive Radio Regulations with specialized procedures amalgamated into generalized procedures where possible.

The major spectrum allocation elements of the 1995 Revision are summarized below:

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BROADCASTING SERVICES

The U.S. objectives for WRC-95 regarding the use of the high frequency (HF) broadcasting bands were to maintain the existing availability dates for the additional frequency bands allocated for HF broadcasting, to assure that there would be no detailed planning

of the frequency bands allocated to the HF broadcasting service, and that future planning of the use of the HF broadcasting bands would be based on the work of the ITU-Radiocommunication task group. The United States obtained all of these objectives, which were of vital concern to the Voice of America (VOA). Through the years the VOA has worked hard to establish a laissez-faire international regulatory environment that gives VOA access to all of the frequencies that it needs to meet its broadcasting requirements. By obtaining the U.S. objectives, this environment was maintained.

ITU practice provides for declarations and reservations to be submitted by governments prior to signature of the instruments to be adopted at a particular conference. In 1995, the United States submitted four declarations and reservations that are included in the 1995 Final Acts. These declarations and reservations require Senate advice and consent to ratification.

The first (Number 67) reiterates the longstanding U.S. positions that it can only be considered bound by instruments adopted at an ITU Conference once it officially notifies the ITU of its consent to be bound and it reserves the right to make additional specific reservations at the time of deposit of the U.S. instrument of acceptance of the revisions to the Radio Regulations. It also declares that the conference unduly restricted allocations for MSS in certain frequency bands and that it will utilize these bands in the way most appropriate to its MSS requirements.

The full text reads as follows:

1. The United States of America shall not be deemed to have consented to be bound by revisions of the Radio Regulations adopted at this Conference without specific notification to the International Telecommunication Union by the United States of America of its consent to be bound.
2. The United States of America refers to No. 445 and No. 446 of the International Telecommunication Union Convention (Geneva, 1992) and notes that in considering the Final Acts of this World Radiocommunication Conference (Geneva, 1995), the United States of America may find it necessary to make additional declarations or reservations. Accordingly, the United States of America reserves the right to make additional specific declarations or reservations at

the time of deposit of its notification to the International Telecommunication Union of its consent to be bound by the revisions to the Radio Regulations adopted by this World Radiocommunication Conference.

3. The United States of America declares that, in view of the fact that the Conference has unduly restricted allocations for mobile-satellite services in the bands 1525–1559 MHz and 1626.5–1660.5 MHz, it will utilize these bands in the way most appropriate to satisfy its particular mobile satellite service requirements recognizing the priority of AMSS (R) and maritime safety communications.

The second (Number 68), in which the United States was joined by the United Kingdom of Great Britain and Northern Ireland, concerned additional and unnecessary burdens of coordination between geostationary and non-geostationary mobile-satellite networks in certain frequency bands. Both governments refuse to accept any additional commitments for coordination. The full text reads as follows:

> Referring to the frequency range below 3 GHz concerning mobilesatellite services, it is necessary to note that proposals were put forward at this Conference to revise No. 726D (S5.354) to the Table of Frequency Allocations in Article 8 in order to avoid additional and unnecessary burdens of coordination between geostationary and non-geostationary mobilesatellite networks in the bands 1525–1559 MHz and 1626.5–1660.5 MHz. There was insufficient time to consider these proposals at this Conference. Accordingly, the above administrations will not accept any additional commitments for coordination arising from No. 726D (S5.354). This reservation is made on behalf of all national and international organizations for whose frequency assignments the two countries are the notifying administrations.

The third (Number 78), in which the United States joined 14 other countries, was in response to a statement by Colombia concerning the use of the geostationary satellite orbit:

> The delegations of the above mentioned countries referring to the Declaration made by the Republic of Colombia (No. 16), inasmuch as this statement refers 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, and any similar statements, consider the claims in question cannot be recognized by this Conference. Further, the abovementioned delegations wish to affirm or reaffirm the Declarations made on behalf of a number of the abovementioned Administrations in this regard when signing the Final Acts of the World Administrative Radio Conference (Geneva, 1979), and the World Administrative Radio Conference on the Use of the Geostationary-Satellite [O]rbit and the Planning of Space Services Utilizing It (first and second sessions, Geneva, 1985 and 1988), the Plenipotentiary Conference of the International Telecommunication Union (Nice, 1989), in the Final Protocol of the International Telecommunication Convention (Nairobi, 1982) and the Final Acts of the Additional Plenipotentiary Conference (Geneva, 1992), as if these Declarations were here repeated in full.
>
> The above-mentioned delegations also wish to state that reference in Article 44 of the Constitution to the "geographical situation of particular countries" does not imply a recognition of claim to any preferential rights to the geostationary-satellite orbit.

The fourth (Number 82), was in response to several declarations by various delegations, including one by Cuba which incorporates by reference previous reservations and declarations concerning the United States. The response read as follows:

> With respect to Declarations 39, 50, 54, 59 and 64, the interpretation of the United States of America on the basis of which the majority of delegations to this Conference supported the United States of America and Indonesian proposals which resulted in Resolution 118 (WRC-95) is as follows:

> Any satellite system, GSO or non-GSO, communicated or notified to the Bureau before 18 November 1995 has a status derived from the date of notification or communication of information required for coordination or notification, as the case may be.
>
> As of 18 November 1995, Resolution 46 applies to all these systems and they shall be coordinated one system with respect to another system in the order of receipt of the information described above.
>
> With respect to the applicability of No. 2613 as agreed in Committee 4, No. 2613 is of an operational character and No. 2613 and Resolution 46 are mutually exclusive.
>
> The United States of America reiterates and incorporates by reference all declarations or reservations made at prior world radiocommunication conferences and in particular with regard to Declaration 60 of this Conference.

The Department of State and the other agencies involved recommend that these declarations and reservations be confirmed in the U.S. instrument of ratification to the 1995 Revision. The Department of State and the other interested agencies are of the view that no additional reservations are required. The 1995 Revision will not require implementing legislation on the part of the United States. . . .

4. U.S. broadcasts to Cuba

In the past, the United States has occasionally broadcast radio and television programming into Cuba from an aircraft operating within U.S. airspace. The Report to the President of the Commission for Assistance to a Free Cuba (discussed in Chapter 16.A.3.) recommended that these broadcasts be continued and that funds be made available "to acquire and refit a dedicated airborne platform for the transmission of Radio and Television Marti into Cuba," consistent with the U.S. international telecommunication obligations. The recommendation was adopted by President Bush.

Cuba objected to the programming and filed complaints with the International Telecommunication Union. The United States responded to these complaints in a letter dated November 18, 2004, from Richard C. Beaird, acting U.S. Coordinator for International Communications and Information Policy, Bureau of Economic and Business Affairs, U.S. Department of State, to Valery Timofeev of the International Telecommunication Union. The letter, excerpted below, is available at *www.state.gov/s/l/c8183.htm. See also* Statement by Ambassador William Marsh, Senior Advisor, U.S. Mission to the United Nations, Right of Reply to Cuba, in the Fourth Committee (Special Political and Decolonization), October 21, 2004, available at *www.un.int/usa/04wm1021.htm.*

We are aware of a number of Cuban complaints to the ITU concerning efforts by the United States to make available certain television programming to the Cuban people via broadcasts from an aircraft flying in U.S. airspace. . . .

The United States takes seriously its obligations under the ITU Constitution and the Radio Regulations and welcomes this opportunity to respond to these Cuban complaints. . . .

The Cuban government has made a number of claims about these broadcasts, to which the United States responds below. First, Cuba asserts that, by carrying out a broadcasting service in this manner, the United States violated Article 23.3 of the Radio Regulations (Geneva, 1979 as amended), which it claims prohibits cross-border broadcasting.[1] Article 23.3 provides that:

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[1] In some of the earlier communications on this matter, Cuba asserted that such broadcasts also violate Article 23.2 of the Radio Regulations. That Article states as follows:

> The establishment and use of broadcasting stations (sound and television broadcasting stations) on board ships, aircraft or any other floating or airborne objects outside national territories is prohibited (emphasis added).

The United States broadcasts do not contravene Article 23.2. As noted in the emphasized language, Article 23.2 only prohibits such broadcasts from

> In principle, except in the frequency band 3,900–4000 KHz, broadcasting stations using frequencies below 5060 KHz or above 41 MHz shall not employ power exceeding that necessary to maintain economically an effective national service of good quality within the frontiers of the country concerned.

The consistent United States position concerning Article 23.3 is that, contrary to the Cuban view, it is not an absolute prohibition against cross-border broadcasting. The United States' position on Article 23.3 was spelled out in detail in a number of written communications to the BR's predecessor, the International Frequency Registration Board (IFRB), during the period from February, 1990 to April, 1992, which communications included, *inter alia*, a detailed Annex examining the background and history of this provision. In the view of the United States, Article 23.3 establishes a general rule of minimizing transmitter power ("[i]n principle"), while allowing for appropriate exceptions to that general rule, provided that the broadcasting service is otherwise consistent with relevant provisions of the Radio Regulations. The United States has long understood that use of the term "in principle" indicates that the Member States that agreed to this provision did not intend to establish an absolute restriction on cross-border broadcasting activities but only to minimize transmitter power so that additional broadcasting stations could be more easily accommodated.

Further, past and current practice by ITU Members runs counter to an interpretation of Article 23.3 as an absolute prohibition of cross-border broadcasting. There are numerous examples, past and present, of cross-border broadcasting services, including many broadcasting stations operating in Europe and Asia and on the United States' borders with Canada and Mexico.

The current broadcasting service into Cuba by the United States from within U.S. airspace is entirely consistent with this well-established and internationally accepted practice of cross-border

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"outside national territories." As explained in the text, all of the broadcasts of which Cuba complains took place from within U.S. airspace and therefore are fully consistent with Article 23.2.

broadcasting. The United States broadcasts do not violate Article 23.3 of the Radio Regulations.

The Cuban government also contends that the broadcasting service is causing harmful interference to Cuban television services registered in the Master International Frequency Register and is contrary to the Preamble of the ITU Constitution. With respect to the claim of harmful interference, Article 45 of the ITU Constitution states as follows:

> All stations, whatever their purpose, must be established and operated in such manner as not to cause harmful interference[2] to the radio services or communications of other Member States. . . . which operate in accordance with the provisions of the Radio Regulations.

As stated above, the United States takes seriously its obligations under Article 45 of the ITU Constitution to operate its broadcast stations in such a manner as to avoid harmful interference to the radio services or communications of other Member States. The United States is not aware of any actual interference occurring to Cuban stations as a result of these broadcasts.

With respect to the claim by the Cuban Administration that the broadcasting service is contrary to the Preamble of the ITU Constitution, the United States notes that the portion of the Preamble quoted by the Cuban Administration states that the ITU Constitution has the object of "facilitating peaceful relations, international cooperation among peoples and social development by means of efficient telecommunication services." The United States asserts that the activities of the Cuban Administration, rather than any activities of the United States, are in conflict with these goals. The Castro regime controls all formal means of mass media and communications on the island of Cuba, including radio, television,

[2] The ITU Constitution defines "Harmful Interference" as "interference which endangers the functioning of a radionavigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunication service operating in accordance with the Radio Regulations." ITU Constitution, Ann. 1003.

print media as well as access to the Internet. Further, the Cuban Communist Party exerts strict editorial control over all news publications and all radio and television broadcasting. The purpose of such a tyrannical control over access to information is to restrict the ability of the Cuban people to obtain timely, accurate and reliable information about current events, social, political and economic developments and human rights and fundamental freedoms.

The Cuban Administration's opposition to Radio and TV Marti, similar to its other recent actions, such as the imprisonment of prisoners of conscience and expulsion of three European parliamentary members, is driven by fear of the consequences were the Cuban people to receive uncensored information about their own country and the world around them, a freedom to which they are entitled under Article 19 of the Universal Declaration of Human Rights. That Article states as follows:

> Everyone has the right of freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Similar provisions are found in Article 19(2) of the International Covenant on Civil and Political Rights. The broadcasting service undertaken by the United States is for the purpose of imparting information and ideas to the Cuban people, regardless of the artificial frontiers that the Cuban government seeks to erect against the free flow of accurate and reliable information to the Cuban people. . . .

* * * *

The Radio Regulations Board held its 35th meeting in Geneva, Switzerland, from December 6–20, 2004. On December 10, 2004, the Radio Regulations Board issued its Summary of Decisions of that meeting. Document RRB04-3/6-E. As to the dispute between the United States and Cuba, the report stated:

> 1) The newly available information and the results of the calculation demonstrated that the US emissions on 213

MHz result in harmful interference, as defined in CS1003, as they seriously degrade the service areas of the Cuban stations recorded in the MIFR. Consequently, the RRB instructed BR to follow the standard approach regarding the treatment of reports of harmful interference. The RRB also instructed the Director, BR, to include in its report to WRC-07, information on the difficulties regarding the different interpretation of the wording of No. 23.3 by the Administrations of the United States of America and Cuba.

2) With respect to US emissions on 530 kHz, the RRB noted that Cuba has no recorded assignments in the MIFR on this frequency, and consequently this case cannot be treated as harmful interference. The RRB noted that there was not enough information that would enable the RRB to conclude whether these emissions represent an irregularity or infringement.

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

G. OTHER ISSUES

1. Economic Cooperation

a. U.S.-EU summit

At a U.S.-EU summit held at Romoland Castle, Shannon, Ireland, June 26, 2004, President George W. Bush, Prime Minister of Ireland Bertie Ahern, and President of the European Commission Romano Prodi, issued the U.S.-EU Declaration on Strengthening our Economic Partnership. A fact sheet issued by the White House Office of the Spokesman, entitled "U.S.-EU Summit: Continuing Our Co-operation to Expand Transatlantic Trade," summarized trade issues addressed at the summit.

The full text of the fact sheet, excerpted below, is available at *www.whitehouse.gov/news/releases/2004/06/20040626-12.html.* The text of the declaration is available

at *www.whitehouse.gov/news/releases/2004/06/20040626-14.html.*

Today, President Bush and EU leaders:

Directed their trade ministers, in cooperation with other WTO members, to finalize framework agreements in the WTO's Doha trade negotiations by the end of July, in order to further enhance the conditions for sustained global economic growth; and

Welcomed the continued progress in reducing impediments to transatlantic commerce and expanded regulatory cooperation.

Doha Negotiations and the Global Economy: President Bush believes that trade liberalization is critical to boosting global prosperity, generating sustained economic growth, and raising living standards. Emphasizing the need to seek an ambitious outcome in the WTO's Doha negotiations, President Bush and his EU counterparts reaffirmed their commitment to cooperate with other WTO members to finalize framework agreements in the Doha trade negotiations by the end of July in order to expeditiously complete these negotiations and further enhance the conditions for sustained global economic growth. President Bush and his EU counterparts also:

Emphasized the need to focus on the core areas of the Doha negotiations; and

Underscored that we are on the verge of an historic opportunity to fundamentally reform trade in agriculture and noted that progress in the agriculture negotiations will be essential to move the other core areas of the negotiations forward.

While the United States and the EU are working to advance WTO negotiations, both the United States and the EU have had laws and other measures challenged under WTO dispute settlement procedures. President Bush intends to comply with final WTO rulings against U.S. measures, such as in the FSC/ETI case where the Bush Administration continues to work closely with the U.S. Congress. The United States is currently awaiting EU action to comply with the WTO ruling in the beef hormone case, as well as awaiting a WTO ruling against the EU moratorium on biotech approvals.

The cooperation with the EU on WTO Doha negotiations is part of President Bush's broader effort to open markets globally, regionally, and bilaterally. In addition to the global efforts in the WTO Doha negotiations and the Free Trade Area of the Americas encompassing the Western Hemisphere, the Bush Administration has negotiated or is negotiating comprehensive, high-quality free trade agreements (FTAs) with partners in every region of the globe. The Bush Administration has completed bilateral or sub-regional FTA negotiations with 11 countries, and is in the process of negotiating agreements with 11 others. These new and pending FTA partners would constitute America's third largest export market and the sixth largest economy in the world. In addition, the United States provides one of the most generous trade preference programs in the world, including the African Growth and Opportunity Act, which has spurred enhanced trade between the United States and the countries of sub-Saharan Africa.

Positive Economic Agenda: President Bush and his EU counterparts welcomed the ongoing cooperation as part of the "Positive Economic Agenda." The United States and the European Union share the largest bilateral trade and investment relationship in the world, accounting for over $1.5 trillion. In order to ensure that this critically important economic relationship continues to thrive, President Bush and his EU counterparts established in 2002 the "Positive Economic Agenda" to advance bilateral cooperation to reduce trade frictions and foster expanded transatlantic commerce.

Regulatory Cooperation: Recognizing that regulatory differences, not tariffs, comprise the most significant remaining transatlantic trade barriers, President Bush and his EU counterparts welcomed the U.S.-EU Regulatory Cooperation Roadmap. This Roadmap builds on the 2002 U.S.-EU Guidelines for Regulatory Cooperation in which the European Commission undertook to make its regulatory process more transparent. The Regulatory Cooperation Roadmap provides a framework for U.S. and EU officials to cooperate on a broad range of important areas such as pharmaceuticals, auto safety, information and communications technology, cosmetics, consumer product safety, chemicals, nutritional labeling, and eco-design of electrical/electronic products.

Through targeted U.S.-EU regulatory consultations, we aim to promote better quality regulation, minimize regulatory divergences, and facilitate transatlantic commerce.

Financial Markets Regulatory Dialogue: President Bush and his EU counterparts welcomed a joint report from U.S. and EU officials participating in the Financial Markets Regulatory Dialogue. The report describes the ongoing collaboration of U.S. and EU policy and regulatory officials on corporate governance and financial market regulation. The Dialogue, launched in 2002, provides a forum for discussing bilateral financial and regulatory issues, with a view to fostering an efficient and transparent transatlantic capital market. The Dialogue has, in particular, provided a useful vehicle for ensuring that European legislation not impede U.S. participation in European capital markets. More broadly, with recent efforts to improve corporate governance and financial market regulation, the Dialogue has served a valuable function in enabling U.S. and EU regulators to work on potential regulatory issues in a cooperative and timely fashion.

b. United States-Iraq Joint Economic Commission

The United States-Iraq Joint Economic Commission ("JEC"), met for the first time on December 20 and 21, 2004, in Washington, D.C. Government representatives from the two countries "agreed to new steps to further Iraq's economic development and re-integration into the world economy, building on Iraq's achievements of the past few months." A joint communiqué signed by Adil Abdul Mahdi, Iraqi Minister of Finance, and Under Secretary of State for Economic, Business, and Agricultural Affairs Alan Larson, on December 22, 2004, is excerpted below. The full text is available at *www.state.gov/e/eb/rls/prsrl/2004/40286.htm*.

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The past few months have witnessed important strides in Iraq's drive to re-integrate into the global economy. In December, the

World Trade Organization (WTO) agreed to begin accession talks with Iraq. In November, Iraq reached agreement with the Paris Club group of creditors to forgive 80 percent of Iraqi sovereign debt, an agreement described in the Iraqi press as the country's second liberation. In October, Iraq concluded an Emergency Post-Conflict Agreement with the International Monetary Fund, backed by $420 million in new lending, to help guide economic reform, and began discussions with the World Bank on International Development Association (IDA) loans. In September, during the inaugural Joint Economic Commission meeting in Baghdad, the U.S. and Iraq agreed on an Export-Import Bank Framework Agreement, which provides insurance for letters of credit issued by the Iraqi Trade Bank.

During this week's JEC meeting in Washington, the two sides concluded three important bilateral instruments. First, Secretary of State Colin Powell, Secretary of the Treasury John Snow and Finance Minister Adil Abd al-Mahdi signed a Debt Cancellation Agreement in which the U.S. forgives 100 percent of Iraq's $4.1 billion debt. The U.S. and Iraq also signed two Memoranda of Understanding in the oil sector. The first establishes a program of regular technical consultations and exchanges on science and technology between the Iraqi Oil Ministry and the U.S. Department of Energy. The second commits both sides to an Oil Sector Training Program that will allow Iraq's oil professionals to directly access state-of-the-art technology, and to help close the information gap that existed for Iraq's oil industry under the prior regime.

The Iraqi side outlined measures to maintain fiscal stability and implement its 2005 budget. Iraq's Finance Minister and Central Bank Governor described the steps that Iraq will take to secure an IMF Stand-By Agreement in 2005. The Iraqi side detailed plans to reform state subsidies, which they said account for 60 percent of budget expenditures and create major market distortions in key areas of their economy. The U.S. side outlined technical assistance programs underway that support Iraq's economic reforms, including USAID programs to strengthen the Iraqi government's economic data gathering and analysis, to train Iraqi commercial banks in loan management, and to help the Central Bank develop more monetary policy instruments.

Development of Iraq's agricultural sector was highlighted as a key priority for both sides. The Iraqi Government outlined its plans to increase productivity through investment and to strengthen market mechanisms. USAID agreed to support the Iraqi Ministry of Agriculture's Transition Plan, by establishing over 100 agricultural demonstration sites throughout Iraq to reinvigorate crop and livestock production, and boost rural job creation. Both sides agreed to continue joint programs to revive Iraqi agriculture in areas such as date production with 13 new date palm nurseries founded thus far in central and southern Iraq, fish farming in the restored Iraqi marshlands, new crop varieties, and the expansion of extension services. The U.S. Department of Agriculture agreed to increase visits of Iraqi agricultural experts under the Cochran Program, noting a successful visit of Iraqis to U.S. agricultural research facilities in December.

The Iraqi side presented its vision for a future legal and regulatory framework in the oil sector, focusing on options for restructuring of the oil industry, reducing fuel subsidies and encouraging private and foreign investment. The U.S. side detailed the range of oil sector training and exchange opportunities available to help modernize Iraq's oil sector and enhance technical and managerial expertise. Both sides examined the role of oil revenue, and the importance of transparency in implementing budget and national development policies.

Both sides emphasized the need for bolstering private sector development and creating private sector jobs. The U.S. described USAID projects underway that will provide 16,000 loans to micro, small and medium size businesses by June 2005. In the area of training, USAID is strengthening the capacity of the Iraqi Ministry of Labor's existing 6 vocational training and 18 job placement centers, with plans to expand in 2005 to 17 vocational training and 28 job placement centers. The two sides agreed that next steps will include USAID-funded workshops on how to manage and grow businesses to be held with Iraqi universities and chambers of commerce throughout the country in 2005. The two sides agreed to hold a videoconference in February 2005, including Iraqi private sector representatives, to monitor progress on job creation and private sector development.

Another urgent priority identified by both sides was housing. The U.S. Treasury and USAID agreed to support the Iraqi Government's housing finance program with technical assistance to develop a policy framework that attracts private sector and multilateral sources of mortgage finance. The Iraqi government-funded Housing Fund will start lending in January 2005 and plans to add 30,000 new residential units in and around Baghdad in 2005. USAID and US Treasury will provide technical assistance for the start-up operations of this Fund.

Recognizing that a healthy banking sector is critical to Iraq's economic growth and implementing its economic reform plans, the two sides agreed to strengthen U.S. technical assistance that boosts Iraqi government capacity in the areas of state bank restructuring, commercial bank supervision, and electronic payments. The U.S. Treasury and State Department and the Iraqi Finance Ministry also agreed on next steps to fully realize the repatriation of Iraqi government assets frozen in third countries, and to coordinate vigorously in stopping the funding of terrorism, working through the UN Sanctions Committee, the UN 1267 Committee and in other fora.

The two sides welcomed the November agreement by the Paris Club to reduce Iraq's debt and stressed their joint determination to work for early implementation of this agreement. The Iraqi side described efforts underway to seek at least comparable treatment from non-Paris Club creditors. The U.S. side noted it implemented the Paris Club agreement by forgiving 100 percent of Iraq's $4.1 billion debt. Both sides urged other creditors to follow this example, to help ensure that Iraqi funds are available for reconstruction needs.

Both sides hailed the decision of the WTO General Council on December 13 to begin accession talks with Iraq, and agreed to work together to support Iraq's early accession. Reaffirming the need to boost trade cooperation, the two sides discussed ways to increase the benefit to Iraq under the Generalized System of Preferences (GSP) program. The Iraqi side held detailed bilateral talks with the U.S. Export-Import Bank, the Overseas Private Investment Corporation and the Trade and Development Agency,

focusing on plans to conclude trade and investment facilitation agreements in the near future.

Both sides affirmed the utility of continuing the Joint Economic Commission in order to coordinate and intensify efforts to revive Iraq's economy and re-integrate it into the world economy. They agreed to hold the next meeting in Baghdad in the spring 2005.

c. Bilateral Trade and Investment Framework Agreements

(1) Pakistan

The first meeting of the Joint Council established by the United States-Pakistan Trade and Investment Framework Agreement ("TIFA") took place in Washington, D.C. in September 2004. As described in a press statement released September 28, 2004,

> [t]he TIFA, signed in June 2003, is an agreement that provides a forum for Pakistan and the United States to examine ways to expand bilateral trade and investment. Specifically the TIFA creates a Joint Council that considers a wide range of commercial issues and promotes principles that underpin the two nations' trade and investment relationship.

U.S. Trade Representative Zoellick and Pakistan Minister for Commerce Humayun Akhtar Khan announced at the conclusion of the meeting that their two countries would begin negotiations on a bilateral investment treaty ("BIT"). Mr. Zoellick stated in part:

> . . . Pakistan and the United States are partners in combating global terrorism. A BIT based on the high standards contained in our model text can play an important role in strengthening Pakistan's economy, so as to create new opportunities for exporters and investors in both economies and assist in meeting the economic conditions to counter terrorism.

The full text of the press statement is available at *www.state.gov/e/eb/rls/prsrl/2004/36573.htm*.

(2) Afghanistan

On September 21, 2004, Assistant U.S. Trade Representative Ashley Wills and Afghanistan's Minister of Commerce, Sayed Mustafa Kazemi, signed a Trade and Investment Framework Agreement in Kabul. A press release from the Office of the U.S. Trade Representative described the TIFA as "provid[ing] a forum for Afghanistan and United States to examine ways to expand bilateral trade and investment." The press release, excerpted further below, is available at *www.ustr.gov/Document_Library/Press_Releases/2004/September/Section_Index.html*.

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". . . TIFAs have proven to be useful catalysts for promoting the kinds of economic and regulatory reform that have contributed to expanding opportunity, development and hope," said Ambassador Wills. "We believe the U.S.-Afghan TIFA will enhance trade between our two countries and assist Afghanistan as it seeks to grow and diversify its economy."

The TIFA creates a Joint Council that will consider a wide range of commercial issues and sets out basic principles underlying the two nations' trade and investment relationship. The Council will establish a permanent dialogue with the expectation of expanding trade and investment between the United States and Afghanistan. The United States has TIFAs with a number of countries to enhance bilateral trade and coordinate regionally and multilaterally through regular senior level discussions on trade and economic issues.

Last year U.S. goods exports to Afghanistan were $61 million and imports were $56 million, which provides an environment for a substantial opportunity to increase bilateral trade. President Bush designated Afghanistan as a participant in the Generalized System of Preferences (GSP), a 30 year old bipartisan program created by Congress. The program's tariff preferences provide an enhanced opportunity for Afghan imports to compete in our market.

2. Rough Diamonds

On April 25, 2003, President George W. Bush signed into law the Clean Diamond Trade Act, Pub. L. No. 108–19, 117 Stat. 631, 19 U.S.C. § 3901 note. *See Digest 2003* at 704–09. During 2004 the Department of State issued Public Notice 4699 and 4796, providing lists of "Participants" under the act. 69 Fed. Reg. 23,848 (April 30, 2004) and 69 Fed. Reg. 47,977 (Aug. 6, 2004), respectively. The basis for and purpose of the lists is explained as follows in the Federal Register. *See also* Chapter 16.B.2. concerning Executive Order 13324 terminating the emergency with respect to Sierra Leone.

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Section 4 of the Clean Diamond Trade Act (the "Act") requires the President to prohibit the importation into, or the exportation from, the United States of any rough diamond, from whatever source, that has not been controlled through the Kimberley Process Certification Scheme (KPCS). Under section 3(2) of the Act, "controlled through the Kimberley Process Certification Scheme" means an importation from the territory of a Participant or exportation to the territory of a Participant of rough diamonds that is either (i) carried out in accordance with the KPCS, as set forth in regulations promulgated by the President, or (ii) controlled under a system determined by the President to meet substantially the standards, practices, and procedures of the KPCS. The referenced regulations are contained at 31 CFR part 592 ("Rough Diamond Control Regulations")(68 FR 45777, August 4, 2003).

Section 6(b) of the Act requires the President to publish in the Federal Register a list of all Participants, and all Importing and Exporting Authorities of Participants, and to update the list as necessary. Section 2 of Executive Order 13312 of July 29, 2003, delegates this function to the Secretary of State. Section 3(7) of the Act defines "Participant" as a state, customs territory, or regional economic integration organization identified by the Secretary of State. Section 3(3) of the Act defines "Exporting Authority" as one or more entities designated by a Participant from whose territory

a shipment of rough diamonds is being exported as having the authority to validate a Kimberley Process Certificate. Section 3(4) of the Act defines "Importing Authority" as one or more entities designated by a Participant into whose territory a shipment of rough diamonds is imported as having the authority to enforce the laws and regulations of the Participant regarding imports, including the verification of the Kimberley Process Certificate accompanying the shipment.

* * * *

On December 14, 2004, in remarks to the United Nations General Assembly, Ambassador Stuart Holliday, Alternate Representative to the United Nations for Special Political Affairs, noted international progress through the Kimberley Process:

> The progress that the participants have made in implementing the Kimberley Process Certification scheme has been remarkable. At the October 2004 plenary in Gatineau, Canada, 42 countries as well as the European Community —comprising some 98% of world diamond trade— participated actively in the proceedings. The Peer Review mechanism is exceeding expectations; by the end of 2004, we expect that 15 countries accounting for more than two thirds of world diamond production will have concluded peer review visits. Annual reports on the Kimberley Process implementation have been received from all Kimberley Process participants. A comprehensive statistical database has been developed and the Working Group on Statistics is actively seeking to improve data quality.

The full text of Ambassador Holliday's remarks is available at *www.un.int/us/04_283.htm*.

3. General System of Preferences: Review of Yugoslavia

Pursuant to sections 501 and 502(a)(1) of Title V of the Trade Act of 1974, as amended (the "1974 Act") (19 U.S.C. 2461,

2462(a)(1)), the President is authorized to designate countries as beneficiary developing countries for purposes of the Generalized System of Preferences ("GSP"). Benefits under the GSP for Yugoslavia were suspended by Presidential Proclamation in 1991. This suspension was codified by the National Defense Authorization Act of 1994, Pub. L. No. 103–160, 107 Stat. 1965. On February 20, 2004, Deputy Secretary of State Richard Armitage waived the legislative restriction that prohibited the President from providing duty-free treatment to articles of Serbia and Montenegro under the GSP. 69 Fed. Reg. 15,917 (March 26, 2004), stating that "the waiver of the application of the prohibitions in Section 1511(a)(6) of Public Law 103–160 is necessary to achieve a negotiated settlement of the conflict in Bosnia-Herzegovina that is acceptable to the parties . . ."

A Department of State press statement on March 29, 2004, explained that the certification and waiver

> does not mean that GSP benefits were restored, only that reinstatement for Serbia and Montenegro could be considered. Serbia and Montenegro made a request for GSP benefits in November 2003, shortly after the Secretary announced the restoration of normal trade relations, which went into effect on December 4, 2003. USTR is currently leading an interagency review of GSP-eligibility for Serbia and Montenegro. Upon completion of this review, it will make the appropriate recommendation to the President for a decision regarding GSP.

See www.state.gov/r/pa/prs/ps/2004/30913.htm.

On September 10, 2004, the Office of the U.S. Trade Representative published a notice in the Federal Register announcing the initiation of a review to consider the designation of Serbia and Montenegro as a beneficiary developing country under the GSP. 69 Fed. Reg. 54,825 (Sept. 10, 2004). The Federal Register notice and solicitation of public comment is excerpted below.

The GSP Subcommittee of the Trade Policy Staff Committee (TPSC) has initiated a review in order to make a recommendation to the President as to whether Serbia and Montenegro meets the eligibility criteria of the GSP statute, as set out below. After considering the eligibility criteria, the President is authorized to designate Serbia and Montenegro as a beneficiary developing country for purposes of the GSP.

Interested parties are invited to submit comments regarding the eligibility of Serbia and Montenegro for designation as a GSP beneficiary developing country. Documents should be submitted inaccordance with the below instructions to be considered in this review.

Eligibility Criteria

The trade benefits of the GSP program are available to any country that the President designates as a GSP "beneficiary developing country." In designating countries as GSP beneficiary developing countries, the President must consider the criteria in sections 502(b)(2) and 502(c) of the Trade Act of 1974, as amended (19 U.S.C. 2462(b)(2), 2462(c)) ("the Act"). Section 502(b)(2) provides that a country is ineligible for designation if:

1. Such country is a Communist country, unless—
(a) The products of such country receive nondiscriminatory treatment, (b) Such country is a WTO Member (as such term is defined in section 2(10) of the Uruguay Round Agreements Act) (19 U.S.C. 3501(10)) and a member of the International Monetary Fund, and (c) Such country is not dominated or controlled by international communism.

2. Such country is a party to an arrangement of countries and participates in any action pursuant to such arrangement, the effect of which is—
(a) To withhold supplies of vital commodity resources from international trade or to raise the price of such commodities to an unreasonable level, and (b) To cause serious disruption of the world economy.

3. Such country affords preferential treatment to the products of a developed country, other than the United States, which has, or is likely to have, a significant adverse effect on United States commerce.

4. Such country—
(a) Has nationalized, expropriated, or otherwise seized ownership or control of property, including patents, trademarks, or copyrights, owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, (b) Has taken steps to repudiate or nullify an existing contract or agreement with a United States citizen or a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of property, including patents, trademarks, or copyrights, so owned, or (c) Has imposed or enforced taxes or other exactions, restrictive maintenance or operational conditions, or other measures with respect to property, including patents, trademarks, or copyrights, so owned, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of such property, unless the President determines that—
(i) Prompt, adequate, and effective compensation has been or is being made to the citizen, corporation, partnership, or association referred to above, (ii) Good faith negotiations to provide prompt, adequate, and effective compensation under the applicable provisions of international law are in progress, or the country is otherwise taking steps to discharge its obligations under international law with respect to such citizen, corporation, partnership, or association, or (iii) A dispute involving such citizen, corporation, partnership, or association over compensation for such a seizure has been submitted to arbitration under the provisions of the Convention for the Settlement of Investment Disputes, or in another mutually agreed upon forum, and the President promptly furnishes a copy of such determination to the Senate and House of Representatives.

5. Such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute.

6. Such country aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism or the Secretary of State makes a determination with respect to such country under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. Appx. section 2405(j)(1)(A)) or such country has not taken steps to support the efforts of the United States to combat terrorism.

7. Such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country).

8. Such country has not implemented its commitments to eliminate the worst forms of child labor.

Section 502(c) provides that, in determining whether to designate any country as a GSP beneficiary developing country, the President shall take into account:

1. An expression by such country of its desire to be so designated;

2. The level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which the President deems appropriate;

3. Whether or not other major developed countries are extending generalized preferential tariff treatment to such country;

4. The extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets and basic commodity resources of such country and the extent to which such country has assured the United States that it will refrain from engaging in unreasonable export practices;

5. The extent to which such country is providing adequate and effective protection of intellectual property rights;

6. The extent to which such country has taken action to—
(a) Reduce trade distorting investment practices and policies (including export performance requirements); and (b) Reduce or eliminate barriers to trade in services; and

7. Whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights. Note that the Trade Act of 2002 amended paragraph (D) of the

definition of the term "internationally recognized worker rights," which now includes: (A) The right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children and a prohibition on the worst forms of child labor as defined in paragraph (6) of section 507(4) of the Act; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

4. Tax Issues: Foreign Tax Credit Restrictions

a. Iraq

On September 19, 2004, Deputy Secretary of State Richard L. Armitage certified that "effective June 28, 2004, Iraq is no longer a country described in section 901(j)(2)(A) of the Internal Revenue Code of 1986, as amended." A memorandum for Paul Curry, Executive Secretary, Department of the Treasury, dated September 20, 2004, provided the revised list of countries as Cuba, Iran, Libya, North Korea, Sudan, and Syria. The basis and effect of that certification is explained in a press release of September 27, 2004, from the Department of the Treasury. *See also* Rev. Rul. 2004–103, available at *www.irs.gov/irb/2004-45_irb/ar06.html.*

The full text of the press release, excerpted below, is available at *www.treas.gov/press/releases/js1960.htm.* The September 20, 2004, memorandum and certification are available at *www.state.gov/s/l/c8183.htm.*

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U.S. tax rules generally allow taxpayers a credit against U.S. income tax for taxes paid to a foreign country. Special rules in sections 901(j) and 952(a)(5) generally deny foreign tax credits and impose other restrictions in the case of income attributable to countries with which the United States does not conduct diplomatic relations or which have been identified as sponsors of international terrorism.

Revenue Ruling 95–63 provides a list of countries that have been identified as meeting the specified criteria and that are, therefore, subject to these restrictions. The restrictions of section 901(j) and related provisions cease to apply with respect to a particular country if the Secretary of State certifies to the Secretary of the Treasury that the country no longer meets the criteria in that section.

The Department of State has certified that Iraq is no longer a country described in Section 901(j)(2)(A) of the Internal Revenue Code, effective June 28, 2004. Accordingly, as of that date, the denial of foreign tax credits and other restrictions of sections 901(j) and related provisions do not apply to income and taxes attributable to Iraq.

Treasury and the IRS intend to update Rev. Rul. 95–63 to reflect this development.

b. Libya

On September 20, 2004, President George W. Bush issued Presidential Determination 2004–48 determining that "the waiver of the application of section 901(j)(1) of the Code with respect to Libya is in the national interest of the United States and will expand trade and investment opportunities for U.S. companies in Libya" and announcing his intention to grant the waiver. The determination also authorized the Secretary of the Treasury to report the President's intention to grant the waiver to Congress. The report from the Secretary of the Treasury describing the waiver process and its application to Libya is excerpted below.

The Presidential Determination and the report to Congress are available at 69 Fed. Reg. 61,703 (Oct. 20, 2004).

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Section 901(j)(1) imposes restrictions on the foreign tax credit in the case of income and taxes attributable to certain countries, including Libya. Section 901(j)(1) generally provides that taxes paid on income from countries described in section 901(j)(2)(A)

cannot be taken into account in computing a U.S. taxpayer's foreign tax credit and that the income from such countries is subject to specific tax rules.

Section 901(j)(5) authorizes the President to waive the restrictions of section 901(j)(1) if the President determines that a waiver of the application of such paragraph is in the national interest of the United States and will expand trade and investment opportunities for U.S. companies in such country. Not less than 30 days before the date on which a waiver is granted, the President must report to Congress the intention to grant such a waiver.

The President has determined that a waiver of the application of section 901(j)(1) with respect to Libya is in the national interest of the United States and will expand trade and investment opportunities for U.S. companies in Libya. The President therefore stated his intention to grant such a waiver with respect to Libya. The President also authorized and directed the Secretary of the Treasury to report to Congress the President's intention to grant the waiver.

The granting of such a waiver is in the national interest of the United States. In light of recent actions taken by the Government of Libya, including commitments and actions to eliminate its weapons of mass destruction programs and its Missile Technology Control Regime (MTCR)-class missiles, it is in the national interest of the United States to uphold the President's commitment to respond in good faith by strengthening economic ties between the United States and Libya as one facet in the gradual normalization of U.S.-Libyan relations. The restrictions imposed by section 901(j) currently inhibit the development of such economic ties, and waiver of the restrictions of section 901(j)(1) will contribute to better and stronger commercial relations between the United States and Libya.

The granting of such a waiver will also expand trade and investment opportunities for U.S. companies in Libya. Upon grant of the waiver, U.S. companies will be better able to compete with companies based in other countries in selling goods and providing services to Libyan companies and consumers. With the restrictions of section 901(j) of the Code removed, U.S. companies will be in a better position to create U.S. jobs through exports to and investments in Libya.

5. Antitrust Positive Comity Agreement with Canada

On October 5, 2004, the United States and Canada signed the Agreement Between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws ("Positive Comity Agreement"). Article III of the agreement, entitled "Positive Comity," provides:

> The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.

The full text of the Positive Comity Agreement is available at *www.usdoj.gov/atr/public/international/docs/205732.htm*.

A press release announcing the signing of the agreement is excerpted below and available at *www.usdoj.gov/atr/public/press_releases/2004/205675.htm*. The 1998 U.S.-EU agreement noted in the press release is discussed in *Cumulative Digest 1991–1999 at* 1543–45.

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Positive comity agreements, such as the agreement signed today, allow antitrust enforcers in one country to request that the other country's antitrust agency investigate and take appropriate law enforcement action against anticompetitive conduct that adversely affects the interests of the country requesting the investigation and violates the laws of the country responding to the request. The agreement signed today builds on the positive comity provision in the 1995 antitrust enforcement cooperation agreement between the U.S. and Canada and provides for more efficient application of the two countries' enforcement resources.

The agreement signed today is very similar to the agreement signed by the U.S. and the European Communities in 1998, and establishes conditions under which the requesting country will normally agree to defer initiating its own enforcement activity. The enhanced agreement aims to reduce the likelihood of duplicate enforcement actions in cases where positive comity requests are made. However, nothing in the agreement prohibits the party making the request from bringing its own enforcement action if the requesting party believes doing so is necessary in order to protect consumers in its country.

The new agreement identifies the types of cases one party will normally refer to the other and lists the obligations the competition authorities will undertake in handling these cases. Specifically, the agreement provides that, in cases where the process is invoked, the requesting party will defer or suspend its enforcement activities in favor of a positive comity referral to the other country where the foreign anticompetitive activities do not directly or principally affect the requesting party's consumers.

* * * *

Under the agreement, each side pledges to devote its best efforts and resources to investigate referred matters and inform the other side's competition authorities on the status of the cases resulting from a referral. Both sides have also agreed that some circumstances will justify parallel investigations—although neither side waives its authority to initiate its own antitrust enforcement actions. Additionally, the new agreement does not apply to merger or cartel investigations. Finally, the agreement stipulates that confidential information may be shared only where the source of the information has consented.

6. Cuban Trademark Litigation in the United States

In an opinion of March 26, 2004, the U.S. District Court for the Southern District of New York resolved a dispute between General Cigar Company (a U.S. corporation) and Cubatabaco (a Cuban state-owned entity), centering on the rights to the COHIBA trademark in the United States, in favor

of Cubatabaco. *Empresa Cubana del Tabaco, d.b.a. Cubatabaco v. Culbro Corp.*, 2004 U.S. Dist. LEXIS 4935 (S.D.N.Y. 2004). Among other things, the district court found that Cubatabaco had acquired the right to the trademark in the United States through the application of the "famous marks doctrine" and enjoined General Cigar from using the mark in connection with any product or service. On April 30, 2004, the district court denied a stay of the permanent injunction pending appeal but granted a thirty-day stay pending further action by the Second Circuit Court of Appeals. 2004 U.S. Dist. LEXIS 7443, 7444 (S.D.N.Y. 2004). General Cigar appealed the decision of the district court and, on June 23, 2004, the 2nd Circuit granted a stay during the appeal.

Although the United States did not participate in the case in the district court, the Second Circuit invited it to submit an *amicus curiae* letter brief. As set forth in the U.S. letter brief, filed November 12, 2004, the appeals court requested that the United States provide its views on the following issues:

> 1) whether the District Court's order constitutes a transfer of property that is prohibited by the CACR, see 31 C.F.R. §§ 515.201(b)–(c), 515.309, 515.310;
> 2) whether Cubatabaco's acquisition of the mark through the "famous marks doctrine" is a transfer by operation of law that is prohibited by the CACR, see 31 C.F.R. § 515.201(b)–(c), 515.525;
> 3) whether Cubatabaco's acquisition of the mark is authorized by 31 C.F.R. § 515.527;
> 4) whether Cubatabaco's acquisition of the mark is authorized by the special license that was issued to it on October 16, 1997 by the Office of Foreign Assets Control (License No. C-18942); and
> 5) such other aspects of the CACR that you deem relevant to this case.

Excerpts below from the U.S. letter brief provide the background of the litigation and the views of the United States that "[a]lthough the Cuban Assets Control Regulations do not prohibit the district court's order canceling General

Cigar's COHIBA registration and enjoining General Cigar from using the COHIBA mark, the district court's conclusion that Cubatabaco acquired the United States COHIBA trademark through the famous marks doctrine in 1992 would constitute a prohibited transfer under the Regulations not otherwise authorized under special license . . ." (Footnotes and references to the Special Appendix filed in the appeal in the case have been omitted.) The full text of the letter brief is available at *www.state.gov/s/l/c8183.htm*.

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a. Plaintiff Cubatabaco is a Cuban governmental entity that exports Cuban tobacco products. Defendant General Cigar Co. is a Delaware corporation that manufactures and distributes tobacco products. Other defendants are related corporate entities.

In the 1970s, Cubatabaco registered its COHIBA trademark for cigars in Cuba and many other countries. It began exporting COHIBA cigars in the early 1980s. In the mid-1980s, Cubatabaco decided not to pursue registration of the COHIBA trademark in the United States, apparently upon advice from counsel who determined that General Cigar had already registered the COHIBA trademark in the United States under an application filed in 1978. However, Cubatabaco did register a different mark—BEHIQUE—in the United States with the same trade dress that it used for COHIBA elsewhere. Cubatabaco did not take any steps to challenge General Cigar's use of the COHIBA mark at that time.

General Cigar became aware of the Cuban COHIBA mark in the late 1970s and obtained the U.S. registration in 1981 based on a first use in 1978. Its sales of COHIBA cigars peaked in the early 1980s but ceased at some point in 1987. By 1992, General Cigar possessed no goodwill from the COHIBA mark. However, in 1992, a new magazine, *Cigar Aficionado*, published articles extremely favorable towards the Cuban COHIBA cigars. On November 20, 1992, General Cigar started using the COHIBA name for one of its premium cigars (previously marketed under a different name). General Cigar's new application to register the COHIBA mark was published in 1994 and granted without opposition in 1995.

However, in 1997, Cubatabaco commenced proceedings before the United States Patent and Trademark Office (USPTO) and its Trademark Trial and Appeal Board (TTAB) to cancel General Cigar's COHIBA registration and to register its own COHIBA mark. General Cigar then launched a new super-premium cigar with the COHIBA name. Later in 1997, Cubatabaco filed the instant lawsuit, seeking injunctive relief and monetary damages under several treaty provisions, the Lanham Act, and New York State law. The USPTO and TTAB proceedings have been stayed pending the outcome of the judicial proceedings.

b. The district court addressed Cubatabaco's claims piecemeal over a series of orders both before and after the bench trial in this case. Specifically relevant to the questions that the Court has posed to the United States, the district court held that Cubatabaco had a protectable mark and that General Cigar's use of that mark was likely to cause consumer confusion as to the origin or sponsorship of its cigars. In reaching this holding, the district court applied the "common-law 'well-known' or 'famous marks' doctrine," which was "first recognized in Article 6bis of the Paris Convention." The district court concluded that by the time General Cigar first used the COHIBA mark (in November 1992) after abandoning its previous registration, the Cuban COHIBA mark had become well known in the United States. Therefore, by operation of the famous marks doctrine, "Cubatabaco had a legally protectable right to the mark at that time." The court based its conclusions regarding the fame of the Cuban COHIBA mark at that time on consumer studies, unsolicited media coverage, and attempts to plagiarize the mark. The court also concluded that "there is a likelihood of confusion between the Cuban COHIBA and the General Cigar COHIBA." Having concluded that Cubatabaco possessed a protectable COHIBA mark in the United States in November 1992 under the famous marks doctrine and that there was a likelihood of confusion between the two COHIBA marks, the district court concluded that Cubatabaco was entitled to relief under the Lanham Act, ordered the cancellation of General Cigar's COHIBA registration, and enjoined the further use of the mark by General Cigar. Having previously bifurcated the trial on liability from any trial on damages, the district court delayed a decision on damages pending further

evidentiary proceedings. Finally, the district court certified its order for interlocutory appeal.

c. This Court granted cross-petitions for interlocutory appeal and a stay pending appeal. . . .

2. This Court has recently described the history and status of the Cuban embargo as follows:

> *The Cuban embargo*. In 1963, the United States imposed an embargo on Cuba, reflected in the Cuban Assets Control Regulations ("CACR"), as amended, 31 C.F.R. §§ 515.101–515.901 (1999), promulgated pursuant to section 5(b) of the Trading with the Enemy Act of 1917, as amended, 12 U.S.C. § 95a ("TWEA"). In 1996, Congress enacted the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act ("LIBERTAD Act"), Pub.L. No. 104–114, 110 Stat. 785 (1996), which, among other things, codified the regulations implementing the Cuban embargo, see 22 U.S.C. § 6032(h). The Secretary of the Treasury has the authority to administer the Cuban embargo, which he has delegated to the Office of Foreign Assets Control ("OFAC"), see 31 C.F.R. § 515.802.

Havana Club Holding, S.A. v. Galleon, S.A., 203 F.3d 116, 120 (2d Cir. 2000); *see also Regan v. Wald*, 468 U.S. 222, 225–59 (1984). As this Court went on to note, the purpose of the Regulations is to "prevent any Cuban national or entity from attracting hard currency into Cuba by selling, assigning, or otherwise transferring rights subject to United States jurisdiction." *Havana Club*, 203 F.3d at 124.

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DISCUSSION

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1. As an initial matter, with two exceptions discussed below, the district court's order in this case does not comprise any transfer of property prohibited by the Regulations. In addition to simply

dismissing or denying certain claims and making non-substantive rulings, the district court: (1) entered judgment in Cubatabaco's favor on its claim of trademark infringement; (2) entered judgment that General Cigar had abandoned its right to the COHIBA mark held prior to November 1992; (3) cancelled General Cigar's COHIBA trademark and directed that the Director of the USPTO take appropriate action upon this cancellation; (4) enjoined General Cigar from using the COHIBA mark; (5) directed General Cigar to turn over to Cubatabaco goods and labels bearing the COHIBA mark; and (6) directed General Cigar to recall goods and labels bearing the COHIBA mark from its customers and distributors.

Despite the broad prohibitions included in 31 C.F.R. § 515.201(b)(1), a judicial order adjudicating liability and setting damages is not prohibited under the Regulations, *see Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 362 (11th Cir. 1984), but a judicial order that actually transfers property or property interests is prohibited, *see National Oil Corp. v. Libyan Sun Oil Co.*, 733 F.Supp. 800, 809–813 (D. Del. 1990) (applying similar provisions of the embargo against Libya), as is the execution of any judgment when that execution transfers property. The Supreme Court has similarly indicated that the OFAC Regulations allow the entry of a judgment in a case involving property in which a Cuban entity has an interest but prohibit the execution of such a judgment. *See First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 632 n.24 (1983) (dictum); *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 735–37 & nn. 25 & 27 (1976) (Marshall, J., dissenting); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (leaving intact Cuban claim of conversion without mentioning regulations). This understanding is consistent with the purpose of the Regulations, namely to "prevent any Cuban national or entity from attracting hard currency into Cuba by selling, assigning, or otherwise transferring rights subject to United States jurisdiction," Havana Club, 203 F.3d at 124. That purpose is achieved by allowing judicial orders that adjudicate disputes and clarify the parties' rights, but prohibiting the execution of judicial orders involving the transfer of property interests as well as the entry of self-executing orders that, by themselves, operate as a transfer of property rights.

In this case, the majority of the district court's substantive orders are not subject to the Regulations. First, the order cancelling General Cigar's COHIBA registration affects only the property of General Cigar; it gives no property right to Cubatabaco, and therefore does not relate to property in which a Cuban national has an interest. At any rate, OFAC has made clear that 31 C.F.R. § 515.527 authorizes a Cuban entity to seek the cancellation of a competing mark. A similar analysis applies to the judgment that General Cigar had abandoned its 1983 COHIBA registration and the injunctions that prohibit General Cigar from using its COHIBA mark and that require it to recall goods and labels bearing that mark. Because these remedies relate solely to General Cigar and its property in which Cubatabaco lacks an interest, they are not prohibited by the Regulations.

However, the Regulations do prohibit two parts of the district court's order and are not permitted pursuant to the special license. First, the order requiring General Cigar to turn over goods and labels bearing the COHIBA mark to Cubatabaco is a self-executing order requiring a transfer of property to a Cuban entity. This transfer is prohibited under the Regulations and this order should therefore be vacated. Second, as discussed in greater detail below, the district court's judgment regarding trademark infringement appears to rest on its holding that Cubatabaco acquired the United States trademark rights to the COHIBA mark through operation of the famous marks doctrine in 1992. And that holding, in turn, constitutes a transfer prohibited under the Regulations. Thus, although a declaratory judgment finding infringement of a Cuban-held trademark is not, in itself, a transfer of property that is prohibited under the Regulations, those Regulations prohibit the declaratory judgment of infringement because the finding is premised on a prohibited transfer.

* * * *

As we noted in Section 1, above, the cancellation of the trademark registrations and the enjoining of General Cigar from using the mark are not prohibited by the Regulations, but the conclusion that Cubatabaco acquired the U.S. rights to the COHIBA trademark in 1992 is prohibited. Thus the remaining

question is whether any of the district court's otherwise permissible orders are rendered invalid because they are dependent upon the invalid finding regarding the acquisition of the United States COHIBA trademark. . . . [W]ith the exception of the declaratory judgment that General Cigar infringed Cubatabaco's trademark, it does not appear that the acquisition of a U.S. trademark by Cubatabaco is a necessary predicate for the remedies entered by the district court. Most saliently, the district court's orders cancelling General Cigar's trademark registration and enjoining General Cigar from using the mark, are not inconsistent with the Regulations.

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Cross-references

Expropriations and related issues, **Chapters 1.C.d.; 8.B.1. and 2.a.; and 10.A.2.d.**(3).
Trade and environment, **Chapter 13.A.3.a.**
Commercial private international law, **Chapter 15.A.**
International civil litigation in U.S. courts, **Chapter 15.D.**
Sanctions, **Chapter 16.**

CHAPTER 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED ISSUES

1. UN Convention on the Law of the Sea

On March 11, 2004, the Senate Foreign Relations Committee ("SFRC") reported the 1982 United Nations Convention on the Law of the Sea ("the Convention") and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the 1994 Agreement") to the full Senate recommending advice and consent to accession and ratification, respectively. S. Exec. Rep. No. 108–10 (2004). President William J. Clinton had transmitted both instruments to the Senate for advice and consent in 1994. S. Treaty Doc. No. 103–39 (1994). *See Cumulative Digest 1991–1999* at 1555–69; *see also* excerpts from testimony before the SFRC and questions and answers for the record in *Digest 2003* at 715–64. The SFRC recommended that the Senate provide advice and consent to accession and ratification conditioned on a number of declarations, understandings, and conditions. S. Exec. Rep. No. 108–10 at 16–22. Although the administration provided additional information and testified in hearings before other interested committees, as discussed below, the Senate took no action. Under Senate procedures, the treaties were returned to the SFRC at the end of the 108th Congress.

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a. Letter concerning implementing legislation

A letter from William H. Taft, IV, Legal Adviser of the Department of State, to Chairman Richard G. Lugar, dated March 1, 2004, addressed implementing legislation and private rights of action. The letter, reprinted in S. Exec. Rep. No. 108–10 at 22, is excerpted below.

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Given that the United States is a party to the 1958 law of the sea conventions, that the United States heavily influenced the development of the Convention, and that U.S. policy since 1983 has been to act in accordance with the Convention's provisions governing traditional uses of the oceans, U.S. law and practice are already generally compatible with the Convention. Except as noted below regarding deep sea-bed mining, the United States does not need to enact new legislation to supplement or modify existing U.S. law, whether related to protection of the marine environment, human health, safety, maritime security, the conservation of natural resources, or other topics within the scope of the Convention. The United States, as a party, would be able to implement the Convention through existing laws, regulations, and practices (including enforcement practices), which are consistent with the Convention and which would not need to change in order for the United States to meet its Convention obligations. For example, U.S. law and practice for managing its natural resources, including its fishery resources, are consistent with the Convention's provisions with respect to the exploration, utilization, conservation, and management of natural resources.

The one area in which implementing legislation would be necessary at some point after U.S. accession is legislation to enforce decisions of the Sea-bed Disputes Chamber, with respect to which the Administration proposed a declaration for inclusion in the Senate's resolution.

Finally, I note that, consistent with another declaration proposed by the Administration, the Convention would not create private rights of action or other enforceable rights in U.S. courts,

apart from its provisions regarding privileges and immunities to be accorded to the Convention's institutions.

b. Testimony before other committees

During 2004 hearings were also conducted by the Senate Committee on Environment and Public Works (March 23, 2004), the Senate Armed Services Committee (April 8, 2004), House Committee on International Relations (May 12, 2004), and Senate Select Committee on Intelligence (closed hearing June 8, 2004). Excerpts from several of the hearings follow.

(1) House International Relations Committee

On May 12, 2004, Mr. Taft testified before the House International Relations Committee in support of the Convention and the 1994 Agreement. Mr. Taft's prepared statement, excerpted below, included responses to concerns that had been raised about the Convention. A paragraph on intelligence activities has been omitted; *see* statement on intelligence in (2) below. *U.N. Convention on the Law of the Sea: Before the House Comm. On International Relations, 108th Cong. 20–42 (2004)(statement of William H. Taft, IV, Legal Adviser, Department of State)*, available at *www.house.gov/international_relations/108/taf051204.htm.*

. . . The Administration strongly supports the Convention. I have testified in support of it before the Senate Foreign Relations Committee on October 21, 2003, as well as before the Senate Armed Services Committee on April 8, 2004. This testimony will focus on the benefits of U.S. accession to the Convention and respond to various arguments being made against accession.

* * * *

BACKGROUND:

The achievement of a widely accepted and comprehensive law of the sea convention to which the United States can become

a party has been a consistent objective of successive U.S. administrations for the last thirty years. The United States is already a party to a series of conventions from 1958 regarding various aspects of the law of the sea. While a step forward at the time as a partial codification of the law of the sea, those conventions left some unfinished business; for example, they did not set forth the outer limit of the territorial sea, an issue of critical importance to U.S. freedom of navigation. The United States played a prominent role in the negotiating session that culminated in the 1982 Convention, which sets forth a comprehensive framework governing uses of the oceans that is strongly in the U.S. interest. When the text of the Convention was concluded in 1982, the United States recognized that its provisions supported U.S. interests, except for Part XI on deep seabed mining. In 1983, President Reagan announced in his Ocean Policy Statement that the United States accepted, and would act in accordance with, the Convention's balance of interests relating to traditional uses of the oceans. He instructed the Government to abide by, or, as the case may be, enjoy the rights accorded by, the provisions of the Convention other than those in Part XI.

Part XI has now been fixed, in a legally binding manner, to address the concerns raised by President Reagan and successive Administrations. We also worked closely with the Senate to ensure that the proposed Resolution of Advice and Consent satisfies the concerns and issues identified by the Administration, including those relating to U.S. military interests. We have urged the Senate to give its advice and consent to this Convention, to allow us to take full advantage of the many benefits it offers.

NAVIGATIONAL ASPECTS:

Joining the Convention will advance the interests of the U.S. military. As the world's leading maritime power, the United States benefits more than any other nation from the navigational provisions of the Convention. Those provisions, which establish international consensus on the extent of jurisdiction that States may exercise off their coasts, preserve and elaborate the rights of the U.S. military to use the world's oceans to meet national security requirements. They achieve this, among other things, by stabilizing

the outer limit of the territorial sea at 12 nautical miles; by setting forth the navigation regime of innocent passage for all ships in the territorial sea; by protecting the right of passage for all ships and aircraft through, under, and over straits used for international navigation, as well as archipelagoes; by reaffirming the traditional freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond; and by providing for the laying and maintenance of submarine cables and pipelines. U.S. Armed Forces rely on these navigation and overflight rights daily, and their protection is of paramount importance to U.S. national security.

ECONOMIC/RESOURCE ASPECTS:

The United States, as the country with the longest coastline and the largest exclusive economic zone, will gain economic and resource benefits from the Convention: It accords the coastal State sovereign rights over living marine resources, including fisheries, in its exclusive economic zone, i.e., out to 200 nautical miles from shore. The Convention also accords the coastal State sovereign rights over non-living resources, including oil and gas, found in the seabed and subsoil of its continental shelf. The Convention improves on the 1958 Continental Shelf Convention, to which the United States is a party, in several ways: by replacing the "exploitability" standard with an automatic continental shelf out to 200 nautical miles, regardless of geology; by allowing for extension of the shelf beyond 200 miles if it meets certain geological criteria; and by establishing an institution that can promote the legal certainty sought by U.S. companies concerning the outer limits of the continental shelf.

The Convention also establishes a legal framework for the protection and preservation of the marine environment from a variety of sources, including pollution from vessels, seabed activities, and ocean dumping. The provisions effectively balance the interests of States in protecting the environment and natural resources with their interests in freedom of navigation and communication. With the majority of Americans living in coastal areas, and U.S. coastal areas and EEZ generating vital economic activities, the United States has a strong interest in these aspects of the Convention.

Concerning mineral resources beyond national jurisdiction, i.e., not subject to the sovereignty of the United States or any other country, the 1994 Agreement meets our goal of guaranteed access by U.S. industry on the basis of reasonable terms and conditions. The Agreement restructures the deep seabed mining regime along free-market principles. It also overhauls the decision-making procedures to accord decisive influence to the United States and others with major economic interests at stake. The United States is guaranteed a seat on the critical decision-making body, and no substantive obligation can be imposed on the United States, and no amendment can be adopted, without its consent. Joining the Convention would facilitate deep seabed mining activities of U.S. companies, which require legal certainty to carry out such activities in areas beyond U.S. jurisdiction.

As to actual costs of being a party, our annual contributions to the Convention's institutions would be about three million dollars, paid to the International Tribunal for the Law of the Sea and the International Seabed Authority from the State Department's Contributions to International Organizations. . . .

DISPUTE SETTLEMENT:

The Convention establishes a dispute settlement system to promote compliance with its provisions and the peaceful settlement of disputes. These procedures are flexible, providing options both as to the appropriate means for resolution of disputes and as to subject matter. In terms of forum, a State is able to choose, by written declaration, one or more means for the settlement of disputes concerning the interpretation or application of the Convention. The Administration is pleased that its recommendation that the United States elect arbitration under Annex VII and special arbitration under Annex VIII is included in the proposed Resolution of Advice and Consent.

In terms of subject matter, the system provides Parties with means of excluding matters of vital national concern from the dispute settlement mechanisms. Specifically, the Convention permits a State, through a declaration, to opt out of dispute settlement procedures with respect to one or more enumerated categories of disputes, including disputes concerning military activities and certain law enforcement activities. The Administration is similarly

pleased that the proposed Resolution of Advice and Consent follows its recommendation that the United States elect to exclude all optional categories of disputes from dispute settlement mechanisms.

A concern raised by Administration witnesses last fall regarding resolution of disputes concerning military activities has been satisfactorily addressed by the proposed Resolution. As I testified before the Foreign Relations Committee, the ability of a Party to exclude disputes concerning military activities from dispute settlement has long been of importance to the United States. The U.S. negotiators of the Convention sought and achieved language that creates a very broad exception, successfully defeating attempts by certain other countries to narrow its scope. The United States has consistently viewed this exception as a key element of the dispute settlement package, which carefully balances comprehensiveness with protection of vital national interests.

This Administration reviewed whether the U.S. declaration on dispute settlement should in some way particularly highlight the military activities exception, given both its importance and the possibility, however remote, that another State Party might seek dispute settlement concerning a U.S. military activity, notwithstanding our declaration invoking the exception. As a result, the Administration recommended, and the proposed Resolution includes, a statement that our consent to accession to the Convention is conditioned on the understanding that each State Party has the exclusive right to determine whether its activities are or were "military activities" and that such determinations are not subject to review. Disputes concerning military activities, including intelligence activities, would not be subject to dispute settlement under the Convention as a matter of law and U.S. policy.

* * * *

PROLIFERATION SECURITY INITIATIVE*:

I would also like to address the relationship between the Convention and the President's Proliferation Security Initiative, an activity involving the United States and more than sixty other countries. The Convention will not affect our policies and practices

* Editor's note: The Proliferation Security Initiative is discussed in Chapter 18.C.2.

in carrying out maritime-related PSI activities to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction, their means of delivery and related materials. The PSI requires participating countries to act consistent with national legal authorities and "relevant international law and frameworks," which includes the law reflected in the 1982 Law of the Sea Convention. The Convention's navigation provisions derive from the 1958 law of the sea conventions, to which the United States is a party, and also reflect customary international law accepted by the United States. As such, the Convention will not affect applicable maritime law or policy regarding interdiction of weapons of mass destruction, their means of delivery and related materials. Like the 1958 conventions, the Convention recognizes numerous legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction, for example, exclusive port and coastal State jurisdiction in internal waters and national airspace; coastal State jurisdiction in the territorial sea and contiguous zone; exclusive flag State jurisdiction over vessels on the high seas (which the flag State may, either by general agreement in advance or approval in response to a specific request, waive in favor of other States); and universal jurisdiction over stateless vessels. Further, nothing in the Convention impairs the inherent right of individual or collective self-defense (a point which is reaffirmed in the proposed Resolution of Advice and Consent).

REASONS TO JOIN:

As a non-Party to the Convention, the United States has actively sought to achieve global acceptance of, and adherence to, the Convention's provisions, particularly in relation to freedom of navigation. As noted, President Reagan's 1983 Oceans Policy Statement directed the United States to abide by, and enjoy the rights accorded by, the non-deep seabed provisions of the Convention. Abroad, the United States has worked both diplomatically and operationally to promote the provisions of the Convention as reflective of customary international law.

While we have been able to gain certain benefits of the Convention from this approach, formal U.S. adherence to the Convention would have further national security advantages:

- The United States would be in a stronger position invoking a treaty's provisions to which it is party, for instance in a bilateral disagreement where the other country does not understand or accept them.
- While we have been able to rely on diplomatic and operational challenges to excessive maritime claims, it is desirable to establish additional methods of resolving conflict.
- The Convention is being implemented in various forums, both those established by the Convention and certain others (such as the International Maritime Organization or IMO). While the Convention's institutions were not particularly active during the past decade since the Convention entered into force, they are now entering a more active phase and are elaborating and interpreting various provisions. The United States would be in a stronger position to defend its national security and other interests in these forums if it were a party to the Convention.
- Becoming a party to the Convention would permit the United States to nominate members for both the Law of the Sea Tribunal and the Continental Shelf Commission. Having U.S. members on those bodies would help ensure that the Convention is being interpreted and applied in a manner consistent with U.S. national security interests.
- Becoming a party to the Convention would strengthen our ability to deflect potential proposals that would be inconsistent with U.S. national security interests, including those affecting freedom of navigation.

Beyond those affirmative reasons for joining the Convention, there are downside risks of not acceding to the Convention. U.S. mobility and access have been preserved and enjoyed over the past twenty years largely due to the Convention's stable, widely accepted legal framework. It would be risky to assume that it is possible to preserve indefinitely the stable situation that the United States currently enjoys. Customary international law may be changed by the practice of States over time and therefore does not offer the future stability that comes with being a party to the Convention.

RESPONSES TO ARGUMENTS AGAINST U.S. ACCESSION:

I would now like to respond to arguments that are being made against U.S. accession to the Convention. I will address them in turn:

President Reagan thought the treaty was irremediably defective.

- President Reagan expressed concerns only about Part XI's deep seabed mining regime.
- In fact, he believed that Part XI could be fixed and specifically identified the elements in need of revision.
- The regime has been fixed in a legally binding manner that addresses each of the U.S. objections to the earlier regime.
- The rest of the treaty was considered so favorable to U.S. interests that, in his 1983 Ocean Policy Statement, President Reagan ordered the Government to abide by and exercise the rights accorded by the non-deep seabed provisions of the Convention.

U.S. adherence to the Convention is not necessary because navigational freedoms are not threatened (and the only guarantee of free passage on the seas is the power of the U.S. Navy).

- It is not true that our navigational freedoms are not threatened. There are more than one hundred illegal, excessive claims affecting vital navigational and overflight rights and freedoms.
- The United States has utilized diplomatic and operational challenges to resist the excessive maritime claims of other countries that interfere with U.S. navigational rights under customary international law as reflected in the Convention. But these operations entail a certain amount of risk—*e.g.*, the Black Sea bumping incident with the former Soviet Union in 1988.
- Being a party to the Convention would significantly enhance our efforts to roll back these claims by, among other things, putting the United States in a far stronger position to assert our rights and affording us additional methods of resolving conflict.

The Convention was drafted before—and without regard to—the war on terror and what the United States must do to wage it successfully.

- It is true that the Convention was drafted before the war on terror. However, the Convention enhances, rather than undermines, our ability to successfully wage the war on terror.
- Maximum maritime naval and air mobility that is assured by the Convention is essential for our military forces to operate effectively. The Convention provides the necessary stability and framework for our forces, weapons, and materiel to get to the fight without hindrance—and ensures that our forces will not be hindered in the future.
- Thus, the Convention supports our war on terrorism by providing important stability for navigational freedoms and overflight. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements. It is essential that key sea and air lanes remain open as an international legal right and not be contingent upon approval from nations along the routes. A stable legal regime for the world's oceans will support global mobility for our Armed Forces.

Obligatory technology transfers will equip actual or potential adversaries with sensitive and militarily useful equipment and know-how (such as anti-submarine warfare technology).

- No technology transfers are required by the Convention. Mandatory technology transfers were eliminated by Section 5 of the Annex to the Agreement amending Part XI of the Convention.
- Article 302 of the Convention explicitly provides that nothing in the Convention requires a party to disclose information the disclosure of which is contrary to the essential interests of its security.

As a nonparty, the U.S. is allowed to search any ship that enters our EEZ to determine whether it could harm the United States

or pollute the marine environment. Under the Convention, the U.S. Coast Guard or others would not be able to search any ship until the United Nations is notified and approves the right to search the ship.

- Under the Convention, the UN has no role in deciding when and where a foreign ship may be boarded.
- Under applicable treaty law—the 1958 conventions on the law of the sea—as well as customary international law, no nation has the right to arbitrarily search any ship that enters its EEZ to determine whether it could harm that national or pollute its marine environment. Nor would we want countries to have such a blanket "right," because it would fundamentally undermine the freedom of navigation that benefits the United States more than any other nation.
- Thus, the description of both the status quo and the Convention's provisions is incorrect. The Convention makes no change in our existing ability or authority to search ships entering our EEZ with regard to security or protection of the environment.

Other Parties will reject the U.S. "military activities" declaration as a reservation.

- The U.S. declaration is consistent with the Convention and is not a reservation.

The 1994 Agreement doesn't even pretend to amend the Convention; it merely establishes controlling interpretive provisions.

- The Convention could only have been formally "amended" if it had already entered into force. We negotiated the 1994 Agreement as a separate agreement in order to ensure that the Convention did not enter into force with Part XI in its flawed state. The 1994 Agreement made explicit, legally binding changes to the Convention and has the same legal effect as if it were an amendment to the Convention itself.

- It would not have been in our interest to wait until the Convention entered into force before fixing Part XI concerns, as it would have been more cumbersome to get the changes that we sought.

The problems identified by President Reagan in 1983 were not remedied by the 1994 Agreement relating to deep seabed mining.

- Each objection has been addressed.
- Among other things, the 1994 Agreement:
    - provides for access by U.S. industry to deep seabed minerals on the basis of non-discriminatory and reasonable terms and conditions;
    - overhauls the decision-making rules to accord the United States critical influence, including veto power over the most important future decisions that would affect U.S. interests and, in other cases, requires supermajorities that will enable us to protect our interests by putting together small blocking minorities;
    - restructures the regime to comport with free-market principles, including the elimination of the earlier mandatory technology transfer provisions and all production controls.

The Convention gives the UN its first opportunity to levy taxes.

- The Convention does not provide for or authorize taxation of individuals or corporations. It does include revenue sharing provisions for oil/gas activities on the continental shelf beyond 200 miles and administrative fees for deep seabed mining operations. The amounts involved are modest in relation to the total economic benefits, and none of the revenues would go to the United Nations or be subject to its control. (U.S. companies applying for deep seabed mining licenses would pay the application fee directly to the Seabed Authority; no implementing legislation would be necessary.) U.S. consent would be required for any expenditure of such revenues. With respect

to deep seabed mining, because the United States is a non-party, U.S. companies currently lack the practical ability to engage in such mining under U.S. authority. Becoming a Party will give our firms such ability and will open up new revenue opportunities for them when deep seabed mining becomes economically viable. The alternative is no deep seabed mining for U.S. firms, except through other nations under the Convention. These minimal costs are worth it.

The Convention mandates another tribunal to adjudicate disputes.

- The Convention established the International Tribunal for the Law of the Sea. However, Parties are free to choose other methods of dispute settlement. The United States would choose two forms of arbitration rather than the Tribunal.
- The United States would be subject to the Sea-bed Disputes Chamber, should deep seabed mining ever take place under the regime established by the Convention. The proposed Resolution of Advice and Consent makes clear that the Sea-bed Disputes Chamber's decisions "shall be enforceable in the territory of the United States only in accordance with procedures established by implementing legislation and that such procedures shall be subject to such legal and factual review as is constitutionally required and without precedential effect in any court of the United States." The Chamber's authority extends only to disputes involving the mining of minerals from the deep seabed; no other activities, including operations on the surface of the oceans, are subject to it.

U.S. adherence will entail history's biggest voluntary transfer of wealth and surrender of sovereignty.

- Under the Convention as amended by the 1994 Agreement, there is no transfer of wealth and no surrender of sovereignty.

- In fact, the Convention supports the sovereignty and sovereign rights of the United States over extensive maritime territory and natural resources off its coast, including a broad continental shelf that in many areas extends well beyond the 200-nautical mile limit, and would give us additional capacity to defend those claims against others.
- The mandatory technology transfer provisions of the original Convention, an element of the Convention that the United States objected to, were eliminated in the 1994 Agreement.

The International Seabed Authority has the power to regulate seven-tenths of the earth's surface, impose international taxes, etc.

- The Convention addresses seven-tenths of the earth's surface. However, the International Seabed Authority (ISA) does not.
- The authority of the ISA is limited to administering mining of minerals in areas of the deep seabed beyond national jurisdiction, generally more than 200 miles from the shore of any country. At present, and in the foreseeable future, such deep seabed mining is economically unfeasible. The ISA has no other role and has no general regulatory authority over the uses of the oceans, including freedom of navigation and overflight.
- The ISA has no authority or ability to levy taxes.

The United States might end up without a vote in the ISA.

- The Council is the main decision-making body of the ISA. The United States would have a permanent seat on the Council, by virtue of its being the State with the largest economy in terms of gross domestic product on the date of entry into force of the Convention, November 16, 1994. (1994 Agreement, Annex Section 3.15(a)) This would give us a uniquely influential role on the Council, the body that matters most.

The PRC asserts that the Convention entitles it to exclusive economic control of the waters within a 200 nautical-mile radius of its artificial islands—including waters transited by the vast majority of Japanese and American oil tankers en route to and from the Persian Gulf.

- We are not aware of any claims by China to a 200-mile economic zone around its artificial islands.
- Any claim that artificial islands generate a territorial sea or EEZ has no basis in the Convention.
- The Convention specifically provides that artificial islands do not have the status of islands and have no territorial sea or EEZ of their own. Sovereignty over certain Spratly Islands (which do legitimately generate a territorial sea and EEZ) is disputed among Brunei, China, Malaysia, the Philippines, and Vietnam. China has consistently maintained that it respects the high seas freedoms of navigation through the waters of the South China Sea.

(2) Senate Select Committee on Intelligence

In a prepared unclassified statement submitted to the Senate Select Committee on Intelligence, June 8, 2004, Mr. Taft focused on intelligence-related issues, as excerpted below. The full text of Mr. Taft's prepared statement is available at *http://intelligence.senate.gov/0406hrg/040608/taft.pdf.*

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Turning to intelligence issues in particular, I would note at the outset that the concerns that have been raised about U.S. accession to the Convention appear to involve two basic issues:

- whether, as a matter of substance, the Convention prohibits or regulates intelligence activities in some way; and
- whether a potential challenge to intelligence activities of a Party would be subject to the Convention's dispute settlement procedures.

The Convention does not prohibit or regulate intelligence activities. And disputes concerning military activities, including intelligence activities, would not be subject to dispute settlement under the Convention as a matter of law and U.S. policy. As such, joining the Convention would not affect the conduct of intelligence activities in any way, while supporting U.S. national security, economic, and environmental interests.

I will now turn to the issues raised in the letters of invitation to the witnesses on this panel grouped by subject matter.

With respect to whether articles 19 and 20 of the Convention would have any impact on U.S. intelligence collection, the answer is no. The Convention's provisions on innocent passage are very similar to article 14 in the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party. (The 1982 Convention is in fact more favorable than the 1958 Convention both because the list of non-innocent activities is exhaustive and because it generally uses objective, rather than subjective, criteria in the listing of activities.) A ship does not, of course, under this Convention any more than under the 1958 Convention, enjoy the right of innocent passage in the territorial sea if in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act aimed at collecting information to the prejudice of the defense or security of the coastal State; however, such activities are not prohibited or otherwise affected by the Convention, in this respect, the Convention makes no change in the situation or legal regime that has existed for many years and under which we operate today. As to whether our understanding of these provisions' effect (or lack of effect) on intelligence collection is shared by other States, we are not aware of any State's taking the position, either under this Convention or under the 1958 Convention, that the provisions setting forth the conditions for the enjoyment of the right of innocent passage prohibit or otherwise regulate intelligence collection or submerged transit of submarines.

Concerning whether any current Convention party restricts intelligence collection activities in its exclusive economic zone and the potential impact of U.S. ratification in relation to such a party, the Convention does not prohibit, regulate, or authorize the coastal

State to regulate intelligence activities in the EEZ. On the contrary, high seas freedoms of navigation and overflight are ensured, including the right to engage in intelligence activities. Certain Parties have published regulations purporting to prohibit military activities in general (which are presumably intended to cover intelligence activities) in their EEZs, including Bangladesh, Brazil, Cape Verde, China, India, Malaysia, the Maldives, Mauritius, Pakistan, and Uruguay. If the United States were to become a party to the Convention, while I could not speculate as to whether this would end or affect Chinese or other challenges to intelligence activities, we would be in a stronger position to protest such unlawful assertions of coastal State jurisdiction.

Turning to whether U.S. intelligence operations could be affected by compulsory dispute resolution under the Convention, the Convention expressly permits parties to exclude matters of vital national concern from dispute settlement. Specifically, it permits a State through a declaration to opt out of dispute settlement procedures with respect to disputes concerning military activities. The proposed Senate resolution of advice and consent not only contains such a declaration but also makes clear that a party has the exclusive right to determine whether its activities are or were "military activities" and that such determinations are not subject to review. Thus, disputes concerning military activities, including intelligence activities, would not be subject to dispute settlement under the Convention as a matter of law and U.S. policy.

Concerning the question whether the Intelligence Community is now operating under any treaty "that combines a treatment of intelligence activity with United Nations compulsory dispute resolution procedures," the answer is no. And, for reasons already stated, neither would this Convention be such a treaty. It does not prohibit or regulate intelligence activity; further, the dispute settlement procedures (which, I would also note, are not "United Nations" procedures, but autonomous procedures established by treaty) would not apply to any dispute concerning military activities, including intelligence activities.

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(3) Senate Armed Services Committee

In testimony before the Senate Armed Services Committee on April 8, 2004, Mr. Taft and Admiral Vernon Clark, Chief of Naval Operations, United States Navy, provided clarification in response to questions from the committee, as excerpted below. The full text of the hearing transcript and prepared statements submitted to the Armed Services Committee by Mr. Taft and Admiral Clark are included in S. Hrg. Doc. 108–796, "Military Implications of the United Nations Convention on the Law of the Sea." The prepared statements are also available at *http://armed-services.senate.gov/e_witnesslist.cfm?id=1143.*

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CLARK: . . . I fully support ratification of the Law of the Sea Convention, because in my mind it, first, defines and it preserves our navigational freedoms, the freedoms to use the key international straits and archipelagoes, the exclusive economic zones and the high seas.

It also provides the operational maneuver space that I need for my Navy to conduct peaceful operations at sea but also for combat operations. And I also believe that it's very important because it puts the United States of America where it should be, and that is in a position of leadership to protect these vital freedoms and to shape the future direction of the treaty.

* * * *

. . . [A]s the chief of the Navy, I'm looking for every possible guarantee that I can find to ensure our sailors' safety and to keep them from needlessly going into harm's way. And that's why I believe that we need to join the Law of the Sea Convention so that our people know when they're operating in the defense of this nation far from the shores that they have the backing and that they have the authority of widely recognized and accepted law to look to, rather than depending only upon the threat or the use of force or customary international law that can be too easily changed.

Finally, entry into the convention will support, in my view, our necessary leadership role in maritime matters. We are an island nation, and this will position us to initiate and influence future developments in the Law of the Sea. Ratification puts us on the inside of the discussion when it's to occur to ensure that the Laws of the Sea continues to protect our people and our maritime interests, to prevent excessive claims that attempt to restrict that access and my ability to operate anywhere I need to go operate and to preserve the critical navigational freedoms and freedom of the seas essential to the national security.

And that's right where I think we want to be—in a position of leadership to preserve the key navigation provisions in the convention and if necessary shape them for the future.

Mr. Chairman, let me just add that the Navy has been studying this convention for over 25 years. As you indicated, you were part of it. There are those who oppose the convention, that suggest that maybe the Navy hasn't looked at this closely enough. Well, I wonder if they say that in jest. The fact is is that every CNO since 1982 has had occasion to look at this very carefully for the reasons that I said, because the stakes are high for our people.

And I just want to be on record in saying that we would never recommend a treaty that would require us to get a permission slip from anyone to conduct operations or restrict our intelligence activities around the world, because we know that those kind of freedoms are essential to what we have to do to be successful in our mission.

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[Senator] WARNER: I think it would be appropriate . . . at this point to read a paragraph from the Chairman of the Joint Chiefs of Staff, which parallels in every respect the present testimony of the Chief of Naval Operations.

"The convention remains," and I'm reading from 7 April 2004, General Richard B. Myers addressed to me, as chairman, "The convention remains a top national security policy. In today's fast-changing world, it ensures the ability of the U.S. armed forces to operate freely across the vast expanse of the world's oceans under the authority of widely recognized and accepted international law.

It supports efforts in the war on terrorism by providing much needed stability and operational maneuvering space, codifying essential navigational and overflight freedoms."

TAFT:

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. . . Joining the convention will not affect our efforts under the PSI to interdict vessels suspected of engaging in the proliferation of weapons of mass destruction.

First, PSI activities are carried out consistent with international law today, and they're intended to continue to be carried out in that way. Specifically, the PSI requires participating countries to act consistent with relevant international law and frameworks, which includes the law that is reflected in the convention.

Second, the Law of the Sea reflected in the convention is no different from the law already applicable to the United States. The convention's navigation provisions either derive from the 1958 Law of the Sea Convention, to which we are a party, or they reflect customary international law which has been accepted by the United States since 1983. As such, joining the convention will not affect the maritime law or policy already applicable to the United States regarding interdiction of weapons of mass destruction.

Third, the convention recognizes many legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction. To give just some examples, there is exclusive port and coastal state jurisdiction in internal waters and national air space and coastal state jurisdiction in the territorial sea and contiguous zone. When a foreign vessel is operating on the high seas, boarding and searching can take place with the consent of the vessel's flag state. Such consent can be given in advance, such as through an agreement, or in response to a specific request.

In this regard, in drawing on our extensive experience with counter-narcotics boarding agreements, the United States has developed PSI boarding agreements, which we are negotiating with key flag states and have already concluded with Liberia, which

is important in this respect as the second largest ship registry nation in the world.

In certain circumstances, boarding and searching of suspect vessels can also take place without the flag state's consent. Further, nothing in the convention impairs the inherent right of individual or collective self defense, a point that is reaffirmed, of course, in the proposed resolution of advice and consent.

In short, the rules authorizing PSI maritime interdiction activities would not change as a result of joining the convention, although, as I pointed out earlier, the convention's provisions that enhance our mobility and flexibility to move around the world's oceans will be helpful in this regard.

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[Senator] WARNER: . . . My first question to the Chief of Naval Operations, Mr. Taft covered the PSI agreement . . . And to introduce the subject by way of question from myself, I am going to refer and quote from a release by Frank Gaffney, March 18, 2004, to pose the question to you.

From page two, "The treaty, however, will also interfere with America's sovereign exercise of freedom of the seas in ways that will have an adverse effect on national security, especially in the post 9–11 world. Incredibly, it will preclude, for example, the president's important, new Proliferation Security Initiative. PSI is a multinational arrangement whereby ships on the high seas that are suspected of engaging in the transfer of weapons of mass destruction or related equipment can be intercepted, searched and, where appropriate, seized. Its value is demonstrated in the recent interception of the nuclear equipment headed to Libya.

Similarly, the treaty will define intelligence collection and submerged transit of territorial waters to be incompatible with the treaty's requirements that foreign powers conduct themselves in such seas only with, quote, 'peaceful intent,' end quote. The last thing we need is for some U.N. court or U.S. lawyers to make it more difficult for us to conduct sensitive counterterrorism operations in the world littorals," end quote of Mr. Gaffney.

So I pose that as a question because this statement by Mr. Gaffney is a part of today's record, and I think there should

be a response from the Department of Defense and particularly the chief of Naval Operations.

CLARK: Well, I think there are at least three questions there. Let me just start by saying with regard to PSI his claim that PSI will not be authorized if you're a party to the Law of the Sea is at odds with the fact that there are now 14 partners in PSI and all of them but us are parties to the convention. I think it's based upon a misunderstanding of what PSI is about and how it's executed, but very briefly, we may board a vessel flying a flag that is from our state, we may board a vessel who consents to our boarding, we may board vessels entering our coastal state, and we may board stateless vessels under the PSI construct. And there is nothing at all in the convention that has anything to do to limit that capability.

With regard to his discussion about conducting intelligence operations while you are passing through straits, we are now into technical definitions of particular activities. What this particular convention does is it vastly broadened the protections that we sought when this treaty was put together in that all we had before was something called innocent passage. Innocent passage rules require submarines to transit on the surface. We wanted provisions that would authorize transit submerged through the straits and that kind of activity.

We got it with something called transit passage that's authorized in this convention. That was something that we in the Navy—we sought because we did not want our submarines to have to be exposed to conduct an innocent passage. We have made the statement that any activity—that we can exclude any kind of activity to open-ended compulsory arbitration, and this process we have chosen and the resolution before the Senate says that military activity will be excluded, and that dismisses the other argument that he's making that puts him opposed to the treaty.

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[W]hat I'm saying is that the convention gives us new protections that did not exist before, and they are transit passage and rights in the archipelago waters, and it also gives us rights in the

extended economic zones, which are at issue in today's world. And, fundamentally, this treaty says that we are authorized to be there. And what I was saying about passing through straits, under the old rules, before we had this convention, innocent passage was the only thing prescribed in international law. That's the old law.

* * * *

CLARK: Transit passage now allows us to conduct our operations in the normal mode, and that is a much better—that's where we want to be.

WARNER: . . .

* * * *

Will military activities, including military intelligence activities, be excepted from the convention's dispute settlement mechanism as a matter of U.S. policy? Secondly, does the administration take the view that each state party has the right to determine whether its activities are military activities and that such determination is not reviewable by other parties to the convention? And, thirdly, how as a matter of U.S. policy will the U.S. intelligence activities be treated with respect to the convention's dispute settlement mechanism? . . .

TAFT: Thank you, Mr. Chairman. Yes, as a matter of policy, we have opted out of the dispute settlement system for all of the categories that you mentioned, including, specifically, military activities.

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. . . And as to the second question as to whether what is a military activity, who decides, the resolution of advice and consent has a declaration in it establishing that that is a self-judging determination, that we will decide that and that it will, in response to your second question, not be subject to review. And, as I testified earlier, the military activities exemption includes intelligence activities. . . .

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[Senator] LEVIN: Just on that one issue, is there any doubt in either of your minds that when we exclude military activities from the arbitration provision, that we are also, because of our own declaration, excluding military intelligence as well?

CLARK: There's no doubt in my mind.

TAFT: No, we have no doubt, and I think it should be clear, certainly, as a result of this testimony and other letters that we have written. Thank you.

LEVIN: On the matter of innocent passage, I'd like to clarify one issue there. I think it's in Mr. Gaffney's brief, I believe. He says that articles 19 and 20, the first one relating to the meaning of innocent passage and the second one, article 20, relating to submarines and other underwater vehicles. It says, quote, "They attempt explicitly to regulate intelligence activities."

First of all, does anything in either of those articles change the current situation relative to innocent passage? . . .

CLARK: We do not conduct intelligence activities while we're conducting innocent passage, so it is not applicable.

LEVIN: So this does not change that in any way.

CLARK: No.

* * * *

TAFT: The only change, Senator, I think that should be noted is that the list of activities that deprive a state of the right of innocent passage in this convention is exclusive. And that's it. Those are the only things that deprive you of those benefits. They are the same as what are in there now, but in the existing 1959 convention it's a little bit vaguer. One of our objectives was to nail it down so that only those things that are specified deprive you of the right of innocent passage. We got that in the convention.

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LEVIN: . . . Admiral, you made reference to this, I believe, both here and in our closed session, but I'd like you to be a little more specific. There are trends that are negative to us in terms of customary maritime law or that might be negative to us that we would like to try to stop. We're interested in mobility and accessibility and that there are some trends which could restrict

our goals in that regard and in other regards. Could you give us a little more explicit understanding of what you mean by that?

CLARK: I sure can. Without naming nations, I will tell you, Senator, that we know that there are nations who want to restrict our ability to operate in their extended economic zone. The convention gives us freedom to operate as a military in the EEZ without restriction. Eighty percent of the world's population happens to live within 200 miles of the coastline in the world we live in today. And, as Senator Inhofe said, two-thirds of the world constitutes my maneuver space, the world's oceans. If we had such restrictions near the coastal region, it would very negatively impact our ability to conduct operations, and we have had nations tell us that they want to restrict our operations.

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2. Freedom of Navigation Program

A listing of U.S. armed forces' operational assertions of U.S. navigation and overflight rights during fiscal year 2004 under the freedom of navigation program is available at *www.defenselink.mil/policy/isp/fon_fy2004.html*.

a. Cuba

Following a June 18, 2004, incident in which Cuban Coast Guard assets attempted to intercept and interfere with a U.S. Coast Guard cutter conducting search and rescue operations in international waters, the U.S. Interest Section in Cuba delivered a demarche to the Cuban Ministry of Exterior Relations and the Cuban Coast Guard ("TGF"). The demarche provided the U.S. position on the issues presented by the incident: that the TGF action had hazarded the voyage of the Coast Guard cutter; that Cuba cannot claim a territorial sea around a Cuban-operated oil platform located in its contiguous zone; and that Cuba must ensure that its vessels

engaged in the enforcement of the 500-meter safety zone surrounding the platform do not interfere with the lawful freedom of navigation exercised by U.S. vessels, as set forth below. Cuba is a party to UNCLOS which, as relevant here, reflects international law accepted by the United States.

In response, the Government of Cuba reaffirmed its obligation to respect and comply with UNCLOS and suggested that the U.S. authorities had misinterpreted the actions and statements of the TGF vessel's commander at the time of the incident.

Suggested talking points prepared for the demarche follow.

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a. The United States strongly protests the dangerous, unsafe, and unwarranted maneuvers conducted by Cuban Border Guard (TGF) assets attempting to intercept and interfere with a U.S. Coast Guard cutter conducting a search and rescue operation in international waters on Friday afternoon, June 18, 2004.
b. One of the TGF vessels approached within 25 yards of the U.S. Coast Guard cutter. The other TGF vessel crossed the Coast Guard cutter's bow at a range of 100 yards at a high rate of speed. At all times, the U.S. Coast Guard cutter was seaward of Cuban territorial sea.
c. These dangerous and unwarranted maneuvers of the TGF vessels hazarded the U.S. Coast Guard cutter and impeded the performance of its search and rescue mission. Such actions by the TGF vessels violated the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS), to which both Cuba and the United States are party.
d. During these dangerous maneuvers, the TGF patrol craft challenged the U.S. Coast Guard cutter via radio and twice erroneously insisted that the cutter was "in Cuban waters." (We also understand that TGF assets have previously hailed U.S. Coast Guard cutters in the vicinity of platform.)

e. The United States notes that this unsafe and uncalled for encounter occurred between 2 and 4 nautical miles from an artificial platform operated by Cuba approximately 18 nautical miles North of Punta Tijeras, Cuba. We note that the platform is, and this entire encounter occurred, entirely seaward of Cuban territorial sea.

f. The United States is aware of, recognizes, and respects the 500-meter safety zone surrounding the platform, properly established in accordance with Article 60 of the Law of the Sea Convention. Further, the United States has and intends to continue to comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures, and safety zones.

g. However, the dangerous and aggressive maneuvering of the TGF patrol craft coupled with the irate verbal insistence by the TGF patrol craft that the U.S. Coast Guard cutter was in "Cuban waters" is unacceptable because the TGF patrol craft commander disregarded his obligations under COLGREGS and apparently undertook these provocative actions upon the erroneous belief that a territorial sea existed around the platform.

h. As you know, artificial islands, like the platform at issue, do not generate a territorial sea. Indeed, international law, as reflected in paragraph 8 of Article 60 of the Law of the Sea Convention, provides that artificial islands, installations, and structures "have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf."

i. The United States demands that TGF patrol craft comply with generally accepted international standards regarding the prevention of collisions at sea, particularly in the vicinity of artificial islands, installations, structures, and safety zones. There was no recognized legal basis for the TGF patrol craft to approach and challenge a U.S. Coast Guard cutter that was on a course and speed on which it would have passed no closer than 3600 meters from platform, well outside the 500 meter safety zone. This encounter

created needless tensions, hazarded the vessels of both Nations, and calls into question Cuba's intentions with respect to this issue.

j. Accordingly, the United States demands that you take immediate action to ensure that TGF patrol craft do not in the future engage in similar unsafe, unwarranted, and provocative actions directed at U.S. vessels, particularly in international waters outside of the established safety zone surrounding the platform at issue. Likewise, we demand assurances that the Government of Cuba is not claiming or attempting to claim a territorial sea surrounding the platform.

b. Philippines

On June 4, 2004, the Department of Foreign Affairs of the Philippines delivered a diplomatic note to the U.S. Embassy in Manila complaining of an "infringement of (Philippine) territorial integrity and a violation of existing agreements between our two countries" by "a United States Navy Vessel, USS Chancellorsville." The vessel allegedly passed through the Basilan Strait on May 2, 2004, and did not respond to requests for information as to route and purpose, nor had the Philippine government issued "the appropriate clearance for this vessel to enter Philippine territorial waters."

The United States responded by diplomatic note, the substantive paragraphs of which are set forth below, stressing that its actions were fully consistent with international law. The ship was not authorized to provide information as to last and next port, as requested, due to operational security, under longstanding standard operating procedures.

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As a party to the 1982 Law of the Sea Convention ("Convention"), the Ministry will be aware that the ships of all States are entitled to exercise the internationally recognized right to navigate through

these waters for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or EEZ and another part of the high seas or EEZ, a right USS CHANCELLORSVILLE was exercising at that time.

The Embassy wishes to take this opportunity to recall its note delivered January 29, 1986 protesting several of the statements contained in the declaration deposited by the Government of the Philippines on signature of the Convention in 1982 as not consistent with international law.

The Embassy also recalls the declaration of the Government of the Philippines deposited with the Secretary-General of the United Nations on October 28, 1988, in which the Philippine Government stated its intention "to harmonize its domestic legislation with the provisions of the Convention", assured the international community that the "necessary steps are being undertaken to enact legislation dealing with archipelagic sea lanes passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention", and assured the States Parties to the Convention "that the Philippines will abide by the provisions of said Convention."

The Embassy wishes to reassure the Ministry that the United States takes the view that the Philippines meets the criteria set out in Part IV of the Convention to qualify as an archipelagic State, and to remind the Ministry that, with the exception of the straight baseline across the Mora Gulf which exceeds the permissible length, the straight baseline system is consistent with Part IV of the Convention.

The Embassy reaffirms the continuing efforts of the United States Government to assist the Philippine Government in establishing its archipelagic claim consistent with the international law of the sea reflected in the Convention.

c. Ecuador

During 2004 U.S. military aircraft on at least five occasions were denied access to the Guayaquil flight information region ("FIR"), established by Ecuador consistent with the

requirements of the 1944 Convention on International Civil Aviation ("Chicago Convention."). In a communication with the Ecuadoran foreign minister, the U.S. embassy made the following points concerning excess territorial claims and U.S. state aircraft transiting the Guayaquil FIR in international airspace.

— International law permits a state to claim a territorial sea and corresponding territorial airspace up to 12 nautical miles in breadth, as measured from the state's base lines drawn in accordance with international law. Beyond this limit, military or other state aircraft are entitled to operate in international airspace exercising the internationally recognized freedoms of navigation and overflight and are not subject to the jurisdiction or control of air traffic control authorities of coastal states, so long as they do not intend to enter such territorial airspace.
— No notice to, clearance from, or approval of a coastal state is required to exercise such freedoms of navigation and overflight. The United States reaffirms its navigation and overflight rights in international airspace beyond twelve nautical miles from baselines drawn consistent with international law.
— On several occasions over the past year, most recently on June 21, 2004, U.S. military aircraft were advised by Ecuadoran air traffic control (ATC) that they could not enter the Guayaquil FIR without overflight clearance.
— After reviewing the flight path of the aircraft in this most recent incident, we have determined that the aircraft was more than twelve nautical miles from the territory of Ecuador, and therefore outside of Ecuadoran airspace, at all times during its flight.
— The U.S. aircraft was operating in international airspace with due regard for the safety of civil aircraft. Military aircraft lawfully operating in international airspace with due regard for the safety of civil aircraft are under no obligation to check in with or obtain clearance from civil air traffic controllers.
— Additionally, under the Chicago Convention FIR procedures do not apply to state aircraft, including military aircraft; therefore the aircraft were under no obligation to obtain such clearance.

— We share your concern for air traffic safety and our military pilots will continue to fly strictly consistent with the requirements of international law.
— Regular overflights in these areas by U.S. military aircraft can be expected to continue.
— The United States understands that the Government of Ecuador has recently submitted the 1982 Law of the Sea Convention to its legislature for accession.
— The United States strongly supports that effort and does not wish U.S. military flights to make that effort more difficult.
— The United States requests the Government of Ecuador to review this matter, prevent a recurrence and ensure that the freedoms and rights guaranteed to all nations under international law for uses of the high seas and the airspace above are not infringed in the future.

d. Syria

On June 16, 2004, U.S. officials from the U.S. Embassy in Damascus, Syria, delivered a diplomatic note to Syrian officials protesting Syrian Territorial Sea Law No. 28, "Internal Waters and Territorial Sea Limits in the Syrian Arab Republic," dated November 19, 2003. Law No. 28 revised Syria's territorial sea claim from thirty-five to twelve miles, and established a 24-nautical mile contiguous zone and an excusive economic zone up to 200 nautical miles, consistent with international law. In certain respects relating to innocent passage through the territorial sea, and assertion of certain authority in the contiguous zone and exclusive economic zone ("EEZ"), however, the Syrian law violated international law as reflected in UNCLOS. The U.S. diplomatic note protested those aspects of the law as set forth in the substantive paragraphs below. For the text of Law No. 28, *see* UN Law of the Sea Bulletin No. 55 at 14–20, also available at *www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/syr_2003e.pdf.*

The Government of the United States welcomes the revision of the Syrian Arab Republic Territorial Sea from 35 to 12 nautical miles, and other provisions of the law that are consistent with the international law of the sea reflected in the 1982 UN Convention on the Law of the Sea. The United States is, however, concerned that a number of provisions of Law No. 28 are not consistent with the law of the sea, including the following:

— The Government of the United States notes that Article 9 of the law requires warships, including submarines, nuclear-powered ships and ships carrying any nuclear or radioactive substances or materials to obtain prior approval from the Government of the Syrian Arab Republic before such vessels transit the territorial sea of the Syrian Arab Republic.

The United States wishes to recall that customary international law, as reflected in Articles 17 to 26 and Article 52 of the UN Convention on the Law of the Sea (UNCLOS), provides that ships of all states enjoy the right of innocent passage through the territorial sea and archipelagic waters of a coastal state. Innocent passage is a navigational right that may be exercised without requirement to provide prior notification to or obtain permission from the coastal state. This right applies to all ships (including warships), regardless of flag, type, means of propulsion, cargo, destination, armament, or purpose of voyage. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Passage is considered to be prejudicial to the peace, good order or security of the coastal state if a foreign ship engages in one of twelve specific activities listed in Article 19(2) of UNCLOS. Mere passage of a warship is not included in the list of activities contained in Article 19(2). It is therefore the firm belief of the United States that Article 9 of the law impermissibly restricts the right of innocent passage and is therefore inconsistent with international law, including UNCLOS.

— The Government of the United States notes further that Article 8 of the law limits the right of innocent passage to ships of all countries recognized by the Syrian Arab Republic during peace. The right of innocent passage is enjoyed by the ships of all states and is not conditioned on the existence of peace.

— Further, Article 11 restricts the exercise of the right of innocent passage by limiting entry into and exit from the territorial sea to national law and Article 13 authorizes the suspension of innocent passage within pre-defined areas without limit as to duration of the suspension. Under international law, reflected in Article 25(3) of UNCLOS, innocent passage may only be suspended by the coastal state temporarily.

— The Government of the United States notes further that Article 20 of the law provides authority to the Syrian Arab Republic in the contiguous zone for preventing violations of laws and regulations concerning, among other things, security.

A contiguous zone is an area extending seaward from the territorial sea in which the coastal state may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (Article 33, UNCLOS). International law does not recognize the right of coastal states to establish zones that would restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. It is the position of the United States that Article 20 is inconsistent with international law, including UNCLOS, to the extent it includes "security" among the areas of competence for the Syrian Arab Republic to exercise authority in its contiguous zone.

— The United States notes that Article 24 of the law appears to require a permit to lay submarine cables and pipelines in the exclusive economic zone.

The United States wishes to recall that, within the exclusive economic zone, a coastal state has sovereign rights for the purpose of exploring, exploiting, conserving, and managing the living and non-living natural resources of the water column and the sea-bed and its subsoil. The United States also wish to recall that pursuant to Article 56 of UNCLOS, a coastal state's rights within the exclusive economic zone is subject to the rights and duties of other states as provided for in international law. The rights specifically preserved for the ships and aircraft of all states in the exclusive economic zone are the freedom of navigation and overflight, and other internationally lawful uses of the sea related

to those freedoms, including the laying of submarine cables and pipelines.

To the extent Article 24 of the law limits other internationally lawful uses of the sea related to the freedoms of navigation and overflight, such as those associated with the operation of ships and aircraft and submarine cables and pipelines, it is not in conformity with international law.

— Articles 25 and 29 of the Syrian law impermissibly purport to regulate all installations and structures in Syria's EEZ or on Syria's continental shelf regardless of their purpose. The coastal state's right to regulate installations and structures in its EEZ and on the continental shelf is limited to those used for economic purposes.

Accordingly, the United States cannot accept those provisions of Law No. 28 that are inconsistent with the international law of the sea, and reserves its rights and those of its nationals.

As called for by the annual UN General Assembly resolutions on oceans and the law of the sea, the Government of the United States urges the Government of the Syrian Arab Republic to conform Law No. 28 with international law, including UNCLOS.

e. Honduras

On March 28, 2003, the U.S. Embassy in Tegucigalpa delivered a diplomatic note protesting segments of straight baselines established by the Government of Honduras as not meeting international legal requirements. The full text of the note, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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The United States notes that the rules for drawing baselines are contained in articles 5–14 of the 1982 convention. Article 5 states that "except where otherwise provided in this Convention, the

normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state." Paragraph one of article 7 states that straight baselines may be drawn only in two specific geographic situations, that is "in localities where the coastline is deeply indented and cut into," or "if there is a fringe of islands along the coast in its immediate vicinity."

The United States would like to remind the Government of Honduras of the statement made by the International Court of Justice in its judgment in the Qatar v. Bahrain case. In its decision, the Court stated,

> "The Court observes that the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity."

(paragraph 212)

The United States wishes to recall that the purpose of authorizing straight baselines is to allow the coastal state, at its discretion, to enclose those waters which as a result of their close interrelationship with the land, have the character of internal waters, by using straight baselines. A state may also eliminate complex patterns, including enclaves, in its territorial sea, that would otherwise result. Properly drawn straight baselines do not result in extending the limits of the territorial sea significantly seaward from those that would result from the use of normal, low-water line baselines. Moreover, the use of straight baselines in a manner that prejudices international navigation, overflight, and communications runs counter to the balance of interests reflected in the 1982 Convention.

With regard to straight baselines justified on the basis of fringing islands along the coast in the immediate vicinity, the United States has taken the position that, under international law, such a fringe of islands must meet all of the following requirements:

— The most landward point of each island lies no more than 24 miles from the mainland coastline;
— each island to which a straight baseline is to be drawn is not more than 24 miles apart from the island from which the straight baseline is drawn; and
— the islands, as a whole, mask at least 50 percent of the mainland coastline in any given locality.
— straight baseline segments shall not depart from the general direction of the coastline and no individual segment shall . . . exceed 24 miles in length.
— and, the drawing of straight baselines should result in sea areas situated landward of the straight baseline segments that are sufficiently closely linked to the land domain to be subject to the regime of internal waters.

The United States wishes to inform the Government of Honduras that after careful analysis of the straight baselines established by the Government of Honduras and careful review of the information provided by the Government of Honduras, the United States has concluded that many of the segments do not meet the international legal criteria set forth above.

Segment 1–2 begins at the terminus of the Honduras-Guatemala international border . . . to the northern point of Punta Caballos. This stretch of Honduran coastline is smooth, with no fringing islands. A straight baseline segment is inappropriate in this area where there are neither fringing islands nor a coastline that is deeply indented and cut into. The territorial sea should be measured from the low-water mark.

Baseline segment 3–4, slightly more than 7 miles in length connects a point near Punta Ulua (just west of the Ulua River) to Punta Sal. The body of water enclosed by this line fails to meet either the article 10 bay closing line requirements or the straight baseline geographic requirements. The low-water mark should be used as the baseline in this area.

Baseline segments 4–13 enclose the offshore Islas de la Bahia.

Baseline segment 4–5 connects the inland coast at Punta Sal to the western end of Isla de Utila, more than 36 miles to the northeast. There are no intervening islands between Punta Sal and

this island and the mainland coastline is quite smooth and is not "deeply indented or cut into." The waters enclosed by this line segment are not "sufficiently closely linked to the land domain to be subject to the regime of internal waters." Therefore, the appropriate baseline in this area would be the low-water mark.

Baseline segment 6–7 connects the north coast of Isla de Utila to a point on the west coast of Isla de Roatan, just north of Punta Oeste. Point 8, situated on the eastern end of Isla de Roatan's north coast, is connected to point 9 on Isla Morat by a straight baseline segment of less than one mile. Segment 9–10 then connects Isla Morat to the central part of the north coast of Isla Barbareta; the straight baseline system continues as segment 10–11 [which] connects this island to the north coast of Isla de Guanaja. From point l2, situated at Black Rock Point on the eastern end of Isla de Guanja a straight baseline segment almost 55 miles in length extends to the southeast to point 13 at Cabo Camarn on the mainland. This straight baseline segment clearly exceeds the requirements of the 1982 Convention as neither geographic criteria is met—there are no fringing islands, nor is the mainland deeply indented or cut into.

The United States has considered whether any valid straight baseline system can be drawn in the vicinity of the three main islands of Isla de Utila, Isla de Roatan, and Isla de Guanaja. The islands are within 24 miles of the mainland and less than 24 miles from each other; however, there are parts of Isla de Roatan that are greater than 24 miles from the mainland and from other islands to the south, which creates a high seas pocket if the 12-mile territorial sea were drawn from the island's low-water mark. When testing for the fringing islands criterion, these islands mask about 61% of the mainland in this immediate area.

The issue remains whether the waters enclosed by these baselines are "sufficiently closely linked to the land domain to be subject to the regime of internal waters." The water depths are rather deep, in many areas exceeding 1400 meters, and there is a pocket of high seas that would remain if the low-water line were used. However, in the two meetings that experts from our two governments have had on this matter, and in the Aide Memoire that the Government of Honduras provided to the Government of

[the] United States on September 20, 2001, it has been shown that the waters between Islas de la Bahia and the mainland appear to be "sufficiently closely linked to the land domain to be subject to the regime of internal waters."

However, the United States notes that if straight baselines were to be drawn along these islands in a manner consistent with international law, the line segments connecting the islands to the mainland would properly extend due south from the respective ends of the eastern and western islands to the mainland. Thus, the United States does not agree that segments 4–5 and 12–13, as presently drawn meet the requirements of international law.

From point 13, four straight baseline segments (13–14, 14–15, 15–16, and 16–17) incorporate the remaining Caribbean-facing coastline to the mouth of the Rio Coco and its international boundary terminus with Nicaragua. With the exception of segment 15–16, which is a valid river closing line, these segments exceed the requirements of the 1982 Convention. The Honduran coastline along this stretch is quite smooth, with no deep indentations, and there are no fringing islands. Further, two of the baseline segments, 13–14 and 14–15, are quite long, being approximately 43 and 63 miles, respectively, in length. The low-water mark should be used in these areas as the baseline.

The embassy also wishes to recall Executive Decree No. PCM 017-2000 published October 7, 2000.

Article 1 of Decree No. PCM 017-2000 states that Decree No. PCM 007-2000 "does not establish any unilateral maritime claims, or any restriction to international navigation." The embassy would point out that, as article 1(a) of Decree No. PCM 007-2000 establishes straight baselines for the delimitation of Honduras' maritime spaces, the effect of straight baselines is to convert the legal status of waters landward of the line to areas in which the international community's navigation rights are diminished. Such unilateral claims restrict international navigation.

Article 1 further provides that Decree No. PCM 007-2000 "shall be interpreted in accordance with international law." The United States views the segments noted above as inconsistent with international law.

The embassy further notes that the preamble of Decree No. PCM 017-2000 states in part that "the straight baselines established in the Honduran law are simply one factor to be taken into account in any negotiating process with neighboring states" to delimit maritime boundaries.

Although it may be true that baselines may be considered given by states in determining the course of a maritime boundary, potential boundary negotiations may not, consistent with international law, be a criterion for the establishment of straight baselines. It is the presence of the specified geographic conditions that, under international law, might warrant the establishment of straight baselines under appropriate circumstances.

In that connection, it is noted there are a number of off-shore islands located seaward of the northeast coast of Honduras that might be taken into account in the course of maritime boundary negotiations.

The United States Government requests that the Government of Honduras reexamine the aforementioned baselines and bring them into conformity with international law.

Accordingly, the United States reserves its rights and the rights of its nationals in this regard.

f. Peru

In November 2003, the United States responded to a diplomatic note from the Government of Peru protesting the flight of a U.S. Navy P3 aircraft allegedly flying through Peru's "national air jurisdiction." The United States reviewed the flight path of the aircraft and determined that it was more than twelve nautical miles from the territory of Peru, and therefore outside of Peruvian airspace, at all times during its flight. The substantive paragraphs of the return note from the United States, delivered in November 2003, follow.

[The United States] has the honor to refer to the note of the Ministry of Foreign Relations . . . of August 13, 2003, referring to

the flight of a United States Navy P3 aircraft that, according to the note, "flew through Peru's national air jurisdiction without soliciting authorization or providing notification of its transit."

As the Government of the United States of America has advised the Government of Peru on several occasions in the past, international law permits a state to claim a territorial sea and a corresponding territorial airspace up to twelve miles in breadth, as measured from properly drawn base lines. Beyond this limit, military or other state aircraft not intending to enter such territorial airspace are entitled to operate in international airspace exercising internationally recognized freedoms of navigation and overflight and are not subject to the jurisdiction of coastal states. No notice to, clearance from, or approval of a coastal state is required to exercise such freedoms of navigation and overflight.

The United States reaffirms its navigation and overflight rights, as were exercised by the U.S. Navy aircraft in question on June 24, 2003, in international airspace beyond twelve nautical miles from baselines drawn consistent with international law.

g. Transportation of pressure vessel from decommissioned nuclear reactor

The U.S. Department of Transportation ("DOT") authorized Southern California Edison to transport a pressure vessel from a decommissioned nuclear reactor from California by sea-going barge and tugs around Cape Horn to Charleston, South Carolina, for disposal at a low-level radioactive waste site. The highly radioactive fuel and all highly radioactive reactor internals had been removed from the vessel, which was classified by DOT as a "low specific activity" object. Although the planned 2004 shipment was subsequently canceled, guidance prepared by the United States to respond to any questions that might have been raised provide the U.S. views on the legality of such shipments, as excerpted below.

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The U.S. Department of Transportation after an extensive review, concluded that the arrangements for the shipment meet all applicable U.S. safety standards and authorized the transport on December 1, 2003.

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— The object being shipped is not a reactor; it is a reactor vessel from which the highly radioactive fuel and all highly radioactive internal reactor components have been removed. The vessel has been filled with concrete and is packaged in a welded steel container to shield persons and the environment from the low level of radioactivity within.

— U.S. regulatory authorities classify the low level waste as a "low specific activity material." A low specific activity material is a material where the radioactivity present is diluted and widely dispersed throughout the entire mass of material. Because the concentration of radioactivity is so low, the material with minimal packaging is regarded as highly unlikely to pose any radiation hazard either in normal transport or in the event of a transport accident.

— The barge transport system is specifically designed for carrying large, heavy objects such as the pressure vessel and its packaging. A naval architecture firm commissioned by SCE to evaluate the system concluded that the planned barge transportation offers comparable or superior safety to transport by a commercial self-propelled ship.

— Prior to departure the material condition of the barge, tugs and fittings, the navigational safety equipment on the tugs, and the qualifications of the crew will he verified by the U.S. Coast Guard.

— It is our understanding that SCE's plans call for the main tug, barge and cargo to remain on the high seas to the maximum feasible extent throughout the voyage. The other tug will call at ports en route as necessary to replenish fuel, food and other supplies, and will be available to replace the main tug if necessary.

— According to an analysis carried out by the company, given the cargo's low level of radioactivity a total loss of the entire package

at any depth should not result in any measurable impact to public health, fisheries, or the environment. According to SCE, a person standing adjacent to the intact package for one hour would receive one-half the amount of radiation that would be received from a medical x-ray.

— SCE has informed the USG that it has obtained Protection and Indemnity and Wreck Removal Insurance.

* * * *

— Under customary international law of the sea, as reflected in the UN Convention on the Law of the Sea (UNCLOS), ships of all States, regardless of cargo, have the freedom to navigate in the Exclusive Economic Zone (EEZ) of other states as well as on the high seas without prior permission or notification.

— Moreover, ships of all states, regardless of cargo, enjoy the right of innocent passage through the territorial sea (i.e., from the coast out to 12 nautical miles) of other States without prior authorization or notification.

— We understand that SCE plans to keep the barge and cargo outside the EEZ and territorial sea of states en route to the maximum feasible extent. SCE nevertheless reserves the right to avail itself of any route consistent with the international law of the sea, and in this regard it has the full backing of the United States Government.

— The size and weight of the package (approximately 770 tons) renders transport entirely overland to Barnwell (the only available disposal site) prohibitive. Routing through the Panama Canal was considered, but the package weight is well above the Canal's weight limit of 150 tons for cargoes of this type.

— The International Maritime Organization (IMO) Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium, and High-Level Radioactive Wastes in Flasks on Board Ships (INF Code) does not apply in this case. The low specific activity material is not of a type that is covered by the INF Code.

* * * *

3. Salvage at Sea

a. Rejection of salvage claims by United States

The U.S. Court of Appeals for the Eleventh Circuit ruled on June 18, 2004, that salvors of a government wreck are not entitled to a salvage award where the government rejected the offer of salvage. *International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked and Abandoned Aircraft*, 373 F.3d 1147 (11th Cir. 2004). In 2000 the Eleventh Circuit had reversed and remanded a district court decision that allowed salvage operations to proceed in the case in the face of opposition by the U.S. government. *International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001). On remand, the district court found that the United States had effectively rejected the salvage efforts in a 1991 letter from Captain Rasmussen, director of the National Museum of Naval Aviation ("NMNA"), three years before plaintiff in the case conducted its first salvage operation. In its 2004 decision, the Eleventh Circuit affirmed the district court, concluding:

> . . . Rasmussen's 1991 letter to Champlin was an "effective rejection" of salvage services. That letter stated: "Any attempt at so salvaging the [Navy "Devastator" TBD-1 torpedo bomber ("TBD")], without the express written permission of the Department of the Navy, through its museum, will result in a recommendation from this office to institute whatever action is appropriate to prevent an unauthorized taking." In effect, this letter rejects salvage efforts undertaken absent a written agreement with the Navy. [International Aircraft Recovery, L.L.C., ("IAR")] stipulated on the record that "there is not now nor has there ever been an agreement with the Navy that was executed or an enforceable agreement where one side or the other could not have backed out." Thus, IAR performed all salvage services after receipt of the Navy's rejection and without a written agreement with the Navy. IAR, therefore, is not entitled to any salvage award.

See Digest 2003 at 755–58 for excerpts from the U.S. brief to the Eleventh Circuit.

b. RMS Titanic protection agreement

On June 18, 2004, the United States signed an international agreement that will lead to increased protection of the wreck site of the *RMS Titanic*. The agreement was negotiated by the four nations most closely associated with the Titanic—Canada, France, the United Kingdom, and the United States. The UK signed the agreement in November 2003 and has adopted implementing legislation. The text of the agreement is available at *www.state.gov/g/oes/rls/or/2004/33709.htm. See also Digest 2001* at 695–97.

The statement of John F. Turner, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, on signing the agreement, is set forth below and is available at *www.state.gov/g/oes/rls/rm/2004/33708.htm*

This morning the United States signed an international agreement to protect the Titanic wreck site from unregulated salvage operations. Under the agreement, the Titanic is designated as an international maritime memorial, recognizing the men, women, and children who perished in the icy waters of the Atlantic 92 years ago and whose remains it entombs. Any country that signs the agreement pledges to prevent its citizens and vessels flying its flag from making unregulated, illegal dives to the wreck or selling artifacts from it. It also ensures that artifacts from the Titanic are collected and curated in accordance with current scientific standards and kept intact and available to the public as a collection.

Although it rests 12,000 feet deep, no other maritime site or vessel has captured the attention or stirred the emotions of people around the globe as Titanic. This agreement will protect this scientific, cultural, and historical treasure from future harm. It will allow the more than 1,500 souls that were lost that frigid night, April 15, 1912, in the North Atlantic to rest in peace.

The agreement was first called for in the Titanic Maritime Memorial Act signed into law by President Ronald Reagan in 1986. In signing the Act, President Reagan stated that the Titanic leaves a "durable imprint of the disaster upon the consciousness of succeeding generations."

Now our task is to work with Congress to gain the necessary implementing legislation that will allow this agreement to enter into force. In addition, working with the U.K., who has already signed the agreement, we will ask other nations to join us in our effort to preserve what Dr. Ballard has called a "museum of the deep."

The United States began negotiating this agreement in 1997 with Canada, France, and the United Kingdom—the four nations most closely associated with the Titanic. Action by these four countries would choke off the likely sources of financing and technology for unregulated dives to the Titanic. Signature of this agreement by the United States demonstrates our country's leadership to preserve priceless maritime heritage sites.

c. Protection of sunken government property

(1) Public notice to persons interested in salvage

On January 12, 2004, the Department of State issued Public Notice 4614 concerning protection of sunken warships, military aircraft, and other sunken government property. 69 Fed. Reg. 5647 (Feb. 5, 2004). The public notice, excerpted below, reiterated U.S. policy on sunken craft and provided information on policies of France, Germany, Japan, the Russian Federation, Spain, and the United Kingdom concerning salvage of sunken craft owned by the state.

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1. On January 19, 2001, the President stated United States policy on sunken government vessels, aircraft and spacecraft ("State craft") of the United States and foreign nations. *See* Weekly Compilation of Presidential Documents, vol. 37, no. 3, pages 195–196. The President advised, inter alia, "[t]hose who would

engage in unauthorized activities directed at sunken State craft * * * that disturbance or recovery of such craft should not occur without the express permission of the sovereign * * *." (The full text is set out at the end of this notice.)

2. The Governments of France, Germany, Japan, Russian Federation, Spain and the United Kingdom have advised the State Department of their policies, as follows:

France: "In accordance with the 1982 United Nations Convention on the Law of the Sea (among others art. 32 & 236) and Customary Law, every State craft (e.g. warship, naval auxiliary and other vessel, aircraft or spacecraft owned or operated by a State) enjoys sovereign immunities, regardless of its location and the period elapsed since it was reduced to wreckage (general principle of non limitation of rights of States).

The primacy of the title of ownership is intangible and inalienable: no intrusive action may be taken regarding a French sunken State craft, without the express consent of the French Republic, unless it has been captured by another State prior to sinking. But this primacy does not forbid the State to freely renounce, whenever it wants to and in a formal way, to use some of its right on the wreck (except its ownership). These principles have been applied in the Agreement between the Government of the USA and the Government of the French Republic regarding the wreck of "La Belle", signed at Washington, DC, March 31st, 2003, and the Agreement between the Government of the USA and the Government of the French Republic concerning the wreck of the CSS Alabama, signed at Paris, October 4th, 1989. Source: Communication from the French Foreign Ministry, November 28, 2003.

Germany: "Under international law, warships and other vessels or aircraft owned or operated by a State and used only on government non-commercial service ("State vessels and aircraft") continue to enjoy sovereign immunity after sinking, wherever they are located. The Federal Republic of Germany also retains ownership of any German State vessel or aircraft owned by it or the German Reich at the time of its sinking. Further, many sunken

warships and aircraft are maritime graves, which have to be respected. No intrusive action may be taken in relation to German State vessels or aircraft without the express consent of the German Government." Source: Communication from the German Foreign Ministry, October 30, 2003.

Japan: "According to international law, sunken State vessels, such as warships and vessels on government service, regardless of location or of the time elapsed remain the property of the State owning them at the time of their sinking unless it explicitly and formally relinquishes its ownership. Such sunken vessels should be respected as maritime graves. They should not be salvaged without the express consent of the Japanese Government." Source: Communication from the Government of Japan, September 13, 2003.

Russian Federation: "Under international law of the sea all the sunken warships and government aircraft remain the property of their flag State. The Government of the Russian Federation retains ownership of any Russian sunken warship, including the warships of the Russian Empire and the Soviet Union, regardless the time they sank. These craft are considered places of special governmental protection and cannot be salvaged without special permission of the Government of the Russian Federation." Source: Communication from the Government of the Russian Federation, October 3, 2003.

Spain: "The Embassy of Spain presents its compliments to the Department of State and has the honor to address the matter of Spanish laws and policy regarding the remains of sunken vessels that were lost while in the service of the Kingdom of Spain and/or were transporting property of the Kingdom of Spain. In accordance with Spanish and international law, Spain has not abandoned or otherwise relinquished its ownership or other interests with respect to such vessels and/or its contents, except by specific action pertaining to particular vessels or property taken by Royal Decree or Act of Parliament in accordance with Spanish law. Many such vessels also are the resting place of military and/or civilian casualties.

"The Embassy of Spain accordingly wishes to give notice that salvage or other disturbance of sunken vessels or their contents in

which Spain has such interests is not authorized and may not be conducted without express consent by an authorized representative of the Kingdom of Spain." Source: Embassy of Spain, Washington, DC, Note No. 128, December 19, 2002.

United Kingdom: "Under international law, warships, naval auxiliaries, and other vessels or aircraft owned or operated by a State and used only on government non-commercial service ("State vessels and aircraft") enjoy sovereign immunity. State vessels and aircraft continue to enjoy sovereign immunity after sinking, unless they were captured by another State prior to sinking or the flag State has expressly relinquished its rights. The flag State's rights are not lost merely by the passage of time. Further, many sunken State vessels and aircraft are maritime graves, which should be respected. No intrusive action may be taken in relation to the United Kingdom's sovereign immune State vessels or aircraft without the express consent of the United Kingdom." Source: Communication from the UK Foreign and Commonwealth Office, July 4, 2003.

3. Anyone believing to have located or wishing to salvage a sunken State craft are advised to contact the government office [at addresses provided in the public notice].

* * * *

(2) Sunken Military Craft Act

On October 28, 2004, President George W. Bush signed into law the National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108–375, 118 Stat. 1811 (2004). Title XIV of the act, entitled "Sunken Military Craft" is designed to ensure uniform application of the law applicable to protection of sunken military craft within U.S. jurisdiction and to encourage reciprocal enforcement and protection by foreign sovereigns. Sections 1401–1403 are set forth below.

SEC. 1401. PRESERVATION OF TITLE TO SUNKEN MILITARY CRAFT AND ASSOCIATED CONTENTS.

Right, title, and interest of the United States in and to any United States sunken military craft—

(1) shall not be extinguished except by an express divestiture of title by the United States; and
(2) shall not be extinguished by the passage of time, regardless of when the sunken military craft sank.

SEC. 1402. PROHIBITIONS.

(a) Unauthorized Activities Directed at Sunken Military Craft—No person shall engage in or attempt to engage in any activity directed at a sunken military craft that disturbs, removes, or injures any sunken military craft, except—

(1) as authorized by a permit under this title;
(2) as authorized by regulations issued under this title; or
(3) as otherwise authorized by law.

(b) Possession of Sunken Military Craft—No person may possess, disturb, remove, or injure any sunken military craft in violation of—

(1) this section; or
(2) any prohibition, rule, regulation, ordinance, or permit that applies under any other applicable law.

(c) Limitations on Application—

(1) ACTIONS BY UNITED STATES—This section shall not apply to actions taken by, or at the direction of, the United States.
(2) FOREIGN PERSONS—This section shall not apply to any action by a person who is not a citizen, national, or resident alien of the United States, except in accordance with—
    (A) generally recognized principles of international law;
    (B) an agreement between the United States and the foreign country of which the person is a citizen; or
    (C) in the case of an individual who is a crew member or other individual on a foreign vessel or foreign aircraft, an agreement between the United States and the flag

State of the foreign vessel or aircraft that applies to the individual.

(3) LOAN OF SUNKEN MILITARY CRAFT—This section does not prohibit the loan of United States sunken military craft in accordance with regulations issued by the Secretary concerned.

SEC. 1403. PERMITS.

(a) In General—The Secretary concerned may issue a permit authorizing a person to engage in an activity otherwise prohibited by section 1402 with respect to a United States sunken military craft, for archaeological, historical, or educational purposes, in accordance with regulations issued by such Secretary that implement this section.
(b) Consistency With Other Laws—The Secretary concerned shall require that any activity carried out under a permit issued by such Secretary under this section must be consistent with all requirements and restrictions that apply under any other provision of Federal law.
(c) Consultation—In carrying out this section (including the issuance after the date of the enactment of this Act of regulations implementing this section), the Secretary concerned shall consult with the head of each Federal agency having authority under Federal law with respect to activities directed at sunken military craft or the locations of such craft.
(d) APPLICATION TO FOREIGN CRAFT—At the request of any foreign State, the Secretary of the Navy, in consultation with the Secretary of State, may carry out this section (including regulations promulgated pursuant to this section) with respect to any foreign sunken military craft of that foreign State located in United States waters.

In signing the bill into law, President Bush stated, as relevant to section 1402(c)(2)(A):

> The executive branch . . . shall construe the phrase "generally recognized principles of international law" . . . to refer to customary international law as determined by the President for the Nation, as is consistent with the

President's constitutional authority to conduct the Nation's foreign affairs.

44 WEEKLY COMP. PRES. DOC. 2673 (Nov. 1, 2004).

Excerpts below from talking points released by the Department of the Navy, Naval Historical Center, explain the effect of the new legislation.

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* * * *

While the Property Clause of the United States Constitution underpins continuously indefinite ownership of U.S. military craft, sunken or otherwise, the favorable case law articulating this proposition has been principally limited to the Fourth and the Eleventh Circuits through a handful of cases. This act extends that limited case law uniformly across other Circuits. Accordingly, the long run effect of the act reduces cost, inconvenience, and anomalous uncertainty of future litigation. Greater certainty of the law could further be expected to discourage challenges to United States' ownership and the associated physical risk to sunken military craft by unpermitted recovery actions.

This clear statement of United States' policy is also likely to induce other nations to respect U.S. ownership and induce parallel expressions of sovereign intent. From time to time, major maritime powers including Great Britain, France, Germany, Japan, Russia, and Spain have articulated their positions consistent with or acted in conformity to the U.S. policy position.

The statute provides the following:

- Protection of sunken U.S. military ship and aircraft wherever located;
- Protection for the graves of lost military personnel;
- Protection of sensitive archaeological artifacts and historical information;
- Codifies existing case law, which supports Federal ownership of sunken U.S. military ship and aircraft wrecks;
- Provides a mechanism for permitting and civil enforcement to prevent unauthorized disturbance;

- Encourages the Secretary of State, in consultation with the Secretary of Defense, to enter into bilateral and multilateral agreements with foreign countries for the protection of sunken military craft;
- Does not affect salvage of commercial merchant shipwrecks, or recreational diving;
- Does not impact commercial fishing, or the laying of submarine cables;
- Does not relate to the routine operation of ships.

* * * *

(3) Japanese mini-submarine

On February 12, 2004, the Department of State delivered a diplomatic note to the Embassy of Japan concerning the wreck of a Japanese Type A mini-submarine that was sunk in combat with U.S. naval forces on December 7, 1941. The submarine sank near Pearl Harbor, Hawaii, and was discovered on August 28, 2002, by the National Oceanic and Atmospheric Administration and the University of Hawaii, within three nautical miles of the nearest land. The U.S. note, the substantive paragraphs of which are set forth below, relayed the U.S. desire to protect the wreck site and to confirm that Japan, as owner of the vessel, did not wish it to be disturbed without express authorization. By return note of the same date, Japan provided the confirmations sought by the United States.

It is the view of the United States that the wreck and its associated artifacts are now the property of the United States. The United States desires to protect the wreck site and to establish definitively that the owner of the wreck does not wish it to be salved or disturbed in any manner without its express authorization. This is in accordance with international law, United States archaeological, historic preservation and salvage laws, and the United States Policy for the Protection of Sunken Warships (January 19, 2001).

To assist the United States in preserving the rights and interests of the United States and Japan in this regard, the Department would be grateful if the Government of Japan would confirm that it does not object to the view of the United States that the wreck and its associated artifacts are now the property of the United States, that the wreck is a war grave, and that it requests the United States to protect the interests of the Government of Japan and its citizens therein.

4. No Compensable Property Right to Fish in EEZ

On August 16, 2004, the U.S. Court of Appeals for the Federal Circuit reversed a decision by the U.S. Court of Federal Claims that had found that American Pelagic Fishing Co., L.P. ("American Pelagic") had suffered a taking in violation of the Fifth Amendment to the U.S. Constitution, and awarding damages in the amount of over $37 million. *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004). In this case, American Pelagic's predecessor, American Star Fishing Company, had purchased a large, U.S.-flagged hull and outfitted it as a commercial fishing vessel at a total investment of nearly $40 million. In April 1997, as the vessel was being completed, American Pelagic held a valid Atlantic mackerel permit to fish for Atlantic mackerel in or from the EEZ as well as a Northeast Multispecies (Nonregulated) fish permit and an authorization letter for Atlantic herring, among other things. The first of these was valid through December 31, 1997, and the latter two through April 30, 1998.

The Federal Circuit opinion indicates that during 1997 opposition to the *Atlantic Star* began to develop because of "[c]oncerns about the size of the vessel and its potential effect on the Atlantic mackerel and herring fisheries." Legislation contained in federal appropriations acts enacted for fiscal years 1997, 1998, and 1999, "effectively cancelled American Pelagic's existing permits and authorization letter, and at the same time prevented any further permits from being issued to the *Atlantic Star*. . . . As a result of the

legislation, the *Atlantic Star* was unable to receive a permit to fish in any U.S. fishery within the EEZ; at the time, no other vessel was affected by the legislation."

In its review of the lower court decision, the Federal Circuit noted that the lower court had first "determined that American Pelagic possessed a property interest 'in using [the *Atlantic Star*] to fish'" and then that the government actions constituted a compensable taking of those property interests. In reversing this decision, the Federal Circuit determined that simply because many commercial fishermen were not affected by the [appropriations legislation] and continued to fish for Atlantic mackerel and herring in the EEZ, it does not follow that those fishermen had a property interest in the use of their vessels to fish in the EEZ. They simply were enjoying a use of their property that the government chose not to disturb. In other words, use itself does not equate to a cognizable property interest for purposes of a takings analysis.

Excerpts below from the court's decision explain the U.S. exercise of sovereignty over its EEZ and the resulting lack of a compensable right to fish in the EEZ (footnotes omitted).

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* * * *

Up until the 1960s, most nations with coastlines, including the United States, had declared jurisdiction over territorial seas of three miles and conservation zones of twelve miles. See, e.g., Bartlett Act, Pub. L. No. 88–308, 78 Stat. 194 (1964) (previously codified at 16 U.S.C. §§ 1081–86) (three-mile territorial sea jurisdiction); Pub. L. No. 89–658, 80 Stat. 908 (1966) (previously codified at 16 U.S.C. §§ 1091–94) (three- to twelve-mile conservation zone jurisdiction) (both repealed by the Magnuson Act, title IV, § 402(a), (b), 90 Stat. at 360). Similarly, prior to the enactment of the Magnuson Act, a state could regulate its state-registered vessels and its citizens while fishing in what is now the EEZ pursuant to a line of Supreme Court cases culminating in Skiriotes v. Florida, 313 U.S. 69, 85 L.Ed. 1193, 61 S. Ct. 924 (1941). Countries generally attempted to achieve conservation of fish by entering

into international fishing agreements (to approximately twenty of which the United States was a party). See S. Rep. No. 94–416, n.3, app. 1. In 1976, however, in response to the third session of the United Nations Convention on the Law of the Sea ("UNCLOS"), which provided for coastal nation management of resources within a two-hundred-mile zone, Congress enacted the Magnuson Act:

> Fishery conservation zone
>
> There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

16 U.S.C. § 1811 (1976).

Subsequently, in a presidential proclamation, President Reagan established the EEZ and assumed sovereign rights for the United States over this two-hundred-mile zone. Quoting from UNCLOS, Dec. 10, 1982, art. 56, P 1, 21 I.L.M. 1245, 1280, he announced:

> Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. . . .

Proclamation No. 5030, 48 Fed. Reg. 10,605. It is clear from this language that, at least as of 1983, the United States had asserted sovereignty with respect to the exploration, exploitation,

conservation, and management of the natural resources of the EEZ. This assertion of sovereignty was subsequently codified in the 1986 amendments to the Magnuson Act:

> United States sovereign rights to fish and fishery management authority
>
> (a) In the exclusive economic zone. Except as provided in section 102 [16 USCS § 1812], the United States claims, and will exercise in the manner provided for in this Act, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.
> (b) Beyond the exclusive economic zone. The United States claims, and will exercise in the manner provided for in this Act, exclusive fishery management authority over the following:
> (1) All anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any waters of a foreign nation.
> (2) All Continental Shelf fishery resources beyond the exclusive economic zone.

Act of Nov. 14, 1986, Pub. L. No. 99–659, tit. I, § 101(b), 100 Stat. 3706, 3706–07 (codified as amended at 16 U.S.C. § 1811 (2000)). Thus, Congress explicitly assumed "sovereign rights and exclusive fishery management authority over all fish" in the EEZ. This assumption of sovereignty indisputably encompasses all rights to fish in the EEZ.

The various provisions of the Magnuson Act are consistent with this exercise of U.S. sovereignty over the EEZ and the fish and resources within it. Enacted to "take immediate action to conserve and manage the fishery resources found off the coast of the United States," 16 U.S.C. § 1801(b)(1), the Magnuson Act established national standards by which fishery "conservation and management" plans would be developed, id. § 1851(a). Congress

further established under the auspices of the Secretary Regional Fishery Management Councils, including the NEFMC and the MAFMC, with direct authority over the fisheries within their respective geographic regions. Id. § 1852. As noted above, each council is charged with the obligation, among others, of preparing and submitting FMPs for the fisheries within its authority. Id. § 1852(h). Congress required the FMPs to contain

> conservation and management measures . . . necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery. . . .

Id. § 1853(a)(1)(A). Significantly, the Magnuson Act bars foreign fishing in the EEZ entirely, except as the United States permits, id. § 1821, and authorizes the regional councils to require federal permits for U.S. fishermen to fish in any fishery within the EEZ, id. § 1853(b)(1). Thus, in addition to asserting U.S. sovereignty over the EEZ and the fish and resources therein, Congress also erected an elaborate framework by which the fisheries in the EEZ would be managed under the oversight of the Secretary.

Pursuant to the Magnuson Act, the "conservation and management of the EEZ" belongs to the sovereign, and this necessarily includes the right to fish in the zone. Moreover, there is no language in the statute to the effect that any fishing privileges that are granted pursuant to the Magnuson Act vest in their owners a property right protected by the Fifth Amendment. See Foss, 161 F.3d at 588 ("The language of the Magnuson Act does not confer any claim of entitlement or property rights."); *see also Parravano v. Babbitt*, 861 F. Supp. 914, 928 (N.D. Cal. 1994) ("Thus, the Magnuson Act confers on the Secretary of Commerce authority to manage the fishery resources in the EEZ for conservation. It does not confer on commercial fishermen any right or title in the fishery resources under the Department of Commerce's authority."), aff'd, 70 F.3d 539 (9th Cir. 1995), cert. denied, 518 U.S. 1016, 135 L.Ed.2d 1066, 116 S. Ct. 2546 (1996).

Because it was already in place by the time American Pelagic purchased the *Atlantic Star*, the Magnuson Act was an "existing rule" or "background principle[]" of federal law that inhered in American Pelagic's title to the vessel. *Lucas* [*v. Coastal Council,* 505 U.S. 1003 (1992)] at 1029–30. In the words of the Supreme Court, as far as ownership of the *Atlantic Star* was concerned, the sovereign rights of the United States in the EEZ "inhered in the title itself, in the restrictions that background principles of the [federal government's] law . . . already placed upon . . . ownership." Id. at 1029 (discussing restrictions on real property). It was against this framework of existing federal restrictions on fishing in the EEZ that American Pelagic invested in the *Atlantic Star*. As of 1996, when the *Atlantic Star* was purchased, the Magnuson Act and the attendant regulatory scheme precluded any permitted fisherman from possessing a property right in his vessel to fish in the EEZ. The revocation of American Pelagic's permits, therefore, did not "go[] beyond what the relevant background principles would dictate." *Id.* at 1030.

The Magnuson Act is consistent with the historical role played by the sovereign, state or federal, with respect to its waters. As early as 1876, the Supreme Court concluded that

> the principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running.

McCready v. Virginia, 94 U.S. 391, 394, 24 L.Ed. 248 (1876) (citations omitted); *see also, e.g., State v. Leavitt*, 105 Me. 76, 72 A. 875, 876 (Me. 1909) ("It is, therefore, settled law that each State, unless it has parted with title . . . owns the bed of all tidal waters within its jurisdiction, and as well, the tide waters themselves and the fish in or under them, so far as they are capable of ownership. . . . It is in fact a property right. . . .").

We are not persuaded by American Pelagic's contention that there exists a historical common law right to use vessels to fish in

the EEZ that was not abrogated by the Magnuson Act. . . . The right to use the *Atlantic Star* to fish for mackerel and herring unquestionably implicates the conservation and management of fishery resources. Accordingly, we conclude that the Magnuson Act directly assumes for the federal government sovereignty over the right to fish for Atlantic mackerel and herring in the EEZ. As American Pelagic itself notes, the Magnuson Act expressly asserts the United States' "sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish" within the EEZ. Id. § 1801(b)(1). The statute does not explicitly, or implicitly, preserve any potentially pre-existing common law right to fish in the EEZ.

* * * *

. . . As discussed above, because the Magnuson Act assumed sovereignty for the United States over the management and conservation of the resources located in the EEZ, and specifically over fishery resources, American Pelagic did not have, as one of the sticks in the bundle of property rights that it acquired with title to the *Atlantic Star*, the right to fish for Atlantic mackerel and herring in the EEZ. American Pelagic thus did not possess the property right that it asserts formed the basis for its takings claim. In the absence of that property right, its claim is fatally defective.

5. Claims Related to Antarctica

On November 15, 2004, Australia made a submission to the Commission on the Limits of the Continental Shelf ("Commission") pursuant to article 76, paragraph 8 of UNCLOS, which entered into force for Australia on November 16, 1994. The submission contains information on the proposed outer limits of the continental shelf of Australia beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The Commission, by notice of the same date, made the executive summary of Australia's submission publicly available and announced that it would be included in the provisional agenda of the

fifteenth session of the Commission scheduled for April 4–22, 2005, in New York.

In an accompanying note, Australia made the following statement about the Antarctic-related aspects of its submission:

> Australia has regard to the circumstances of the area south of 60 degrees South latitude and the special legal and political status of Antarctica under the provisions of the Antarctic Treaty, including its article IV, and notes that appurtenant to Antarctica there exist areas of continental shelf the extent of which has yet to be defined. It is open to the States concerned to submit information to the Commission which would not be examined by it for the time being, or to make a partial submission not including such areas of continental shelf, for which a submission may be made later, notwithstanding the provisions regarding the ten-year period established by article 4 of Annex II to UNCLOS and the subsequent decision on its application taken by the Eleventh Meeting of States Parties to UNCLOS.
>
> Consistent with the first option, Australia requests the Commission in accordance with its rules not to take any action for the time being with regard to the information in this Submission that relates to continental shelf appurtenant to Antarctica.

In response, the United States submitted a diplomatic note recording its position on the Antarctic-related aspects of Australia's submission, stating:

> . . . The United States recalls the principles and objectives shared by the Antarctic Treaty and the United Nations Convention on the Law of the Sea (the Convention), and the importance of the Antarctic system and the Convention working in harmony and thereby ensuring the continuing peaceful cooperation, security and stability in the Antarctic area. The United States wishes to inform you that, recalling Article IV of the Antarctic Treaty,

> the United States does not recognize any State's claim to territory in Antarctica and consequently does not recognize any State's rights over the seabed and subsoil of the submarine areas beyond and adjacent to the continent of Antarctica. The United States acknowledges with appreciation Australia's request to the Commission that it not take any action on that portion of its submission relating to areas of the seabed and subsoil adjacent to Antarctica. . . .

Notes from Russia, Japan, Germany, and the Netherlands addressed the same point. The Australian note and executive summary and related documents, including diplomatic notes submitted by the United States and other countries are available at *www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm.*

In guidance prepared on this issue earlier in 2004, the Department of State explained the legal issues as excerpted below.

. . . Article 77 of the 1982 Law of the Sea Convention, reflecting customary international law, provides that the coastal State exercises sovereign rights over the continental shelf for the purposes of exploring it and exploiting its natural resources. Article 76 of the Convention, which defines the term "continental shelf," describes the circumstances under which States are entitled to continental shelf beyond 200 nautical miles from coastal baselines. With respect to States Parties, paragraph 8 of that article provides that the coastal State is to submit information on the limits of the continental shelf to the Commission on the Limits of the Continental Shelf (the Commission). Pursuant to a decision of the Eleventh Meeting of the States Parties to the Convention, the ten-year period for filing submissions set forth in Article 4 of Annex II to the Convention would begin on May 13, 1999.

Annex I to the Commission's Rules provides, in paragraph 2, that, in "cases of unresolved land or maritime disputes," the Commission shall be informed of such disputes by the coastal State making the submission and ensured by the coastal State making

the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States. Paragraph 5 provides, in part, that "In cases where a land or maritime dispute exists, the Commission shall not examine and qualify a submission made by any of the States concerned in the dispute." Annex I also provides: "The Commission recognizes that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States."

The Antarctic Treaty "froze" claims that had been made as of the time that the Treaty entered into force in 1961. Article IV of the Antarctic Treaty provides, in part, that nothing in that Treaty shall be interpreted as prejudicing the position of any Party as regards its recognition or non-recognition of any other State's right of or claim to territorial sovereignty in Antarctica. Article IV of the Antarctic Treaty also provides, in part: "No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force." The United States does not recognize any State's claim to territory in Antarctica. While the United States has never asserted a claim to territory in Antarctica, the United States does maintain a basis for asserting a claim to territory in Antarctica.

6. Other Boundary Issues

a. U.S.-Niue maritime boundary treaty

The Treaty between the Government of the United States of America and the Government of Niue on the Delimitation of a Maritime Boundary, done at Wellington May 13, 1997, entered into force on October 8, 2004. The treaty was transmitted to the Senate for advice and consent to ratification on June 23, 1998, S. Treaty Doc. No. 105–53 (1998);

see Cumulative Digest 1991–1999 at 1576–78; Limits in the Seas No. 119, available at *www.law.fsu.edu/library/collection/LimitsinSeas/ls119.pdf.*

b. Beaufort Sea dispute

On July 29, 2004, the state of Alaska's Department of Natural Resources announced the "Beaufort Sea Areawide 2004 Competitive Oil and Gas Lease Sale." Under U.S. law, Alaska has jurisdiction over the seabed and subsoil out to 3 nautical miles of the baseline from which the territorial sea is measured. By diplomatic note of August 20, 2004, Canada expressed its concern that Alaska was proposing to offer for lease areas east of Canada's claimed maritime boundary. In response, the United States expressed the view that the area falls within U.S. sovereignty and stated that Alaska intends to act in a manner as to not exacerbate the dispute. The substantive portions of the U.S. diplomatic note are set forth below.

[The United States] . . . refers to Note No. UNEC0814 of the Embassy of Canada of August 20, 2004 concerning the sale announcement published by the State of Alaska's Department of Natural Resources on July 29, 2004 regarding the "Beaufort Sea Areawide 2004 Competitive Oil and Gas Lease Sale."

The Government of the United States does not accept that any part of the "Beaufort Sea Areawide 2004 Competitive Oil and Gas Lease Sale" encroaches 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 west 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 "Beaufort Sea Areawide 2004 Competitive Oil and Gas Lease Sale."

The Government of the United States notes that on August 23, 2004, the State of Alaska's Department of Natural Resources issued

a supplemental notice containing the following statement: "The United States Department of State has notified the State of Alaska that land within Tract 001 of the Beaufort Sea Areawide Lease Sale may be subject to a title dispute with the government of Canada. Potential bidders on Tract 001 should be prepared for possible delays in determining state title to lands within this tract if an acceptable bid is received for this tract." In recognition that there is no agreed maritime boundary, the State of Alaska does not intend to issue any leases in the disputed area at this time. The State of Alaska's special treatment of the area in question is without prejudice to U.S. rights and interests or the future settlement of the boundary.

B. OUTER SPACE

1. Committee on the Peaceful Uses of Outer Space

The 43rd Session of the Legal Subcommittee ("LSC") of the UN Committee on the Peaceful Uses of Outer Space ("COPUOS") met in Vienna, March 29–April 2, 2004. The U.S. delegation provided a statement addressing a new item on the LSC's agenda, Agenda Item 12, the practice of States and international organizations in registering space objects. The United States joined consensus on adoption of a proposed draft General Assembly resolution on the concept of the "launching State." The General Assembly adopted Resolution 115, "Application of the concept of the 'launching State,'" on December 10, 2004, without vote. U.N. Doc. A/RES/59/115.

The full text of the U.S. delegation statement to COPUOS, excerpted below, is available at *www.state.gov/sl/c8183.htm*.

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* * * *

Pursuant to Article III of the UN Convention on the Registration of Objects Launched into Outer Space, the United Nations

established a Register to record information on space objects launched into earth orbit or beyond as provided by States. . . .

Since the establishment of the Register, activities in space have dramatically increased and changed in nature to include increasing commercial activities. While the Registration Convention remains both useful and relevant, it has become increasingly evident that State and international organization practice in recording space objects on the UN Registry is widely divergent.

Last year the United States and other Members of this Subcommittee proposed that this Subcommittee add to its agenda a new item on the practice of States and international organizations in registering space objects. The United States and other Members stated their view that LSC could play a useful role in promoting adherence to the Registration Convention with respect to registration of space objects. We and others proposed, and the Subcommittee adopted, a multi-year work plan under which the LSC would examine State and international organization practice in recording space objects on the Registry established under the Registration Convention with the view to identifying common elements. We are now in the first year of this work plan and our agenda calls for Member States and international organizations to report on their practice in registering space objects and submitting the required information to the Office for Outer Space Affairs for inclusion in the Register.

In respect to the United States, over the years we have taken several steps towards implementation of the Registration Convention. First, in accordance with Article II of the Convention the United States established a national registry and notified the UN Secretary-General in a note verbale dated February 9, 1977. That registry is located and maintained by the Office of Space and Advanced Technology in the U.S. Department of State. The registry is updated quarterly on the basis of information provided by the U.S. Strategic Command which maintains a catalogue of all space objects. The information on the U.S. registry is in turn provided to the UN for inclusion in the Register. We include on the U.S. registry all U.S. government and private functional objects and certain non-functional objects, as well as launches of the Space Shuttle. The registry notes when objects are no longer in orbit.

. . . Today, one is able to access the entire US registry by going to the website *www.usspaceobjectsregistry.state.gov*.

As part of the updating process, we also undertook to clarify the domestic criteria for including objects on the U.S. Registry. This clarification was intended to ensure that U.S. owners/operators of space objects and non-U.S. entities have a clear understanding as to the circumstances under which space objects are and are not registered by the United States. Our registry now generally includes all space objects that are owned or operated by U.S. private or governmental entities and launched from inside or outside U.S. territory. In general, the United States will not include on its registry non-U.S. payloads that are launched from U.S. territory or facilities. It is our view that such non-U.S. payloads should be included on the registry of the State of the payload's owner/operator because that State is best positioned to exercise continuing supervision. In addition, we will continue our practice of including certain non-functional objects on the U.S. registry.

Regarding our practice in registering space objects that are owned or operated by U.S. private entities and launched from U.S. territory, we note, of course, that such registration does not affect the rights or obligations of the United States and the corresponding government under the Convention on International Liability for Damage caused by space objects or under the Outer Space Treaty. The Report of the recent U.N. Workshop on Space Law in Daejeon, Republic of Korea, confirmed this conclusion. Paragraph 43 of the Report states: "The Workshop noted that a State's liability did not depend on whether or not that State registered a space object in accordance with the provisions of the [Registration] Convention."

When the Department of State is notified by a U.S. non-governmental entity that it will be launching a space object from non-U.S. territory, the United States notifies, through diplomatic channels, the corresponding government that

- The United States has been advised that such a launch will take place;
- As this space object is owned or controlled by a U.S. private entity and launched from outside the territory of the United

States, the U.S. Department of State will include the space object on the U.S. registry once it has been launched into Earth orbit;

- Registration of the space object shall not affect the rights or obligations of the United States and the corresponding government under the Convention on International Liability for Damage caused by space objects or under the Outer Space Treaty.

In cases where two or more governments jointly launch one or more space objects, specific provisions on registration are provided for in the cooperation agreement.

* * * *

2. U.S. Global Positioning System

a. Agreement with European Commission

On June 26, 2004, U.S. Secretary of State Colin Powell, European Commission Vice-President Loyola de Palacio, and Irish Foreign Minister Brian Cowen signed the Agreement on the Promotion, Provision, and Use of Galileo and GPS Satellite-Based Navigation Systems and Related Applications. The signing occurred at the U.S.-E.U. Summit, County Clare, Ireland, June 25–26, 2004.

Representatives of the other European Community Member States also signed the agreement. A fact sheet issued by the White House Office of the Press Secretary is set forth below, and available at *www.state.gov/g/oes/rls/fs/2004/33986.htm*. *See also* fact sheet on the U.S. and European systems, released by the Office of the Spokesman, U.S. Department of State January 8, 2004, available at *www.state.gov/r/pa/prs/ps/2004/28006.htm* and discussion of the role of the EC and each of the member states in the agreement, Chapter 4.A.1.

Today, the United States and the European Union reached an agreement covering their satellite navigation services, the U.S. Global Positioning System, and Europe's planned Galileo system.

The U.S. Global Positioning System (GPS) is a constellation of 28 satellites and ground support facilities, used for a wide array of economic, scientific, and military applications. The satellites broadcast signals that can be converted into precise positioning and timing information anywhere in the world. In 1998, the European Union decided to pursue its own satellite navigation system, known as Galileo, which currently is still in its development phase.

U.S. Secretary of State Colin Powell, European Commission Vice-President Loyola de Palacio, and Irish Foreign Minister Brian Cowen signed the Agreement on the Promotion, Provision, and Use of Galileo and GPS Satellite-Based Navigation Systems and Related Applications. This historic agreement protects Allied security interests, while paving the way for an eventual doubling of satellites that will broadcast a common civil signal world-wide, thereby promoting better and more comprehensive service for all users.

The agreement ensures that Galileo's signals will not harm the navigation warfare capabilities of the United States and the North Atlantic Treaty Organization military forces, ensures that both the United States and the European Union can address individual and mutual security concerns, and calls for non-discrimination and open markets in terms of trade in civil satellite navigation-related goods and services.

Recognizing the added benefit to civil and commercial users if the two independent systems were compatible and interoperable, the United States and the European Union have shared technical analyses and information, resulting in an agreement to establish a common civil signal. The additional availability, precision, and robustness that will be provided by dual GPS-Galileo receivers lays the foundation for a new generation of satellite-based applications and services, promoting research, development, and investment that will benefit business, science, governments, and recreational users alike.

In remarks at the time of the signing, Secretary of State Powell described the benefits to the parties as follows:

> Thanks to this agreement we will enhance the common benefits of these new technologies. The agreement manages to balance the competition that is inherent in the commercial dimension of satellite navigational technology with the cooperation necessary for the security dimension. This agreement also establishes a framework for ongoing U.S.-EU cooperation in the field of satellite navigation. GPS-Galileo capabilities will open up major opportunities for scientific research and creative engineering, enabling new applications, applications that we haven't even begun to think of yet, and also for the development of new technologies. And the agreement paves the way for the two systems to eventually broadcast a common civil signal, which will double the number, as you heard a moment ago, of satellites working within a compatible framework. This, in turn, will ensure the safety and availability of satellite navigation technology for transportation and recreational users worldwide.

Remarks by Secretary Powell, Foreign Minister Cowen, and EU Vice President de Palacio, available at *www.state.gov/secretary/former/powell/remarks/34026.htm*.

b. Joint statement with Japan

A press statement of November 22, 2004, from Adam Ereli, Deputy Spokesman, Department of State, announced that the United States and Japan had issued a joint statement on GPS cooperation. The text of the joint statement is excerpted below and available at *www.state.gov/r/pa/prs/ps/2004/38773.htm*.

The Government of the United States and the Government of Japan convened a plenary meeting in Washington, D.C., on November 18, 2004, to review and discuss matters of importance regarding cooperation in the civil use of the Global Positioning System (GPS). Such consultations are held regularly pursuant to

the "Joint Statement on Cooperation in the Use of the Global Positioning System" issued by the then heads of the two Governments on September 22, 1998. During the meeting, representatives of both Governments reviewed the ongoing work of the U.S.-Japan working group on GPS-related technical issues and discussed various issues in the international arena related to satellite navigation.

Both Governments reconfirmed the principles contained in the 1998 Joint Statement. The U.S. Government will continue to provide the GPS Standard Positioning Service for peaceful civil, commercial, and scientific use on a continuous, worldwide basis, free of direct user fees. The Government of Japan intends to work cooperatively with the United States to ensure that a free and open Global Navigation Satellite System (GNSS) benefits all civil users of GPS. Both Governments believe that a free and open GNSS will assist in the further peaceful development of the Asia-Pacific region, strengthen cooperative relations between the United States and Japan, and promote global economic growth.

* * * *

3. Lack of Private Property Rights in Outer Space

On April 27, 2004, the U.S. District Court for the District of Nevada dismissed a complaint seeking a declaratory judgment concerning alleged private property rights on the asteroid 433, "Eros." *Nemitz v. United States of America*, CV-N-3-0599-HDM (RAM) (D. Nev. 2004). The National Aeronautics and Space Agency ("NASA") had denied Nemitz' compensation claim for parking or storage fees of twenty cents per year, payable at $20 per century, since the landing of the spacecraft NEAR on Eros on February 12, 1996. As explained by the court, Nemitz' causes of action "hinge on his alleged property interest in the asteroid, which claim is based on his registration on the Archimedes Institute website and his filing of a Uniform Commercial Code security interest in California as both debtor and creditor with the asteroid identified as the collateral." He also relied on the

Congressional declaration of policy and purpose for NASA, 42 U.S.C. § 2451(c) and (d)(9). The court dismissed the claim for lack of a cognizable legal theory, finding that none of these sources established a legal basis for his claim. In an August 15, 2003, response to a "Notice" sent by Nemitz to the Department of State concerning his claimed ownership, Ralph L. Braibanti, Director, Space and Advanced Technology, Bureau of Oceans and International Environmental and Scientific Affairs, had stated:

> We have reviewed the "Notice" dated February 13, 2003, that you sent to the U.S. Department of State. In the view of the Department, private ownership of an asteroid is precluded by Article II of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. Accordingly, we have concluded that your claim is without legal basis.

Cross-references

Ratification of Cape Town Convention on Aircraft Protocol, **Chapter 15.A.6.**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. ENVIRONMENT

1. Pollution and Related Issues

a. Climate change

On December 6, 2004, Dr. Harlan L. Watson, Senior Climate Negotiator and Special Representative of the United States, addressed the first meeting of the plenary session of the Conference of the Parties to the UN Framework Convention on Climate Change ("COP10"), held in Buenos Aires, Argentina, from December 6–17, 2004. His remarks outlined actions being taken by the United States to address issues of climate change. Dr. Watson stated:

> Many here today are looking forward to the Kyoto Protocol's entry into force. The United States has chosen a different path and I want to make it clear that we are taking substantial actions to address climate change. The United States remains committed to the Framework Convention, and we are doing much to contribute to its objective.
>
> The U.S. three-prong approach to climate change addresses both its near-term and long-term aspects by: (1) slowing the growth of greenhouse gas (GHG) emissions by reducing our GHG intensity; (2) laying

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important groundwork for both current and future action through major investments in science, technology, and institutions; and (3) cooperating internationally with other nations to develop an efficient and effective global response.

The full text of Dr. Watson's statement is available at *www.state.gov/g/oes/climate/rmks/2004/39431.htm*. For fact sheets concerning U.S. positions and related statements and documents, *see www.state.gov/g/oes/climate/c13568.htm. See also* joint U.S.-European Commission statement following the second meeting of the EC-U.S. Joint Climate Change Science and Technology Workshop in Bologna on January 29–30, 2004, available at *www.state.gov/r/pa/prs/2004/28660.htm* and joint U.S.-Australia statement following the fourth meeting of the U.S.-Australia Climate Action Partnership, available at *www.state.gov/r/pa/prs/ps/2004/31811.htm*.

b. Trans-boundary air pollution

On November 16, 2004, Secretary of State Colin L. Powell signed an instrument of acceptance for the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution ("LRTAP") to Abate Acidification, Eutrophication and Ground-Level Ozone, done at Gothenburg, Germany, November 30, 1999 ("Gothenburg Protocol"). The 1979 LRTAP Convention created a regional framework applicable to Europe and North America for controlling and reducing transboundary air pollution. The Gothenburg Protocol takes a multi-pollutant approach to transboundary air pollution, focusing on acid deposition caused by nitrogen oxides ("NO_x") and sulfur dioxide ("SO_2") emissions that adversely affect ecosystems, visibility, and public health; eutrophication, which involves excessive nitrogen loading in water that leads to algal blooms, oxygen depletion, and fish kills; and ground-level ozone, caused by NO_x and volatile organic compounds ("VOC"), which harms humans and damages crops and other plant

life. The protocol recognizes geographic differences among the Parties and generally contains different requirements for the United States and Canada than for European countries. Under the protocol, the United States and Canada will be able to replicate their obligations with respect to NO_x and SO_2 under the U.S.-Canada Air Quality agreement (*see Cumulative Digest 1991–1999* at 1665–67) rather than take on obligations more appropriate for European countries.

The full text of the Gothenburg Protocol is available at *www.unece.org/env/lrtap/full%20text/1999%20Multi.e.pdf.*

c. *Forest conservation*

During 2004 the United States entered into debt-for-nature agreements with Panama and Jamaica to conserve forests in those countries. The agreements are concluded under the authority of the 1998 Tropical Forest Conservation Act, Pub. L. No. 105–214, 112 Stat. 885, codified as amended at 22 U.S.C. §§ 2431–2431k. As described in media notes announcing signature of agreements with the two countries, "[t]he Tropical Forest Conservation Act of 1998 was first funded in 2000 to provide eligible developing countries opportunities to reduce concessional debts owed the United States while generating funds to conserve their forests." The media note for the agreement with Panama, signed August 19, 2004, is available at *www.state.gov/r/pa/prs/ps/2004/35457pf.htm* and with Jamaica, October 8, 2004, at *www.state.gov/r/pa/prs/ps/2004/36929.htm*. The first debt-for-nature agreement under this authority was signed with Belize in August 2001. *See Digest 2001* at 738–40.

2. Protection of the Marine Environment and Marine Conservation

a. *Oceans*

See 2.c.(4) below.

b. Pollution from ships

(1) Undersea noise pollution

The World Conservation Union ("IUCN") World Conservation Congress met in Bangkok, Thailand, on November 20, 2004. At that meeting a resolution entitled "Undersea noise pollution," RESWCC3.068, was adopted, asserting that anthropogenic ocean noise is a form of pollution and, among other things, entreating IUCN member governments to take steps to address this issue. The United States provided a statement for the record, set forth below. The full text of the resolution and statements for the record from Turkey and the United States are available at *www.iucn.org/congress/members/submitted_motions.htm.*

The United States shares the underlying concerns with the potential effects of anthropogenic ocean sound on marine life and would like a number of clarifying points included in the Record.

- We recognize that some anthropogenic ocean sound may have adverse effects, ranging from chronic to acute, on marine life.
- The United States is a leader in funding research on all aspects of the issue.
- The United States is a leader in implementing science-based management programs to assess and mitigate the adverse effects of some anthropogenic sound on marine mammals and endangered and threatened species.
- The United States supports continued reliance upon science in making regulatory decisions about activities associated with anthropogenic ocean sound.
- The United States encourages an international approach to advance scientific understanding of this issue and to promote science-based means of addressing adverse effects.

State and agency members of the United States refrained from engaging in deliberations on this motion and took no national

government position on the motion as adopted for reasons given in the US General Statement on the IUCN Resolution Process.*

(2) International Convention for the Control and Management of Ships' Ballast Water and Sediments

On February 13, 2004, the International Maritime Organization adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments, available at *www.imo.org/Conventions/mainframe.asp?topic_id=867.*

(3) Ship dismantling

Parties to the Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal ("Basel Convention"), meeting in the sixth Conference of the Parties in December 2002, adopted "Technical guidelines for the environmentally sound management of the full and partial dismantling of ships." Decision VI/24. As explained on the

* Editor's note: The U.S. delegation provided a formal statement for the record on the motions process of the World Conservation Congress on November 22, 2004. The United States stated that it is "very interested in the perspectives and priorities of IUCN members, particularly NGOs, as reflected in the 100-plus motions put forward for consideration by this Congress . . . and places a high priority . . . on IUCN programs which contribute significantly to conservation goals we share." Nevertheless, it "remained convinced that there are some types of resolutions on which it may not be appropriate for us, as a government, to engage or negotiate." Therefore, the statement indicated that the United States would not take a position as a government on motions "directed primarily to a single government or group of governments on national, bilateral or regional issues, . . . except as they have direct implications for the U.S. Government" and that it did not intend to take national government positions on motions "focused on global issues that we agree are important but that are topics of ongoing international policy debate in other fora. . . ." The full text of the U.S. statement and a subsequent listing of U.S. positions taken on motions as adopted are set forth in Proceedings of the Members' Business Assembly at 26–29, World Conservation Congress, available at *http://app.icun.org/congress/documents/outputs/wcc_2004_proceedings_en.pdf.*

website of the Secretariat of the Basel Convention, United Nations Environment Programme, "in that decision, Parties and others were invited to use the Technical Guidelines and to report to the Seventh Meeting of the Conference of the Parties, through the Secretariat, on their experience and any difficulties or obstacles encountered in the application of the Guidelines, with a view to improving them as necessary and required." *See www.basel.int/ships/techguid.html.*

The seventh meeting of the Parties ("COP VII") took place in Geneva from October 25–29, 2004. COP VII adopted a draft decision that, among other things, (1) reminded Parties to fulfill their obligations under the Basel Convention "where applicable"; (2) encouraged Parties to ensure their participation in the work of the Joint International Labor Organization ("ILO")/International Maritime Organization ("IMO")/Basel Working Group on the issue of ship dismantling; (3) invited the IMO to continue to consider the establishment in its regulations of mandatory requirements regarding ship dismantling; and (4) requested the Open-ended Working Group to consider the "practical, legal and technical aspects of the dismantling of ships in the context of achieving a practical approach towards the issue of ship dismantling and to present any proposals as appropriate to COP-8 on a legal binding solution taking into consideration the work of the IMO and the Joint Working Group." Decision VII/26, Annex I of Doc. No. UNEP/CHW.7/33 at 63, available at *www.basel.int/meetings/cop/cop7/docs/33eRep.pdf.*

The United States delivered a statement of its views on the roles of the ILO and IMO in resolving the issues presented and to make clear its view that operative paragraph 1 of the decision should not be read to suggest that the obligations of the Basel Convention generally apply to the transboundary movement of ships.

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

* * * *

The United States again reiterates its concern regarding the health and environmental impacts of ship dismantling. We believe that the steps taken at this meeting, together with developments in the IMO and the upcoming work of the Joint Working Group of the IMO, ILO and Basel Convention will lead to the establishment of a practical, workable and effective approach towards ensuring that ships are dismantled in an environmentally sound manner and in a manner that protects the environment and the health and safety of workers engaged in scrapping.

As we have noted throughout this meeting, any practical solution to the issue of ship dismantling is best achieved initially through coordination at the national level, between environment, transport, and other relevant ministries, in order to ensure that delegations have a coordinated and unified position with respect to this issue. Such coordination will facilitate cooperation—rather than competition—between the ILO, IMO and the Basel Convention and facilitate progress towards a real, practical solution.

In this regard, the United States believes that the principal elements of any such solution are likely to be best developed through the IMO. We note that, in fact, paragraph 5 of [Decision VV/26], invites the IMO to continue its consideration of the development of a mandatory reporting or notification system. The Joint Working Group's consideration of the issue should also focus on the practical and workable, rather than being sidetracked on legal issues regarding specific obligations under existing instruments.

With respect to the first operative paragraph of [Decision VII/26], which reminds Parties to fulfill their obligations under the Basel Convention, where applicable, we would like to make clear our view that the obligations of the Basel Convention do not generally apply to the transboundary movements of ships, as ships are not classified as hazardous wastes. We do not believe that continued debate of these legal issues would be fruitful, and look forward to the development of a cooperative practical international approach to address the health and environmental problems associated with ship dismantling."

(4) Hazardous spills agreement with British Virgin Islands

On August 12, 2004, T. H. Gilmour, Rear Admiral, U.S. Coast Guard, and Thomas Macan, Governor of the British Virgin Islands, signed the Agreement Between the Government of the United States of America and the Government of the British Virgin Islands Concerning Assistance to be Rendered During Discharge of Oil or Other Hazardous and Noxious Substances into Waters of the British Virgin Islands. The agreement entered into force on the same date.

Excerpts below from Articles 1 and 2 set forth the agreement for assistance the costs of which the British Virgin Islands agreed to reimburse. The two governments also agreed, among other things, to conduct biennial training exercises to enhance spill response compatibility, to establish a joint committee for implementation of the agreement, and to cooperate through exchange of information in order to prevent discharges of oil and other hazardous substances.

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

* * * *

Article 1

Assistance in Combating Discharges
Of Oil or Other Hazardous Substances

1. In the event of a major discharge of oil or other hazardous substances in the territorial sea or internal waters of the British Virgin Islands or seaward thereof in circumstances which could result in significant pollution damage to the waters and coastal areas of the British Virgin Islands, the Government of the British Virgin Islands may request the assistance of the Government of the United States of America in removing such oil or hazardous substances and in minimizing and mitigating related damage.

* * * *

3. Upon receipt of such a request, the Government of the United States of America may make available to the Government

of the British Virgin Islands the services, including personnel, equipment and facilities, of the United States Coast Guard and other members of the U.S. National Response Team capable of providing the assistance requested.

* * * *

Article 2

Direction and Coordination of Assistance

1. The personnel, equipment and facilities of the Government of the United States of America made available to the Government of the British Virgin Islands pursuant to this Agreement shall at all times remain under the control and direction of the Government of the United States of America.

* * * *

c. Marine wildlife

(1) Overview and illegal, unregulated, and unreported fishing

In testimony before the House Committee on Resources, Subcommittee on Fisheries Conservation, Wildlife, and Oceans, April 29, 2004, David A. Balton, Deputy Assistant Secretary of State for Oceans and Fisheries, testified on a broad range of issues related to international fisheries. His testimony reviewed the current status of treaties including amendments to the 1981 U.S.-Canada Albacore Treaty (entered into force May 28, 2004), U.S.-Canada Agreement on Pacific Whiting, Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, South Pacific Tuna Treaty Extension, and amendments to the Inter-American Tropical Tuna Commission (*Digest 2003* at 800–01); U.S. participation in the UN Food and Agriculture Organization ("FAO") Committee on Fisheries; whales and International Whaling Commission issues; protection and conservation of sea turtles; and funding for international fisheries commissions. Excerpts below address U.S. participation in the FAO

Committee on Fisheries, and in particular, in regard to illegal, unreported and unregulated ("IUU") fishing.

The full text of Mr. Balton's testimony is available at *www.state.gov/g/oes/rls/rm/2004/32245.htm*. The U.S. National Plan of Action on IUU Fishing, issued April 23, 2004, and referred to in the testimony is available at *www.state.gov/documents/organization/43101.pdf*. The FAO International Plan of Action ("IPOA")-IUU is available at *www.fao.org/DOCREP/003/y1224e/y1224e00.htm*.

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UN FAO Committee on Fisheries

The Administration continues to view the Food and Agriculture Organization (FAO) of the United Nations as the international organization with the membership, the mandate and the expertise to address global sustainable fisheries problems. Since the adoption of the 1993 High Seas Fishing Compliance Agreement and the 1995 Code of Conduct for Responsible Fisheries, the FAO Committee on Fisheries has been turning its attention on specific problems facing international fisheries with the development and adoption of four International Plans of Action (IPOA).

One of these "IPOAs" seeks to address the problem of excess fishing capacity. Another provides the basis for conserving and managing sharks stocks. A third provides a menu of measures to minimize the by-catch of seabirds in longline fisheries. The final and most recent IPOA gives nations a comprehensive toolbox of measures to crack down on illegal, unreported and unregulated (IUU) fishing. FAO is also attempting to improve the quality of capture fisheries and aquaculture "status and trends" data that member governments send it. The Departments of Commerce, Interior, Homeland Security (Coast Guard) and State, as well as U.S. industry representatives and a variety of non-governmental organizations, have contributed to strong U.S. leadership of these efforts at the FAO.

The IPOAs call upon each FAO member to take a series of actions to address the problems in question. I am pleased to report that, as envisioned in the IPOA to combat IUU Fishing, the United

States has developed its own National Plan of Action on IUU Fishing, which is now complete and ready to be distributed and to be used. We look forward to working with this Subcommittee and other members of Congress on some of the recommendations it contains.

The international community relies primarily on regional fishery management organizations for regional implementation of approaches designed by FAO. We have sought to use two additional tools to implement important FAO recommendations. First, we are buttressing this effort through our regular bilateral discussions with fishing states. Second, since the 21 members of Asia-Pacific Economic Cooperation (APEC) have the highest per capita consumption of fish, possess almost 75% of the world's capture fisheries harvesting capacity, and engage in the majority of global trade in fish and fish products, we have sought to use the APEC Fisheries Working Group to build capacity in APEC Economies to carry out the FAO recommendations. This global, regional, and bilateral approach requires considerable time and energy to pursue, but we believe it will bring benefits over time.

I wish to observe that, while we have an array of new international instruments with which to combat unsustainable fishing practices, progress in implementing them is slow. The 1995 UN Fish Stocks Agreement and the FAO Compliance Agreement have entered into force. Some regional fishery management organizations are reducing fishing capacity within their convention areas. Some governments are producing national plans of action but, generally speaking, developing States still lack the capacity to undertake many of the steps contemplated. We are reaching out to the international donor community to work with us in providing needed assistance.

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(2) Agreement with Canada on Pacific Hake/Whiting

On June 16, 2004, President George W. Bush transmitted to the Senate for advice and consent to ratification the Agreement Between the Government of the United States

of America and the Government of Canada on Pacific Hake/Whiting, done at Seattle, November 21, 2003. Among other things, the agreement allocates between the two countries the total allowable catch of the transboundary stock of Pacific hake, also known as Pacific whiting. Excerpts below from the Report of the Department of State accompanying the transmittal describe key elements of the agreement. S. Treaty Doc. No. 108–24 (2004).

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The Agreement establishes, for the first time, agreed percentage shares of the transboundary stock of Pacific whiting, also known as Pacific hake. It also creates a process through which U.S. and Canadian scientists and fisheries managers will determine the total catch of hake each year, to be divided by the percentage formula. Stakeholders from both countries will have significant input into this process.

Since the late 1970s, scientists from the United States and Canada have generally reached informal agreement on an annual overall total allowable catch (TAC) for the transboundary stock of Pacific hake. The two countries have conducted joint stock assessments every three years, and have agreed informally on certain stock management measures, but not the most important one: how to divide the TAC between U.S. and Canadian fisheries. The United States has generally claimed 80% of the allowable catch, while Canada has taken 30%. This situation, coupled with other factors, led to a decline in the stock. In 2002, for the first time, the Department of Commerce declared the stock to be "overfished."

U.S. and Canadian officials have been attempting since the early 1990s to reach agreement on a percentage share. Following resumed talks in 2002, both sides agreed in principle in April 2003 to the text of a new long-term management and sharing arrangement.

The new agreement formalizes past scientific and stock assessment collaboration through the creation of two new science

bodies: a Joint Technical Committee, charged with producing an annual stock assessment, and a Scientific Review Group to provide peer review of the technical committee's work. These groups will include scientists appointed by each Party, as well as independent members referred by a panel of private sector advisors. A third body, the Joint Management Committee, will consider the scientific advice and recommend to the Parties each year an overall total allowable catch.

Most importantly, the agreement establishes a default harvest policy and assigns 73.88% of the TAC to the United States and 26.12% to Canada for an initial period of nine years, and thereafter unless the Parties agree to change it.

The U.S. Department of Commerce and the U.S. fishing industry strongly support the Agreement. The Agreement not only allows the Parties to redress the overfishing that had led to the recent decline in stock levels, but also provides for long-term stability to U.S. fishers and processors and a structure for future scientific collaboration.

The recommended legislation necessary to implement the Agreement will be submitted separately to the Congress.

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(3) Whale hunting

On June 16, 2004, Secretary of Commerce Donald L. Evans certified under § 8 of the Fisherman's Protective Act of 1967, Pub. L. No. 90–482, 82 Stat. 729, as amended ("Pelly Amendment"), 22 U.S.C. § 1978, that "Icelandic nationals are hunting whales in a manner that diminishes the effectiveness of the International Whaling Commission ('IWC') conservation program." Secretary Evans also kept Japan certified for its annual harvest of whales for "scientific research." *See* press release at *www.publicaffairs.noaa.gov/releases2004/jun04/noaa04–065.html*. Consistent with § 8(b) of the Pelly Amendment, President Bush reported the certification to Congress on June 22, 2004, and addressed

steps to be taken, as excerpted below. 40 PRES. DOC. WEEKLY COMP. 1117 (June 25, 2004).

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* * * *

The certification of the Secretary of Commerce is the first against Iceland for its lethal research whaling program. In 2003, Iceland announced that it would begin a lethal research whaling program and planned to take 250 minke, fin, and sei whales for research purposes. The United States expressed strong opposition to Iceland's decision, in keeping with our longstanding policy against lethal research whaling. Iceland's proposal was criticized at the June 2003 IWC Annual Meeting by a majority of members of the IWC Scientific Committee, and the IWC passed a resolution that urged Iceland not to commence this program. In addition, the United States, along with 22 other nations, issued a joint protest asking Iceland to halt the program immediately. The United States believes the Icelandic research whaling program is of questionable scientific validity. Scientific data relevant to the management of whale stocks can be collected by non-lethal techniques. Since Iceland's 2003 announcement, Iceland reduced its proposed take to 38 minke whales and in implementing its lethal research program, killed 36 whales last year. For this year, Iceland has proposed taking 25 minke whales. The United States welcomes this decision to reduce the take and to limit it to minke whales, and we appreciate Iceland's constructive work with the United States at the IWC on a variety of whaling issues. These adjustments, however, do not change our assessment that Iceland's lethal research whaling program is of questionable scientific validity and diminishes the effectiveness of the IWC's conservation program.

In his letter of June 16, 2004, Secretary Evans expressed his concern for these actions, and I share these concerns. I also concur in his recommendation that the use of trade sanctions is not the course of action needed to resolve our current differences with Iceland over research whaling activities. Accordingly, I am not directing the Secretary of the Treasury to impose trade sanctions on Icelandic products for the whaling activities that led to certification by the Secretary of Commerce. However, to ensure

that this issue continues to receive the highest level of attention, I am directing U.S. delegations attending future bilateral meetings with Iceland regarding whaling issues to raise our concerns and seek ways to halt these whaling actions. I am also directing the Secretaries of State and Commerce to keep this situation under close review and to continue to work with Iceland to encourage it to cease its lethal scientific research whaling activities. I believe these diplomatic efforts hold the most promise of effecting change in Iceland's research whaling program, and do not believe that imposing import prohibitions would further our objectives.

(4) Dolphin-safe tuna

On August 9, 2004, the U.S. District Court for the Northern District of California issued an order staying the implementation of a final finding by the Department of Commerce concerning the use of purse seine nets in the Eastern Tropical Pacific ("ETP"). *Earth Island Institute v. Evans*, 2004 U.S. Dist. LEXIS 15729 (N.D.Cal. 2004). At issue was the December 31, 2002, finding by the National Marine Fisheries Service ("NMFS"), a division of the National Oceanic and Atmospheric Administration ("NOAA") of the Department of Commerce, on behalf of the Secretary. 68 Fed. Reg. 2010 (Jan. 15, 2003). A statement by William T. Hogarth, Assistant Administrator for Fisheries, included in the Federal Register, stated his conclusion as follows:

> To arrive at a finding, NOAA Fisheries, in consultation with the Marine Mammal Commission (MMC) and the Inter-American Tropical Tuna Commission (IATTC), conducted "a study of the effect of intentional encirclement (including chase) on dolphins and dolphin stocks incidentally taken in the course of purse seine fishing for yellowfin tuna in the ETP." Based on the research results and the other best available information, I have concluded that the intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse impact on depleted dolphin

> stocks in the ETP. This finding means that the dolphin-safe labeling standard shall be that prescribed by section (h)(1) of the DPCIA. Therefore, dolphin-safe means that dolphins can be encircled or chased, but no dolphins can be killed or seriously injured in the net in which the tuna was harvested.

As explained in the district court opinion, excerpted below, Earth Island Institute and other environmental groups filed suit on the same day and, on January 22, 2003, the Secretary stipulated to a stay of his final finding pending the district court's consideration of their motion for a preliminary injunction. On April 10, 2003, the court preliminarily enjoined the Secretary from changing the dolphin safe standard. *See also Digest 2002* at 794–96.

In its August 2004 opinion, the court granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment. The court's conclusion is excerpted below.

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* * * *

(4) Conclusion

In sum, the best available scientific evidence clearly shows that the Northeastern offshore spotted dolphins and the Eastern Spinner dolphins remain severely depleted, and that while reported direct mortality is very low—and not a threat to the dolphins' recovery—the dolphins are still not recovering at expected rates and may never fully recover. Rather, the very low growth rates indicate that the dolphin populations are being significantly adversely impacted by something—i.e. that "some process is acting to suppress population growth." AR 861 (FSR) at 5512.

As to the cause of the suppression, scientists examined two potential explanations: (1) changes to the ecosystem and (2) indirect effects from the fishery. With the respect to the former, the available scientific evidence indicates that while the ecosystem may have changed to some degree it is not the likely explanation for the dolphins' failure to recover. With respect to the latter, scientists

identified potential indirect effects of the fishery, including cow-calf separation, delayed stress effects, and under-reporting of mortality. While inconclusive, the best available scientific evidence all suggests that these combined effects can explain the dolphins' failure to recover, particularly given the intensity of the fishery. As such, the Final Science Report concludes that "the final determination of whether or not the purse seine fishery is having a significant adverse impact . . . should be made in consideration of the evidence for adverse fishery effects *beyond reported mortality and the lack of evidence for substantial ecosystem change.*" *Id.* at 5537 (emphasis added). Indeed, it appears clear that, as with the case of the initial finding, virtually all of the best scientific evidence that *is* available points in favor of finding that the fishery is having a significant adverse impact on the depleted dolphin stocks.

* * * *

C. Integrity of the Decision-Making Process

In seeking to uphold his initial finding, the Secretary expressly argued that "international concerns and competing policies for protecting dolphins" should be taken into account. *Brower II*, 257 F.3d at 1065–66. As both this Court and the Ninth Circuit have plainly held, however, Defendants were required to make the final finding based solely on the best available scientific data, and without deference to trade politics or competing policy viewpoints. *Brower I*, 93 F. Supp. 2d at 1087, 1089–90, *aff'd*, 257 F.3d at 1070; *EII*, 256 F. Supp. 2d at 1066, 1069–71. Indeed, the prior decisions in this matter made it patently clear that "international concerns" and "competing policies" regarding the best approach to dolphin conservation had no place in the Secretary's decision-making because such factors had already been weighed by Congress—and resulted in the specific and mandatory requirements of the IDCPA. "Such [policy] decisions are within Congress' bailiwick, and both the Secretary and this court *must defer to congressional intent as reflected in the IDCPA.*" *Brower II*, 257 F.3d at 1066 (emphasis added). Indeed, Defendants agreed at oral argument that the Congressional compromise was to leave the decision to NOAA's scientific expertise. Oral Arg. Tr. at 54.

Despite these explicit warnings and admissions, the record is replete with evidence that the Secretary was influenced by policy concerns unrelated to the best available scientific evidence. . . .

* * * *

As this Court has previously held, the Secretary must be held to the Congressional compromise that resulted in the IDCPA. *Brower I*, 93 F. Supp. 2d at 1089. Under this compromise, the dolphin-safe standard would *not* be changed in order to support the IDCP or otherwise promote the international trade policies and objectives sought by the Executive Branch either in 1997 or today. Rather, the compromise required that the fate of the dolphin-safe standard would turn solely on the *scientific* evidence of the impact of the fishery on depleted dolphin stocks. Indeed, Defendants conceded this point at oral argument. *See* Oral Arg. Tr. at 54 ("There had been international obligations to look into the change of this label with our own Congress, but our Congress made a different decision in terms of leaving it within NOAA's expertise . . . to review the science"). Given all of the above, this Court is convinced that the Secretary's decision-making process was infected by the very policy considerations that Congress had directed should not be considered. Accordingly, the Court has no choice but to conclude that the final finding was based on "factors which Congress has not intended [the agency] to consider." *Brower II*, 257 F.3d at 1065; *Midwater Trawlers Coop. v. Dep't. of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002); *New York v. Gorsuch*, 554 F. Supp. 1060, 1065–66 (S.D.N.Y. 1983) (agency can not fail to comply with statutory mandate based on competing concerns).

* * * *

Given all of the above, the Court finds that Plaintiffs have amply met their burden of demonstrating that (1) the Secretary's offered explanation for its decision runs counter to the evidence before the agency and (2) the agency relied on facts which Congress did not intend it to consider. *Brower II*, 257 F.3d at 1065. Accordingly, the Court finds that the Secretary's final finding is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

The Secretary argues that, in the event the Court sets aside his final finding, that the matter should be remanded to him for further proceedings. Plaintiffs, on the other hand, contend that the Court should remand with specific directions. While the more typical course would be a remand for further proceedings, the Court agrees with Plaintiffs that this is not a typical case. Rather, the fact that Defendants have repeatedly failed to heed both Congress' intent and the teachings of the appellate court leads this Court to conclude that a remand for further proceedings would be futile in this case. Further, the deadline for making the final finding has passed, and the record as of December 31, 2002 is complete. While Congress could in the future direct the agency to undertake and consider specific additional research after the December 31, 2002 deadline, the IDCPA does not make any such provisions. Accordingly, the Court concludes that this is one of the rare cases in which a remand with specific directions is appropriate. See generally *Sierra Club v. United States Envt'l Protection Agency*, 346 F.3d 955, 963 (9th Cir. 2003) (remanding with instructions when court failed to see how further administrative proceedings would serve a useful purpose, record was fully developed, and conclusions that must follow from it were clear).

Accordingly, and good cause appearing, it is HEREBY ORDERED that:

(1) Defendants' Motion for Summary Judgment is DENIED.

(2) Plaintiffs' Motion for Summary Judgment is GRANTED.

(3) The December 31, 2002 final finding of the Secretary that the "intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse effect on any depleted dolphin stock in the [Eastern Tropical Pacific ocean]," set forth in 68 Fed. Reg. 2010, 2011 (Jan. 15, 2003) pursuant to the Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(g)(2) is declared arbitrary, capricious, an abuse of discretion and contrary to law pursuant to the Administrative Procedures Act, 5 U.S.C. § 706(2). Accordingly, "dolphin safe" shall continue to mean that "no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured during the sets in which the tuna were caught," as defined in 16 U.S.C. § 1385(h)(2).

IT IS FURTHER ORDERED that Defendants Donald Evans, Secretary of Commerce, and William T. Hogarth, Assistant Administrator of Fisheries, National Marine Fisheries Services, and their agents, servants, employees, successors, and those in active concert or participation with them, shall not allow any tuna product sold in the United States to be labeled as "dolphin safe" that does not meet the aforesaid statutory definition. Defendants shall immediately notify all appropriate government personnel and enforcement agencies, including but not limited to, the United States Customs Service, the Federal Trade Commission, and the United States Department of State.

On September 13, 2004, the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, issued a final rule to implement provisions of the IDCPA consistent with the court's decision. *See* "Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)," 69 Fed. Reg. 55,288 (Sept. 13, 2004).

(5) UN General Assembly resolutions: Oceans and sustainable fisheries

On November 16, 2004, Ambassador Sichan A. Siv, Alternate U.S. Representative to the UN General Assembly, delivered a statement addressing Resolution A/RES/59/24, "Oceans and the Law of the Sea," co-sponsored by the United States, and introducing Resolution A/RES/59/25, "Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments."

Ambassador Siv's statement, excerpted below, is available at *www.un.int/usa/04_246.htm*.

Mr. President, my delegation is pleased to co-sponsor resolution A/59/L.22 entitled "Oceans and the Law of the Sea." Before I introduce Resolution A/59/L.23, on Sustainable Fisheries, I would like to make a technical correction to the text of the resolution, as agreed upon in consultations. Within both operative paragraphs 66 and 67, following the words "including bottom trawling"—strike the comma and replace the word "which" with the word "that."

I am honored to introduce, on behalf of the co-sponsors, Resolution A/59/L.23 concerning sustainable fisheries. I am also pleased to announce that, since the publication of the draft resolution, the following countries have become co-sponsors: Australia, Belgium, Belize, Germany, Greece, Italy, Micronesia, . . . Poland, Spain, and Ukraine.

* * * *

Mr. President, a key element of the fisheries negotiations this year was protecting sensitive underwater features and vulnerable marine ecosystems from destructive fishing practices. The resolution calls upon States and regional fisheries management organizations to urgently address the impacts of destructive fishing practices. To this end, it calls for the interim prohibition of such practices and the adoption of conservation and management measures. The United States will work cooperatively with all States and international bodies engaged in regulating fisheries, to give effect to these provisions. This fisheries resolution also lays the foundation for the review conference mandated by the 1995 UN Fish Stocks Agreement. It calls for renewed efforts to achieve sustainable aquaculture; combat illegal, unreported, and unregulated fishing; and address fishing overcapacity, harmful subsidies, and derelict fishing gear.

We are also pleased that the fisheries resolution once again explicitly takes up the issue of shark conservation and management. We are still concerned that many shark species remain vulnerable to exploitation due to their unique biology and lack of effective management. Unfortunately, progress in implementing the 1999 Food and Agriculture Organization (FAO) International Plan of Action for the Conservation and Management of Sharks

has been disappointing. We applaud the language on sharks strengthening last year's resolution. We look forward to continuing to work with all to implement it at the FAO and through relevant regional organizations.

Turning to the resolution on oceans and the law of the sea, it is fitting that we will adopt this resolution today, the tenth anniversary of the Convention on the Law of the Sea's entry into force. Three years ago, in this forum, I announced the Bush Administration's support for this treaty. Now that the United States Senate committees have completed their hearings, the full Senate is in a position to approve accession to the Convention. The Bush Administration hopes that this will occur expeditiously so that the United States may join the other 145 parties to the Convention. We support the international community's efforts to implement fully the provisions of the Convention and related agreements. This will achieve the goals of establishing a legal order that will promote freedom of the seas; peaceful uses of the oceans; equitable and efficient utilization of their resources; conservation of their living resources; and the study, protection, and preservation of the marine environment.

The highlight of this year's oceans resolution is the establishment of a Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. Destructive practices need to be addressed both within exclusive economic zones and beyond. However, the areas beyond national jurisdiction present particular legal and logistical challenges for the international community. In preparation for the meeting of the Working Group in early 2006, the Secretariat will prepare a report on these issues. This may identify options and approaches to promote international cooperation. We anticipate that this report will be written in consultation with relevant international bodies and with interested States. This way, it can serve as a comprehensive and objective basis for the Working Group's examination of these novel and difficult issues.

The resolution also requests the Secretary-General to convene the Second International Workshop on the regular process for global reporting and assessment of the state of the marine

environment. Recent informal contacts among States have revived hope that we can make progress next June in establishing this information collection process. This would provide essential information for scientists and policy makers.

We also look forward to the sixth meeting of the Informal Consultative Process (ICP) in June. We will focus on two important topics: marine debris and the role of fisheries in sustainable development. The ICP has become a valuable means of educating UN delegations and stimulating discussion that informs negotiation of the annual oceans and fisheries resolutions. It also helps coordinate the work of oceans-related bodies throughout the year.

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(6) Sea turtle conservation and shrimp imports

On April 30, 2004, the Department of State certified 38 nations and Hong Kong as meeting the requirements of § 609 of Pub. L. No. 101–162, 103 Stat. 988, 1037 (1989), for continued export of shrimp to the United States. As explained in a media note announcing the certification, "[s]ection 609 prohibits importation of shrimp and products of shrimp harvested in a manner that may adversely affect sea turtle species. This import prohibition does not apply in cases where the Department of State certifies annually to Congress . . . that the government of the harvesting nation has taken certain specific measures to reduce the incidental taking of sea turtles in its shrimp trawl fisheries —or that the fishing environment of the harvesting nation does not pose a threat to sea turtle species." The full text of the media note is available at *www.state.gov/r/pa/prs/ps/2004/32529.htm*.

On January 26, 2004, the Department of State determined that Nigeria, which had been certified in 2003, no longer met the requirements of § 609. *See www.state.gov/r/pa/prs/ps/2004/28834.htm*.

(7) Sharks

The United States co-sponsored a proposal to ban shark finning, the practice of taking only a shark's fins and discarding the carcass, at a meeting of the International Commission for the Conservation of Atlantic Tuna ("ICCAT") in New Orleans, November 21–25, 2004. The ban was adopted by consensus on November 22, 2004.

A news release dated November 29, 2004, from the National Oceanic and Atmospheric Administration, Department of Commerce, summarized the effect of the ICCAT action as excerpted below. The full text of the news release is available at *www.noaanews.noaa.gov/stories2004/s2346.htm*. *See also* U.S. comments on shark issues in 2.e. *supra*.

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After a week of deliberations, ICCAT adopted the U.S. proposal to ban the wasteful practice of shark finning—slicing the fin off the shark and discarding the carcass to save space on a fishing vessel. The United States has long condemned shark finning, which threatens future food security in many countries as well as the delicate balance of marine ecosystems. The United States banned finning in the Atlantic in 1993, and this binding agreement will require other countries fishing in the Atlantic Ocean and Mediterranean to do the same.

* * * *

This historic agreement comes just days after the United Nations General Assembly passed a resolution urging nations to work together through regional fisheries management organizations to manage sharks. It includes adoption of additional shark management practices already in place in the United States, such as data collection on catches of sharks, research on shark nursery areas and a provision to encourage the release of live sharks, especially juveniles. Co-sponsors of the shark proposal included Canada, the European Community, Japan, Mexico, Panama, South Africa, Trinidad and Tobago and Venezuela.

3. Other Conservation Issues

a. Trade and environment

(1) WTO Committee on Trade and Environment in Special Session

The WTO Committee on Trade and Environment in Special Session ("CTESS") was established to implement the mandate in paragraph 31 of the Ministerial Declaration of the World Trade Organization Ministerial Conference, adopted November 14, 2001, at Doha ("Doha Declaration"), available at *www.wto.int/English/thewto_e/minist_e/min01_e/mindecl_e.htm*. Paragraph 31 provides:

> 31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:
>
> (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
> (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
> (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

On June 21, 2004, the United States submitted views on subparagraph 31(i). WTO Doc. TN/TE/W/40 (June 21, 2004). The full text of the U.S. submission, excerpted below, is available at *www.state.gov/s/l/c8183.htm*. *See also Digest 2003* at 808–11 for earlier U.S. submissions.

I. INTRODUCTION

1. During the last two years, the CTE in Special Session has engaged in fruitful dialogue concerning the mandate in sub-paragraph 31(i) of the Doha Declaration. Based on these discussions over many meetings, and the 26 submissions offered under 31(i), a consensus has emerged that the Committee should proceed with an analysis based on fact and experience. There also appears to be wide agreement among Members that certain multilateral environmental agreements (MEAs) of common interest contain Party-to-Party specific trade obligations (STOs) within the 31(i) mandate. Building on these welcome developments, this submission seeks to contribute to further progress in the CTE's discussion of the 31(i) mandate.

2. This submission also builds on the first U.S. submission under 31(i) (TN/TE/W/20), which discussed the mandate's limits and categories of STOs in MEAs, including identification of STOs covered under the mandate, and proposed an experience-based way forward to focus future discussions. Consistent with the framework proposed by Australia (TN/TE/W/7), and following Hong Kong's submission concerning its experience (TN/TE/W/28), this submission continues down the path to a new phase in the discussions. In light of the shared understanding that certain MEAs contain STOs within the 31(i) mandate, this paper moves to the next phase of sharing Members' experiences with the negotiation and implementation of the STOs set out in certain MEAs.

3. This submission provides U.S. observations concerning the similarities and differences among certain features of STOs in several MEAs enumerated in WT/CTE/W/160/Rev.1 and builds upon examples contained in TN/TE/W/20. It is without prejudice to U.S. views on any other provisions contained in those MEAs that are not specifically referenced in this submission and without prejudice to U.S. views on the applicability of WTO rules. Finally, the inclusion of particular MEA provisions in this submission and exclusion of others is intended to further a constructive discussion in the CTE and is not an indication of the importance or environmental significance of any particular MEA provision in relation to any other.

II. U.S. EXPERIENCE REGARDING CERTAIN STOS IN CERTAIN MEAS

4. The United States has participated in the development and implementation of a number of MEAs. In a previous submission, the United States identified six MEAs that we believe include STOs within the meaning of the mandate. For purposes of this submission, we will highlight U.S. experiences related to particular STOs in three of these MEAs that appear to be of common interest to Members: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); the Stockholm Convention on Persistent Organic Pollutants (POPs); and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC). We have had a varying duration of experience with the mechanisms established by each of these MEAs. For example, CITES entered into force in 1975 and offers decades of implementation-related experience. The POPs Convention entered into force only this year and offers a fresh perspective on negotiating MEAs containing STOs. The PIC Convention, while entering into force only this year, derives many of its relevant features from the pre-existing voluntary London Guidelines.

5. The identified STOs set out in these three MEAs present a useful array of common and distinguishing features. The discussion below of U.S. experience regarding a subset of STOs (export restrictions) set out in these three MEAs highlights the importance of:

— National coordination, transparency, and accountability generally in the negotiation and implementation of MEAs containing STOs; and
— the design and implementation of STOs in particular.

6. Drawing on U.S. experiences, the submission also identifies features of these STOs that have, in our view, contributed to the effective achievement of each MEA's objectives and furthered the mutually supportive relationship that has existed between these MEAs and the WTO. The United States hopes these experiences

offer insight and information useful to the Committee in its discussions of the 31(i) mandate.

A. National Coordination, Transparency and Accountability with Respect to Negotiating and Implementing MEAs

7. The United States has stressed the critical importance of domestic coordination between MEA and WTO policy-makers and negotiators. Domestic coordination is the most direct and effective means of maintaining harmony between STOs in MEAs and WTO disciplines. Additionally, transparency and accountability in the domestic policy-making process can contribute to better policy-making.

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B. Specific Trade Obligations: Design and Implementation of Export Restrictions

19. In its first submission concerning 31(i), the United States emphasized the variety of STOs set out in MEAs. The wide variety reflects the complex environmental concerns that these STOs were designed to address. The United States notes that the variety in the design and scope of STOs suggests that STOs are not easily categorized.

20. For purposes of this submission, the United States will focus in particular on export restrictions[1] in MEAs. Export restrictions offer a useful point of comparison both because there are considerable differences in their features and because they appear to be one of the most common forms of STOs set out in MEAs. In reviewing U.S. experience, this submission identifies some

[1] For purposes of this submission, the United States refers to the various export-related obligations in these three MEAs by using the generic term "export restrictions." However, it should be noted that each MEA uses a precise terminology for its export-related STOs (e.g., CITES refers to the "regulation" of trade in endangered species because in some cases, such as Appendix II-listed species, the permitting requirements would function as regulations rather than restrictions on trade).

of the factors that have contributed to successful design and implementation of these export restrictions, so as to achieve MEA objectives in light of WTO rights and obligations.

21. The U.S. experience with the negotiation and implementation of export restrictions also suggests that there have been tremendous efforts to work together to craft STOs in a manner that takes into account the specific objectives of the MEA, the nature of the environmental harm to be prevented, the other types of control obligations set out in the MEA (e.g., production and use restrictions), the concerns and needs of all participating countries and relevant trade rules and trade implications.

Features of the Export Restrictions

In the U.S. experience, export restrictions can vary in design in several important respects, including: the purpose of the export restrictions; the role of the export restrictions within the MEA; the extent to which the importing Party's view about the proposed export is relevant; the procedures and criteria by which export restrictions may evolve; and the level of clarity of the export restrictions.

(1) *Purpose*. Export restrictions may be aimed at protecting the environment of either the exporting or the importing Party. In CITES, for example, export restrictions are generally aimed at protecting populations of species found in the exporting Party that are, or may become, threatened with extinction unless trade in such species is strictly regulated. In the PIC and POPs Conventions, in contrast, the purpose is to protect the importing Party from an environmental or health hazard, such as hazardous chemicals.

(2) *Role of the export restriction within the MEA*. Export restrictions may also differ in terms of the role that they play in the MEA. In the PIC Convention and CITES, for example, the purpose of the MEA itself is to regulate trade to address a particular environmental concern, and the STOs are the primary mechanism for doing so. In contrast, the STOs set out

in the POPs Convention are supportive of the primary control measures, which restrict Parties' production and use of POPs. (3) *Role of the importing and exporting Parties*. The role of the importing Party concerning export restrictions varies significantly depending on the role of the export restriction within the MEA and its design. Export restrictions that are intended to protect the environment in the exporting Party (e.g., CITES) typically do not put as much emphasis on the conditions in, or the views of, the importing Party. In contrast, export restrictions intended, at least in part, to protect the environment and/or human health in the importing Party (e.g., POPs and PIC Conventions) typically take into account the conditions in, and/or the view of, the importing Party. However, export restrictions under all three MEAs involve some degree of interplay of obligations and activity on the part of both the exporting and importing Party. . . .

* * * *

23. As a practical matter, the above export restrictions that are aimed at helping the importing Party to enforce an import decision appear unlikely to generate trade concerns. For example, it is unlikely that an importing Party, who set the import condition in accordance with the terms of the MEA, would raise concerns or complaints about the export restriction (within the MEA or in another forum), which is intended to help the importing Party enforce its domestic policies. It is also unlikely that an exporting Party would raise concerns with an importing Party's decision, if that decision is clearly articulated within the MEA and consistently applied.

(4) *Evolution of the scope of the export restriction*. The export restrictions considered here generally have in common that their scope can evolve in order to maintain and improve effectiveness in response to scientific and other relevant developments. In the U.S. experience, there are two elements to this evolution that are likely to be relevant to the extent to which trade concerns are raised:

— The degree to which changes to the scope of the export restrictions are based on science; and
— The degree to which the process for modifying the scope of the export restriction is transparent and provides for input from all Parties.

All of the MEAs highlighted in this submission provide for science-based and participatory decision-making, but they also differ in several particular respects.

* * * *

25. The extent to which an MEA's procedures rely on objective criteria and scientific input in making decisions (with full opportunity for input by all Parties and for the collection of information from reliable sources) contributes to the MEA's effectiveness and may significantly reduce the likelihood of disagreement among Parties concerning an export restriction.

26. In addition to science-based and participatory decision-making processes, these MEAs require varying degrees of consent regarding changes to the scope of the export restrictions, and additionally, provide opportunities for Parties to opt out of changes to the scope of the export restrictions. . . .

27. As a practical matter, mechanisms that provide Parties appropriate flexibility in terms of whether or not to be bound by changes to the scope of an export restriction reduce the likelihood of a formal disagreement among Parties concerning an export restriction.

(5) Clarity of the export restriction's scope. In the U.S. experience, the degree to which the STO and its scope are clearly defined in the MEA facilitates consistent and complete implementation of the STO, increases understanding of the MEA and its goals among government officials and the public, and reduces the opportunity for disagreement among Parties in terms of the STO's application. Clarity can be promoted through various means, including through:

— A publicly available list of items subject to the export restriction;
— application of science-based, objective criteria; and
— specificity.

28. For example, [certain] MEAs include a clear and publicly available list of specific items that are subject to export restrictions under the MEA (e.g., POPs Annexes A and B; CITES Appendices I, II, and III; and PIC Annex III). . . . This clear and transparent approach is preferable to approaches that allow disparate interpretations by different Parties of a list framed in general terms, or disparate interpretations of non-specific obligations, which can open the door to disagreement among MEA Parties concerning how an export restriction is applied.

III. CONCLUSION

29. Based on the U.S. assessment of its experiences, as reflected above, the United States believes that the MEA/WTO relationship is working quite well. This is especially true where:

— Trade and environment experts have worked together nationally (and internationally) to tailor STOs to meet particular environmental objectives in a way that takes account of Parties trade-related rights and obligations; and
— both the design of the STOs in the MEAs and Parties' practice in their implementation (at both the national and international levels) incorporate certain features, which contribute to their effective operation.

30. The United States also believes that certain features of the STOs have, in practice, contributed to a mutually supportive relationship. These design and implementation features include, e.g.,:

— The careful design of export restrictions (and their complementary import provisions), so as to target a specific environmental problem;

— science-based procedures by which the export restrictions can be adjusted in light of advances in knowledge or other changes in relevant conditions;
— procedures for changes to the scope of the export restriction over time that are both inclusive and appropriately flexible; and
— the clarity and transparency of export restrictions.

31. In light of these factors it is not surprising that no formal disputes, on trade or other matters, have arisen concerning the STOs discussed here.

— In the nearly 30 years that CITES has been in force, to the knowledge of the United States no Party has ever invoked the provisions for formal resolution of disputes by arbitration under Article XVIII of that Convention, nor has any dispute ever been raised in a trade forum, such as the WTO.
— Similarly, although the PIC Convention entered into force only recently, the PIC procedure for ascertaining whether the importing Party has consented or not, and whether conditions have been set, is fairly well developed given that it builds on the existing voluntary PIC procedure, operated by UNEP and FAO since 1989. The PIC Convention takes into account experience gained during the implementation of the voluntary procedure (as set out in the London Guidelines for the Exchange of Information on Chemicals in International Trade and the FAO International Code of Conduct on the Distribution and Use of Pesticides). None of this experience has involved formal disputes in trade forums or elsewhere.

32. The United States notes that this submission reflects practical observations related to certain STOs in certain MEAs and is not put forward in the nature of principles or other guiding factors, either specific to certain STOs or generic. Instead, the United States offers these observations in an effort to move the

discussions forward by initiating an experience-based dialogue among delegations. Through such a dialogue Members can move beyond definitional discussions of terms in the mandate itself (e.g., what is an MEA, a specific trade obligation, etc.) and initiate a practice-based discussion in which members can share concrete experiences. The United States hopes that this submission will help to advance the Committee's discussion and invites other delegations to share their experience in negotiating and implementing STOs in MEAs.

(2) Bilateral environmental cooperation

On May 18, 2004, in conjunction with the signing of the U.S.-Australia Free Trade Agreement (*see* Chapter 11.E.1.a.), the two countries signed the U.S.-Australia Joint Statement on Environmental Cooperation. The joint statement acknowledges shared environmental priorities and challenges and, as described in a media note of the same date, "strengthens the Governments' commitments to address environmental issues through knowledge sharing and cooperation." The joint statement is available at *www.state.gov/r/pa/prs/ps/2004/32583.htm*, the media note at *www.state.gov/r/pa/prs/ps/2004/32582.htm*.

On June 28, 2004, the United States and Morocco issued a joint statement on environmental cooperation, "[r]ecognizing the importance of protecting the environment while promoting sustainable development in concert with the expanded bilateral trade and investment ties that will accompany the U.S.-Morocco Free Trade Agreement." The joint statement included an annex setting forth areas of ongoing and future for environmental cooperation.

The joint statement is available at *www.state.gov/g/oes/env/tr/2004/34004.htm*. *See* Chapter 11.E.1.b. for the free trade agreement.

b. Hazardous chemicals and pesticides

The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade ("Rotterdam Convention") entered into force February 24, 2004, and the first Conference of the Parties ("COP") was held in Geneva, September 20–24, 2004. The United States transmitted the treaty to the Senate for advice and consent to ratification in 2000 (S. Treaty Doc. No. 106–21 (2000); *see Cumulative Digest 1991–1999* at 1683–87), but has not yet ratified. The United States participated in the COP as an observer. Documents referred to in this discussion are available at *www.pic.int/en/ViewPage.asp?id=355*.

Among other things, the Rotterdam Convention allows for an expedited procedure for the addition of chemicals to be covered by the voluntary prior informed consent ("PIC")* provisions of the convention for chemicals identified by the Intergovernmental Negotiating Committee ("INC") in the

* An overview provided on the Convention website at *www.pic.int/en/ViewPage.asp?id=101* explains PIC as follows:

> The Convention creates legally binding obligations for the implementation of the Prior Informed Consent (PIC) procedure. It builds on the existing voluntary PIC procedure, operated by UNEP and FAO since 1989, and takes into account experience gained during the implementation of the voluntary procedure (as set out in the London Guidelines for the Exchange of Information on Chemicals in International Trade and the FAO International Code of Conduct on the Distribution and Use of Pesticides).
> *Major Provisions:*
> The Convention establishes the principle that export of a chemical covered by the Convention can only take place with the prior informed consent of the importing party. The Convention establishes a "Prior Informed Consent procedure," a means for formally obtaining and disseminating the decisions of importing countries as to whether they wish to receive future shipments of specified chemicals and for ensuring compliance with these decisions by exporting countries.

interim period prior to the first meeting of the COP. A resolution adopted by the Conference of Plenipotentiaries on the Convention in September 1998, however, included in paragraph 8 a decision that the INC would decide on the inclusion of any additional chemicals "between the date on which the Convention was opened for signature and the date of its entry into force." Final Act of the Conference of Plenipotentiaries on the [Rotterdam Convention], Rotterdam, Netherlands, 10–11 September 1998, UNEP/FAO/PIC/CONF/5, annex I, resolution 1. This formulation left a gap between the entry into force and the convening of the first meeting of the COP.

At the request of the United States at its tenth session in November 2003, the INC adopted Decision 10/5: "decid[ing] to convene the eleventh session of the [INC], in the form of a Conference of Plenipotentiaries, immediately before the first meeting of the [COP] for the purpose of deciding whether to include [chemicals identified after the entry into force date] in the voluntary PIC procedure. UNEP/FAO/PIC/INC.11/2, Annex I. Annex II provided a draft resolution to extend the period to cover the gap between entry into force and the convening of the COP.

The eleventh session convened on September 18, 2004, in Geneva. It adopted Decision 11/1, in which it decided to "supplement paragraph 8 of the resolution on interim arrangements by extending the period for inclusion of any additional chemicals under the interim prior informed consent procedure from the date of entry into force of the Convention until the opening of the first meeting of the Conference of the Parties." *See* Report of the Intergovernmental Negotiating Committee for an International Legally Binding Instrument for the Application of the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the work of its eleventh session, UNEP/FAO/PIC/INC.11/7. Annex I. The INC then acted to include a list of chemicals in the voluntary PIC.

c. Antarctica

The twenty-seventh Antarctic Treaty Consultative Meeting was held in Cape Town, South Africa, May 23–June 4, 2004. On the issue of tourism in Antarctica, the States Parties adopted Measure 4: Insurance and Contingency Planning for Tourism and Non-Governmental Activities in the Antarctic Treaty Area, which will enter into force when all states parties have ratified it. A position paper submitted by the United States, U.S. Policy On Private Expeditions To Antarctica And Current U.S. Framework For Regulation Of Antarctic Tourism, ATME Paper #05, explained U.S. practice:

> The United States Antarctic Program, managed by the U.S. National Science Foundation, has a long-standing policy on private expeditions to Antarctica. The policy expressly provides that the U.S. government does not offer support or services to private expeditions. Tour operators are expected to be self-sufficient, to carry adequate insurance coverage against the risk of incurring financial charges or material losses in the Antarctic, and to make arrangements for search and rescue, medical, and any other emergencies that may arise in the course of their activities.

The United States also stated its position that "[b]ecause the Antarctic Treaty and its Protocol on Environmental Protection provide a comprehensive basis for regulating Antarctic tourist activities, the United States supports strong and effective domestic implementation of the Parties' existing obligations under the Protocol. It may not be necessary, therefore, for the Antarctic Treaty Consultative Parties to adopt substantial additional measures for the oversight of Antarctic tourism."

Excerpts below from Attachment B to the U.S. position paper describe U.S. regulation of Antarctic tourism. The full text of the U.S. position paper with attachments is available at *www.state.gov/s/l/c8183.htm*. For further information on

the XXVII Antarctic Treaty Consultative Meeting, *see www.ats.org.ar/27atcm/e.* The text of Measure 4 is available from that site in the Final Report of XXVII ATCM at 168.

Attachment B
U.S. FRAMEWORK FOR REGULATION OF ANTARCTIC TOURISM

Advance Notification
Under Article VII of the Antarctic Treaty, each Party is required to provide advance notification of "all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory." U.S. tour operators organizing expeditions to Antarctica are required to provide advance notification of their expeditions to the U.S. Department of State. The U.S. Department of State then provides this information to the Antarctic Treaty System. The U.S. National Science Foundation (NSF), as manager of the United States Antarctic Program (USAP), provides advance notification for U.S. governmental expeditions.

Regulation Through the Permitting Process
The United States implemented the [Environmental] Protocol through legislation and regulations. The Antarctic Conservation Act (ACA), as amended, applies to, among others, tour operators and tourists subject to the jurisdiction of the United States. Under the ACA, it is unlawful, unless authorized by permit, for tourist expeditions and others subject to U.S. jurisdiction to:

- Take native birds, mammals or plants;
- Engage in harmful interference of native mammals, birds, plants or invertebrates;
- Enter specially protected areas;
- Introduce non-native species to Antarctica;
- Introduce substances designated as pollutants (including fuels);
- Discharge wastes; or
- Import certain Antarctic items into the United States.

NSF administers a permitting program that requires permits for taking native birds, mammals, or plants, entering Antarctic Specially Protected Areas, or using or releasing designated pollutants or disposing of waste. The permit process is transparent. NSF publishes requests for new permits or material changes to existing permits, and public comment is invited. Those to whom permits are issued must provide an annual report of their activities.

Under the regulations that implement the Antarctic Conservation Act, a permit to take or engage in harmful interference may only be issued for the purposes of providing specimens for scientific study or information or for museums or other educational uses. Most tourist expeditions would not be able to meet the criteria under the regulations for obtaining such a permit.

Tourist expeditions also do not qualify for permits for entry into Antarctic Specially Protected Areas (ASPAs), except for cases in which areas are protected for their historic value and where issuing a permit for tourist visits would be consistent with the management plan for the ASPA. Accordingly, U.S. implementation of Annex V of the Protocol effectively prevents tourists from entering those areas designated as specially protected because of their environmental or scientific values. To enter sites designated as protected for historic values (e.g., Shackleton's hut at Cape Royds), U.S.-based tour operators must apply for permits to enter.

Tourist and other nongovernmental expeditions planning to use or release designated pollutants or to release wastes are required to prepare a plan for the use, storage, and disposal of these materials and to apply for a waste management permit from NSF. Some categories of waste must be removed from the Antarctic.

In addition, the following activities are prohibited, regardless of whether a tour operator has a permit:

- Open burning of wastes;
- Use or release of banned substances into Antarctica (e.g., polychlorinated biphenyls);
- Disposal of waste onto ice-free land areas or into fresh water systems; and

s Damaging, removing, or destroying a historic site or monument.

NSF has a cadre of specially trained Antarctic Conservation Law Enforcement Officers that enforce the statute and educate tourists about the Act's requirements.

Environmental Impact Assessment

The United States has established a comprehensive system to implement Annex I of the Environmental Protocol. The U.S. Environmental Protection Agency's (EPA's) regulations provide for the environmental impact assessment of nongovernmental activities, including tourism, for which the U.S. is required to give advance notice, i.e., all nongovernmental expeditions including tourists and nongovernmental research expeditions. For nongovernmental activities, EPA, in consultation with other interested Federal agencies, is responsible for the review of Environmental Impact Assessments (EIAs) prepared by nongovernmental operators. EPA is an environmental protection authority, and NSF provides scientific and Antarctic program management expertise.

* * * *

EPA's regulations require submission of basic information that is similar in content to an Advance Notification, as well as the specific information required for one of the three levels of EIA documentation noted. With regard to the specific levels of documentation, EPA's regulations implement the requirements of Article 8 and Annex I of the Protocol and parallel those requirements. There are no specific models or forms required for this documentation process. The EIA documents include post-trip reports that are submitted to NSF.

EPA's regulations also include schedules for document submission and for EPA's review in advance of the expedition's proposed departure date, . . . linked to the Protocol, Annex I, Article 3, requirements that draft CEEs be circulated to all Parties for comment and to the Committee for Environmental Protection 120 days in advance of the next Antarctic Treaty Consultative Meeting and that final CEEs be circulated to all Parties no later

than 60 days before the proposed departure of the expedition. To date there have not been any nongovernmental U.S. expeditions at the CEE level of documentation.

* * * *

Other Tourism Operator Obligations

U.S. tour operators are required to notify tourists and other expedition members of their obligations under the ACA. U.S. tour operators must also have emergency response plans for environmental emergencies. Operators may not transport passengers on a vessel that does not comply with Annex IV of the Protocol, which provides for protection of the marine environment. The U.S. Coast Guard implements these requirements for U.S.-flagged vessels, and NSF implements the requirements for U.S. tour operators who use non-U.S.-flagged vessels.

In addition, tour operators are not allowed to engage in activities relating to mineral resources other than scientific research. Tour operators may not collect meteorites for nonscientific purposes. Expeditions that plan to collect meteorites must submit a plan to NSF that addresses their plans for collection, handling, documentation, and curating of Antarctic meteorites.

Tour operators file a post-visit report form, adopted by the Treaty Parties. . . .

* * * *

U.S. Regulations Implementing the Protocol

Other Parties may find it useful to review in detail the U.S. regulations implementing various aspects of the Protocol. These regulations for the National Science Foundation, the Environmental Protection Agency, and the U.S. Coast Guard may be found at *http://www.gpoaccess.gov/cfr/index.html:*

- Article 7 requirements implemented in NSF regulations at 45 CFR Part 674;
- Article 15 requirements implemented in NSF regulations at 45 CFR 673 and Coast Guard regulations at 33 CFR 151.26;
- Annex I requirements implemented in EPA regulations at 45 CFR Part 8;

- Annex II requirements implemented in NSF regulations at 45 CFR 670;
- Annex III requirements implemented in NSF regulations at 45 CFR 671;
- Annex IV requirements implemented in Coast Guard regulations at 33 CFR 151.26; and
- Annex V requirements implemented in NSF regulations at 45 CFR 670.

B. MEDICAL AND HEALTH ISSUES

1. HIV/AIDS, Malaria, and Tuberculosis

On June 26, 2004, President Bush, Prime Minister of Ireland Bertie Ahern, and President of the European Commission Romano Pradi issued the U.S.-EU Declaration on HIV/AIDS, Malaria, and Tuberculosis. Excerpts below from the text of the declaration address global cooperation in fighting these diseases. The full text of the declaration is available at *www.whitehouse.gov/news/releases/2004/06/20040626-4.html.*

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1. The spread of communicable diseases is one of the biggest threats to human life, prosperity, and security. The HIV/AIDS epidemic, in particular, is one of the biggest global challenges of our time. . . .

2. The United States and the European Union welcome the strong leadership, internationally and by many national governments, that is now being demonstrated in responding to the global HIV/AIDS epidemic. . . .

3. In recognition of the extent of the crisis and of our joint commitment to fighting HIV/AIDS and other communicable diseases, we are determined to further strengthen our co-operation with a particular focus on the following areas:

Global

4. We support the U.N. Declaration of Commitment on HIV/AIDS. We believe that steps should be taken to address the HIV/AIDS crisis in accordance with the time frames set out in the

Declaration. We have been instrumental in establishing, resourcing, and promoting the effectiveness of the Global Fund to fight AIDS, Tuberculosis, and Malaria. We have supported the promising work of the Global Fund in confronting HIV/AIDS, tuberculosis, and malaria. We are dedicated to ensuring that Fund resources are available to countries most severely affected by these diseases. We are determined to continue working together to promote the effective operation of this new global mechanism, including the mobilisation of new resources. We are also determined to ensure that it promptly disburses funding in support of programmes that are directed at prevention, treatment, and the care of people living with HIV/AIDS in recipient countries and that provide affordable access to medicines and commodities.

5. In this context, we underline the importance of the work in the WTO related to paragraph 6 of the Doha Ministerial Declaration of 14 November 2001 on TRIPS and Public Health. We undertake to cooperate on the corresponding amendment of the TRIPS Agreement in an expeditious manner.

* * * *

2. Regional Emerging Diseases Intervention Center

On May 24, 2004, the Regional Emerging Diseases Intervention Center was opened in Singapore. *See* remarks by Claude A. Allen, Deputy Secretary of Health and Human Services, U.S. Department of Health and Human Services, available at *http://singapore.usembassy.gov/US_Singapore/REDI_Allen/REDI_Allen.shtml.*

Although initially established as a bilateral endeavor, the intention is for the REDI center to become a regional research and training center for health professionals in Southeast Asia, as provided in Article 2.4 of the Agreement Between the Government of the United States of America and the Government of the Republic of Singapore Establishing the Regional Emerging Diseases Intervention ("REDI") Center ("Agreement").

The Agreement grew out of a decision by the two governments to pursue collaborative efforts to combat new

global health threats, including emerging infectious diseases and biosecurity threats. As stated in the preamble to the Agreement, the mission of the REDI Center is to enhance "the Asia and Pacific region's capability and capacity to effectively monitor, detect, and respond to naturally-occurring infectious disease outbreaks or man made health threats" and to "serve as a regional resource for training and research, to help build individual and collective capacity and facilitate cooperative efforts to monitor, respond to, and prevent critical infectious disease threats in the Asia Pacific region."

Among other things, the Agreement establishes the REDI Center as an international organization (Article I). The agreement obligates Singapore to provide a facility for the Center, cover certain costs of the Center (Article VI) and provide certain privileges and immunities for the Center and its staff (Articles VIII and XIII). The Agreement does not impose any obligation on the United States to fund the Center. (Article 6.4). For the United States, any activities under the Agreement will be subject to the availability of appropriated funds.

The text of the Agreement is available at *www.state.gov/s/l/c8183.htm. See also* a fact sheet released by the U.S. Department of Health and Human Services dated October 17, 2003, available at *www.globalhealth.gov/Singapore_REDI_MOU.shtml.*

3. WHO Tobacco Control Treaty

On May 10, 2004, then Health and Human Services Secretary Tommy G. Thompson signed the WHO Framework Convention on Tobacco Control ("FCTC") at the United Nations. A background note prepared by the Department of State at the time is set forth below in full.

The United States signed the Framework Convention on Tobacco Control ("FCTC") in May 2004, and, as a signatory,

has since worked with other countries to set up the rules for how the treaty would be implemented. We welcome its entry into force and support its goal of curbing tobacco use globally.

Tobacco is the leading preventable cause of death in the world, and the FCTC will serve as a basis for advancing tobacco control measures internationally. The FCTC addresses the demand for and the supply of tobacco through a variety of measures, including those aimed at smoking prevention and cessation, health warnings on packaging, restrictions on tobacco advertising and sponsorship, prohibitions on cigarette sales to minors, and measures to combat illicit trade. If the U.S. ratifies the FCTC, the Executive branch will need to seek implementing legislation to comply with the Convention's requirement concerning the size of the health warning label on tobacco products prior to U.S. ratification of the Convention.

C. OTHER TRANSNATIONAL SCIENTIFIC ISSUES

1. Cloning

On October 22, 2004, Susan Moore, U.S. Special Advisor to the U.S. Mission to the United Nations, addressed the Sixth Committee on Agenda Item 150: International Convention Against the Reproductive Cloning of Human Beings. Excerpts below set forth the views of the United States supporting a ban on all human cloning. *See also* fact sheet on U.S. position on cloning, available at *www.un.int/usa/ga59-fact5.pdf*

The full text of the statement is available at *www.us.int/usa/04_202.htm*.

This committee has been tasked with elaborating the mandate for the negotiation of a convention against human cloning. Having considered the issue, many states, including the 63 co-sponsors of Resolution L.2, presented by Costa Rica, believe the convention must address all forms of human cloning, regardless of purpose.

As President Bush said in his speech to the U.N. General Assembly, "no human life should ever be produced or destroyed for the benefit of another."

The United States strongly supports a ban on all cloning of human embryos, both for reproductive and so-called "therapeutic," "research" or "experimental" purposes. We therefore support the Costa Rican draft resolution, which proposes a ban on all activity that results in the creation through cloning of a human embryo, whether for purposes of reproduction or scientific experimentation.

The process commonly referred to as cloning (Somatic Cell Nuclear Transfer) involves the laboratory production of a human embryo with the precise genetic makeup of another individual. In "reproductive" cloning, this embryo would be implanted into a woman's womb and allowed to grow. In what has been called "therapeutic," "research," and "experimental" cloning, the embryo is destroyed for research purposes.

A ban that differentiates between human reproductive and experimental cloning would essentially authorize the creation of a human embryo for the purpose of destroying it, thus elevating the value of research and experimentation above that of a human life. Experimental embryonic cloning would therefore turn nascent human life into a resource or commodity to be mined and exploited, eroding the sense of worth and dignity of the individual. For this reason, a partial ban that prohibits reproductive cloning but permits therapeutic, research, or experimental cloning is unacceptable to the United States and many other countries. To again quote the President, "Because we believe in human dignity, we should take seriously the protection of life from exploitation under any pretext."

Further, experimental cloning has the potential to exploit women, because it may create an incentive for egg donations for financial gain. The President has expressed his concern that "this would create a massive national market for eggs and egg donors, and exploitation of women's bodies that we cannot and must not allow." Especially troubling is that poorer women are often particularly vulnerable to such forms of exploitation.

We live in a time of great medical progress, and the United States supports continued efforts to find breakthrough treatment

and cures for disease. Fortunately, it is increasingly clear that there are many routes to developing therapies and cures that do not pose the same threat to human dignity as cloning of human embryos. Gene therapy treatment is developing at a rapid pace, and within the last few years, a wealth of published scientific reports has demonstrated that adult stem-cells—contained in tissues of the human body, and after birth in the umbilical cord and placenta—have the ability to transform into other tissue and cell types, and have been shown to be able to repair and regenerate damaged and diseased tissue. Adult stem-cells have already benefited patients, and there are on-going clinical trials for such conditions as heart disease, Parkinson's disease, and spinal cord injury.

* * * *

2. Plant Genetic Resources Treaty

On June 29, 2004, the United Nations Food and Agriculture Organization International Treaty on Plant Genetic Resources entered into force after having been ratified by 55 governments. A media note issued by the Department of State Office of the Spokesman explained the U.S. postponement of ratification as excerpted below. *See www.state.gov/r/pa/prs/ps/2004/34024.htm. See also Digest 2002* at 810–811.

. . . The United States signed the treaty in November 2002, but has postponed consideration of ratification pending the negotiation of a standard material transfer agreement.

The treaty establishes a multilateral system for providing access to genetic material from a list of 35 major crops in exchange for sharing benefits in the event a product derived from the transferred material is commercialized. By facilitating access to plant genetic material and the equitable sharing of benefits, the treaty promotes sustainable agriculture and global food security and encourages farmers and plant breeders to develop new crop varieties adapted to specific agricultural and geographic conditions.

A standard material transfer agreement is integral to the success of the treaty's multilateral system. Until a standard agreement is adopted, transfers of plant genetic resources under the treaty's provisions cannot occur.

The Food and Agriculture Organization has delayed scheduling an Expert Group meeting to negotiate a material transfer agreement until it receives sufficient funding through voluntary contributions from governments. The U.S. Government, through the Department of Agriculture, has contributed $50,000 toward holding this meeting and has encouraged other governments to make contributions as well.

CHAPTER 14

Educational and Cultural Issues

A. IMPORT RESTRICTIONS

On March 12, 2004, the United States and Honduras signed a Memorandum of Understanding ("MOU") to impose import restrictions on Pre-Columbian archaeological artifacts from Honduras. 69 Fed. Reg.12,267 (Mar. 16, 2004). Background information provided by the Bureau of Educational and Cultural Affairs, U.S. Department of State, is excerpted below. Further information and links to related documents are available at *http://exchanges.state.gov/culprop/hnfact.html.*

This U.S. action is in response to requests from the Government of [Honduras] under Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The import restrictions are intended to mitigate the results of extensive looting to meet the demands of U.S. and international trade in artifacts. The U.S. action also furthers the aims of the 1994 Summit of the Americas action plan to enhance appreciation of indigenous cultures and cultural artifacts through the implementation of cultural property protection agreements.

The unique cultural patrimony of Honduras was found to be in jeopardy of pillage as evidenced by systematic looting in such regions as the Lower Ulua Valley, Copan Valley, Olancho, Comayagua, and Santa Barbara as well as other sites throughout the modern boundaries of Honduras. The rich cultural heritage

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of this country is represented in over 40,000 archaeological sites; all vulnerable to looting.

B. IMMUNITY OF ART AND OTHER CULTURAL OBJECTS

On December 22, 2004, the United States filed a Statement of Interest in the U.S. District Court for the District of Columbia in a case concerning immunity of certain artwork in the United States under the Mutual Educational Cultural Exchange Program administered by the Department of State. *Malewicz v. City of Amsterdam*, Civil Action No. 04-0024 (RMC). In that case, plaintiffs, heirs of the artist Kazmir Malevich, alleged that the City of Amsterdam took 14 works of art by Malevich in violation of international law and sought their return. The works were imported into the United States in 2003 to be part of a temporary exhibition. Pursuant to 22 U.S.C. § 2459, prior to their importation, the Department of State had determined that the objects were "of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest," thus providing immunity from seizure and other forms of judicial process while in this country. *See* 68 Fed. Reg. 17,852 (Apr. 11, 2003). Section 2459 provides:

> Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition, assembly, activity, or festival administered, operated, or sponsored, without profit by any such cultural or educational institution, no court . . . may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States, of custody or control of such object if before the

> importation of such object the President or his designee has determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register.

Excerpts below from the U.S. Statement of Interest explain the interest of the United States in the case and the legal basis for the U.S. position that the works were immune from this action (most footnotes omitted). The full text of the Statement of Interest is available at *www.state.gov/s/l/c8183.htm*.

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The United States is aware of no plaintiff that has previously sought to base jurisdiction solely upon art brought into this country under a grant of immunity from seizure. This unprecedented approach has introduced great uncertainty as to whether sovereign lenders will face greater litigation exposure simply through the introduction of an immunized exhibit into the United States. Accordingly, the United States submits this statement to inform the Court concerning the background and purpose of section 2459 and to present its concerns as to the potential effects of plaintiffs' lawsuit upon the interests that section 2459 is designed to foster.

DISCUSSION

1. To Establish Jurisdiction Over a Foreign State, Plaintiffs Rely on the Exhibition of the State's Artwork By a U.S. Borrower Under a Grant of Immunity

* * * *

The works at issue were imported into this country in 2003 to be part of a temporary exhibition of artwork at the Guggenheim Museum in New York City and the Menil Collection in Houston. Following consideration of the request that the artwork be granted immunity, as well as a request by plaintiffs' counsel that immunity not be granted, the Department of State granted the application based on the determination that the objects were of cultural

significance, and that the temporary exhibition of the works within the United States was in the national interest. *See 68* Fed. Reg. 17,852-01, April 11, 2003. Under 22 U.S.C. § 2459, such artwork was immune from seizure and other forms of judicial process while in this country. Plaintiffs filed their complaint in this action two days prior to the closure of the exhibit, and the artwork was returned to Amsterdam according to a prearranged schedule, immediately following that closure, and prior to the City's being served with process.

Notwithstanding plaintiffs' prayers for relief—including in particular, their cause of action for replevin and prayer that the Court order the return of works "currently present in the United States,"—it is undisputed that plaintiffs could not seek to seize the artwork while it was in this country under a grant of immunity. It also appears to be undisputed that if plaintiffs had filed their lawsuit prior to the importation of these works, or following their departure, the Court would have had no jurisdiction over plaintiffs' claims . . . Plaintiffs are therefore using the window of opportunity afforded by the Malevich exhibition as the jurisdictional hook for their claims.

2. *The Protections of Section 2459 Play an Integral Role in Promoting Cultural Exchange*

Section 2459 has long played and continues to play an integral role in fostering cultural exchange. In the past ten years, as indicated by a search of the Westlaw Federal Register database, the United States Information Agency and Department of State have published immunity notices under section 2459 for more than 600 exhibits. More than 900 such notices have been published since 1980. These notices encompass a wide variety of cultural objects displayed at temporary exhibitions throughout the country. The past ten notices alone, for example, have addressed cultural objects to be displayed at 17 different museums in 11 different cities. As stated *supra*, these notices reflect the determinations of the Department of State that the imported objects were of "cultural significance" and that the exhibitions were "in the national interest."

Congress' stated purpose in enacting section 2459 was "to encourage the exhibition in the United States of objects of cultural

significance which, in the absence of assurances such as are contained in the legislation, would not be made available." H. Rep. No. 1070, 89th Cong., 1st Sess. 2–3. At the time section 2459 was enacted, such objects had become more vulnerable to lawsuits as a result of enactment of the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), approximately one year prior to section 2459. That Amendment sharply restricted application of the Act of State doctrine as a bar to jurisdiction over claims to property allegedly taken in violation of international law. The immunity provided by section 2459 thus addressed the threat to cultural exchange posed by the increased vulnerability to lawsuits of foreign artwork on temporary loan to this country's cultural institutions. Indeed, at the time of the enactment of section 2459, an exchange was pending between a Soviet Museum and the University of Richmond, and "[a]s a condition to the loan, the Soviets insisted on a grant of immunity from seizure as protection against former Soviet citizens who had valid claims to the title of the works." Rodney M. Zerbe, *Immunity from Seizure for Artworks on Loan to United States Museums*, 6 NW. J. Intl L. & Bus. 1121 n. 21 (1985).

3. *Permitting Jurisdiction Based Solely Upon an Immunized Exhibition Threatens the Cultural Benefits Provided By Section 2459*

As the foregoing reflects, the cultural benefits of section 2459 depend upon providing a sufficient level of assurance to foreign lenders that participating in an immunized exhibit will not expose them or their artwork to litigation in the United States. In this case, for example, the City asserts that it relied upon this grant of immunity in making the works available. *See* 68 Fed. Reg. 17,852-01, April 11, 2003; Def. Mem. at 5. The United States is thus concerned that permitting jurisdiction over a foreign state in such cases threatens to undermine significantly the interests that section 2459 was designed to foster and to create friction in U.S. relations with other countries.

Section 1605(a)(3) of the FSIA, first effective in 1977, provides for the possibility of *in personam* jurisdiction over foreign states in expropriation cases without the need for the prior attachment of

the property in question. H.R. Rep. 94–1487, 94th Cong., 2d. Sess. at 8, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606. Instead, it requires a sufficient nexus with the United States to provide fair notice to foreign states that they are submitting themselves to U.S. jurisdiction and abrogating their sovereign immunity. Most relevant for present purposes, section 1605(a)(3) requires that the property at issue be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state."

Foreign states are unlikely to expect that this standard is satisfied by a loan of artwork for a U.S. Government-immunized exhibit that must be carried out by a borrower on a non-profit basis. The possibility that such a minimal level of contact will necessarily suffice to provide jurisdiction threatens to chill the willingness of sovereign lenders to participate in the section 2459 program. Just as a foreign lender will be less likely to send valuable artwork to this country if the artwork is subject to seizure while it is here, such a lender will be discouraged from lending such works if the loan will provide the sole jurisdictional basis for an expropriation lawsuit that could not have occurred in the absence of the loan. Pursuant to the Supreme Court's invitation last term for the Executive branch "to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct," it would be appropriate to give these concerns great weight "as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2255 (2004) (emphasis in original).[5]

[5] Defendant's motion to dismiss asserts various bases for dismissing this lawsuit, including *forum non conveniens*, the statute of limitations, and sovereign immunity. While the United States does not at this stage address defendant's particular claims, it notes that in joining the Court's recent opinion upholding the retroactive application of the Foreign Sovereign Immunities Act to conduct occurring prior to its enactment, Justices Breyer and Souter recognized the importance of statutes of limitations and defenses such as *forum non conveniens* in protecting against "vast and potential liability for expropriation claims in regards to conduct that occurred generations ago. . . ." *Altmann*, 124 S. Ct. at 2261–62 (Breyer, J., and Souter, J., concurring) (*quoting id.* at 2271).

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 Public Law 99–83, 99 Stat. 190, 16 U.S.C. § 469j (1985). The duties of the commission are set forth in the act as follows:

> (1) identify and publish a list of those cemeteries, monuments, and historic buildings located abroad which are associated with the foreign heritage of United States citizens from eastern and central Europe, particularly those cemeteries, monuments, and buildings which are in danger of deterioration or destruction;
> (2) encourage the preservation and protection of such cemeteries, monuments, and historic buildings by obtaining, in cooperation with the Department of State, assurances from foreign governments that the cemeteries, monuments, and buildings will be preserved and protected; and
> (3) prepare and disseminate reports on the condition of and the progress toward preserving and protecting such cemeteries, monuments, and historic buildings.

In its annual report to Congress for 2004, mandated by § 1303(h), the Commission reported among other things that it had signed bilateral agreements on the protection and preservation of certain cultural properties with five countries during the year: Albania (July 12, 2004), Armenia (May 25, 2004), Poland (May 11, 2004); Hungary (April 15, 2004), and Austria (April 13, 2004). See *www.heritageabroad.gov/reports/doc/2004_Report.pdf.*

D. CULTURAL DIVERSITY

1. UNESCO

In 2003 UNESCO adopted a resolution deciding "that the question of cultural diversity as regards the protection of

the diversity of cultural contents and artistic expressions shall be the subject of an international convention." *See Digest 2003* at 830–32. In September 2004, addressing the First Session of the UNESCO Intergovernmental Meeting of Experts on Developing a Convention on Cultural Diversity, Robert Martin, Director of the United States Institute of Museum and Library Services and co-head of the U.S. delegation, stressed the importance the United States attaches to adopting a convention that will create "a climate in which creativity and diversity flourish."

The full text of Mr. Martin's opening statement, excerpted below, is available at *www.state.gov/s/l/c8183.htm.*

. . . Our delegation is pleased to have the opportunity to be here at this first intergovernmental meeting of experts to discuss the development of a convention on cultural diversity. The United States believes that such a convention could be a useful tool for supporting and promoting cultural diversity, and we wish to engage constructively with other member states in developing a convention that all members can endorse. We understand the central role that culture plays in the formation of the identity of people around the world.

Any discussion of cultural diversity necessarily must take into account the concept of cultural liberty. As the UNDP Human Development Report 2004 stated, "Culture is not a frozen set of values and practices." Cultures are dynamic and must be allowed to change according to the will of individuals making independent choices about what is of value and what they wish to produce, see, hear or otherwise experience. Cultural diversity thrives in an atmosphere of cultural liberty, when individuals have the freedom to preserve traditional values and practices and to pursue new and untried cultural and expressive directions.

In the United States, we value and promote cultural diversity. . . . As in all societies, our cultural forms claim their origins from a multiplicity of sources around the globe and are continually enriched by interaction between and among cultures.

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We therefore would suggest to our fellow delegates that the role of our governments is and should be to create a climate in which creativity and diversity flourish. It is imperative that each government provide a solid framework that promotes the activities and expressions of its diverse cultures, but does not direct or restrict their development, nor limit their interaction with other communities.

We are deeply concerned that the preliminary draft convention circulated prior to today's meeting does not address the fundamental concept of cultural liberty, which is essential to sustaining cultural diversity. Moreover, it suggests no substantive steps that could have an immediate impact on fostering greater awareness and appreciation of diverse cultures, both within our borders and beyond.

Our delegation therefore proposes that we use this opportunity to develop a substantive initiative that will, in fact, promote cultural diversity and create opportunities for lesser-developed nations to promote their cultures globally. Let us recognize, build upon, and refine the ongoing and important efforts of existing UNESCO programs, rather than creating barriers and establishing costly bureaucratic structures. Let us find ways to nourish and promote cultural diversity, instead of diverting limited funds for administration. Our focus today is to ensure that every nation has the capacity to promote human creativity in all its varied forms and to share its culture with the world.

We look forward to working together with the representatives of other nations to increase opportunities for cultural interaction, and to sharing additional thoughts, ideas and concerns throughout these meetings. We are hopeful that a spirit of cooperation and constructive dialogue will lead to the development of a convention that all nations can embrace.

2. UN Commission on Human Rights

On April 16, 2004, the UNCHR adopted a resolution, "Promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities." E/CN.4/RES/2004/20. The United States proposed an amendment to

delete paragraphs 17–19 from the draft resolution which, among other things, "[r]ecognizes the need to seek the views of a larger number of States and intergovernmental and non-governmental organizations on the possibility of establishing a thematic procedure the basis of whose mandate would be the comprehensive implementation of the present resolution."

The United States called for a vote on the amendment, which was rejected; the United States voted against adoption of the resolution.

Cross-references

Protection of Iraqi cultural property, **Chapter 16.A.1.a.**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW

1. Overview

On July 30, 2004, Harold Burman of the Office of Private International Law, Office of the Legal Adviser, U.S. Department of State, and government liaison to the Council on Private Law Matters, provided an overview of developments in economic and commercial law in a memorandum to Joshua Markus, Chair of the American Bar Association Section on International Law and Practice. The full text of the memorandum, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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International organization overview

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The probable future status of the European Union as a party to certain private law instruments has been on the table. Two new private law conventions, the 2001 Cape Town Convention on mobile equipment finance, affecting the globally important field of aircraft finance in its first Protocol, and the 2002 Hague Conference Convention on securities intermediaries, both contain similar provisions allowing REIO's (regional economic intergovernmental

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organizations) to accede and undertake the obligations of a State party. Aimed at this stage primarily at the EU, they may open the door to other regional bodies at some future date if they assume a certain level of legal responsibility for actions of their member States. . . . In addition, discussions are underway on the EU's request to become a member of the Hague Conference. This may require resolution of matters such as when and to what extent the EU can vote or make representations binding on its member States, and whether those actions are effective only as to those EU member States present at a meeting.

Outer space finance law

UNIDROIT held its first intergovernmental meeting in October 2003 at Rome on the draft Protocol to the Cape Town Convention on secured finance rights in outer space equipment. . . .

The next intergovernmental meeting is scheduled for October 2004 at Rome. It has become clear that a protocol for space finance will be more difficult than one for airspace. First, a number of States, including the U.S., will interpose regulatory review prior to allowing transference of satellite operations, which in turn will necessitate negotiating new financial assurances to balance the credit risk. In addition, some States will seek to protect contractual arrangements for public services, which could undermine a secured finance market. Space finance is likely to need to cover manufacturing phases via project finance type provisions, unlike the air finance protocol.

The intersection of the treaty systems is under review by the UN's Committee on the Peaceful Uses of Outer Space (UNCOPUOS). Participants agreed that while the private law protocol could affect States inter se, it could not affect public law obligations of States under the COPUOS-prepared Outer Space treaty system. As with the air finance registry to be supervised by ICAO (International Civil Aviation Organization), the space finance protocol would require a similar UCC-type filing system. Proposals that the Secretariat of the UN's Outer Space Committee (OOSA) might perform some functions related to the registry, as it now does for the UN space object registration treaty, met with some resistance, in part on concerns about the UN staff being authorized to facilitate private financing systems.

Secured finance

The Administration sent the Cape Town Convention to the Senate in November 2003, and the Senate granted advice & consent to ratification in July 2004, in a major step forward for private commercial law conventions. . . . Separately, implementing legislation was sent forward by the Transportation Department for [Federal Aviation Agency ("FAA")]'s role in the new international registry, and passed by both houses of Congress in July 2004. . . .*

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On other secured finance fronts, UNCITRAL's Working Group VI continued its project to conclude a UN legal guide on secured finance law reform. . . .

A number of U.S.-based finance interests, the National Law Center for Inter-American Free Trade (NLCIFT), the State Department and others have continued to seek implementation of the 2002 OAS Model Inter-American Law on Secured Finance. This effort includes seeking IADB (Inter-American Development Bank) support to approach secured finance reform on a regional basis in the CAFTA states, rather than state by state, as has been done in the past. While the size of each Central American State individually may not be large enough to attract new capital by this means, it is believed that regionally that approach could represent a combined market size that would work.

Investment securities

The Hague Conference completed its work on a Convention to determine the law applicable to securities held indirectly by intermediaries, a new mechanism whereby rights to securities are held generally in and transferred by computer data. The exponential growth in this area created concerns about systemic risk, since older law (Revised UCC Article 8 is an exception) is unable to predict applicable law, making valuation and reserve requirements unreliable and raising risk levels. The new Convention at the last minute adopted, with EU support, the UCC solution—relying primarily on

* Editor's note: The United States deposited its instrument of ratification on October 28, 2004. *See* A.6. below.

party choice of law through account agreements, because "location" is no longer an effective concept in a computer age. A draft official commentary which would confirm that result is expected to be agreed to by October 2004, and authority then sought for U.S. signature to the Convention.

Building on that, UNIDROIT has undertaken a new project to harmonize some aspects of substantive securities transaction law, such as closing and settlement, intermediaries' rights and obligations, rights to reuse account holders' securities and other matters. This is the first substantial effort in this field at the international level. A draft is expected to be circulated for public comment in September 2004 and a first negotiating meeting possibly by May 2005. A parallel project has been proposed by the U.S. and some other States for consideration by the OAS as a topic for its Seventh Specialized Conference on Private International Law (CIDIP-VII), in part because a number of Latin American States are more likely to adhere to a regional instrument developed at a body where their influence is pervasive.

Insolvency law reform

UNCITRAL, the World Bank and the International Monetary Fund continued to develop new guidelines for insolvency law reform, now seen as a critical part of a State's ability to manage financial tailspins as well as to attract investment or start-up capital for its enterprises. . . . The UNCITRAL project was completed in June 2004 and the final text will be available in the near future.**

Electronic commerce

UNCITRAL moved forward with its draft convention on formation of contracts in e-commerce, which would encompass enabling provisions, a number of which are derived from UNCITRAL's first 1996 e-commerce Model Law. . . . While e-commerce may inherently be international, as is air transportation,

** Editor's note: The General Assembly resolution, U.N. Doc. A/RES/59/49, and the text and *travaux preparatoires* of the The UNCITRAL Legislative Guide on Insolvency Law are available at *www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html.*

it would be much more difficult to gain acceptance for a text that would replace domestic law. This would be so in the U.S., where the intersection between existing state law, i.e. the Uniform Electronic Transactions Act (UETA) and the Federal E-signature and Global E-commerce Act would need to be worked out, even though each of those draws substantially on the 1996 UNCITRAL Model Law as a common source.

The treaty law aspects of the new convention will need buy-in by enough countries to become effective. The draft Convention states that its provisions will also apply to certain listed UN Conventions, such as the Vienna Convention on Contracts for the Sale of Goods (CISG), as well as other conventions or treaties if so listed by declaration by States party thereto, so that terms in those instruments can be interpreted in a manner consistent with modern technology and practices. Such a provision would be effective only inter se, that is only between any two or more States that adopt the new UNCITRAL Convention, and would not affect obligations of those States to any other States party to the other conventions or treaties affected. The scope of this new approach itself is still unresolved, i.e. whether it should be limited to PIL treaties, extend to all commerce and trade agreements (arguably the reach of UNCITRAL's charter), or extend to any treaty a ratifying State chooses to apply it to, whether trade related or not. Either way, the purpose is to extend the "footprint" of modern e-commerce law to more States than have adopted such measures so far.

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Commercial fraud

An international colloquium held in April 2004 in Vienna, organized by UNCITRAL with the assistance of the UN Crime Commission, considered the impact of growing levels of fraud in commercial sectors, often aided by the internet and other computer-based communications networks. The impact was felt in most States, including the U.S., but its implications were seen as especially serious in some developing countries. Sectors reviewed were banking, maritime carriage, insurance, bankruptcy and other asset recovery, and others. One common problem was the inability of applying

remedies in non-criminal matters in cross border cases, and the difficulty of obtaining multi-jurisdiction cooperation in the absence of some framework international instrument or process. The Commission agreed in June 2004 to authorize studies on possible next steps, including possible preparation of best practice rules designed to limit fraudulent actions.

Uniform International Rules

The UNIDROIT Principles of International Commercial Contracts has been reissued in a 2004 edition, updating the original 1995 version. The widely used Principles have served as a common set of party choice of rules and as a reference point for many transactional and academic purposes. Often an effective means of avoiding extended discussions and due diligence on comparative laws in commercial transactions, the UNIDROIT Principles have been generally accepted in commercial arbitration as an enforceable party choice. Generally merging best practices from both common and civil law jurisdictions, the new edition added chapters on agency, third party rights, set off, assignment of rights, transfer of obligations and assignment of contracts, and limitation periods. In addition, some provisions of existing chapters were also revised. A brief review of the new edition is available in UNIDROIT's *Uniform Law Review*, Vol. IX, 2004-1, by rapporteur Michael Joachim Bonell. Comments on the new chapters and other revisions will be of valuable assistance in assessing whether to recommend use of the new edition.

2. UNCITRAL Working Groups

a. Arbitration: Ex parte interim measures of relief

In February 2004 James Castello, private advisor to the U.S. delegation, presented to the United Nations Commission on International Trade Law ("UNCITRAL") a summary of the position of the U.S. delegation in support of the power of arbitral tribunals to grant *ex parte* interim measures of relief

provided there were adequate safeguards. As noted in A.1 *supra*, the paper was provided to Working Group II (Arbitration) in preparation for its forty-fifth session in Vienna, September 13–17, 2004. A report of the Working Group's progress on a draft revision of Article 17 of the UNCITRAL Model Law on Arbitration on interim measures of protection, A/CN.9WG.II/WP.131, is available at *www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html*. Excerpts below from the U.S. position paper address two aspects of the position paper: the safeguards in the draft revision of Article 17 of the Model Law that would limit the incidence of *ex parte* relief to the most urgent and serious cases, and principal objections raised by others to giving arbitrators *ex parte* authority to grant interim measures of protection. The full text of the U.S. submission is available at *www.state.gov/s/l/c8183.htm*.

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The agenda for this meeting notes that we will again consider the general question whether arbitrators should be authorized (in a draft revision of Article 17 of the Model Law) to issue interim measures on an *ex parte* basis. This will be the Working Group's fifth such discussion over the last four years. . . . Our delegation believes that we should bear in mind how we have reached the current phase of this debate and that we must not lose track of the insights that have already been expressed during the past four years. . . . As the Report from [the Fall 2002] session states: "There was wide agreement in the Working Group that by strengthening and increasing the safeguards, a provision on *ex parte* interim measures of protection might be more acceptable."

What are the safeguards that have now been developed by the Working Group and incorporated in the draft revision of Model Law Article 17? There are at least five of them:

1. Time Limit:

The Working Group has now further reduced the maximum duration of any *ex parte* measure from 30 to 20

days. Quite apart from this maximum duration, the tribunal is also required to give notice of the measure as soon as practical to the affected party and, following notice, to give that party an "opportunity to present its case." Taken together, these provisions obviously serve to limit substantially any possibility of abuse of *ex parte* measures.

2. The Showing of Need:

To obtain even an *inter partes* interim measure, a party must satisfy the court (1) that, if the measure is not granted, this will result in harm "that cannot adequately be compensated by damages," (2) that this harm "substantially outweighs" any harm that will be caused to the party against whom the measure is directed, and (3) that there is a reasonable possibility that the requesting party will ultimately prevail on the merits. To obtain an *ex parte* interim measure, the moving party must further show (4) that there is an "urgent need" for the measure and (5) that it is "*necessary* to proceed *ex parte* to ensure that the purposes of the measure are not frustrated before it is granted" (emphasis added).

3. Security and Liability:

The requesting party is made liable to the party against whom a measure is directed "for any costs and damages caused by the *ex parte* measure" if it is later determined that the measure should not have been granted. The requesting party must also post security in whatever form the tribunal directs, to cover such potential costs and damages.

4. Opt-out Provision:

Parties are expressly permitted to agree to exclude the possibility of *ex parte* interim measures from their arbitration.

5. Full Disclosure by Requesting Party:

Yet a further provision requires a party requesting *ex parte* measures to disclose to the tribunal "all circumstances that the tribunal is likely to find relevant and material to its determination," including, of course, those circumstances that may not favor the interim measure.

These are very substantial safeguards, which will undoubtedly limit the incidence of *ex parte* relief to the most urgent and serious cases and go very far towards eliminating any possible abuse in those cases where a tribunal does grant an *ex parte* measure.

Notwithstanding the incorporation of these safeguards, there remain objections from some delegates and observers in this Group to the very concept of giving arbitrators *ex parte* authority. . . . [O]nce again, we believe it is important to recall the essential debate that has already occurred over the last four years. That debate has demonstrated, in our view, that objections against *ex parte* authority do not withstand close scrutiny. We briefly summarize, therefore, the discussion that has already occurred with respect to the five principle objections to this authority.

1. First, it has been argued that parties can often seek *ex parte* relief from courts and therefore it is unnecessary to confer this authority on arbitral tribunals. With all due respect, we find this a particularly anomalous objection to hear from this Working Group. The fundamental premise of the UNCITRAL Model Law and of the 1958 New York Convention is that parties have *chosen* to resolve their disputes by arbitration and that this choice ought to be supported in every way possible. Here again, we would recall the important principle embraced by the Working Group in its Spring 2001 session and recorded in the Report from that session: "The aim of the model legislative provisions should be to allow *as much parity as possible* between the powers of the arbitral tribunal and those of a court" (emphasis added). Such parity responds not simply to parties' general desire to avoid national courts (which they express when they sign an arbitration agreement) but also to parties' specific reasons for preferring to seek interim relief from arbitrators.

These reasons can include the following:

a) The moving party may not yet have retained counsel qualified to practice in the relevant national courts and the same urgency that prompts the request for the *ex parte* relief may also prevent timely retention of such counsel.
b) The tribunal may already be acquainted with the facts of the case and thus can evaluate an urgent request for interim relief more efficiently than a court confronting the dispute for the first time.
c) The moving party may not speak the language of the relevant courts and thus can more readily put on a substantive case in favor of the interim relief before the tribunal.
d) There may be legal barriers to seeking the interim measure in the courts of the relevant jurisdiction where the interim measure should have effect. These legal barriers are illustrated by the so-called *McCreary* doctrine that is followed by some American courts and which holds that an arbitration agreement preempts a court's jurisdiction even to grant interim relief.
e) The moving party may wish to preserve confidentiality surrounding a commercial dispute by confining the dispute to an arbitral tribunal.
f) The moving party may have more confidence in the speed, expertise and especially the impartiality of the tribunal than in the relevant national courts—indeed, in some cases, the moving party may reasonably fear the effects of corruption in those courts.

This is not an exhaustive list of the reasons why parties may prefer to seek interim relief from an arbitral tribunal. But this list demonstrates that there can be powerful reasons for that preference. And therefore, in this delegation's view, it would be inappropriate for UNCITRAL to say to these parties, "notwithstanding all of your legitimate reasons for preferring the arbitral forum, we will require you to go to court for this relief."

2. A second objection that has been raised and answered is the argument that allowing arbitrators to issue *ex parte* measures somehow violates basic principles of due process. The fundamental flaw in this argument is that due process is an essential principle

in almost every legal system, yet the courts in most of those systems have themselves developed a practice of granting *ex parte* relief in certain circumstances. Courts have viewed their *ex parte* practice as fully consistent with due process for two fundamental reasons. The first is fairness. It is recognized that in certain circumstances fairness requires that certain evidence be preserved, or that certain goods be kept within the court's jurisdiction, or that certain assets necessary to give effect to a final judgment be maintained, and that these goals can sometimes only be achieved effectively if done on an urgent *ex parte* basis. The second reason for courts' belief that an *ex parte* procedure comports with due process is that such a procedure is confined within a structure of substantial safeguards that are, in fact, very similar to the safeguards that this Working Group has already written into the draft of revised Model Law Article 17.

3. A third argument against arbitrators' exercising *ex parte* authority is that this may lead them to prejudge the merits of the dispute. This, of course, is an objection that can be—and has been—raised with respect to all interim measures, not simply those that may be issued *ex parte*. The Working Group has responded to that concern by softening some of the conditions for interim measures precisely to forestall the risk of prejudgment. For example, the present draft of revised Article 17 provides that the tribunal need only be satisfied that "there is a reasonable possibility that the requesting party will succeed on the merits" before issuing any interim measure. We think, therefore, that the Working Group has reduced as far as possible the danger that a tribunal that issues an interim measure would somehow bind itself to a prejudgment of the merits. Accordingly, those who invoke this argument against *ex parte* measures must really be objecting to something slightly different, namely, the risk that a party may abuse the *ex parte* proceedings by presenting a false impression of the dispute. We understand this concern, but we think the likelihood that a party may misrepresent the facts of a dispute in order to obtain an *ex parte* measure is actually greater if we force parties to seek that measure from courts rather than from tribunals. This is true for at least three reasons. First, to the extent that any part of the case has already been presented to the arbitral tribunal at the time that

ex parte relief is requested, the tribunal is likely to have a better understanding of the background to the request and should therefore be less likely to be misled by a one-sided presentation of the request. Secondly, if a party abuses the *ex parte* process by providing inaccurate information to a court and if the court subsequently learns of the misrepresentation, the worst that could happen to this party is that its interim measure will be rescinded. By contrast, if the requesting party similarly abuses the *ex parte* process before an arbitral tribunal and the tribunal subsequently learns of the deception, the requesting party will have to live with a wary or hostile tribunal for the rest of the arbitral proceedings. Finally, pursuant to proposed paragraph 7(g) of the draft revised Article 17, the party seeking a tribunal *ex parte* measure will be obliged to inform the tribunal of all relevant information (including information that may not favor the request), whereas in most national courts there will be no such obligation. It seems likely that these combined factors will inhibit abuses of the *ex parte* process more effectively in arbitration than in national courts.

4. A fourth objection to creating arbitral *ex parte* authority is that, since parties will have to go to court to enforce an *ex parte* interim measure, there is no harm in requiring them to seek the *ex parte* measure from the court in the first place. This argument is unpersuasive for two reasons. First, as practitioners know from experience, the vast majority of interim measures granted by arbitral tribunals are adhered to by the parties subject to those measures, without any need for court enforcement. Thus, it is entirely possible that a party seeking a tribunal *ex parte* measure will be content with obtaining that measure without taking the second step of seeking court enforcement. At the very least, we believe parties should be given that option. Secondly, even in those cases where a party may feel it necessary to seek court enforcement, there may still be good reasons why that party would wish to obtain the interim measure in the first instance from a tribunal rather than a court. We have already reviewed some of the reasons why parties may prefer tribunals to national courts, including concerns about the partiality of certain national courts. There may be much greater scope for courts to display their partiality when they are reviewing a request for an interim measure rather than simply deciding

whether to enforce a measure already granted by a tribunal. In sum, the fact that some parties may wish to seek court enforcement of an interim measure does not, in our view, justify a policy prohibiting parties from seeking certain interim relief from tribunals.

5. A fifth objection to granting arbitrators *ex parte* authority is that it is inconsistent with the consensual nature of the arbitral process. Some arbitrators say that they would feel uncomfortable awarding any relief to one party without hearing from the other party because arbitrators derive their authority solely from the consent of both participants in the arbitration. This argument has prompted two rebuttals. First, it has been pointed out that, in at least the larger sense, an arbitrator acting *ex parte* will not be acting without the consent of both parties, since those parties usually will have consented to the applicable law that authorizes *ex parte* authority. The parties will normally have consented to that law either by choosing it to govern their agreement or by choosing a site of arbitration within the jurisdiction of that law. And pursuant to that law, of course, both parties will have equal assess to the *ex parte* mechanism. But, secondly—and much more fundamentally—an arbitrator who refuses to act at the request of one party even for a short period of time before hearing from both parties may, in our view, be acting against the spirit of arbitration in a much more basic sense. Surely, it is an essential principle of arbitration that the parties seek to achieve a fair and effective resolution of their dispute. A refusal to grant *ex parte* relief can, in some instances, defeat those essential objectives. One can imagine that an arbitrator who refuses to consider *ex parte* relief may, at some point, be forced to tell a party something like the following, during an arbitral proceeding:

> "I am sorry to tell the Claimant this but any amount the arbitral tribunal may grant you in its ultimate award in this case will not be worth the paper it is written on because your opponent quickly hid its assets as soon as it received notice that you were seeking an interim measure to prevent that. But you must understand that, even though you had demonstrated that you would be irreparably harmed without the measure and that the harm to you would

> outweigh the harm of the measure to your opponent, and that you offered to put up potential security, and would be fully liable if this provision were wrongly granted, I could not entertain an application for *ex parte* relief because this would destroy the atmosphere of trust that is essential to arbitration."

We think it is not consistent with the principles of arbitration to place an arbitrator in the unwelcome position of having to give that speech.

b. Electronic commerce

The UNCITRAL Working Group on Electronic Commerce met in its forty-fourth session in Vienna, October 11–22, 2004, to continue negotiations on a draft convention on formation of contracts in e-commerce, addressed in A.1. *supra*. In preparation for that session, the United States prepared a position paper that summarized U.S. goals in the negotiation as excerpted below. The full text of the position paper is available at *www.state.gov/s/l/c8183.htm*. Additional information on the working group and related documents are available at *www.uncitral.org/uncitral/en/commission/working_groups/4Electronic_Commerce.html*; the report to the UN General Assembly on the work of the forty-fourth session is available in U.N. Doc. A/CN.9/571.

* * * *

(A) Expand the footprint of basic e-commerce enabling laws across more of the globe, consistent with prior initiatives including the Uncitral Model Law on Electronic Commerce, with an emphasis on developing and emerging countries who have not yet adopted basic rules that validate electronic conduct of contractual relations. (B) Support a basic enabling law approach, such as MLEC, UETA, etc., which enhance predictability but minimize displacement of

applicable substantive law, rather than the more regulatory approach of some countries. Continue to support market-based practice rules to the extent sufficiently wide in application or otherwise consistent with commercial sector requirements.

(C) Focus on commercial predictability ex-ante, with lesser required due diligence to the extent possible, in order to promote entry into the e-market and encourage commercial credit, rather than emphasizing post-contract dispute resolution (the latter, while also important, raises a number of e-jurisdiction questions for which resolutions are not in sight and which are not intended to be dealt with in this treaty).

(D) Continue to factor in existing US federal and uniform state law, as well as other state laws, as economic guidance and so that variances are fully explainable, taking into account that while the US does not need the Convention for domestic purposes, without countries such as the US taking a lead, many developing countries may not agree to extend the baseline of enabling law.

(E) Support broad application of the treaty, while retaining flexibility both in black letter provisions and ability to further modify by declaration or exclusion, so as to be adjustable as needs of particular sectors require over a reasonable period of time. While achieving less uniformity at the outset, it lessens the risk of provisions that cannot meet the test of adaptability to developing practices and economics of e-commerce.

(F) Emphasis on primary USG goals for developing countries such as capacity building as well as growth of a more stable base for democratic institutions, by promoting and deepening private sector commerce, including expansion of contracts for distant marketing, sales and services. Capacity building requires special focus on medium and smaller enterprises as well as larger crossborder companies, and attention to regional as well as national development.

c. Carriage of goods by sea

The UNCITRAL Working Group on Transport Law continued negotiations involving the draft convention on the carriage of goods prepared by the Brussels-based Comité Maritime

International ("CMI"). The U.S., as a member of the Working Group, submitted a paper to the Working Group in October 2003 outlining its position on ten aspects of the draft instrument. Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea], U.N. Doc.A/CN.9/WG.III/WP.34; *see Digest 2003* at 843–47. On November 8, 2004, the United States submitted a modification of its original proposal on Ocean Liner Service Agreements ("OLSAs") as contained in paragraph 29 of the draft instrument. Noting that certain concerns had been raised by other States as well as non-governmental organizations and private interests, the United States explained its modified proposal as excerpted below. U.N. Doc.A/CN.9/WG.III/WP.42).

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1. In WP.34, the United States presented an overall proposal covering the key subjects that should be addressed in the draft instrument. Paragraph 29 of WP.34 proposes a definition of an Ocean Liner Service Agreement, i.e., a definition of the category of transactions that we believe should be presumptively covered by the draft instrument, but which should be allowed to derogate from the terms of the draft instrument under certain conditions.

2. Since WP.34 was distributed in August 2003, the United States has listened carefully to the comments we have received on the definition of an OLSA included in paragraph 29. . . . One of the concerns expressed was that, due to a provision of U.S. shipping law, non-vessel operating common carriers (NVOCCs) in the U.S. trade would be unable to enter into an OLSA, as that term was defined in paragraph 29.

3. Another less substantive concern was that the draft instrument would be clearer if the OLSA concept was contained in a stand-alone article, rather than as part of what is now Article 88 of WP.32 (Limits of Contractual Freedom).

4. In response to those concerns, the United States has modified its proposal contained in paragraph 29 of WP.34. This proposal provides for a stand-alone article on OLSAs, and defines an OLSA

in a way that meets shipper concerns for specificity, and meets NVOCC concerns that the definition be broad enough to include them. This proposal has the support of all affected U.S. interests, including shippers, VOCCs and NVOCCs.

5. The United States therefore proposes the following language, in lieu of our proposal in paragraph 29 of WP.34:

Article XX

1. [Notwithstanding art. xx [contract of carriage definition excluded/contracts provision], this instrument applies to an Ocean Liner Service Agreement. [Note 1]

2. An Ocean Liner Service Agreement means a contract that is mutually negotiated and agreed to in writing or electronically between one or more carriers and one or more shippers and that provides for the liner carriage of goods by sea in a series of shipments over a specified period of time. Such contract shall obligate the carrier(s) to perform a service not otherwise mandatorily required by this instrument and shall obligate the shipper(s) to tender a minimum volume of cargo and to pay the rate(s) set forth in the contract. The carrier(s) service obligation shall include ocean carriage and may also include carriage by other modes of transport, warehousing, or logistics services, as required by the shipper. Liner carriage means an advertised maritime transport service for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports. [Note 2]

3. An Ocean Liner Service Agreement may not be (i) a carrier's schedule of prices and services, a bill of lading, or a cargo receipt or similar document, although an Ocean Liner Service Agreement may incorporate such documents by reference; or (ii) a charter of a liner vessel or the charter of space on a liner vessel.

4. Notwithstanding paragraph 1, an Ocean Liner Service Agreement may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in this instrument. A provision in an Ocean Liner Service Agreement that provides for greater or lesser duties, rights, obligations, and liabilities shall be set forth in the body of the contract and may not be incorporated, by reference

from another document. Any terms in an Ocean Liner Service Agreement that vary from this instrument shall be binding only on the parties to the contract and any third-party who expressly consents to be bound thereby. [Note 3]

5. If a transport document or electronic record is issued pursuant to an Ocean Liner Service Agreement, then the provisions of this instrument apply to the contract evidenced by or contained in that transport document or electronic record to the extent that the transport document or the electronic record governs the relations between the carrier and any holder or consignor or consignee named in said transport document or electronic record who is not a party to the Ocean Liner Service Agreement, except to the extent that said holder, consignor or consignee expressly consented to be bound by an Ocean Liner Service Agreement or such terms therein that are different from those set forth in the instrument.

Note 1: The bracketed language cannot be finalized until other articles, such as the definition of "contract of carriage" and the treatment of excluded contracts, have been finalized. The intent, however, is to avoid any confusion between the OLSA provision, on the one hand, and other provisions which might suggest that OLSAs were excluded (such as the definition of contract of carriage, and the list of excluded contracts) from the Instrument.

Note 2: In order to ensure that the OLSA provision is interpreted to apply equally to vessel operators and non-asset based carriers who issue documentation in their own name and are responsible for the performance of the ocean carriage, the United States proposes that the definition of "carrier" included in Article I (b) of WP.32 be amended to read as follows: "Carrier" means a person, whether or not that person operates a vessel, that enters into a contract of carriage with a shipper."

Note 3: The United States notes that it has proposed in WP.34 that the parties to an OLSA could bind a third party to a forum selected for the litigation of cargo claims that is designated in an OLSA, as long as certain conditions have been satisfied, including, among others, that notice of the designated forum is provided to the third party. See WP.34, paragraph 35.

3. Forum-shopping

On March 25, 2004, Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, addressed the U.S. Chamber of Commerce, Institute of Judicial Reform, in Washington, D.C., on the topic of forum-shopping. Excerpts from points prepared for his speech entitled "Government Responses to Global Forum Shopping" appear below. The full text is available at *www.state.gov/s/l/c8183.htm.*

* * * *

WHAT IS THE PROBLEM?

- The urge to go global forum shopping exists because litigants have good reason to believe they can gain an advantage by suing in one country rather than another.
- They do this for any number of reasons:
  - — They may prefer one court over another because they perceive that the law is on their side or that the court will be more likely to side with their position.
  - — It may be that they relish—or fear—certain types of legal institutions: juries, class actions, loser pays attorney fees statutes, broad rules on discovery of evidence, punitive or treble damages, and so on.
  - — They may anticipate—or fear—corruption and unfair procedures; or simply procedures that are so slow that they will result in no justice.
- Depending on your point of view in any specific case, forum-shopping may seem to be inimical to well-ordered justice, or it may seem to be the only way to see justice done.

  In Europe, as I understand it, it is known as launching the "Italian Torpedo" to rush into Italian court and file a declaratory judgment action of no liability when you fear you are about to be subject to suit. Because Europe has a strict first-in-time *lis pendens* rule for dealing with parallel lawsuits, the action will not be permitted to go forward elsewhere. The company that fires the "torpedo" can

then expect that the case will be tied up so long in the Italian courts that it is effectively shielded indefinitely from liability.

- Forum shopping is a problem to some extent even in domestic legal systems like the American system—Alabama and D.C. juries are well known in some quarters for the generosity of their money judgments.
  - And we have heard how the EC is making every effort as part of their economic and political integration to unify their regional legal system and reduce forum shopping.
- Conflicts over international forum shopping disputes are arising with greater and greater frequency.
  - The Supreme Court is hearing three petitions this term related to forum shopping:
    - one involving access to U.S. courts to sue over antitrust activities occurring abroad;
    - one involving taking of evidence by U.S. courts in support of a party to an administrative antitrust claim before the European Commission where the Commission itself says it does not want the evidence; and
    - one involving alleged violations of international human rights law under the Alien Tort Statute brought by a foreign plaintiff.
  - Only narrowly missing the Court, however, were other cases, including:
    - efforts by Canada and the European Commission and member states, to sue for treble damages under the Racketeering laws (RICO) to collect lost tax revenue arising from an alleged tobacco smuggling ring;
    - a case arguing that the UN Sales Convention requires the prevailing plaintiff to be awarded its attorneys fees;
    - and a difficult child abduction case under the Hague Abduction Convention involving custody jurisdiction between Maryland and Scotland.
- In addition, the use by courts of anti-suit injunctions to enjoin parties from bringing suit in foreign courts is on the

rise, notably where one of the parties is seeking to enforce an arbitration agreement or collect on an arbitral award.
  — Recent litigation involving state-owned companies from Indonesia and Ukraine comes to mind.
- Finally, a week doesn't go by that U.S. officials are not contacted by attorneys and businessmen who are either contemplating filing a claim against a foreign company or are seeking to collect on a valid judgment against a foreign company. In some cases, the defendants are state-owned companies or are headed by members of royal families.
  — These, too, are frustrated would-be forum shoppers.
- All these cases make for very difficult political relationships.
  — How can governments intervene to set things right when we are promoting the independence of courts and the rule of law everywhere?
  — In some cases where there are treaties involved—such as under Bilateral Investment Treaties (BITs) or NAFTA—remedies may exist through arbitration.
  — In many cases, however, there may be no treaty rights involved, and it is hard to bring customary international law to bear.
  — But even where there is a treaty, however, what if the decision of the tribunal or court is clearly wrong, or at least arguably so, or what if a party was unfairly treated?
  — How does the State Department prevail on a foreign court to change its decision?
  — Indeed, from a practical standpoint, even if the State Department were willing and able in a specific case to intervene, how can governments be sure that they understand fully both sides' positions in the dispute?
    — Must governments always back their citizens?
    — Or must they hold quasi-judicial hearings to decide the merits?
    — How can the Department weigh the importance of the dispute against a list of other pressing bilateral concerns, from terrorism to trade?
  — It was the failure of just such procedures to determine in a prompt, efficient, and effective way whether or not a

party to a lawsuit was protected by immunity, that led to the enactment of the Foreign Sovereign Immunities Act in the late 1970s.

— The FSIA leaves all immunity decisions to the courts, whatever the political tensions those decisions might evoke.

— This approach has generally worked very well for immunity questions.

* * * *

WHAT CAN WE DO?

- First, we need gradually to reach a point where parties perceive there is less and less of a reason to forum shop.
  — This requires a greater convergence or harmonization of our civil law systems and greater judicial cooperation, particularly among courts of the major democracies and global economies.
  — Convergence is necessary for everything from service of process to the taking of evidence, to speed, availability of counsel, jurisdiction, choice of law, harmonization of substantive law, dealing with parallel litigation, and greater consistency in the awarding of damages.
- In fact, the United States has been working with other governments on these issues in at least four institutions for many years: the Hague Conference on Private International Law, the International Institute for Unification of Private Law (UNIDROIT), the UN Commission on International Trade Law, and the periodic conference on private international law of the Organization of American States (CIDIP).
- Probably the most important steps toward this greater convergence have already been taken in the Hague Service and Evidence Conventions, by the New York Convention on the Enforcement of Foreign Arbitral Awards, and by the UN Sales Convention.
  — The Service and Evidence Conventions establish common procedures for these most basic steps in the litigation process.

  - The New York Convention sets up a system of private justice to resolve international business disputes, with an enforcement network of over 130 countries.
  - The Vienna Convention on the Law of Sales creates a uniform default set of rules on basic contract law for international transactions, and is now in force for over 60 countries, including the U.S.
- Ongoing projects include enforcement of judgments in [buyer-to-buyer] contracts containing choice of court clauses, better implementation of the Service and Evidence conventions, improving the international system of arbitration and mediation, and addressing substantive law harmonization in electronic commerce, maritime transport, insolvency, secured finance, and commercial fraud.
  - The Office of the Legal Adviser is leading these negotiations on behalf of the U.S. Government hand-in-hand with the private stakeholders in the U.S.
- To address forum shopping in an effective way faces severe comparative law challenges.
  - I am convinced our brains are wired differently from birth and that civil law and common law citizens simply think differently about the law.
  - We spent a decade negotiating at the Hague Conference a comprehensive jurisdiction and enforcement of judgments convention.
  - We had constant clashes with our European friends in those negotiations.
    - They saw the goal to be to force the U.S. to knuckle under—to alter significantly its traditional approaches to jurisdiction and damages.
    - The U.S. side saw an opportunity for the rest of the world to follow the lead of U.S. courts and open up their courts to the liberal enforcement of foreign judgments.
  - We could not find a way to meet halfway, particularly where questions about jurisdiction in Internet cases could not be fully resolved even in domestic courts.

— And we knew the treaty would not get off the ground when the major copyright industries in the U.S. could not resolve fundamental disagreements with the Internet Service Provider industries.

- The way we found to continue to move forward was to defer the dream of a comprehensive treaty for now and to focus on what should be a firm foundation for agreement—exclusive choice of court agreements in commercial contracts, including the enforcement of the agreement to go to a specific court, and enforcement of the resulting judgment.
  — This last project is now fully underway, with some hope of completion by early 2005.

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4. U.S. Harmonization Efforts

On May 7, 2004, Mr. Kovar addressed a conference, "Private International Law and Judicial Cooperation in the EU-U.S. Relationship," at the University of Pittsburgh. Mr. Kovar's remarks, excerpted below (footnotes omitted), discuss the role of the United States in the development and harmonization of private international law. The full text is available at *www.state.gov/s/l/c8183.htm.*

* * * *

Private law is traditionally a matter of the law of the individual states of the United States, and private international law (or "conflict of laws") has largely developed through state common law, or through federal case law development under the Constitution. These developments can be influenced and affected not only by legislative acts and by academic writings, but also through organized efforts by private law harmonization bodies to restate and develop the common law. . . .

[Another speaker] has asked whether there is a political will in the United States to harmonize private international law on a worldwide basis. The answer, I believe, is a strong "yes" when there is a compelling social or economic reason for the harmonization. The

answer is "no" where the reason is not so clear or is itself very controversial. Whereas the general policy goal of greater unification and harmonization at the EU level is a compelling factor in itself in Europe leading to increased efforts toward harmonization of private international law through that intergovernmental organization, this goal does not drive U.S. actions because of the established role the states play in private law in the U.S. federal system. In the U.S. most harmonization is initiated through private institutions like the Uniform Law Commissioners and the American Law Institute.

I. The U.S. as an Actor in Private International Law

What, then, is the role of the United States as an actor on the international stage in private international law? What motivates it?

If we look back to the first half of the 20th Century, the United States was not an original member of the Hague Conference on Private International Law: The Hague Conference, which held its first session in 1893, was a body of highly technical specialists that existed largely to help the European states harmonize their conflict of laws rules. Since the U.S. did not see itself at the national level as an actor in the development of private international law, it was not until the 1960s that we began to see the Hague Conference as a relevant forum.

U.S. courts and institutions developed and shaped the law of conflicts in this country in an organic way, and did not look to external treaties to lead the way. Indeed, the U.S. even stayed on the sidelines of the negotiations of the New York Convention in 1958 in large part because of perceived federalism limitations.

The traditional U.S. approach to international judicial cooperation in civil and commercial cases was not to treat it as a sovereign function to be handled by the Executive and Legislative branches, but as a matter of comity between courts. According to this concept, private litigation is a matter only for the courts, which are expected to show respect for the acts of foreign courts and develop the standards for cooperation. In this respect, it is only in areas such as tax cases where U.S. courts will show no comity toward foreign decisions—a principle known as the "revenue rule." Tax judgments are therefore seen not as essentially private matters, but as public

ones that should be the subject of government-to-government resolution and not resolution in the courts.

We still see the influence of the "pure comity" view in the debates at the American Law Institute and National Conference of Commissioners on Uniform State Laws over whether enforcement of judgments legislation should have a mandatory reciprocity requirement. Proponents object to any suggestions that enforcement should only be extended to judgments of a country that will reciprocate by enforcing U.S. judgments. They argue that a foreign judgment is a purely private matter between private parties and should be dealt with by the courts on that basis alone, without the interference of sovereign political considerations. Many still hold up the banner of "leading by example" to encourage the development of reciprocal practices in other countries. No treaty or government intervention is necessary for this golden rule model of friendly cooperation.

We even see the proponents of the "pure comity" view venturing into the public law sphere, where they have launched—so far without success—insistent attacks on the traditional revenue rule limits on the enforcement of foreign tax judgments. Canada and the European Commission and several EU member states recently sued under RICO to take advantage of this view, and attempted to recover three times their lost tax revenue. . . .

To the extent that the U.S. moved away from the pure comity approach by joining the Hague Conference and UNIDROIT in the 1960's, and participating actively in the creation of UNCITRAL, what has motivated its participation? [Another speaker] anticipates a world where the federal government would "reform" domestic law through treaty-making in the private law sphere, but let us look at the track record by examining the four major instruments the U.S. has ratified in this field. I believe it shows that the needs of the private sector are what drives U.S. treaty practice, not specific policy goals of the federal government.

First, let us look at the New York Convention on the Enforcement of Foreign Arbitral Awards. The U.S. largely sat on the sidelines of the active negotiations. When the U.S. became a party in 1978, it was only after 20 years of successful practice under the Convention. It was the growing insistence of business and legal institutions that finally brought the U.S. in. With business and the

Bar finally demanding it, Congress stepped in and asserted federal authority.

Second, there are the three Hague judicial cooperation conventions: Abolishing the Requirement of Legalization (Apostille); Service Abroad; and Taking of Evidence Abroad. These conventions are largely litigation practice-oriented, and represent the three critical elements of conducting international litigation: serving process; taking evidence; and proving evidence in court.

These four conventions (plus their corollaries in the OAS region) are the sum total to date of the areas in which the U.S. has acted decisively at the national level in the traditional realm of private international law. Why have there not been more? What is the U.S. experience with these conventions? Let's examine the practice.

The New York Convention created a private system of enforceable dispute resolution for international business. It is simple and party-driven, and it works in practice. As one of the largest trading nations, the U.S. has naturally become one of the most enthusiastic proponents of this convention. Led by firm and clear guidance from the Supreme Court in favor of international arbitration, we place few limits on the arbitrability of disputes and apply the Convention even to consumer contracts. The U.S. has been extremely active in UNCITRAL in the negotiation of the subsequent Model Law and Model Rules on Arbitration, which supplement the Convention, and in international arbitral institutions. And the American Arbitration Association now handles more international arbitrations annually than either the International Chamber of Commerce or the London Court of International Arbitration.

As for the Service and Evidence Conventions the record is a little more mixed, largely because these conventions are more detailed and particular than the New York Convention, and have permitted major imbalances in practice among states. Led by the comity model, the U.S. has long put very few restrictions on the service of foreign judicial documents or the taking of evidence for use in foreign tribunals. Around the same time as the development of the Hague Conventions in the 1960s, the U.S. was busy putting in place federal laws that made taking of evidence in support of foreign proceedings tremendously accessible-far more, in fact, than in most national systems. The stated rationale for these far-reaching

statutes was that they would encourage foreign governments to do the same for evidence requests in support of U.S. proceedings. Unfortunately, the benefits of the legislation and the Evidence Convention didn't materialize for American litigants in the way envisioned, as country after country declared that they would not apply the Evidence Convention to pre-trial discovery of documents. Moreover, many continued to prohibit U.S. lawyers from taking depositions, or maintained many traditional restrictions, including on serving process, that are seen as outdated or incompatible with American notions of judicial fairness.

It should not be a surprise that, in light of these realities, the Supreme Court interpreted the Evidence and Service Conventions as providing optional procedures, not cutting off some existing avenues for taking evidence or serving process.' This was, in effect, a reversion to the comity-based approach that assumed countries would be trying to do the best for each other's courts, rather than using the Conventions to limit judicial cooperation. From abroad, however, came countercharges that the U.S. was not applying the Conventions as they were intended.

Thus, while the Service Convention works quite well because countries are more open to alternative methods of service, the Evidence Convention has not been wholly satisfactory because the private sector parties themselves and courts have not been satisfied that it generally provides comity-based outcomes.

. . . [W]here the U.S. today plays the most active role is not in the traditional private international law (conflicts) area, but in the development of *international* private law-from commercial law to family law. In the commercial law sphere, the link to commercial needs is clear. In the family law area, the Hague Conventions that have been ratified by the U.S. (the 1980 Child Abduction Convention) or will soon be ratified (the 1993 Intercountry Adoption Convention), are primarily administration of justice or regulatory cooperation conventions, not conventions providing harmonized rules of traditional civil law.

As noted before, these developments are largely driven by the needs of the private sector and not by any doctrinal imperative. Perhaps more telling, the difference is significant not just for the United States, but also for the world. Looking at the sweep of projects

now under consideration at the Hague Conference, UNIDROIT, and UNCITRAL, the vast majority are not private international law but are international private law.

II. What Can We Foresee?

First, the Hague Securities Convention demonstrates that a pure conflict of laws instrument can succeed when industry specifically demands it and the project is carefully focused. This convention provides a badly needed choice of law rule, driven by concerns for party-autonomy, in a new and growing area of international transactions that are collateralized using interests in electronic securities. It departs radically from traditional choice of law rules by following the actual industry standards and practice.

Second, thanks to far-sighted Scottish and European Commission leadership, the large Hague Enforcement of Judgments Convention was not scrapped altogether, but was focused down to the essence of what business needs—a convention on choice of court agreements. Like the New York Convention, it will provide rules on enforcing the agreement on the chosen court and rules on enforcing the resulting judgment.

Finally, in the area of child support (maintenance) enforcement, the Hague Conference is developing a new instrument that will provide a mechanism for recognizing and enforcing foreign support orders without any need to harmonize rules of jurisdiction. This approach recognizes just how difficult it is to harmonize fundamental rules of jurisdiction, and how at least in this specialized area, it is unnecessary. Moreover, the negotiations have a major focus on defining the administrative structures necessary at the national level properly to implement the Convention.

III. Conclusion

The role and practice of the U.S. Department of State in private international law reflect the needs of our citizens and residents who are carrying out activities across international borders. We have few, if any, doctrinal requirements, and largely seek to find pragmatic and flexible solutions that will provide fair and largely balanced

mechanisms for cooperation. This approach seeks flexible structures to authorize and facilitate the reciprocal exercise of comity among courts.

Is it impossible to think that the U.S. will implement more traditional private international law instruments? The 1996 Hague Convention on the Protection of Children is probably beyond reach for the foreseeable future. The Convention requires the implementation of strict new jurisdiction rules, but various exceptions and the traditional case-by-case nature of courts examining the best interests of the child seem to point to little more certainty in outcome than a traditional comity approach outside of the Convention. However, the prospects for the 1999 Hague Protection of Adults Convention may be considerably brighter. The practical need is so great to sort out the affairs of the growing number of elderly tourists and foreign residents who become disabled abroad, that the interest in the Convention is very strong. We hope to be able to make a major push to ratify it soon.

* * * *

5. Maritime Law—Limitation of Liability under the Carriage of Goods by Sea Act

In *Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14 (2004), the U.S. Supreme Court (1) extended federal admiralty jurisdiction over multimodal bills of lading no matter how far inland the damage or loss occurs, so long as the bill of lading requires substantial carriage of goods by sea; and (2) held that an ocean carrier's subcontractor that performed the inland portion of the carriage was entitled to the protection of the liability limitations in both the bill of lading issued by the freight forwarder to the shipper and the bill of lading issued by the ocean carrier to the freight forwarder, even though the shipper was not in privity with the inland subcontractor and was not a party to the bill of lading issued by the ocean carrier.

In this case, Kirby, an Australian shipper, contracted with a freight forwarder, International Cargo Control ("ICC"), to ship machinery from Australia to Huntsville, Alabama. The

bill of lading invoked the default liability rule of the Carriage of Goods by Sea Act ("COGSA"). It also included a so-called Himalaya clause, which called for the same limitation of liability to apply whenever claims relating to performance of the contract evidenced by the bill of lading were brought against any servant or agent whose services were used in order to perform the contract. ICC subcontracted with Hamburg Sud, through another bill of lading containing its own limitation of liability and Himalaya clauses, to ship the goods from Australia to Huntsville. Hamburg Sud then subcontracted with Norfolk Southern Railroad to transport the machinery from the port at Savannah, Georgia, to Huntsville. When a train accident resulted in $1.5 million in damages, Kirby sued Norfolk. Norfolk invoked the COGSA limitation of liability and the Himalaya clauses contained in both bills of lading. The district court granted summary judgment in favor of Norfolk. The U.S. Court of Appeals for the Eleventh Circuit reversed, finding that Norfolk could not benefit from the limitation of liability in the first bill of lading because it was not in privity of contract with ICC, and that it could not benefit from the limitation in the second bill of lading because ICC had not been acting as Kirby's agent when it received the bill of lading.

In reversing the Eleventh Circuit, the Court found that the contracts at issue were maritime contracts subject to admiralty jurisdiction and were to be interpreted under federal, not state, law. It reached this conclusion using the conceptual approach to the analysis of maritime contracts first articulated in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). Under this approach, a contract qualifies as a maritime contract when its primary objective is to accomplish the transportation of goods by sea, which the Court found to be the case here. The Court also noted that the fundamental interest giving rise to maritime jurisdiction was the protection of maritime commerce. Examining that interest in the instant case, the Court found that it was to the commercial advantage of Kirby, the shipper, to arrange for transport for the entire journey in a single bill of lading, rather than being obligated

to find an American railroad to complete the journey between the port and the final destination of the goods. Thus, finding maritime jurisdiction over the contracts would further the important interest of facilitating maritime commerce. Furthermore, there was no substantial local interest requiring the application of state law to the interpretation of the contract.

The Court emphasized the importance of uniformity in maritime law, not just within U.S. jurisprudence but within maritime law as a global body of law. It also noted that such uniformity was necessary to the proper functioning of COGSA. Excerpts from the Court's decision follow.

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Applying state law to cases like this one would undermine the uniformity of general maritime law. The same liability limitation in a single bill of lading for international intermodal transportation often applies both to sea and to land, as is true of the Hamburg Sud bill. Such liability clauses are regularly executed around the world [internal citations omitted]. . . .

In protecting the uniformity of federal maritime law, we also reinforce the liability regime Congress established in COGSA. By its terms COGSA governs bills of lading for the carriage of goods "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C.App. § 1301(e). [. . . .] But COGSA also gives the option of extending its rule by contract. See § 1307 . . . [internal citation omitted]. As COGSA permits, Hamburg Sud in its bill of lading chose to extend the default rule to the entire period in which the machinery would be under its responsibility, including the period of the inland transport. Hamburg Sud would not enjoy the efficiencies of the default rule if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility. And the apparent purpose of COGSA, to facilitate efficient contracting contracts for carriage by sea, would be defeated.

* * * *

The Court went on to interpret the bills of lading under federal law. It held that the 11th Circuit had erred in requiring privity of contract or specific language extending the limitation of liability under the Himalaya clause, misinterpreting the Court's prior decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959). Rather than requiring linguistic specificity or privity of contract to extend a Himalaya clause, the court explained, *Herd* held that contracts for the carriage of goods by sea must be construed by their terms and consistent with the intent of the parties. With regard to the first bill of lading between Kirby and ICC, the Court held that, because it was obvious that the services of a land carrier would be necessary for the performance of the contract, the parties clearly intended that such carrier would be the beneficiary of the ICC bill's broadly written Himalaya clause.

The Court recognized that the question of Kirby's position vis á vis the second bill of lading (between Hamburg Sud and ICC) was more difficult. The Court stated that it would be "unsustainable" to consider the intermediary freight forwarder as the cargo owner's agent in every sense because it was undeniable that the traditional indicia of agency, a fiduciary relation and effective control by the principal, did not exist between Kirby and ICC. Nevertheless, relying on its decision in *Great Northern R. Co. v. O'Connor*, 232 U.S. 508 (1914), the Court stated that ICC should be treated as Kirby's agent for a single, limited purpose, that is, when ICC contracted with subsequent carriers for limitation of liability. In the view of the Court, finding that an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers is necessary to ensure the reliability of downstream contracts for limitations of liability. The Court explained that this rule of limited agency was desirable because it "tracks industry practices. In intercontinental ocean shipping, carriers may not know how many other intermediaries came before, or what obligations may be outstanding among them." *Norfolk Southern*, 125 S. Ct. at 399. In addition, "if liability limitations negotiated with cargo owners were reliable while

limitations negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates. A rule prompting downstream carriers to distinguish between cargo owners and intermediary shippers might interfere with statutory and decisional law promoting nondiscrimination in common carriage." *Id.* Finally, the Court noted, the shipper, Kirby, still retained the right to sue ICC for any losses exceeding the liability limitation to which it had agreed. For these reasons, the Court held that Norfolk was entitled to the protection of the liability limitations in the second bill of lading as well.

6. Ratification of Cape Town Convention on Aircraft Protocol

On October 28, 2004, the United States ratified the 2001 Cape Town Convention on International Interests in Mobile Equipment and the related Aircraft Protocol, mentioned in A.1. *supra*. Excerpts below from a letter from Harold Burman of the Office of Private International Law, Office of the Legal Adviser, to Jeffrey Wool, General Counsel of the Aerospace Working Group, describe the significance of the ratification.

. . . The United States as you know formally deposited the instruments of ratification of the Convention and Protocol in Rome on October 28, 2004. As requested, we are providing herewith our views as to the importance of that action and its relevance to your member companies and organizations.

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The significance of the new Cape Town Convention, and the international private law process that produced it, should be seen in context. The modern era of commercial air transportation began in 1944 with the conclusion of the Chicago Convention establishing the framework for commercial air transportation, followed by other treaty instruments including the 1949 Geneva Convention on nationality of aircraft and certain air finance matters. Significant

changes in air finance and national regulation over the decades led to practices no longer compatible with the Geneva Convention, and the Cape Town treaty was intended to modernize this sector through changes in private commercial law, rather than public law, with important implications for States at all levels of economic development who have air transportation concerns The treaty system will, when properly implemented, lower the cost of aircraft both in sales and leases, lessen the reliance by countries on sovereign debt, and improve safety and navigation by bringing into use earlier newer stage aircraft. The treaty system will involve the world's first computer-based registry of finance interests accessible from any country 24 hours a day.

In addition to the effects on aircraft and aircraft engines and helicopters, the treaty will bring to many countries modern financing concepts that can be adapted to improve other economic sectors, through mechanisms such as asset-based finance and receivables finance. These modern approaches to finance have been incorporated into the Uniform Commercial Code (UCC) in the United States and have been fully market tested, so that their economic potential is well understood when countries are willing to replace traditional finance laws, which could especially impact lesser developed and emerging states.

The Convention itself was negotiated as a "multi-equipment" convention, with intended future application to railroad and space satellite equipment (in fact, US ratification took place during a forty-country meeting on a future protocol to the Convention on space equipment). In addition, steps have been taken in recent weeks to begin informal consideration of a new protocol on mobile high-value agricultural, construction and mining equipment, which would involve the UN's Food and Agriculture Organization in Rome among others.

We would also note advances made for the international private law field in the negotiation process. Greater recognition of the importance of having industry and affected commercial sector interests at the table at all stages advanced during this process, as is common in private international law organizations, compared with some whose focus is primarily on public international law. The selection of South Africa as the site for final negotiation was

also a recognition of the importance of extending the private law process to developing countries. We anticipate that the legal and financing concepts in this Convention will in the future be reflected in standards for assessment of private law related country risk and performance by international financial institutions and private capital markets.

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B. FAMILY LAW

1. Reciprocating Countries for Enforcement of Family Support Obligations

In 2004, Switzerland, the Canadian province of New Brunswick, and the Canadian territories of Nunavut and the Northwest Territories were added to the list of countries, provinces, or territories designated as "foreign reciprocating countries" for the purpose of the enforcement of family support obligations. 69 Fed. Reg. 59,980 (Oct. 6, 2004). Pursuant to 42 U.S.C. § 659A, the Secretary of State, with the concurrence of the Secretary of Health and Human Services, is authorized to declare foreign countries or their political subdivisions to be reciprocating countries for the purpose of the enforcement of family support obligations if the country has established, or has undertaken to establish, procedures for the determination and enforcement of duties of support for residents of the United States. The procedures must be in substantial conformity with the standards set forth in the statute. *See Digest 2001* at 49–51.

The addition of Switzerland to the list of reciprocating countries was the result of the conclusion of the Agreement Between the Government of the United States of America and the Government of the Swiss Confederation for the Enforcement of Maintenance (Support) Obligations, which entered into force in September 2004. The agreement establishes the following objectives in Article 1. The full text of the agreement is available at *www.state.gov/s/l/c8183.htm*.

* * * *

1. Subject to the provisions of this Agreement, the Parties hereby seek to provide for:

a. the recovery of maintenance or the reimbursement of maintenance to which a maintenance creditor or a public body having provided benefits for a maintenance creditor residing in one State Party (hereinafter referred to as the claimant) is entitled from a maintenance debtor who is residing in the other State Party (hereinafter referred to as the respondent), and

b. the recognition and enforcement of maintenance orders, reimbursement orders and settlements (hereinafter referred to as maintenance decisions) made or recognized within the jurisdiction of either Party.

2. Establishment of decisions will, to the extent possible, be done in the State Party where the creditor resides.

The Agreement applies to both child and spousal maintenance obligations, including the collection of payment arrears. However, it limits the enforcement of maintenance obligations toward a spouse or former spouse when there is no parallel request for child maintenance to cases where there is reciprocity between Switzerland and the individual states and other jurisdictions of the United States. In addition, the Agreement calls for the designation of Central Authorities to administer the provisions of the Agreement, and describes the functions of those Central Authorities in Article 5.

2. Hague Conference on Private International Law—Special Commission on Maintenance

The United States participated in the second Special Commission, held from June 7 through June 18, 2004, by the Hague Conference on Private International Law, to consider the development of a new Convention for the International Recovery of Child Support and Other Forms of Family Maintenance. Members of the U.S. delegation to the Special Commission served on the Drafting Committee both during and after the Special Commission. The full text of the Working Draft

produced at the June 2004 Special Commission is available at *www.hcch.net/upload/wop/maint_wd34e.pdf. See also Digest 2003* at 856–59.

In remarks to the Office of Child Support Enforcement at the U.S. Department of Health and Human Services in September 2004, Mary Helen Carlson, of the Office of Private International Law, described the U.S. of the views on developments during the Special Commission, as excerpted below.

The full text of Ms. Carlson's remarks is available at *www.state.gov/s/l/8183.htm.*

. . . The United States is taking a leading role in the negotiation of this new treaty, which will likely be used by most countries for the next 25–50 years. The U.S. Department of State, the federal Office of Child Support Enforcement and [National Child Support Enforcement Association] all attended the June meeting, along with more than 50 other countries and about a dozen non-governmental organizations.

Where the first Special Commission, which was held in 2003, was a forum for an exchange of views, this year's meeting produced a draft text which reflects an emerging consensus on several of the key issues to the United States. . . . [T]he delegates appear to be in agreement that the legal structure of the convention, including the jurisdictional rules on which countries will agree to recognize and enforce child support decisions from other countries, must be "flexible." "Flexible" is the codeword for a text with jurisdictional rules that the United States can accept. The United States is the only country in the world that does not recognize the residence of the custodial parent and child as a constitutionally appropriate forum to enter a child support order against a non-custodial parent who has no other connection with the forum state. The consensus of the delegates was that a State Party should be able to opt out of accepting the residence of the custodial parent and child in the forum state as a jurisdictional basis. The delegates also agreed that the new convention must emphasize administrative cooperation and good practices.

One important unresolved issue is costs. Many countries, including the United States, believe that it is essential that the new convention provide that the core services necessary to the establishment and enforcement of maintenance decisions be provided by the Requested Party at no cost to the Requesting Party or to the applicant. Some countries, especially countries with strictly judicial systems that handle child support cases much like they handle any other civil case to enforce payment of a debt, do not provide free legal and administrative services and are opposed to such a requirement. . . .

* * * *

C. JUDICIAL ASSISTANCE

In a March 12, 2004, letter to the Ministry of Justice of the Republic of Slovenia, Robert M. Hollis, Director of the Office of International Judicial Assistance, Civil Division, U.S. Department of Justice, confirmed that under the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, private attorneys in the United States are authorized to forward requests for service of process to a foreign Central Authority. The full text of the letter, excerpted below, is available at *www.state.gov/s/l/c8183.htm.*

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Article 3 of the Hague Service Convention provides that a request for service should be transmitted to the Central Authority of the state addressed by the "authority or judicial officer competent under the law of the State in which the documents originate." Under the domestic law of the United States this provision is interpreted as authorizing an attorney as an officer of the court to execute the request. . . . Specifically, the Federal Rules of Civil Procedure, which govern procedural aspects of litigation within our federal courts, provide in Rule 4(c), first, that "[t]he plaintiff is responsible for service of a summons and complaint . . ." and, second, that such service "may be effected by any person who is not a party and

who is at least 18 years of age." Rule 4(c) has been interpreted as authorizing attorneys to forward service under Article 3 of the Hague Service Convention. . . . In addition, many state courts have similar provisions which make clear that attorneys are competent to provide service in litigation. . . . Beyond that, in the United States attorneys representing parties in litigation are deemed to be officers of the court, *Holloway v. Arkansas*, 435 U.S. 475 (1978), and, as such, come within the terms of Article 3. . . .

We might also add that the competence of attorneys within the United States to effect service under Article 3 of the Convention is discussed in the Draft Handbook on the Operation of the Hague Convention, at page 32 prepared by the Hague Conference. The Draft Handbook specifically states: "Under [U.S.] federal procedural law, a private attorney is authorised to serve a judicial document in the United States of America. Accordingly, he or she also has authority to send a request for service to a foreign Central Authority." *See Provisional Version of the New Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, p. 32. . . .

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D. INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS

1. Concurrent Proceedings in Foreign Courts: Anti-suit Injunctions

During 2004 U.S. courts were at times presented with requests by litigants in international disputes to enjoin opposing parties from pursuing suit in foreign courts concurrently. Three such cases follow.

(1) In *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren ("KPMG-B")*, 361 F.3d 11 (1st Cir. 2004), the court of appeals upheld a district court order enjoining KPMG-B, a Belgian accounting firm that had been ordered to produce documents in securities fraud litigation in the United States,

from participating in further litigation in Belgian courts on the matter. KPMG-B had filed an *ex parte* writ with the Court of First Instance of Brussels, seeking to prevent plaintiffs from enforcing or relying on a discovery order issued by the district court in the U.S. litigation; *see Digest 2003* at 868–70; *see also* related case discussed in *Digest 2003* at 885–87. In summarizing the complex background to the case at hand, the court of appeals stated that "this appeal arises out of a welter of cases having a common theme: the allegation that KPMG-B and others perpetrated large-scale securities fraud leading to [a publicly-traded company's] collapse."

As stated by the U.S. Court of Appeals for the First Circuit, "[d]etermining the appropriateness of an international antisuit injunction is a highly nuanced exercise. An inquiring court must find a way to accomodate conflicting, mutually inconsistent national policies without unduly interfering with the judicial processes of a sovereign nation." The Court then considered the appropriate standard for a district court to order an international anti-suit injunction in light of the "liberal" and "conservative" approaches adopted by other courts. Excerpts below provide the court's analysis in establishing an approach that requires a district court to examine "the totality of the circumstances" in deciding whether the presumption against issuing such an anti-suit injunction has been overcome and affirming the lower court's injunction against KPMG-B here.

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. . . The courts of appeals have differed as to the legal standards to be employed in determining whether the power to enjoin an international proceeding should be exercised. Two basic views have emerged. . . .

. . . Under [the liberal] approach, an international antisuit injunction is appropriate whenever there is a duplication of parties and issues and the court determines that the prosecution of simultaneous proceedings would frustrate the speedy and efficient determination of the case. . . .

. . . Under [the conservative] approach, the critical questions anent the issuance of an international antisuit injunction are whether the foreign action either imperils the jurisdiction of the forum court or threatens some strong national policy . . . This approach accords appreciably greater weight to considerations of international comity.

We reject the liberal approach. We deem international comity an important integer in the decisional calculus—and the liberal approach assigns too low a priority to that interest. In the bargain, it undermines the age-old presumption in favor of concurrent parallel proceedings—a value judgment that leaves us uneasy—and presumes that public policy always favors allowing a suit pending in an American court to go forward without any substantial impediment. To cinch matters, this approach gives far too easy passage to international anti-suit injunctions. We understand that the judicial process is a cornerstone of the American way of life—but in an area that raises significant separation of powers concerns and implicates international relations, we believe that the law calls for a more cautious and measured approach.

The conservative approach has more to commend it. First, it recognizes the rebuttable presumption against issuing international anti-suit injunctions (and, thus, honors the presumption favoring the maintenance of parallel proceedings). Second, it is more respectful of principles of international comity. Third, it compels an inquiring court to balance competing policy considerations. . . .

We stop short, however, of an uncritical acceptance of the conservative approach. The recent expositions of that approach have come to regard the two main rationales upon which international anti-suit injunctions may be grounded—preservation of jurisdiction and protection of important national policies—as exclusive. *See, e.g., Gen. Elec. Co. v. Deutz Ag*, 270 F.3d 144, 160–61 (3d Cir. 2001) (describing these as the "only" justifications that can support the issuance of such an injunction); *Gau Shan*, 956 F.2d at 1355 (similar). . . . In our view, the sensitive and fact-specific nature of the inquiry counsels against the use of inflexible rules.

We therefore reject this reworking of the conservative approach and instead endorse its traditional version. That version is not only more flexible but also more consistent with *Laker Airways*

[731 F.2d at 927]—which we regard as the seminal opinion in this field of law. The *Laker Airways* court did not suggest that its two stated rationales were the only ones that could justify issuing an international anti-suit injunction. . . . Rather, the court indicated that it was prudent to use a wider-angled lens, making clear that the equitable considerations surrounding each request for an injunction should be examined carefully. *Id*.

In order to provide guidance for the district courts, we spell out the manner in which our preferred approach operates. The gatekeeping inquiry is, of course, whether parallel suits involve the same parties and issues. Unless that condition is met, a court ordinarily should go no further and refuse the issuance of an international antisuit injunction. *See*, *e.g.*, *China Trade*, 837 F.2d at 36; *Laker Airways*, 731 F.2d at 928; *see also* George A. Bermann, The Use of Anti-Suit Injunctions in International Litigation, 28 Colum. J. Transnat'l L. 589, 626 (1990) (stating that courts generally "will not consider issuing anti-suit injunctions" unless there are "parallel local and foreign actions between the same parties over the same claim"). If—and only if—this threshold condition is satisfied should the court proceed to consider all the facts and circumstances in order to decide whether an injunction is proper. In this analysis, considerations of international comity must be given substantial weight—and those considerations ordinarily establish a rebuttable presumption against the issuance of an order that has the effect of halting foreign judicial proceedings.

We acknowledge that the task of determining when a litigant has overcome this presumption is a difficult one. That is partly because comity is an elusive concept. The Supreme Court has defined it 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." *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L.Ed. 95 (1895). . . .

We hasten to add that although the definition of comity may be tenebrous, its importance could not be more clear. In an increasingly global economy, commercial transactions involving participants from many lands have become common fare. This

world economic interdependence has highlighted the importance of comity, as international commerce depends to a large extent on "the ability of merchants to predict the likely consequences of their conduct in overseas markets." *Gau Shan*, 956 F.2d at 1355. This predictability, in turn, depends on cooperation, reciprocity, and respect among nations. That helps to explain the enduring need for a presumption—albeit a rebuttable one—against the issuance of international antisuit injunctions.

In the final analysis, rebutting this presumption involves a continual give and take. In the course of that give and take, the presumption may be counterbalanced by other facts and factors particular to a specific case. These include (but are by no means limited to) such things as: the nature of the two actions (i.e., whether they are merely parallel or whether the foreign action is more properly classified as interdictory); the posture of the proceedings in the two countries; the conduct of the parties (including their good faith or lack thereof); the importance of the policies at stake in the litigation; and, finally, the extent to which the foreign action has the potential to undermine the forum court's ability to reach a just and speedy result.

Seen in this light, we agree that either the preservation of jurisdiction or the safeguarding of important national policies may afford a sufficient basis for the issuance of an international antisuit injunction. We do not, however, attach talismanic significance to concepts such as jurisdiction-stripping and insults to public policy. Instead, we hold that in every case a district court should examine the totality of the circumstances in deciding whether a particular case warrants the issuance of an international antisuit injunction. *See Laker Airways*, 731 F.2d at 927 ("There are no precise rules governing the appropriateness of antisuit injunctions."). If, after giving due regard to the circumstances (including the salient interest in international comity), a court supportably finds that equitable considerations preponderate in favor of relief, it may issue an international antisuit injunction.

* * * *

Where, as here, a party institutes a foreign action in a blatant attempt to evade the rightful authority of the forum court, the need

for an anti-suit injunction crests. *See Laker Airways*, 731 F.2d at 929–30. Fairly read, KPMG-B's petition to the Belgian tribunal seeks to arrest the progress of the securities fraud action by thwarting the very discovery that the district court, which is intimately familiar with the exigencies of the underlying case, has deemed essential to the continued prosecution of the action against any of the defendants. In technical terms, this may not constitute a frontal assault on the district court's jurisdiction, but the practical effect is the same. That is a matter of considerable import: a court has a right—indeed, a duty—to preserve its ability to do justice between the parties in cases that are legitimately before it. *See id.* at 930; *see also Davis*, 767 F.2d at 1039 (upholding an anti-suit injunction as "necessary to ensure a complete adjudication of the matter before it").

* * * *

We do not mean to minimize the potential difficulty of the situation that KPMG-B faces. To some extent, however, that situation is the natural consequence of its decision to ply its wares in the lucrative American marketplace. Having elected to establish a major presence in the United States, KPMG-B must have anticipated that it would be subject to suit in this country (and, thus, subject to pretrial discovery rules that are pandemic to the American justice system). See Restatement (Third) of Foreign Relations Law § 442, reporters' note 1 (1987) (noting "that persons who do business in the United States . . . are subject to the burdens as well as the benefits of United States law, including the laws on discovery"). While courts should "take care to demonstrate due respect for any special problem confronted by [a] foreign litigant on account of its nationality," S*ociete Nationale*, 482 U.S. at 546, a foreign national that chooses to engage in business in the United States likewise must demonstrate due respect for the operation of the American judicial system.

* * * *

(2) In *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645 (2d Cir. 2004), the Second Circuit affirmed a district court

anti-suit injunction in a case concerning efforts by GE Medical Systems ("GEMS-IT"), a U.S. manufacturer of medical equipment, to invoke the arbitration clauses in commercial agreements with Paramedics Electro-medicina Comercial ("Tecnimed"), a Brazilian distributor of GEMS-IT's products. In April 2002 GEMS-IT filed a notice and request for arbitration with the Inter-American Commercial Arbitration Commission ("IACAC"). Soon thereafter, Tecnimed commenced litigation in Porto Alegre, Brazil against GEMS-IT and General Electric do Brasil ("GE Brasil") challenging the arbitration requirement and alleging contract breaches. GEMS-IT answered the Porto Alegre complaint but also filed a statement of claim with a panel that had in the interim been appointed by IACAC. When Tecnimed responded by filing a petition in New York state court for a permanent stay of the arbitration, GEMS-IT removed the petition to federal court and asserted counterclaims for an order compelling arbitration and for an anti-suit injunction as to the Porto Alegre action. In April 2003 the IACAC panel determined that it had jurisdiction and that the claims GEMS-IT had submitted to the panel were within the scope of the arbitration clauses, as were the claims Tecnimed was asserting in Porto Alegre.

In June 2003 the U.S. District Court for the Southern District of New York ruled that the arbitration clauses were valid and also that both GEMS-IT's claims and Tecnimed's Porto Alegre claims were arbitrable. The court granted GEMS-IT's counterclaim, issuing orders compelling arbitration, entering an anti-suit injunction, and ordering Tecnimed to take steps necessary to cause dismissal of the Porto Alegre action. When Tecnimed failed to comply, the court imposed daily fines and held Tecnimed and its president in civil contempt. Tecnimed appealed.

Excerpts from the opinion of the U.S. Court of Appeals for the Second Circuit in affirming the anti-suit injunction follow.

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* * * *

An anti-suit injunction against parallel litigation may be imposed only if: (A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined. *China Trade*, 837 F.2d at 35. Once past this threshold, courts are directed to consider a number of additional factors, including whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum. *Id.* at 36. Tecnimed contends that neither threshold requirement has been satisfied, and that comity considerations render the injunction inappropriate.

A. Tecnimed asserts that the parties in the two matters are not identical because GE Brasil, which Tecnimed named as a defendant in the Porto Alegre action, is not a party in the New York action. The record supports the district court's finding of substantial similarity and affiliation between GEMS-IT and GE Brasil.

. . . Tecnimed's complaint in the Porto Alegre action specifically states that GE Brasil is an appropriate party because "more than 70% of its shares are held by [GEMS-IT], which makes it an active participant in the business relationships arising from [the Agreements]." . . .

The decisive point on this record is that GE Brasil is named in the Porto Alegre action chiefly on the basis of its aspects of identity with GEMS-IT. . . .

B. Under *China Trade*, an anti-suit injunction may be proper if "resolution of the case before the enjoining court would be dispositive of the enjoined action." 837 F.2d at 36. . . . In short, the district court's judgment disposes of the Porto Alegre action because the Porto Alegre litigation concerns issues that, by virtue of the district court's judgment, are reserved to arbitration.

* * * *

C. Beyond the threshold criteria of *China Trade*, other considerations include whether the foreign proceeding threatens a strong public policy or the jurisdiction of the domestic forum. *See China Trade*, 837 F.2d at 36–37. Both considerations are salient in this case.

As the D.C. Circuit has noted, "an anti-suit injunction will issue to preclude participation in the litigation only when the strongest equitable factors favor its use," and the granting of an injunction

depends in part on the "importance to the forum of the law allegedly evaded." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931–32 (D.C.Cir. 1984); *see also Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1358 (6th Cir. 1992) ("only the evasion of the most compelling public policies of the forum will support the issuance of an antisuit injunction").

The federal policy favoring the liberal enforcement of arbitration clauses . . . applies with particular force in international disputes. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638–40, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985); *Smith/Enron*, 198 F.3d at 92. The Porto Alegre action, filed 31 days after GEMS-IT filed a notice and request for arbitration with the IACAC, was a tactic to evade arbitration. As Mr. Werlang, Tecnimed's president, stated in his affidavit, Tecnimed initiated the Porto Alegre action "to avoid being dragged into an arbitration process that GE had no right to force upon it."

We need not decide categorically whether an attempt to sidestep arbitration is alone sufficient to support a foreign anti-suit injunction, because "[t]here is less justification for permitting a second action," as here, "after a prior court has reached a judgment on the same issues." *Laker Airways*, 731 F.2d at 928 n.53. An anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered. The doctrine of res judicata, where applied, may obviate injunctive relief against re-litigation in a second forum; but a foreign court might not give res judicata effect to a United States judgment, particularly since United States courts "may choose to give res judicata effect to foreign judgments on the basis of comity," but "are not obliged" to do so. *Mezitis Diorinou v. Mezitis*, 237 F.3d 133, 140 (2d Cir. 2001) (internal quotation marks and citation omitted).

Principles of comity weigh heavily in the decision to impose a foreign anti-suit injunction; while such an injunction in terms is leveled against the party bringing the suit, it nonetheless "effectively restricts the jurisdiction of the court of a foreign sovereign." *China Trade*, 837 F.2d at 35. So courts that contemplate this extreme measure often must reconcile the protection of their own jurisdiction with respect for the foreign forum. But where one court has already reached a judgment—on the same issues,

involving the same parties—considerations of comity have diminished force.

* * * *

(3) In *LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194 (2d Cir. 2004), LAIF X SPRL ("LAIF X") alleged that Telinor Telefonia ("Telinor") purchased and converted certain shares in Axtel, a Mexican corporation, with the effect of reducing the extent of LAIF X's control over Axtel and rendering certain directors illegitimate. LAIF X, a limited partnership organized under the laws of Belgium, initiated a suit in Monterrey, Mexico, challenging the election of directors and also filed a demand for arbitration with the American Arbitration Association ("AAA") under the terms of Axtel's bylaws seeking, among other things, a declaration that the conversion of shares was void as contrary to those bylaws. Before answering the demand for arbitration, Telinor, Axtel's controlling shareholder, commenced suit in Monterrey, Mexico, seeking a declaration that LAIF X did not validly possess certain corporate shares. Telinor answered LAIF X's demand for arbitration in February 2004, requesting that the AAA dismiss the arbitration and, alternatively, that it stay proceedings pending the outcome of Telinor's Mexican lawsuit.

Also in February 2004 LAIF X petitioned the U.S. District Court for the Southern District of New York for an order compelling Telinor to arbitrate the issue of LAIF X's title to the shares and for an anti-suit injunction enjoining Telinor from further pursuit of any related lawsuits. The district court declined to grant any relief and LAIF X appealed. Excerpts below provide the analysis of the U.S. Court of Appeals for the Second Circuit in affirming the district court's decision not to grant an anti-suit injunction because: "(i) principles of comity counsel against issuing the anti-suit injunction; (ii) the United States federal courts have no interest in enjoining Telinor's Mexican lawsuit; and (iii) Telinor's lawsuit is not directed at sidestepping arbitration."

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. . . Comity militates strongly against an injunction here. LAIF X invested in a Mexican enterprise, governed by Mexican law. A question has arisen under Mexican law—whether LAIF X is an Axtel shareholder—and that question has been presented to a Mexican court. Mexico has a strong interest in determining who is a shareholder of a Mexican corporation and whether particular transactions were permissible under the bylaws of a Mexican corporation.

On the other hand, the legal relationship between a Belgian investor and a Mexican enterprise in no way implicates "the strong public policies of the enjoining forum," *Paramedics Electromedicina*, 369 F.3d at 652, which is the Southern District of New York.

Finally, although Telinor seeks a ruling of Mexican law from a Mexican court, Telinor continues to participate in the AAA arbitration. True, Telinor has sought a stay of the arbitration, but it has made that application in the arbitral forum. It has thus submitted itself to the arbitral forum, exercised its right in that forum to assert a procedural defense, and invoked the discretion of the arbitral forum to stay proceedings in deference to the Mexican court on a point of Mexican law. The arbitral forum may exercise its discretion as requested. If not, LAIF X may (or may not) seek intervention by the AAA in aid of whatever course or order of proceedings it prefers. All of that is in the future. But as of now, it cannot be said that Telinor's conduct is an evasion of the arbitral forum or an "attempt to sidestep arbitration." *Id.* at 654.

Under these circumstances, the district court did not abuse its discretion in refusing to issue an anti-suit injunction.

2. Evidence

a. Discovery in the United States for use in a foreign forum

Section 1782 of Title 28 of the U.S. Code provides federalcourt assistance in gathering evidence for use in foreign tribunals. Paragraph (a) of the statute, in particular, provides that a district court "may order" a person residing or found in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal . . . upon

application of any interested person." Developments during 2004 in the case law interpreting this statute included cases discussed below.

(1) On June 21, 2004, the U.S. Supreme Court, in *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241 (2004), held that § 1782(a) authorizes, but does not require, the district court to provide discovery aid to respondent Advanced Micro Devices, Inc. ("AMD") and enumerated factors "that bear consideration" by district courts when requested to order such assistance. In this case, respondent AMD filed an antitrust complaint against petitioner Intel Corporation ("Intel") with the Directorate-General for Competition ("D-G Competition") of the Commission of the European Communities, alleging that Intel had violated European competition law. The D-G Competition declined AMD's request to seek documents that Intel had produced in a private antitrust suit in an Alabama federal court. AMD then petitioned the District Court for the Northern District of California under § 1782(a) for an order directing Intel to produce those documents. The district court ruled that § 1782(a) did not authorize such discovery. The U.S. Court of Appeals for the Ninth Circuit reversed and remanded the case for disposition on the merits. The Supreme Court granted certiorari "in view of the division among the Circuits" on the question whether § 1782(a) contains a foreign-discoverability requirement. The Court affirmed the Ninth Circuit:

> . . . The statute, we rule, does not categorically bar the assistance AMD seeks: (1) A complainant before the European Commission, such as AMD, qualifies as an "interested person" within § 1782(a)'s compass; (2) the Commission is a § 1782(a) "tribunal" when it acts as a first-instance decisionmaker; (3) the "proceeding" for which discovery is sought under § 1782(a) must be in reasonable contemplation, but need not be "pending" or "imminent"; and (4) § 1782(a) contains no threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the

> foreign proceeding. We caution, however, that § 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to "interested person[s]" in proceedings abroad. Whether such assistance is appropriate in this case is a question yet unresolved. To guide the District Court on remand, we suggest considerations relevant to the disposition of that question.

See Digest 2003 at 873–76 for U.S. amicus brief urging the grant of certiorari to resolve the conflict among the circuits and addressing the importance of the exercise of judicial discretion in determining whether the grant of discovery on the facts of this case would be appropriate.

In its opinion the Court first rejected Intel's argument that, because the caption to § 1782 refers only to "litigants," AMD does not qualify as an "interested person" because it is a "complainant" before the European Commission. Noting that the caption of a statute "cannot undo or limit that which the [statute's] text makes plain," the Court held that the caption to § 1782 conveys only that litigants are included among the "interested person[s]" who may invoke it. The text of § 1782 "plainly reaches beyond the universe of persons designated "litigant":

> The complainant who triggers a European Commission investigation has a significant role in the process. . . . [I]n addition to prompting an investigation, the complainant has the right to submit information for the DG-Competition's consideration, and may proceed to court if the Commission discontinues the investigation or dismisses the complaint. . . . Given these participation rights, a complainant "possess[es] a reasonable interest in obtaining [judicial] assistance," and therefore qualifies as an "interested person" within any fair construction of that term. . . .

Second, in finding that the assistance AMD seeks in obtaining documents meets the requirement "for use in a foreign or international tribunal," the Court stated:

> [W]hen Congress established the Commission on International Rules of Judicial Procedure in 1958, . . . it instructed the Rules Commission to recommend procedural revisions "for the rendering of assistance to foreign courts *and quasi-judicial agencies*." . . . Section 1782 had previously referred to "any judicial proceeding." The Rules Commission's draft, which Congress adopted, replaced that term with "a proceeding in a foreign or international tribunal." . . . Congress understood that change to "provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]." . . . We have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit. . . .

Third, the Court rejected Intel's claim that § 1782(a) is inapplicable because AMD's complaint had not progressed beyond the investigative stage, and thus no adjudicative action is currently, or even imminently, on the Commission's agenda. Based on the plain language and legislative history of the provision, the Court held that the "proceeding" for which discovery is sought under § 1782(a) must be in reasonable contemplation, but need not be "pending" or "imminent."

Fourth, the Court addressed the foreign-discoverability rule on which the circuit courts have divided. The Court queried: "Does § 1782(a) categorically bar a district court from ordering production of documents when the foreign tribunal or the 'interested person' would not be able to obtain the documents if they were located in the foreign jurisdiction?" Intel raised "two policy concerns in support of a foreign-discoverability limitation on § 1782(a) aid—avoiding offending foreign governments, and maintaining parity between litigants." The Court found no basis for imposing such a rule, as excerpted below.

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* * * *

. . . Beyond shielding material safeguarded by an applicable privilege . . . nothing in the text of § 1782 limits a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there. 'If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect."

. . . While comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a).

We question whether foreign governments would in fact be offended by a domestic prescription permitting, but not requiring, judicial assistance. A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from United States federal courts. . . . A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a). . . . When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless. The rule in that situation would serve only to thwart § 1782(a)'s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws.

Concerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a cross-the-board foreign-discoverability rule. When information is sought by an "interested person," a district court could condition relief upon that person's reciprocal exchange of information . . . Moreover, the foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate. . . .

Turning to the issue of the discretionary language of § 1782(a), the Court noted factors the district court should

consider on remand before ruling on a § 1782(a) request, as excerpted below (footnotes omitted).

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* * * *

[IV.] . . . [A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so. See *United Kingdom v. United States,* 238 F.3d 1312, 1319 (C.A.11 2001) ("a district court's compliance with a § 1782 request is not mandatory"). We note below factors that bear consideration in ruling on a § 1782(a) request.

First, when the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . . In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid. See App. to Reply Brief 4a.

Second, as the 1964 Senate Report suggests, a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. See S.Rep. No. 1580, at 7. Further, the grounds Intel urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case. See Brief for United States as *Amicus Curiae* 23. Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. See *id.,* at 27. Also, unduly intrusive or burdensome requests may be rejected or trimmed. . . .

. . . We decline, at this juncture, to adopt supervisory rules. Any such endeavor at least should await further experience with § 1782(a) applications in the lower courts. European Commission

has stated in *amicus curiae* briefs to this Court that it does not need or want the District Court's assistance. See European Commission *Amicus Curiae* 11–16; Brief for European Commission as *Amicus Curiae* in Support of Pet. for Cert. 4–8. It is not altogether clear, however, whether the Commission, which may itself invoke § 1782(a) aid, means to say "never" or "hardly ever" to judicial assistance from United States courts. Nor do we know whether the European Commission's views on § 1782(a)'s utility are widely shared in the international community by entities with similarly blended adjudicative and prosecutorial functions.

* * * *

Several facets of this case remain largely unexplored. Intel and its *amici* have expressed concerns that AMD's application, if granted in any part, may yield disclosure of confidential information, encourage "fishing expeditions," and undermine the European Commission's Leniency Program. See Brief for Petitioner 37; European Commission *Amicus Curiae* 11–16. Yet no one has suggested that AMD's complaint to the Commission is pretextual. Nor has it been shown that § 1782(a)'s preservation of legally applicable privileges, . . . and the controls on discovery available to the District Court, see, *e.g.*, Fed. Rule Civ. Proc. 26(b)(2) and (c), would be ineffective to prevent discovery of Intel's business secrets and other confidential information.

On the merits, this case bears closer scrutiny than it has received to date. Having held that § 1782(a) authorizes, but does not require, discovery assistance, we leave it to the courts below to assure an airing adequate to determine what, if any, assistance is appropriate.

(2) In *Schmitz v. Bernstein Liebhard & Lifshitz, LLP,* 376 F.3d 79 (2d Cir. 2004), the U.S. Court of Appeals for the Second Circuit affirmed a judgment of the U.S. District Court for the Southern District of New York denying an application for discovery under § 1782. Interpreting the district court's judgment in light of the Supreme Court's ruling in *Intel Corp.*, *supra*, the Second Circuit found that the district court had taken into account factors recommended by the Supreme

Court for consideration in deciding whether to approve § 1782 requests, as excerpted below.

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* * * *

Petitioners are 28 German investors in Deutsche Telekom AG ("DT"), a German corporation. According to respondent Cravath, Swaine & Moore ("Cravath"), thousands of individual German plaintiffs, including the 28 involved in this proceeding, have commenced thousands of separate lawsuits against DT in Germany since 2001. Similar allegations are also the focus of a criminal investigation of former DT employees and others by the Public Prosecutor in Bonn, Germany ("the Bonn Prosecutor") and a class action lawsuit commenced in American courts by American purchasers of DT's American Depository Shares. . . . Pursuant to a protective order, approximately 300,000 documents were produced by DT in that action.

In January 2003, petitioners applied . . . for permission to obtain discovery pursuant to 28 U.S.C. § 1782 from the . . . law firms involved in the American action [, seeking] the documents already produced by DT. . . .

* * * *

In this case, the German government was obviously unreceptive to the judicial assistance of an American federal court. Judge Stein was faced with specific requests from the German Ministry of Justice and the Bonn Prosecutor to deny petitioners the discovery they sought at this time. The German authorities expressed concerns that granting discovery would jeopardize the ongoing German criminal investigation of DT and "jeopardize German sovereign rights." Notably, they also left open the possibility that the DT documents would be made available to petitioners in the future. Faced with these submissions, the district court found that granting petitioners' request would not promote the twin aims of § 1782 ["providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts."]. *Cf. In re Euromepa*, 51 F.3d at 1101 (rejecting the

district court's conclusion that a discovery request would offend French sovereign rights where "no authoritative declarations by French judicial, executive or legislative bodies objecting to foreign discovery assistance appear in the record"). On the contrary, as Judge Stein noted, granting the request here "would in fact encourage foreign countries to potentially disregard the sovereignty concerns of the United States and generally discourage future assistance to our courts." *In re Application of Schmitz*, 259 F. Supp. 2d 294, 300 (S.D.N.Y. 2003).

Thus, the district court carefully considered various appropriate factors including "the receptivity of the foreign government . . . to federal court judicial assistance," *Intel*, 124 S. Ct. at 2483, in deciding how to exercise its considerable discretion under 28 U.S.C. § 1782. We cannot say that the court abused that discretion in concluding that the "the twin aims of the statute . . . would not be furthered if the petition were granted." *In re Schmitz*, 259 F. Supp. 2d at 295.

The court's decision to deny discovery also finds support in the first factor noted by the Supreme Court in *Intel*. Although technically the respondent in the district court was Cravath, for all intents and purposes petitioners are seeking discovery from DT, their opponent in the German litigation. Intel suggests that because DT is a participant in the German litigation subject to German court jurisdiction, petitioner's need for § 1782 help "is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad." *Intel*, 124 S. Ct. at 2483.

* * * *

b. Discovery abroad for use in a U.S. forum

(1) The Hague Evidence Convention

In *In re: Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004), appellants, German automotive paint manufacturers who were among a group of U.S. and foreign defendants in a consolidated multi-district antitrust class action suit in the Eastern District of Pennsylvania, appealed a denial

of their motion to dismiss for lack of personal jurisdiction and for a protective order. Plaintiffs had opposed the motion and had served jurisdictional discovery requests pursuant to the Federal Rules of Civil Procedure, seeking production of documents concerning the appellants' contacts with the United States as a whole. Appellants had also sought a protective order arguing, among other things, that jurisdictional discovery should proceed first under the Hague Evidence Convention, to which both the United States and Germany are party.

On interlocutory appeal, the Third Circuit affirmed the district court's denial of a motion to dismiss. After first deciding that personal jurisdiction in federal antitrust litigation should be assessed on the basis of the appellants' contacts with the United States as a whole, rather than with the forum state, the court held that a plaintiff may be permitted to seek jurisdictional discovery from foreign defendants under the Federal Rules of Civil Procedure without first resorting to the Hague Convention. As explained in excerpts below, the court rejected appellants' contention that the U.S. Supreme Court's decision in *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987), finding no requirement for first resort to the Hague Convention, was distinguishable because that case involved discovery on the merits in a case where personal jurisdiction was undisputed. (Footnotes omitted)

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* * * *

Aerospatiale holds that the Hague Convention does not provide exclusive procedures for obtaining documents and information located in a foreign signatory nation's territory. *Aerospatiale* first rejects a rule of exclusive use or a rule of first use as a matter of law in favor of the Convention on the ground that neither the language nor the negotiating history of the Convention support such rules. *Aerospatiale*, 482 U.S. at 533–36. Specifically, *Aerospatiale* holds that the Convention's plain language, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was "intended as a

permissive supplement, not a preemptive replacement, for other means of obtaining evidence located abroad." Id. at 536 (emphasis added). The Convention's preamble speaks in non-mandatory terms, specifying its purpose to "facilitate" discovery and to "improve mutual judicial co-operation." Id. at 534. Similarly, its text uses permissive language, and does not expressly modify the law of contracting states or require them to use the specified procedures or change their own procedures. Id. Accordingly, the Convention does not deprive the District Court of its jurisdiction to order, under the Federal Rules of Civil Procedure, a foreign national party to the proceeding to produce evidence physically located within its territory. Id. at 539–40.

Aerospatiale rejects next a rule of first resort favoring the Convention on grounds of international comity and respect for the "judicial sovereignty" of the signatory nation in which evidence sought is located. Id. at 542–43. . . . [T]he determination of whether to resort to the Convention requires "prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that such resort will prove effective." Id. (establishing the three-prong test for determining whether to resort to the Convention).

Aerospatiale acknowledges that "both the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States." Id. at 533. However, the Federal Rules are "the normal methods" for federal litigation involving foreign national parties unless the "optional" or "supplemental" Convention procedures prove to be conducive to discovery under some circumstances. Id. at 536. . . .

Notwithstanding its rejection of the first resort rule, *Aerospatiale* instructs the American courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Id.* at 546, 107 S. Ct. 2542. "Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses." *Id.*

Aerospatiale has not explicitly addressed, however, the issue of which party bears the burden of convincing the court of an

"optional" and "supplemental" use of the Convention procedures in a particular case. Nor has *Aerospatiale,* involving foreign defendants over whom the trial court had undisputed personal jurisdiction, addressed the issue of what procedures to follow in a case, as here, where jurisdiction is contested and discovery sought is limited only to proof of jurisdiction.

* * * *

. . . [A]ppellants argue that *Aerospatiale* is not applicable to jurisdictional discovery and that this Court should adopt a first resort rule in favor of the Hague Convention procedures based on considerations of international comity and respect for the German sovereignty, the host signatory nation where discovery is to be conducted. They argue that the *Aerospatiale* balancing approach is premised expressly on the existence of personal jurisdiction in that case. Where jurisdiction is disputed and not yet established, they assert the balancing approach must yield to a rule of first resort.

The appellants stress the split of authorities among federal district courts and state courts regarding the extension of *Aerospatiale* to jurisdictional discovery. . . .

The appellants rely also on a report by the Special Commission of the Hague Conference attended, among others, by delegations from the United States and Germany. *See* Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention, April 1989, *reprinted in* 28 Int'l Law Materials 1556 (1989). The report stated that while views varied as to whether the Hague Convention "occupied the field and therefore excluded application of domestic procedural rules," "the Commission thought that in all Contracting States, whatever their views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought." *Id.* at 1564, 1569. The appellants argue that the statement in the report that "priority" should be given to the Convention should be entitled to substantial deference.

The appellants are correct that *Aerospatiale* makes numerous references to the existence of personal jurisdiction in that case. We

disagree, however, that the *Aerospatiale* holding is dependent on personal jurisdiction. . . .

We agree with the majority of trial courts' decisions that there should be no exception to the *Aerospatiale* holding for jurisdictional discovery. . . .

Unlike *Geo-Culture,* relied on by the appellants, where the plaintiff failed to allege even a prima facie case of personal jurisdiction, the District Court found that the plaintiffs here had established a prima facie case of personal jurisdiction, a conclusion not challenged by the appellants. The plaintiffs' allegations amounted, therefore, to more than "mere blanket fishing expeditions" and were "not the type of bare-boned allegations that potentially could lead to the fishing expeditions of obvious concern to the signatory countries." *In re Vitamins*, 120 F.Supp.2d at 50.

. . . Moreover, the denial of resort to Hague Convention procedures for jurisdictional discovery is not unfair to the appellants because they "[had] taken advantage of the [Federal] Rule allowing them a preliminary hearing and determination of the issues raised in their motion.". . . .

* * * *

Accordingly, the distinction drawn by the appellants between "merits" discovery and "jurisdictional" discovery, predicated on a false dichotomy of having and not having jurisdiction, amounts to no real difference because the court has jurisdiction for either type of discovery. The undisputed presence of personal jurisdiction in *Aerospatiale* is, therefore, tangential to its holding and irrelevant to the issue of whether *Aerospatiale* applies also to jurisdictional discovery.

* * * *

The court provided three additional reasons supporting its conclusion. First, "jurisidictional discovery" is more limited and less intrusive than "merits discovery;" second, Germany has no "blocking statute" that imposes penal sanctions on appellants for participating in U.S. discovery, as was the case for the French defendants in *Aérospatiale*, and third, there are no reasons of respecting the "judicial sovereignty"

of the signatory host nation and preventing discovery abuse that would require adoption of a first resort. As to this last point, the court explained as follows.

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* * * *

The appellants and their supporters argue generally that Germany is a civil law country where the gathering of evidence is a judicial function and that pursuing discovery without resort to the Convention may be deemed an affront to Germany's sovereignty. The Aerospatiale Court, as well as other courts, has found such argument "unpersuasive." . . . As observed by the court in *In re Vitamins*, 120 F. Supp. 2d at 50, there is no reason to assume that discovery under the Federal Rules would inevitably offend Germany's sovereign interest because presumably Germany, like the United States, would prohibit the alleged price-fixing conspiracy and would welcome investigation of such antitrust violation to the fullest extent. *See* Germany's Act Against Restraints of Competition § 1; Treaty Establishing the European Economic Community, Art. 81(1). There is also no reason to "believe that the sovereign interests of . . . foreign signatory nations would be any more offended by [the] narrower jurisdictional discovery than they would be by the broader, merits-related discovery allowed by Aerospatiale." . . .

(2) Discovery abroad under U.S. Federal Rules of Civil Procedure

In *International Ins. Co. v. Caja Nacional de Ahorro y Seguro* ("Caja"), 2004 U.S. Dist. LEXIS 4280 (N.D.Ill., March 18, 2004), a default judgment was issued against defendant, an Argentine entity, in an action to enforce an arbitral award against Caja. In subsequent discovery, Caja failed to provide complete information regarding its assets. In a joint status report prepared by the parties by order of the court, the parties agreed, among other things, that Caja's liquidator Dr. Sobral would be deposed in Argentina "pursuant to the U.S.

Federal Rules of Civil Procedure." Subsequently defendant contended that Dr. Sorbal should be deposed in accordance with the Hague Evidence Convention. The court concluded that Caja was judicially estopped from repudiating its agreement that Dr. Sobral's deposition would be taken "as an American-style, question-and-answer deposition." Excerpts below provide the court's analysis that discovery under the Federal Rules of Civil Procedure was warranted.

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* * * *

Furthermore, the facts of this case warrant the application of the Federal Rules of Civil Procedure for Dr. Sobral's deposition as opposed to the Hague Convention.

The Hague Convention is not the exclusive avenue for obtaining discovery in a foreign country. *See Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern Dist. of Iowa*, 482 U.S. 522, 539–40, 107 S. Ct. 2542, 96 L.Ed.2d 461 (1987) (*Societe*). Courts must determine on a case-by-case basis whether it is more appropriate to take discovery in a foreign country under the Hague Convention or under the Federal Rules of Civil Procedure. Three factors the court utilizes to determine which method of discovery should be utilized are: (1) the appropriateness of the proposed discovery given the facts of the particular case, (2) the sovereign interests involved, and (3) the likelihood that resort to the Hague Convention would be an effective discovery device. *See Societe*, 482 U.S. at 544–46; *In re Aircrash Disaster Near Roselawn, Indiana October 31, 1994*, 172 F.R.D. 295, 309 (N.D.Ill. 1997).

Here, the proposed discovery is directly relevant to the enforcement of the now four-year-old arbitration award. Defendant has asserted that all of its assets have been transferred to the Argentine government; and, thus, it has no remaining assets. However, Defendant has failed to provide any information with respect to the status or nature of the transferred assets. Plaintiff seeks the deposition of Dr. Sobral because he has been identified by Defendant as the individual who provided Defendant with the limited information that Defendant has provided to Plaintiff.

Defendant argues that a question-and-answer deposition is not appropriate because it differs from the norm in Argentina, and such depositions can be considered by Argentine nationals as an affront or invasion of privacy. However, the U.S. courts have no duty to use the procedures normally used in a foreign country. *See Societe*, 482 U.S. at 543–44. In addition, Plaintiff does not seek any personal information from Dr. Sobral. Instead, Plaintiff seeks information about the assets of the Defendant.

As to the second factor, "[f]irst and foremost, the United States has its own sovereign interest in protecting its citizens." *In re Aircrash*, 172 F.R.D. at 309. Defendant argues that requiring Dr. Sobral to sit for a deposition pursuant to the Federal Rules of Civil Procedure would be an affront to the sovereignty of Argentina because Defendant is now under the control of the Argentine state, through the Ministry of Economy and Production. However, the information sought by Plaintiff relates to an entity which was not under the control of the Argentine government at the time of the transactions between the parties and relates to assets of the Defendant, not Argentina.

In addition, the interest in the United States' protecting its citizens outweighs the interests asserted by Defendant under the facts of the instant case. Defendant's efforts to avoid the application of the Federal Rules of Civil Procedure would undermine the United States' interests by further delaying and frustrating the discovery of the information to which Plaintiff is legally entitled. Defendant has already delayed the discovery of this information and has been sanctioned for such delay.

Lastly, allowing the discovery of the material sought pursuant to the Hague Convention would not be an effective discovery device. As stated above, Defendant has a history of avoiding and delaying discovery in this case; and requiring that information sought be provided by the letter request process would only further delay the present proceedings. The letter requests sought to be used by Defendant under the Hague Convention are generally considered inferior to the traditional deposition format because the deposition format is more flexible and efficient. In addition, letter requests often generate answers prepared by lawyers rather than the witness. *See Madness v. Madness*, 199 F.R.D. 135, 142 (S.D.N.Y. 2001).

3. Service of Process Abroad

(1) In *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004), the U.S. Court of Appeals for the Ninth Circuit addressed the use of international mail as a means of effecting service abroad under the Hague Service Convention. Brockmeyer and his company filed suit in federal district court against his competitors, including Marquis Publications Ltd. ("Marquis"), a British company, in federal court, alleging trademark infringement and various state-law causes of actions. Plaintiffs' counsel made two attempts to serve Marquis by ordinary first class mail to a post office box in England. Marquis failed to respond and eventually a default judgment was entered against it.

Marquis moved to set aside the default judgment, arguing, among other things, that international mail service must be made by certified or registered mail. The district court denied Marquis's motion, ruling that mail service is not forbidden by the Hague Convention and that service on an English defendant by ordinary international first class mail is proper. The Ninth Circuit agreed that the Hague Service Convention does not prohibit service of process by mail so long as the receiving country does not object. It reversed the district court decision, however, holding that service must also be affirmatively authorized by some provision of domestic law. In this case, Brockmeyer had failed to follow the specific procedures prescribed in Rule 4(f) of the Federal Rules of Civil Procedure, which require, respectively, that service be sent by the clerk of the court, using a form of mail requiring a signed receipt, or that the mailing procedure be directed specifically by the district court.

Excerpts below provide the court's interpretation of Article 10(a) of the Hague Service Convention.

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* * * *

The Hague [Service] Convention, ratified by the United States in 1965, regularized and liberalized service of process in international civil suits. The primary means by which service is accomplished

under the Convention is through a receiving country's "Central Authority." . . .

The Convention also provides that it does not "interfere with" other methods of serving documents. Article 10(a) of the Convention recites:

Provided the State of destination does not object, the present Convention shall not interfere with—

> (a) the freedom to *send* judicial documents, by postal channels, directly to persons abroad.

(Emphasis added.) . . . American courts have disagreed about whether the phrase "the freedom to *send* judicial documents" in Article 10(a) includes within its meaning the freedom to *serve* judicial documents.

* * * *

Today we join the Second Circuit in holding that the meaning of "send" in Article 10(a) includes "serve." *See Ackermann*, 788 F.2d at 838. In so doing, we also join the essentially unanimous view of other member countries of the Hague Convention. *See, e.g.*, Case C-412/97, *E.D. Srl. v. Italo Fenocchio*, 1999 E.C.R. I-3845, [2000] C.M.L.R. 855 (Court of Justice of the European Communities) ("Article 10(a) of [the Hague Convention] allows service by post."); *Integral Energy & Envtl. Eng'g Ltd. v. Schenker of Canada Ltd.*, (2001) 295 A.R. 233, 2001 WL 454163 (Alberta Queens Bench) ("Article 10(a) of the Hague Convention provides that if the state of destination does not object, judicial documents may be served by postal channels"), *rev'd on other grounds*, (2001) 293 A.R. 327; *R. v. Re Recognition of an Italian Judgment*, [2002] I.L.Pr. 15, 2000 WL 33541696 (Thessaloniki Court of Appeal, Greece) ("It should be noted that the possibility of serving judicial documents in civil and commercial cases through postal channels . . . is envisaged in Article 10(a) of the Hague Convention.").

We agree with the Second Circuit that this holding is consistent with the purpose of the Convention to facilitate international service of judicial documents. *See* Hague Convention, art.1 ("[T]he present Convention shall apply in all cases, in civil or commercial

matters, where there is occasion to transmit a judicial or extrajudicial document for *service* abroad.") (emphasis added); *see also* 1 Moore's Federal Practice § 4.52[2][d] (stating that "it comports with the broad purpose of the Hague Convention" to construe "send" to mean "serve").

Commentaries on the history of negotiations leading to the Hague Convention further indicate that service by mail is permitted under Article 10(a). According to the official Rapporteur's report, the first paragraph of Article 10 of the draft Convention, which "except for minor editorial changes" is identical to Article 10 of the final Convention, was intended to permit service by mail. *See* 1 Bruno A. Ristau, *International Judicial Assistance* § 4-3-5, at 204–05 (2000) (quoting the Service Convention Negotiating Document) (translated from French by Ristau). A "Handbook" published by the Permanent Bureau of the Hague Convention, which summarizes meetings of a "Special Commission of Experts," states that to interpret Article 10(a) not to permit service by mail would "contradict what seems to have been the implicit understanding of the delegates at the 1977 Special Commission meeting, and indeed of the legal literature on the Convention and its predecessor treaties." Permanent Bureau of the Hague Convention, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* 44 (1992). As further evidence of the understanding of the parties at the time the Hague Convention was signed, the United States delegate to the Hague Convention reported to Congress that Article 10(a) permitted service by mail. *See* S. Exec. R. No. 6, at 13 (1967) (statement by Philip W. Amram).

The United States government, through the State Department, has specifically disapproved the Eighth Circuit's holding in *Bankston*. On March 14, 1991, the Deputy Legal Advisor of the State Department wrote a letter to the Administrative Office of the United States Courts.[1]

[1] Letter from Alan J. Kreczko, U.S. Dep't of State Deputy Legal Adviser, to the Admin. Office of the U.S. Courts (March 14, 1991), *quoted in* U.S. Dep't of State Op. Regarding the *Bankston* Case, 30 I.L.M. 260 (1991).

> After discussing Article 10(a) and noting that Japan did not object to the use of postal channels under Article 10(a), the letter concluded. We therefore believe that the decision of the Court of Appeals in *Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country.

The letter also emphasized that, "while courts in the United States have final authority to interpret international treaties for the purposes of their application as law of the United States, they give great weight to treaty interpretations made by the Executive Branch." *See also United States v. Lombera-Camorlinga*, 206 F.3d 882, 887 (9th Cir. 2000) (en banc). State Department circulars also indicate that service by mail is permitted in international civil litigation. *See, e.g.*, U.S. Dep't of State, *Circular: Service of Process Abroad, in Selected Materials in Int'l Litig. and Arbitration*, 688 PLI/Lit. 777, 1021 (2003). The State Department circular tailored to the United Kingdom specifies that mail service by international registered mail is allowed. U.S. State Dep't, *Judicial Assistance in the United Kingdom (England, Scotland, Wales, and Northern Ireland), in Selected Materials in Int'l Litig. & Arbitration*, 689 PLI/Lit. 13, 325 (2003).

The purpose and history of the Hague Convention, as well as the position of the U.S. State Department, convince us that "send" in Article 10(a) includes "serve." We therefore hold that the Convention permits—or, in the words of the Convention, does not "interfere with"—service of process by international mail, so long as the receiving country does not object.

B. Rule 4(f): "Service Upon Individuals in a Foreign Country"

Article 10(a) does not itself affirmatively authorize international mail service. It merely provides that the Convention "shall not interfere with" the "freedom" to use postal channels if the "State of destination" does not object to their use. As the Rapporteur for the Convention wrote in explaining Article 10(a), "It should be stressed that in permitting the utilization of postal channels, . . . the

draft convention did not intend to pass on the validity of this mode of transmission under the law of the forum state: *in order for the postal channel to be utilized, it is necessary that it be authorized by the law of the forum state*." 1 Ristau § 4-3-5, at 205 (emphasis added) (quoting Service Convention Negotiating Document); *see also* id. at 162 ("Even though a contracting state may not object to methods of service of foreign judicial documents in its territory in a manner other than as provided for in the Convention . . . *it is still necessary that the law of the state where the action is pending authorize the particular method of service employed*.") (emphasis added).

In other words, we must look outside the Hague Convention for affirmative authorization of the international mail service that is merely not forbidden by Article 10(a). Any affirmative authorization of service by international mail, and any requirements as to how that service is to be accomplished, must come from the law of the forum in which the suit is filed.

* * * *

. . . [W]e hold that any service by mail in this case was required to be performed in accordance with the requirements of Rule 4(f) [of the Federal Rules of Civil Procedure]. Service by international mail is affirmatively authorized by Rule 4(f)(2)(C)(ii), which requires that service be sent by the clerk of the court, using a form of mail requiring a signed receipt. Service by international mail is also affirmatively authorized by Rule 4(f)(3), which requires that the mailing procedure have been specifically directed by the district court. Service by international mail is not otherwise affirmatively authorized by Rule 4(f). Plaintiffs . . . simply dropped the complaint and summons in a mailbox . . . The attempted service was therefore ineffective, and the default judgment against Marquis cannot stand.

* * * *

(2) *Paracelsus Healthcare Corp. v. Philips Medical Systems, Nederland, B.V.*, 384 F.3d 492 (8th Cir. 2004), involved a breach of warranty claim concerning a medical device manufactured by Philips Medical Corp., a Dutch corporation. To

effect service on Philips Medical, Paracelsus Healthcare Corp. forwarded a copy of its amended complaint to Legal Language Services ("LLS"), a company specializing in service of process on foreign defendants in accordance with the Hague Service Convention. LLS prepared the documents necessary for service and forwarded them to the Central Authority of the Netherlands, as permitted under the Hague Convention. The Central Authority received the documents several weeks before the statute of limitations on the claim expired, but failed to complete service in time.

The U.S. District Court for the District of North Dakota dismissed Paracelsus' claim on the ground that the statute of limitations had expired. On appeal, the Eighth Circuit affirmed, dismissing Paracelsus' argument that once the amended complaint was delivered to the Central Authority, service was complete or the statute of limitations was tolled under North Dakota law. As to completion of service, the Eighth Circuit agreed with the lower court that service on a foreign Central Authority did not satisfy N.D. law providing for service by delivery to a sheriff or other officer of the county in which a corporation is situated. Excerpts below provide the Eighth Circuit's analysis of tolling of the statute of limitations.

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* * * *

Paracelsus next argues once the amended complaint was delivered to the Central Authority the statute of limitations was tolled under [N.D. Cent. Code] § 28-01-29.

Section 28-01-29 provides, "[w]hen the commencement of an action is stayed by injunction or other order of a court, *or by a statutory prohibition*, the time of the continuance of the stay is not a part of the time limited for the commencement of the action." (Emphasis supplied.)

Paracelsus argues the Hague Convention is a "positive rule of law" creating a statutory prohibition which prevented it from bringing its action against Philips Medical in a timely manner, because once the suit papers were delivered to the Central Authority, Paracelsus no longer had control over when service would occur.

In support of its argument, Paracelsus cites *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wash.2d 670, 10 P.3d 371 (2000).

In *Broad*, the plaintiffs brought a federal diversity action against a German manufacturer alleging its product was defective. *Id.* at 373. The plaintiffs first attempted service through the Bavarian State Ministry one day before the statute of limitations expired. The attempt was unsuccessful, but under Washington law, once the complaint was filed with the court, the plaintiffs were afforded an additional 90-day period within which to perfect service. *Id.* at 373–74. The plaintiffs next submitted the suit papers to the German Central Authority for service of process but service was not effected until after the additional 90-day period had expired. The defendant moved for summary judgment, with the plaintiffs arguing the 90-day extension should be tolled because they were prevented by the Hague Convention from serving the defendant in a timely manner. The Ninth Circuit Court of Appeals certified the question to the Washington Supreme Court and the court agreed. *Id.* at 377–79. In reaching its holding in *Broad*, the Washington Supreme Court looked to the provisions of a Washington statute nearly identical to § 28-01-29 and concluded the Hague Convention operated as a "positive rule of law" which prevented the plaintiffs from bringing suit, because once the suit papers were turned over to the Central Authority the plaintiffs could no longer control when the defendant would be served. *Id.* at 378. *Broad*, however, is distinguishable.

* * * *

In *Broad*, Germany had objected to the alternate methods for serving documents, leaving service through the Central Authority as the sole means by which the defendant could be served. *Id.* at 373. Here, other methods of service were available to Paracelsus because the Netherlands had not objected to the alternatives. Accordingly, the Hague Convention did not operate in this case as a "positive rule of law" preventing Paracelsus from bringing suit. While Paracelsus lost control over service of the documents once they were delivered to the Central Authority, other options were available which would not have required Paracelsus to rely on the Central Authority.

* * * *

(3) In *Popular Enterprises, LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560 (E.D. Tenn. 2004), the court concluded in a case of first impression that service by e-mail was fully authorized in the circumstances of the case. Plaintiff Popular Enterprises alleged that the foreign defendant in the case infringed upon and diluted its trademark by directing web users to pornographic web sites in violation of trademark and unfair competition laws. Plaintiff attempted on several occasions, with assistance from the court, to serve defendant via certified and overnight mail to the address supplied by the defendant. In a final effort, the court "forwarded a request for service to the Portuguese Ministerio de Justica, as required by the Hague Convention. The Portuguese Ministerio de Justica was unable to effect service because it did not have a valid mailing address." Thereafter, on March 19, 2004, papers were sent via e-mail and the court stated that the "e-mail did not bounce back and presumably reached defendant." Noting that Federal Rule of Civil Procedure 4(f)(3) "allows for service of process to be made on an individual in a foreign country 'by . . . means not prohibited by international agreement as may be directed by the court,'" the court concluded that in this case service upon defendant by e-mail was fully authorized. Excerpts from the court's opinion follow (footnotes omitted).

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* * * *

. . . Under the facts and circumstances presented here, Rule 4(f)(3) clearly authorizes the court to direct service upon defendant by e-mail. The rule is expressly designed to provide courts with broad flexibility in tailoring methods of service to meet the needs of particularly difficult cases. Such flexibility necessarily includes the utilization of modern communication technologies to effect service when warranted by the facts. Broadfoot, 245 B.R. at 720. Although communication via e-mail and over the internet is comparatively new, such communication has been zealously embraced within the business community.

. . . Service of process by e-mail is reasonably calculated to apprize defendant of the pendency of this action and afford it an opportunity to respond. As stated by the Ninth Circuit Court of Appeals, "when faced with an international e-business scofflaw, playing hide-and-seek with the federal court, e-mail may be the only means of effecting service of process." Rio, 284 F.3d at 1018. Such is the case here.

(4) In *Powers Integrations, Inc. v. System General Corporation*, 2004 WL 2806168 (N.D. Cal. Dec. 7, 2004), plaintiff, Power Integrations, Inc. ("Power Integrations"), requested, pursuant to Federal Rules of Civil Procedure 4(h)(2) and 4(f)(2)(C)(ii), that the Clerk of the Court perfect service via Federal Express on defendant, System General Corporation ("SG Taiwan"), a Taiwanese corporation. SG Taiwan received and signed for the package dispatched by the Clerk of the Court. SG Taiwan later filed a motion to dismiss for insufficiency of service of process. SG Taiwan contended that "service was ineffective because Taiwanese law does not provide for service to be effected by any means other than letters rogatory or via diplomatic channels."

Excerpts below provide the court's analysis in rejecting SG Taiwan's motion to dismiss because SG Taiwan had not established that service by mail (a term the court finds can include Federal Express) was expressly prohibited by Taiwanese law (footnotes omitted).

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* * * *

. . . Rule 4(h)(2) provides that a foreign corporation may be served "in any place not within a judicial district of the United States in any manner prescribed for individuals by subdivision 4(f) except personal delivery. . . ." Where as here, there is no "internationally agreed means of service," Rule 4(f) provides in relevant part, that "unless prohibited by the law of the foreign country" and so long as "service is reasonably calculated to give notice," service may be effected by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served.". . .

SG Taiwan contends that service was ineffective because Taiwanese law does not provide for service to be effected by any means other than letters rogatory or via diplomatic channels, and Power Integrations has not used those means to effect service. . . .

* * * *

Thus, Rule 4(f)(2)(C) provides for service in a manner that, while not expressly prescribed by the laws of a foreign country, is not prohibited by those laws. In the Court's view, this is not a distinction without a difference for if there were no distinction between those terms, Rule 4(f)(2)(C) would be rendered superfluous. . . .

* * * *

The Court also concludes that this method of service is reasonably calculated to give notice to the defendant of the pending action. Indeed, it is undisputed in this case that SG Taiwan did receive the complaint and is aware of the nature of the claims. . . .

4. Forum Non Conveniens

In *Gross v. British Broadcasting Corporation*, 386 F.3d 224 (2d Cir. 2004), the U.S. Court of Appeals for the Second Circuit reversed a district court decision dismissing the action on the basis of *forum non conveniens*. Gross, an American filmmaker living in New York City, had sued in the U.S. District Court for the Southern District of New York, claiming that the BBC had used her ideas for a documentary film without her permission. When BBC moved to dismiss, Gross argued that if she were forced to sue in Britain, her action in reality would be barred by excessive litigation expenses, since the British system prohibits contingent fee arrangements in her circumstances.

Although recognizing that Gross was entitled, "on a *prima facie* basis," to vindicate her rights in her home forum, the district court found Britain to be the more appropriate forum because British law would apply to the action and all relevant witnesses, aside from the plaintiff, resided in Britain. Noting

Gross's difficulties in retaining British counsel, however, the district court imposed three conditions, to which the BBC consented: "(1) refraining from seeking security for costs and attorneys' fees from the plaintiff; (2) waiving prevailing party to seek costs and attorneys' fees from the plaintiff; and (3) refraining from interference with the plaintiff's efforts to obtain an attorney on a contingent fee basis." The district court also ruled that the waiver of prevailing party's costs and attorneys' fees should be mutual.

In reversing the order to dismiss, the Second Circuit stated:

> The common law doctrine of *forum non conveniens* permits a court to decline to exercise jurisdiction when the convenience of the parties and the interests of justice indicate a foreign forum would be the more appropriate forum. But, because of the substantial deference to a U.S. citizen's choice of her home forum, the balance of interests must strongly favor the defendant to justify dismissal of plaintiff's complaint on such grounds. District courts have discretion to determine whether the interests of justice favor dismissal for *forum non conveniens*, yet that discretion is not unfettered. In this case, we think the district court's dismissal of plaintiff's suit was manifestly unreasonable and thus an abuse of discretion. We therefore vacate the order dismissing plaintiff's suit and remand to the district court for further proceedings.

In addition to stressing the deference due to a plaintiff suing in her home forum, and finding that the BBC was amendable to suit in that forum and there was nothing to suggest that she had chosen it for improper reasons, the court determined that England would provide an alternate forum. It then turned to "the third step and the most substantial part of the analysis [which is] to weigh the public and private interests to determine if the ends of justice would be served by dismissing the case from plaintiff's chosen forum." Here the court stated that "[w]hen the district court judge addressed each factor, he himself concluded that the factors were either neutral or,

at most, slightly favored England," thus falling "far short of the level of oppressiveness to defendant required to overturn a U.S. plaintiff's choice of her home forum."

Finding the conditions on dismissal imposed by the district court somewhat "troublesome," the court commented as excerpted below.

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Finally, we must say a word about the conditions imposed on the parties as part of the dismissal. In this case, the BBC's motion to dismiss was granted only after the parties agreed to waive their statutory rights relating to contingent fees and fee-shifting for prevailing parties.

It is not uncommon for a district court to qualify a dismissal for *forum non conveniens* on the movant's acceptance of certain conditions to reduce the prejudice to the plaintiff. For example, if the district court is unsure that the defendant would in fact be amenable to suit in the proposed foreign forum, it may require the defendant to consent to jurisdiction in that forum before dismissing the case. *See, e.g., Jota v. Texaco Inc.*, 157 F.3d 153, 159 (2d Cir. 1998). Or if the statute of limitations will have run before the new action is filed, the court may ask the defendant to waive its arguments on that ground. *See, e.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002). This makes some sense since it is the defendant who is seeking to have the action effectively transferred for its convenience.

In the above examples, the defendant is asked to cede a *personal* defense that is waivable at its will. . . .

The conditions imposed in the case at bar are somewhat more troublesome to us because they are primarily institutional rather than personal in nature. A legal system's rules pertaining to fee-shifting and contingent fees reflect policy judgments about the goals of that legal system, the incentives for and against litigation, and the availability of representation in various circumstances. The British system has over the years engaged in a lengthy public debate that has led to a series of contentious changes in its allowance of conditional fee arrangements in certain circumstances.

Beginning in 1928, a government report on legal aid urged local law societies to provide free services for the poor since contingent fee arrangements had been opposed by the Law Society since 1912. In 1949 England created a comprehensive legal aid system and continued in 1979 through the Royal Commission on Legal Services to recommend against contingency fees. There were numerous studies and reports issued through the 1980s, particularly the Green Papers that reopened the issue of contingency fees. Finally, in 1990 the Courts and Legal Services Act of 1990 approved conditional fee agreements, which took five years to come into effect. *See, e.g.*, Richard L. Abel, *An American Hamburger Stand in St. Paul's Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation*, 51 DePaul L.Rev. 253 (2001) (surveying the recent developments in British conditional fee arrangements); Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DePaul L.Rev. 259 (2002) (same).

There is a point at which conditions cease to be a limitation on the defendant and become instead an unwarranted intrusion on the transferee forum's policies governing its judicial system. By applying conditions that implicate the British legal system's rules on fee-shifting and the availability of contingent fees, the district court effectively stepped into the middle of Britain's policy debate on those issues. Principles of comity demand that we respect those policies. We urge the district courts to be cognizant of the prudential choices made by foreign nations and not to impose conditions on parties that may be viewed as having the effect of undermining the considered policies of the transferee forum.

* * * *

5. Personal Jurisdiction Over Foreign Entities in U.S. Courts

(1) In *Yahoo! Inc. v. La Ligue Controle Le Racisme Et L'Antisemetisme*, 379 F.3d 1120 (9th Cir. 2004), Yahoo! appealed the decision of the U.S. District Court for the Northern District of California that it had personal jurisdiction over defendants, two French associations, La Ligue Controle

Le Racisme Et L'Antisemetisme ("LICRA") and L'Union Des Etudiants Juifs De France ("UEJF"). The LICRA and UEJF had sent a cease-and desist letter to Yahoo! in California, demanding that it prohibit the display of Nazi materials on its website to French viewers. They later filed suit in French court, alleging violations of French laws against Nazi symbols. LICRA and UEJF served Yahoo! with the complaint by using the U.S. Marshals Service pursuant to the service-abroad requirements of the Hague Convention. The French court, at LICRA and UEJF's request, then issued an order requiring Yahoo!, subject to a fine, to destroy all Nazi-related messages, images, and text stored on its servers.

Thereafter, Yahoo! sued in the district court, requesting a declaration that the French court's orders were not enforceable in the United States and that, in any case, they violated the First Amendment. LICRA and UEJF moved to dismiss the action, claiming that the district court lacked *in personam* jurisdiction over them. The district court found that LICRA and UEJF had purposely availed themselves of the benefits of California based on their three contacts with the forum: (1) the cease-and-desist letter; (2) the use of the United States Marshals Services to serve process; and (3) their request to the French court that plaintiff remove the Nazi items from its website in California. The district court held that these contacts constituted "express aiming" by LICRA and UEJF in the sense contemplated by the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984).

The U.S. Court of Appeals for the Ninth Circuit disagreed and reversed the lower court decision by a 2-1 majority. Excerpts below provide the majority's analysis in concluding that intentional, wrongful conduct is required for personal jurisdiction under the *Calder* "effects" test.

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In *Bancroft & Masters*, 223 F.3d at 1087, this Court noted that cases since *Calder* had "struggled somewhat with *Calder's* import, recognizing that the case cannot stand for the broad proposition

that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction." We stated that there must be "something more," and concluded that "something more" was what the *Calder* Court described as express aiming at the forum state. *Bancroft & Masters*, 223 F.3d at 1087; *see also Calder*, 465 U.S. at 789, 104 S. Ct. 1482 ("[T]heir intentional, and allegedly tortious, actions were expressly aimed at California."). We then held that the express aiming requirement of *Calder* was "satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters*, 223 F.3d at 1087.

In *Bancroft & Masters*, the defendant, Augusta National Inc. (ANI), held several federally registered trademarks for "Masters." *Id.* at 1084. The plaintiff, California-domiciled Bancroft & Masters ("B & M"), registered the domain name "masters.com" for use as its business homepage. *Id.* When ANI learned of B & M's use of the domain name, ANI sent a letter to B & M's California offices demanding that B & M cease and desist its use of masters.com. *Id.* at 1085.

More importantly, ANI also sent a letter to Network Solutions, Inc. ("NSI"), the organization charged at the time with regulating domain names. *Id.* at 1085. That letter triggered NSI's dispute-resolution process, which gave B & M three options: (1) voluntarily transfer the domain name to ANI; (2) allow the domain name to be placed "on hold" such that neither party could use it; or (3) obtain a declaratory judgment establishing B & M's right to use the domain name. *Id.* B & M chose the third option and filed suit in California; ANI challenged jurisdiction. *Id.*

B & M contended that ANI's letters constituted purposeful availment under *Calder*, since ANI triggered NSI's dispute-resolution process in part to wrongfully effect the conversion of B & M's masters.com domain name. *Id.* at 1087. Although ANI responded that its letters were purely defensive, aimed only at protecting its mark, we adopted B & M's interpretation because prima facie jurisdictional analysis requires us to accept the plaintiff's allegations as true. *Id.*

Interpreting *Calder*, we determined that the express aiming "requirement is satisfied when the defendant is alleged to have

engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters*, 223 F.3d at 1087. We concluded that ANI's letters wrongfully initiated the NSI process and that this act was targeted at B & M; thus, it was not presumptively unreasonable to hale ANI into a California court to answer for its allegedly wrongful actions. *Id.* at 1089.

Consequently, for LICRA's and UEJF's litigation efforts against Yahoo! to amount to "express aiming," those efforts must qualify as wrongful conduct targeted at Yahoo!. We hold that they do not.

France is within its rights as a sovereign nation to enact hate speech laws against the distribution of Nazi propaganda in response to its terrible experience with Nazi forces during World War II. Similarly, LICRA and UEJF are within their rights to bring suit in France against Yahoo! for violation of French speech law. The only adverse consequence experienced by Yahoo! as a result of the acts with which we are concerned is that Yahoo! must wait for LICRA and UEJF to come to the United States to enforce the French judgment before it is able to raise its First Amendment claim. However, it was not wrongful for the French organizations to place Yahoo! in this position . . .

* * * *

. . . [T]he French court has already upheld LICRA and UEJF's position with respect to French law. We know that LICRA and UEJF were acting to uphold their legitimate rights under French law. This places the parties in this case in a very different posture than the parties in *Bancroft & Masters*. As a result, we cannot say here that the parties did anything wrongful, sufficient for a finding of "express aiming," in bringing this suit against Yahoo!.

Yahoo! obtains commercial advantage from the fact that users located in France are able to access its website; in fact, the company displays advertising banners in French to those users whom it identifies as French. Yahoo! cannot expect both to benefit from the fact that its content may be viewed around the world and to be shielded from the resulting costs—one of which is that, if Yahoo! violates the speech laws of another nation, it must wait for the foreign litigants to come to the United States to enforce the

judgment before its First Amendment claim may be heard by a U.S. court.

[T]he District Court did not properly exercise personal jurisdiction over LICRA and UEJF. Because the District Court had no personal jurisdiction over the French parties, we do not review whether Yahoo!'s action for declaratory relief was ripe for adjudication or whether the District Court properly refused to abstain from hearing this case.

Cross-references

Adoption and child abduction issues, **Chapter 2.B.**
Forum non conveniens, **Chapter 6.G.6.b.(1).**
International comity, **Chapter 8.B.2.a. and 10.A.2.b.(1) and 2.b.(2)(ii), B. and F.1.**

CHAPTER 16

Sanctions

A. IMPOSITION, MODIFICATION, AND IMPLEMENTATION OF SANCTIONS

1. Iraq

a. Development Fund and other economic sanctions

On May 20, 2004, President Bush continued the national emergency declared by Executive Order 13303 (May 22, 2003) protecting the Development Fund for Iraq and certain other property in which Iraq has an interest and additional measures adopted in Executive Order 13315 (Aug. 28, 2003) related to property of the former Iraqi regime and its senior officials. 69 Fed. Reg. 29,409 (May 21, 2004). The President based his action on the fact that "obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." *See Digest 2003* at 914–23.

As discussed in Chapter 18.A.3, on June 8, 2004, the UN Security Council adopted Resolution 1546 in anticipation of the transfer of sovereign authority to the Interim Government of Iraq. U.N. Doc. S/RES/1546 (2004). Among other things, Paragraph 24 noted that, "upon dissolution of the Coalition Provisional Authority, the funds in the Development

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Fund for Iraq shall be disbursed solely at the direction of the Government of Iraq," and decided that "the Development Fund for Iraq shall be utilized in a transparent and equitable manner and through the Iraqi budget including to satisfy outstanding obligations against the Development Fund for Iraq. . . ." In paragraph 26 the Security Council decided that the Interim Government of Iraq and its successors "shall assume the rights, responsibilities and obligations relating to the Oil-for-Food Programme that were transferred to the [Coalition Provisional] Authority. . . ." In paragraph 29, the Security Council recalled the "continuing obligations of Member States to freeze and transfer certain funds, assets, and economic resources to the Development Fund for Iraq in accordance with paragraphs 19 and 23 of resolution 1483 (2003) and with resolution 1518 (2003) of 24 November 2003."

In addition, as discussed in 1.b. below, Resolution 1546 decided, in paragraph 21, that "the prohibitions related to the sale or supply to Iraq of arms and related materiel under previous resolutions shall not apply to arms or related materiel required by the Government of Iraq or the multinational force to serve the purposes of this resolution."

Following the transfer of sovereign authority to the interim government in Iraq on June 28, 2004, President Bush issued Executive Order 13350 of July 29, 2004 (69 Fed. Reg. 46,055 (July 30, 2004)), terminating Executive Order 12722 of August 2, 1990, which had imposed sanctions on Iraq in response to its invasion of Kuwait. In the President's letter transmitting Executive Order 13350 to Congress, he stated:

> I have determined that the removal of the regime of Saddam Hussein warrants the termination altogether of the national emergency declared in Executive Order 12722. This action is consistent with United Nations Security Council Resolutions 1483 and 1546, of May 22, 2003, and June 8, 2004, respectively, which substantially lifted the multilateral economic sanctions against Iraq.

At the same time, Executive Order 13350 continued certain sanctions related to blocked property, as explained below in

further excerpts from the letter. The full text of the letter to Congress is available at 40 WEEKLY COMP. PRES. DOC. 1384 (Aug. 2, 2004).

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Although I am terminating the national emergency declared in Executive Order 12722, pursuant to my authority under IEEPA, I am continuing for the near future certain prohibitions with respect to property previously blocked pursuant to Executive Orders 12722 and 12724. Such prohibitions are necessary on account of claims involving Iraq.

Consistent with section 203(a)(1)(C) of IEEPA, 50 U.S.C. 1702(a)(1)(C), in Executive Order 13290 of March 20, 2003, I ordered that certain blocked funds held in the United States in accounts in the name of the Government of Iraq, the Central Bank of Iraq, Rafidain Bank, Rasheed Bank, or the State Organization for Marketing Oil be confiscated and vested in the Department of the Treasury. I originally exercised these authorities in furtherance of Executive Order 12722. In light of the changed circumstances in Iraq, and my decision to terminate the national emergency declared in Executive Order 12722, I have now determined that the exercise of authorities in Executive Order 13290 should continue in order to address the national emergency I declared in Executive Order 13303 of May 22, 2003, and expanded in Executive Order 13315 of August 28, 2003, regarding the obstacles posed to the orderly reconstruction of Iraq. This order amends Executive Order 13290 to that effect.

In Executive Order 13303 of May 22, 2003, I declared a national emergency to address the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative, and economic institutions in Iraq. I expanded that emergency in Executive Order 13315 of August 28, 2003, in light of UNSCR 1483 of May 22, 2003, in which the Security Council decided that states shall freeze the assets of the former Iraqi regime, Saddam Hussein, and other senior

officials of the former Iraqi regime, and their immediate family members, among others, and cause the transfer of certain of those assets to the Development Fund for Iraq. Executive Order 13315 implements this provision of UNSCR 1483.

This order further modifies the actions taken to address the national emergency declared in Executive Order 13303, as expanded in Executive Order 13315, by amending the Annex to Executive Order 13315 to include certain persons determined to have been subject to economic sanctions pursuant to Executive Orders 12722 and 12724. Because of their association with the prior Iraqi regime, I have determined that these persons present an obstacle to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative, and economic institutions in Iraq and, therefore, I have determined that such persons should be subject to sanctions under Executive Order 13315.

Additionally, in UNSCR 1483, the Security Council decided that states shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property or other items of archeological, historical, cultural, rare scientific, and religious importance that were illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since August 6, 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed. This order, among other actions, implements this international legal obligation.

* * * *

On July 28, 2004, the Office of Foreign Assets Control, U.S. Department of the Treasury, issued a final rule "amending the Iraqi Sanctions Regulations, in light of the President's termination of the national emergency declared in Executive Order 12722 [and providing] . . . a general license under Executive Order 13315 to allow certain transactions related to Iraq under that Executive Order." 69 Fed. Reg. 46,090 (July 30, 2004). Among other things, the rule indicated that the termination of the national emergency in Executive Order 12722 resulted in transfer of jurisdiction over exports and re-exports

to Iraq to the Department of Commerce; *see* 1.b. below. The Background section of the Federal Register publication summarized the actions taken and provided the following examples of transactions authorized:

> Examples of transactions authorized by section 575.533 and General License No. 1 include investment by U.S. persons in Iraq, the importation of goods or services of Iraqi origin (with the exception of the cultural properties described in paragraph (b)(3)), travel-related transactions involving Iraq, the transfer of funds to or from Iraq, and transactions related to transportation to or from Iraq. This authorization, however, does not eliminate the need to comply with other provisions of 31 CFR chapter V or with other applicable provisions of law, including any aviation, financial, or trade requirements of agencies other than OFAC. Such requirements include the Export Administration Regulations (15 CFR parts 730 et seq.) administered by the Bureau of Industry and Security, Department of Commerce, and the International Traffic in Arms Regulations (22 CFR chapters 120–130) administered by the Department of State.

On November 29, 2004, President Bush issued Executive Order 13364, making further modifications related to the Development Fund for Iraq. 69 Fed. Reg. 70,177 (Dec. 2, 2004). Excerpts below from the President's letter to Congress reporting on the issuance of the executive order describe its effect. The full text of the letter is available at 40 WEEKLY COMP. PRES. DOC. 2878 (Dec. 6, 2004).

. . . I have determined that an additional threat exists with respect to which the national emergency was declared and expanded in those Executive Orders. I have also determined that steps taken in Executive Order 13303 to deal with the national emergency declared therein need to be revised in light of United Nations Security Council Resolutions 1483 of May 22, 2003, and 1546 of June 8, 2004, respectively. . . .

In Executive Order 13303 of May 22, 2003, I found that the threat of attachment or other judicial process against the Development Fund for Iraq, Iraqi petroleum and petroleum products and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, obstructed the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq. I determined that this situation constituted an unusual and extraordinary threat to the national security and foreign policy of the United States, and I declared a national emergency to deal with that threat.

Consistent with IEEPA, as amended, (50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code, in Executive Order 13303 I ordered, inter alia, that unless licensed or otherwise authorized pursuant to that order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to the following:

(a) the Development Fund for Iraq, and
(b) all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any other financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, in which any foreign country or a national thereof has any interest, 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.

Consistent with United Nations Security Council Resolutions 1483 and 1546, I have determined that the steps taken in Executive Order 13303 to deal with the emergency declared therein need to be revised so that such steps do not apply with respect to any final

judgment arising out of a contractual obligation entered into by the Government of Iraq, including any agency or instrumentality thereof, after June 30, 2004, and so that, with respect to Iraqi petroleum and petroleum products and interests therein, such steps shall apply only until title passes to the initial purchaser.

The new order provides that protections granted by section 1 of Executive Order 13303, as well as the protections granted by this order to the property of the Central Bank of Iraq, do not apply with respect to any final judgment arising out of a contractual obligation entered into by the Government of Iraq, including any agency or instrumentality thereof, after June 30, 2004.

In addition, the order modifies section 1 of Executive Order 13303 to provide that the protections granted therein to all Iraqi petroleum and petroleum products, and interests therein, apply only until title passes to the initial purchaser.

Furthermore, I now find that the threat of attachment or other judicial process against the assets of the Central Bank of Iraq constitutes one of the obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq. I have determined that the scope of the national emergency declared in Executive Order 13303, as expanded by Executive Order 13315, and modified by Executive Order 13350, be further modified to address this threat.

Consequently, the order modifies the actions taken to address the national emergency declared in Executive Order 13303, as expanded by Executive Order 13315, and further modified in Executive Order 13350, by amending section 1 of Executive Order 13303 to extend the protections granted therein against any attachment, judgment, decree, lien, execution, garnishment, or other judicial process to any accounts, assets, investments, or any other property of any kind owned by, belonging to, or held by the Central Bank of Iraq, or held, maintained, or otherwise controlled by any financial institution of any kind in the name of, on behalf of, or otherwise for the Central Bank of Iraq.

* * * *

b. Modified arms embargo

In order to implement changes in UN sanctions on arms trade, including those in UN Security Council Resolution 1546 noted above, the Bureau of Industry and Security, U.S. Department of Commerce, issued an interim rule also dated July 30, 2004, "establish[ing] the new export control policy for exports to Iraq." 69 Fed. Reg. 46,070 (July 30, 2004). The Supplementary Information section explaining the rule in the Federal Register is excerpted below.

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* * * *

This rule establishes the new export control policy for exports to Iraq under the licensing responsibility of the Bureau of Industry and Security (BIS). The new export control policy reflects changed circumstances in Iraq and is consistent with changes in U.S. legal authorities concerning Iraq and actions taken by the United Nations Security Council with respect to the embargo against Iraq.

The President has signed an Executive Order terminating the national emergency declared in Executive Order 12722, revoking it and certain related Executive Orders. Among other things, the termination of the national emergency in those Executive Orders ends the Department of the Treasury's authority to maintain export controls pursuant to those orders and related regulations, namely the Iraqi Sanctions Regulations, 31 CFR part 575. By virtue of this action, primary export licensing jurisdiction reverts to BIS.

In addition, Section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Pub. L. 108–11), authorized the President to make inapplicable, with respect to Iraq, Section 620A of the Foreign Assistance Act and any other provision of law applicable to countries that have supported terrorism. On May 7, 2003, the President exercised this authority by the issuance of Presidential Determination 2003–23, which, among other things, suspended the application of the provisions of the Iraq Sanctions Act of 1990 (Pub. L. 101–513), except section 586E (relating to penalties). In particular, the President's action suspended the requirement in section 586G(a)(3) of the Iraq Sanctions Act that

items controlled under sections 5 and 6 of the Export Administration Act (50 U.S.C. App. 2401 et seq.) (EAA) be prohibited for export to Iraq and made inapplicable with respect to Iraq section 620A of the Foreign Assistance Act and any other provision of law that applies to countries that have supported terrorism.

Further, on May 22, 2003, the United Nations Security Council (UNSC) adopted Resolution 1483 that lifted the comprehensive UNSC trade sanctions on Iraq while retaining restrictions on the sale or supply to Iraq of arms and related materiel and their means of production. Resolution 1483 also reiterated certain provisions of related UNSC Resolutions 707 of August 15, 1991, and 687 of April 3, 1991. In particular, those provisions require that Iraq eliminate its nuclear weapons program and restrict its nuclear activities to the use of isotopes for medical, industrial or agricultural purposes. Such provisions further mandate the elimination of Iraq's chemical and biological weapons programs as well as its ballistic missile program. Sale or supply by U.S. entities that would make a material contribution to any of these programs is prohibited.

Finally, on June 8, 2004, the UNSC adopted Resolution 1546. In this resolution, the UNSC decided that prohibitions related to the sale or supply to Iraq of arms and related materiel under previous resolutions shall not apply to such items required by the Interim Government of Iraq or the Multinational Force in Iraq to serve the purposes of the resolution. Provisions in UNSC Resolutions 687 and 707 noted above are not affected by UNSC Resolution 1546.

License Requirements for Exports and Reexports to Iraq and Certain Transfers Within Iraq

Overview

The new Iraq export licensing policy significantly reduces the level of control over commercial exports to Iraq while retaining restrictions on the export of multilaterally-controlled items and other sensitive items to Iraq in keeping with Iraq's new economic and security status. The licensing requirements and licensing policy reflected in this rule are consistent with UNSC Resolution 1483

(2003) and other relevant resolutions which lifted the comprehensive trade embargo imposed on Iraq but retained certain restrictions including an embargo on arms and related materiel and their means of production.

This rule is designed to address two significant foreign policy goals with respect to Iraq. In particular, this rule furthers the goal of ensuring that exports and reexports of controlled items destined to civil infrastructure rebuilding do not suffer undue licensing delays. At the same time, in furtherance of applicable UNSC Resolutions and U.S. foreign policy interests, this rule revises section 746.3 of the Export Administration Regulations (15 CFR parts 730–799) (EAR) and retains substantial restrictions on exports to Iraq destined for inappropriate end-users or end-uses. In addition, this rule addresses certain transactions involving the transfer of items subject to the EAR within Iraq.

Items for Which Export License Requirements Are Generally Lifted

Under this rule, items subject to the EAR but not listed on the Commerce Control List (15 CFR part 774) (CCL) (i.e., EAR99 items) will generally not be subject to a license requirement except pursuant to the end-user and end-use controls set forth in part 744 of the EAR and revised section 746.3 of the EAR. Items controlled only for anti-terrorism (AT) reasons on the CCL, except for items controlled under six Export Control Classification Numbers (ECCNs), will also not be subject to a licensing requirement, except for the end-use and end-user requirements noted above. . . .

As a result, in most instances, the new policy will allow the export or reexport to Iraq, or the transfer within Iraq, without a license, of items classified as EAR99 or controlled only for AT reasons.

Also, the de minimis rules applicable to Iraq are amended to provide generally that reexports of items to Iraq from abroad are subject to the EAR only when U.S.-origin controlled content in such items exceeds 25% (as opposed to the existing 10%).

Items for Which Export License Requirements Will Be Retained

This rule retains license requirements for the export or reexport of items on the multilateral export control regime lists, the

Wassenaar Arrangement, the Nuclear Suppliers' Group, the Australia Group and the Missile Technology Control Regime, and items controlled for crime control (CC) or regional stability (RS) reasons. . . .

New License Requirements

A license is required for the transfer within Iraq of any item subject to the EAR exported or reexported pursuant to a specific license issued by the Department of the Treasury or a Department of Commerce specific license or License Exception.

* * * *

See also Chapter 3.B.2.a. concerning removal of Iraq from the list of state sponsors of terrorism and Chapter 11.G.4.b.(1) concerning Presidential Determination allowing foreign tax credit.

c. Oil-for-food program

In April 2004 UN Secretary General Kofi Annan appointed the Independent Inquiry Committee ("IIC") on the United Nations oil-for-food program, composed of chairman Paul Volcker, former Chairman of the United States Federal Reserve, Richard Goldstone, former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda, and Mark Pieth, Professor of Criminal Law and Criminology at the University of Basel, Switzerland. Under its terms of reference, the IIC is to "collect and examine information relating to the administration and management of the Oil-for-Food Programme, including allegations of fraud and corruption on the part of United Nations officials, personnel and agents, as well as contractors, including entities that have entered into contracts with the United Nations or with Iraq under the Programme." *See www.iic-offp.org*. On April 21, 2004, the UN Security Council unanimously adopted Resolution 1538 welcoming the inquiry, emphasizing the importance of full cooperation by all United Nations officials

and personnel, the Coalition Provisional Authority, Iraq, and all other Member States, and calling for full cooperation in the investigation "by all appropriate means." U.N. Doc. S/RES/1538 (2004).

On April 7, 2004, the Senate Foreign Relations Committee held a hearing to examine the oil-for-food program, "A Review of the United Nations Oil-for-Food Program," *available at http://foreign.senate.gov/hearings/2004/hrg040407a.html.* In his opening statement, the chairman of the committee, Senator Richard Lugar, commented on the need for thorough investigations as follows:

> . . . Although the precise extent of the corruption and mismanagement in this program is not yet known, there is no doubt that billions of dollars that should have been spent on humanitarian needs in Iraq were siphoned off by Saddam Hussein's regime through a system of surcharges, bribes, and kickbacks. This corruption was not solely a product of Saddam Hussein's machinations. He required members of the U.N. Security Council who were willing to be complicit in his activities, and he required U.N. officials and contractors who were dishonest, inattentive, or willing to make damaging compromises in pursuit of a compassionate mission.
>
> These charges must be fully investigated. Secretary General Kofi Annan's recent announcement that he will undertake a high-level investigation is welcome. But the Secretary General and his staff must understand that the credibility of this investigation will be suspect without diligent efforts to ensure its independence and effectiveness. He must appoint individuals of the highest caliber, internationally recognized for their ability and integrity. The U.N.'s Office of Inspection and Oversight Services' is conducting its own investigation into the possible culpability of U.N. personnel. The executive branch of the U.S. government also should undertake its own investigation. We now have access to records in Iraq, and we have a long and highly developed expertise in contract oversight.

Senator Lugar's statement is available at *http://foreign.senate.gov/testimony/2004/LugarStatement040407.pdf.*

Among those testifying before the committee were Ambassador John Negroponte, U.S. Permanent Representative to the United Nations and Joseph Christoff, Director of International Affairs and Trade at the U.S. General Accounting Office. Ambassador Negroponte addressed U.S. support for the UN inquiry, as excerpted below. The full text of Ambassador Negroponte's remarks is available at *www.un.int/usa/04_047.htm.* Ambassador Negroponte's statement for the record is available at *http://foreign.senate.gov/testimony/2004/NegroponteTestimony040407.pdf.*

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. . . We are committed to ensuring that all allegations are investigated and addressed. . . . Following the recent specific allegations of corruption by UN officials, I was immediately instructed by Secretary Powell to convey our concerns to United Nations Secretary-General Annan. I have discussed this on several occasions with the Secretary-General, who has on his own initiative launched an investigation that is intended to be independent, transparent and comprehensive. As you know, we joined our fellow Security Council members on March 31 in welcoming this expanded investigation and pledging our full cooperation. We must not forget that, allegations aside, it is the Iraqi people who would have been most hurt by any wrongdoing. It is for them most of all that we must take this responsibility very seriously, and we will urge all UN member states to do the same.

The Oil-for-Food program . . . was created to alleviate the hardships faced by the Iraqi people, hardships caused by Saddam Hussein's regime's refusal to comply with its obligations and the resulting comprehensive, multilateral sanctions regime imposed by the Security Council on Iraq following the invasion of Kuwait in August of 1990. The Oil-for-Food Program allowed for the import of humanitarian goods using the proceeds from authorized Iraqi oil sales while maintaining sanctions on imports other than food

and medicine. It represented the largest humanitarian relief operation ever launched by the international community.

The United States supported the program's general objective of creating a system to address the humanitarian needs of the Iraqi civilian population while maintaining strict sanctions enforcement on items that Saddam Hussein could use to re-arm or reconstitute his weapons of mass destruction program. We believe the system the Council devised largely met those objectives. However, the rules and procedures governing implementation of the program were the product of negotiation among the fifteen members of the Security Council and between the United Nations and the former Iraqi regime. The United States was able to set basic parameters and monitor the functioning of the program through our participation in Security Council discussions and as a member of the Iraq Sanctions Committee, also known as the "661 Committee," named for the Security Council resolution that created it. However, we were not in a position to exercise exclusive control over the process, as the Committee made decisions through consensus.

Although the flow of humanitarian and civilian goods to Iraq was a matter of strong interest to the United States government, an even greater goal throughout the period of sanctions was to ensure that no items were imported, which could in any way contribute to Iraq's WMD programs or capabilities. At the United States Mission to the United Nations we concentrated our efforts on this aspect of the sanctions.

* * * *

Recent press reports allege there was corruption and abuse in the implementation of the program. These allegations fall into four general categories:

— first, direct oil smuggling by the former Iraqi regime;
— second, the manipulation of pricing on Iraqi oil exports;
— third, kickbacks on Oil-for-Food Program humanitarian contracts; and
— lastly, possible abuse by United Nations personnel.

At the heart of this were the determined efforts by Saddam Hussein to obtain funds illicitly and hide his sanctions-busting activities.

In the written statement that I submitted for the record, I have provided greater detail about what we know about the allegations in each category. Where we could identify abuse and fraud in the implementation of the Oil-for-Food Program, we and the United Kingdom endeavored to stop them, including through bilateral diplomacy and special briefings to the Security Council and the 661 Committee of the ways in which we observed the Hussein regime diverting funds from the program, smuggling and generally violating Council resolutions. What we did not have before the fall of Saddam's regime was documentation and witnesses who were willing to step forward to provide evidence of corruption. Documentation is now becoming available in the wake of the Saddam Hussein regime's demise. Witnesses are now coming forward who may be able to shed more light on how Saddam Hussein and his supporters evaded sanctions, and on instances of corruption that may have existed in implementing the Oil-for-Food Program.

The independent high-level inquiry initiated by the Secretary-General will shortly get underway. The Terms of Reference have been written and provided to Security Council members. The inquiry will investigate allegations of fraud and corruption in the administration and management of the Oil-for-Food Program, including those against United Nations personnel, contractors and entities that entered into contracts with the UN or with Iraq under the program.

We and other Security Council members have welcomed the Secretary-General's initiative and called for international cooperation. Both the summary and the final report on the findings of this Panel will be made public. We expect announcements soon on the membership of the inquiry panel, and have strongly urged the Secretary-General to ensure that members are of unimpeachable standing. We believe that this inquiry can serve as an important vehicle in addressing various allegations.

* * * *

In his prepared statement, Joseph Christoff presented the conclusions of a report by the Government Accounting Office, "United Nations: Observations on the Oil for Food Program." The introductory summary is provided below. Mr.

Christoff's statement is available at *http://foreign.senate.gov/testimony/2004/Christoff Testimony040407.pdf.*

GAO estimates that from 1997–2002, the former Iraqi regime attained $10.1 billion in illegal revenues from the Oil for Food program, including $5.7 billion in oil smuggled out of Iraq and $4.4 billion through surcharges on oil sales and illicit commissions from suppliers exporting goods to Iraq. This estimate includes oil revenue and contract amounts for 2002, updated letters of credit from prior years, and newer estimates of illicit commissions from commodity suppliers.

Both the U.N. Secretary General, through the Office of the Iraq Program (OIP) and the Security Council, through its sanctions committee for Iraq, were responsible for overseeing the Oil for Food Program. However, the Iraq government negotiated contracts directly with purchasers of Iraqi oil and suppliers of commodities, which may have been one important factor that allowed Iraq to levy illegal surcharges and commissions. While OIP was responsible for examining Iraqi contracts for price and value, it is unclear how it performed this function. The sanctions committee was responsible for monitoring oil smuggling, screening contracts for items that could have military uses, and approving oil and commodity contracts. While the sanctions committee responded to illegal surcharges on oil, it is unclear what actions it took to respond to illicit commis-sions on commodity contracts.

OIP transferred 3,059 Oil for Food contracts—with pending shipments valued at $6.2 billion—to the [Coalition Provisional Authority ("CPA")] on November 22, 2003. However, the CPA stated that it has not received all the original contracts, amendments, and letters of credit it needs to manage the program. These problems, along with inadequate CPA staffing during the transfer, hampered the efforts of CPA's Oil for Food coordination center in Baghdad to ensure continued delivery of commodities. Poor planning, coordination, and the security environment in Iraq continue to affect the execution of these contracts.

Inadequate oversight and corruption in the Oil for Food program raise concerns about the Iraqi government's ability to import

and distribute Oil for Food commodities and manage at least $32 billion in expected donor reconstruction funds. The CPA has taken steps, such as appointing inspectors general, to build internal control and accountability measures in Iraq's ministries. The CPA and the World Food Program (WFP) are also training ministry staff to help them assume responsibility for Oil for Food contracts in July 2004. The new government will have to balance the reform of its costly food subsidy program with the need to maintain food stability and protect the poorest populations.

* * * *

Other investigations

A final report by the special advisor to the Director of Central Intelligence Charles Duelfer was issued on September 30, 2004. The report, entitled "Comprehensive Report of the Special Advisor to the Director of Central Intelligence on Iraq's Weapons of Mass Destruction," and often referred to as the "Duelfer Report," is available at *www.cia.gov/cia/reports/iraq_wmd_2004/chap5.html*. Among other things, the report addresses how Iraq attempted to procure WMD-related equipment despite international sanctions, and the funding mechanisms the regime attempted to develop. It concludes that illicit revenue streams of "more than $11 billion from the early 1990s to [Operation Iraqi Freedom in 2003] outside the UN-approved methods" included "[p]rotocols or government-to-government [economic trade] agreements that generated over $7.5 billion for Saddam . . . ; an additional $2 billion from kickbacks or surcharges associated with the UN's OFF program; $990 million from oil 'cash sales' or smuggling; and another $230 million from other surcharge impositions." *See* Key Findings in chapter entitled "Regime Finance and Procurement" of the Duelfer Report. *See also* testimony by Charles Duelfer before the Senate Committee on Governmental Affairs, Permanent Subcommittee on Investigations, *How Saddam Hussein Abused the United Nations Oil For Food Program*, S. Hrg. 108–761 (Nov. 15, 2004).

At the end of 2004, a number of other investigations initiated by executive agencies and committees in both the House and Senate were under way as well as a separate investigation being conducted by Iraq's Board of Supreme Audit, with the assistance of international accounting firm Ernst and Young. The Iraqi head of the Board was killed in a car bomb in Iraq on July 1, 2004.

2. Syria

On May 11, 2004, President Bush signed Executive Order 13338, entitled "Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria." 69 Fed. Reg. 26,751 (May 13, 2004). The executive order implements the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108–175, 117 Stat. 2482, *see Digest 2003* at 269–70 and 1084–86. A fact sheet issued by the White House Office of the Secretary on May 11 described the sanctions imposed by the executive order.

The full text of the fact sheet, excerpted below, is available at *www.whitehouse.gov/news/releases/2004/05/20040511-7.html.*

President Bush today signed an Executive Order implementing sanctions on Syria pursuant to the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 ("the Act"). With the implementation of these sanctions, the President has demonstrated U.S. resolve to address the Syrian government's support for terrorist groups, its continued military presence in Lebanon, its pursuit of weapons of mass destruction, and its actions to undermine U.S. and international efforts with respect to the stabilization and reconstruction of Iraq.

Implementation of sanctions comes after many months of diplomatic efforts to convince the Syrian government to change its unacceptable behavior. Secretary Powell conveyed U.S. concerns to Syrian President Asad repeatedly, including in their May 2003

meeting. The Syrian government has failed to take significant, concrete steps to address these concerns.

The sanctions include:

- Prohibition on the export to Syria of any items that appear on the United States Munitions List (arms and defense weapons, ammunition, etc.) or Commerce Control List (dual-use items such as chemicals, nuclear technology, propulsion equipment, lasers, etc.);
- Prohibition on the export to Syria of products of the United States, other than food and medicine; and
- Prohibition on aircraft of any air carrier owned or controlled by the Syrian government to take off from or land in the United States.

Under the authority provided in Section 5(b) of the Act, the President has determined that it is in the national security interest of the United States to waive the application of these sanctions in certain cases and for certain products, as specified in the Department of Commerce's General Order No. 2.

In addition to the sanctions provided for under the Act, the President has decided to impose additional sanctions.

- Under Section 311 of the USA PATRIOT Act, the Secretary of the Treasury is to issue a notice of proposed rulemaking with respect to a measure to require U.S. financial institutions to sever correspondent accounts with the Commercial Bank of Syria based on money laundering concerns.
- Pursuant to the International Emergency Economic Powers Act (IEEPA), the President has authorized the Secretary of the Treasury, in consultation with the Secretary of State, to freeze, within the jurisdiction of the United States, assets that belong to certain Syrian individuals and government entities.

The President will consider additional sanctions against the Government of Syria if it does not take serious and concrete steps to cease its support for terrorist groups, terminate its weapons of

mass destruction programs, withdraw its troops from Lebanon, and cooperate fully with the international community in promoting the stabilization and reconstruction of Iraq.

Syria's Record

Terrorism: The Government of Syria provides safe haven to Palestinian rejectionist groups, whose Damascus-based leaderships maintain operational ties with those who conduct acts of terror and violence against Israel. Syria supports and facilitates arms supplies to Hizballah, a terrorist organization that is involved in terrorist acts in the region and around the world. These terrorist groups actively undermine the U.S. goal of a comprehensive peace in the Middle East.

Lebanon: Syrian troops entered Lebanon in 1976. Today, Syria maintains a military presence in Lebanon inconsistent with the spirit of the 1989 Taif Accords, which called for the extension of Lebanese government control over the entire territory of Lebanon.

Weapons of Mass Destruction: Syria has one of the most advanced Arab state chemical weapons capabilities and it is highly probable that Syria continues to develop an offensive biological weapons capability. It has a stockpile of the nerve agent sarin and has engaged in the research and development of more toxic and persistent nerve agents such as VX. In addition, Syria maintains an inventory of Scud and SS-21 short-range ballistic missiles, and is believed to have chemical warheads available for a portion of its Scud missile force. While Syria is a party to the Non-Proliferation Treaty, it has not yet signed the International Atomic Energy Agency's Additional Protocol, which strengthens the IAEA's investigative powers to verify compliance with nuclear safeguards.

Iraq: On the eve of Operation Iraqi Freedom, Syria sent military supplies to Saddam Hussein's forces. While in recent months Syria has taken steps to close its shared border with Iraq, Syria nevertheless remains a preferred transit point for foreign fighters into Iraq. In addition, Syria has failed to transfer the approximately $200 million in frozen Iraqi assets that remain in Syrian banks to the Development Fund for Iraq (DFI), as required under United Nations Security Council resolution 1483 (2003). Paragraph 23

of that resolution requires Member States to freeze and, unless they are the subject of a prior judicial, administrative, or arbitral lien or judgment, immediately transfer to the DFI funds or other financial assets that belonged to the previous Government of Iraq or its state entities or that were removed from Iraq by Saddam Hussein or other senior officials of his regime and their immediate family members. Syria earned an estimated $3 billion in illicit trade with Iraq in violation of United Nations sanctions.

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On May 11, 2004, the Bureau of Industry and Security, U.S. Department of Commerce, issued General Order No. 2 implementing Executive Order 13338 by restricting exports or re-exports to Syria of items subject to the Export Administration Regulations. 69 Fed. Reg. 26,766 (May 14, 2004). In a final rule dated May 28, 2004, the Federal Aviation Administration, U.S. Department of Transportation, further implemented the executive order by "prohibit[ing] takeoffs from or landings in the territory of the United States by any air carrier owned or controlled by Syria when engaged in scheduled international air services, except in the event of an emergency." 69 Fed. Reg. 31,717 (June 4, 2004).

3. Cuba

a. Commission for Assistance to a Free Cuba

(1) Report of the commission

President George W. Bush announced the creation of the interagency Commission for Assistance to a Free Cuba ("CAFC") on October 10, 2003; the CAFC held its first meeting December 10, 2003. *See www.state.gov/p/wha/rls/fs/26976.htm.* On May 6, 2004, the CAFC provided to the President the Report of the Commission for Assistance to a Free Cuba, available at *www.state.gov/p/wha/rt/cuba/commission/2004.* In a press briefing on the release of the report, Roger F. Noriega,

Assistant Secretary of State for Western Hemisphere Affairs, described the report as follows:

> The proposed programs and the initiatives that are outlined in this report are meant to help the U.S. Government prepare to respond to a transition in Cuba. They are not intended to be a prescription for how a free Cuba organizes itself or what policies it decides ultimately to pursue. Those decisions remain with the Cuban people or will be with the Cuban people as expressed by a free and sovereign Cuban Government.
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> * * * *
>
> Those people who continue to do business with or travel to Cuba are prolonging the misery of the Cuban people. There will be a time to do business with and to travel to Cuba, but that should not come at the expense of the well-being of the Cuban people. . . .
>
> A fact sheet issued on May 6 by the White House Office of the Press Secretary described the CAFC and the actions directed by the President in accordance with recommendations of the report. The full text of the fact sheet, excerpted below, is available at *www.state.gov/p/wha/rls/fs/32275.htm*.

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The objectives of United States policy towards Cuba are clear:

- Bring an end to the ruthless and brutal dictatorship;
- Assist the Cuban people in a transition to representative democracy; and
- Assist the Cuban people in establishing a free market economy.

* * * *

Immediate Actions
Hastening the End of the Cuban Dictatorship

1. The President has directed that up to $59 million over the next 2 years be committed to implementing key Commission recommendations including:

- Up to $36 million to carry out democracy-building activities, support for the family members of the political opposition, and to support efforts to help youth, women, and Afro-Cubans take their rightful place in the pro-democracy movement;
- Up to $18 million for regular airborne broadcasts to Cuba and the purchase of a dedicated airborne platform for the transmission of Radio and Television Marti into Cuba; and
- Provide $5 million for public diplomacy efforts to disseminate information abroad about U.S. foreign policy, including Castro's record of abusing human rights, harboring terrorists, committing espionage against other countries, fomenting subversion of democratically-elected governments in Latin America, and other actions which pose a threat to United States national interests.

2. The President has also directed that the following actions be taken to deny resources and legitimacy to the Castro regime:

- Eliminate abuses of educational travel programs through tighter regulations;
- Counter the regime's manipulation of our humanitarian policies by:
  - Limiting recipients of remittances and gift parcels to immediate family members, while denying remittances and gift parcels to certain Cuban officials and Communist Party members;
  - Stepping up law enforcement and sting operations against "mule" networks and others who illegally carry money;

  - Limiting family visits to Cuba to one trip every three years under a specific license to visit immediate family (grandparents, grandchildren, parents, siblings, spouses, and children) (new arrivals from Cuba would be eligible to apply for a license 3 years after leaving Cuba); and
  - Reducing the authorized per diem amount for a family visit (the authorized amount allowed for food and lodging expenses for travel in Cuba) from $164 per day to $50 per day (8 times a Cuban national's likely earnings in a 14-day visit).
- Neutralize Cuban government front companies by establishing a Cuban Asset Targeting Group made up of law enforcement authorities to investigate and identify new ways hard currency moves in and out of Cuba;
- Support and work with NGOs and other interested parties to help Cuban citizens access the Inter-American Commission on Human Rights (IACHR) and to provide in-country training to help to prepare claims for the IACHR;
- Ensure that Cuban independent labor representatives are able to engage with the International Labor Organization, and to draw attention to exploitative labor conditions in Cuba and to assist Cuban workers in obtaining redress; and
- Target regime officials for visa denial if they (1) are or were involved in torture or other serious human rights abuses or (2) provided assistance to fugitives from U.S. justice.

3. The President has directed the establishment of a Transition Coordinator at the State Department to facilitate expanded implementation of pro-democracy, civil-society building, and public diplomacy projects and to continue regular planning for future transition assistance contingencies.

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(2) Implementing regulations

During June and July 2004 the Department of the Treasury and the Department of Commerce issued new rules to implement the recommendations from the CAFC adopted by the President. A fact sheet issued by the Department of State on July 22, 2004, summarized the new rules on travel and exports as set forth in full below (emphasis in the original); *see www.state.gov/p/wha/rls/fs/34617.htm.*

In response to the President's direction to implement recommendations from the Commission for Assistance to a Free Cuba, the Departments of Treasury and Commerce published new rules on Cuba. **These new rules do not affect individuals and NGOs currently licensed to provide humanitarian assistance or support for the Cuban people (e.g., to civil society or religious groups) and they do not impose any more stringent requirements for obtaining such licenses in the future.** The key components of the new rules are as follows:

Family Visits
The rules were amended to eliminate the general license authorizing family visits and to require a specific license to visit certain family members in Cuba; visits are permitted once every three years; living expenses are authorized up to $50 per day plus an additional $50 per trip for travel expenses in Cuba. **These frequency and per diem rules limits apply only to individuals traveling for family visits.**

Remittances
The general license authorizing quarterly remittances was amended to authorize remittances only to certain family members and to prohibit remittances to certain Cuban Communist Party members and Cuban government officials; remittance rate remains $300 per quarter. This rule remains applicable only to remittances to family. **NGOs wishing to provide financial support to civil society or religious organizations or members of such groups can apply for a specific license from OFAC to do so.**

Educational Activities
The educational activities license category was amended to authorize only full semester programs of study in Cuba by accredited graduate and undergraduate institutions and certain of their students. This rule applies only to students, educational institutions, and other individuals engaged in educational activities.

Gift Parcels
The rule authorizing exports of gift parcels to Cuba was amended (1) to limit eligible recipients to include only certain family members, (2) to limit the frequency of non-food gift parcels to once per month per household, and (3) to limit the types of non-food items that may be included in gift parcels. The new rule also prohibits gift parcels to certain Cuban Communist Party members and Cuban government officials. Notably, there are still no frequency or value limits on the amount of food that can be sent in gift parcels to Cuba. **The rules authorizing humanitarian donations by groups or organizations with experience maintaining verifiable delivery systems remain unchanged, as do the rules for licenses to export in support of the Cuban people.**

Baggage
This rule was amended to authorize only 44 pounds of baggage to accompany certain travelers to Cuba. Individuals traveling under an OFAC license to carry out humanitarian projects or a license in support of the Cuban people are exempt from this requirement.

Temporary Sojourn to Cuba
This rule amended the policy for evaluating export applications for aircraft or boats on temporary sojourn to Cuba. Such applications will now be evaluated on a case-by-case basis and approved only for the explicit purpose of delivering humanitarian goods or services, or when it is in the U.S. foreign policy interest.

The final rule issued by the Department of Commerce on revision of export and re-export restrictions on Cuba addressed limits on gift parcels and personal baggage and licensing policy regarding vessels going to Cuba. 69 Fed. Reg. 34,565 (June 22, 2004). Excerpts below from the

Federal Register explain the new limitations on gift parcels referred to above.

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Among other things, the [CAFC] found that, although gift parcels provide a critical humanitarian benefit to the Cuban people, they directly benefit the Castro regime in two ways. Such parcels decrease the burden on the Cuban regime to provide for the basic needs of its people, enabling the regime to dedicate more of its limited resources to strengthening its repressive apparatus. Moreover, through delivery charges, the regime is able to generate additional sources of much needed hard foreign currency. As a result, the Commission set forth a number of recommendations for addressing these issues.

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This rule narrows the list of eligible commodities that can be included in gift parcels to Cuba under License Exception GFT (§ 740.12 of the EAR). The eligible categories are now limited to: food (including vitamins), medicine, medical supplies and equipment (including hospital supplies and equipment and equipment for the handicapped), receive-only radio equipment for reception of commercial/civil AM/FM and short wave publicly available frequency bands, and batteries for such equipment. This rule removes seeds, clothing, personal hygiene items, veterinary medicines and supplies, fishing equipment and supplies, and soap-making equipment from the list of commodities that may be sent to Cuba in gift parcels. This rule does not limit the export of food to Cuba, except for eliminating the use of License Exception GFT to send any item to certain Cuban Communist Party or Government officials.

This rule limits the delivery of gift parcels to Cuba containing items other than food to once per month per household, instead of once per month per individual recipient. A household, for purposes of gift parcels to Cuba, is defined as all individuals living in common at a unique address. This rule also specifies that a gift parcel recipient must be a grandparent, grandchild, parent, sibling, spouse, or child of the donor. Finally, this rule makes License Exception GFT unavailable to send gift parcels to certain Cuban government officials or Communist Party members. This rule is

not intended to limit the ability of non-governmental organizations to provide humanitarian support or assistance to pro-democracy or civil society groups. Therefore, it does not change the "humanitarian donations" provisions of License Exception GFT (§ 740.12(b) of the EAR) nor does it place any new limits on the review policy for applications for licenses for exports and reexports to provide support for the Cuban people as described in § 746.2(b)(4) of the EAR.

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The interim final rule issued by the Office of Foreign Assets Control ("OFAC"), Department of the Treasury, also referenced in the fact sheet above, was issued June 16, 2004. 69 Fed. Reg. 33,768 (June 16, 2004). The rule addressed "fully-hosted travel," importation of Cuban merchandise, exportation of accompanied baggage, travel to visit relatives in Cuba, attendance at certain professional meetings in Cuba, educational activities in Cuba, participation in international sports federation competitions and clinics and workshops licensing policy, quarterly remittances to nationals of Cuba, NGO remittances to Cuba, and remittance-related transactions by banks and other depository institutions, as well as technical and conforming amendments. Excerpts below from the Federal Register explain the changes relating to "fully-hosted travel."

Fully-hosted travel. Section 515.420, the note to paragraph (c) and paragraph (f) of § 515.560, and paragraph (c)(4)(i) of § 515.572 are amended to remove discussion of and references to fully-hosted travel and the presumption that travelers to Cuba pay expenses for Cuba travel-related transactions. The term "fully-hosted travel" refers to travel to, from, or within Cuba for which all costs and fees either are paid for by a third-country national who is not subject to U.S. jurisdiction or are covered or waived by Cuba or a national of Cuba. The term was first introduced into the CACR on July 22, 1982, in § 515.560 of the "Licenses, Authorizations, and Statements of Licensing Policy" subpart. *See* 47 FR 32060. Paragraph (j) of § 515.560 provided that all transactions incident to fully-hosted travel were authorized. On May 13, 1999, OFAC removed this

provision from § 515.560, amended it, and placed it in a new § 515.420, which is in the "Interpretations" subpart of the CACR. see 64 FR 24808.

In the years since the May 13, 1999 amendments, it has been found that persons who claimed their travel was fully-hosted in fact routinely engaged in prohibited money transactions (e.g., payment of entry and exit and docking fees). It has also been determined that even a person who accepts goods or services in Cuba without paying for them is in fact engaging in a prohibited dealing in property in which Cuba or a Cuban national has an interest. Therefore, language regarding fully-hosted travel is removed from the CACR and any authorization of fully-hosted travel is thereby eliminated. Amended § 515.420 now explains that the prohibition in § 515.201(b)(1) on dealing in property includes a prohibition on the receipt of goods or services in Cuba when those goods or services are provided free-of-charge, whether received as a gift from the Government of Cuba, a national of Cuba, or a third-country national, unless otherwise authorized by an OFAC general or specific license. See, e.g., § 515.560(a) of the CACR. Amended § 515.420 also explains that payment for air travel to Cuba on a third-country carrier, which involves property in which Cuba has an interest (for example, because the carrier will pass a portion of the payment on to Cuba), is now prohibited unless the travel is pursuant to an OFAC general or specific license.

Along with the references to fully-hosted travel, the companion language in § 515.420, which states that any person who travels to Cuba without OFAC authorization is presumed to have engaged in prohibited travel-related transactions there, is also removed. Notwithstanding the removal of this language, it is OFAC's position that the receipt of services or other dealings in property in which Cuba has an interest, such as a stay at a Cuban hotel or the purchase of food in Cuba, can be inferred from evidence of multi-day travel in Cuba.

* * * *

The Department of the Treasury, Office of Foreign Assets Control ("OFAC") also published a Federal Register notice on June 16, 2004, amending the terms of licenses already issued

to engage in travel-related transactions incident to visiting close relatives in Cuba. As amended, the licenses terminated no later than June 30, 2004. 69 Fed. Reg. 33,775 (June 16, 2004).

Travel-related transactions and other transactions "directly incident to activities in their official capacities by persons who are officials of the United States Government, any foreign government, or any intergovernmental organization of which the United States is a member and who are traveling on the official business of their government or international organization" continue to be authorized. 64 Fed. Reg. 25,815 (May 13, 1999).

b. Continuation and expansion of national emergency

On February 26, 2004, President George W. Bush issued a notice continuing the national emergency relating to Cuba first declared on March 1, 1996, by Proclamation 6867 (61 Fed. Reg. 8843 (Mar. 5, 1996); *see Cumulative Digest 1991–1999* at 1365–67). 69 Fed. Reg. 9513 (Feb. 27, 2004). On the same date, President Bush issued Proclamation 7757, entitled "Expanding the Scope of the National Emergency and Invocation of Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels into Cuban Territorial Waters." 69 Fed. Reg. 9515 (Mar. 1, 2004). Excerpts from Proclamation 7757 follow.

By the authority vested in me by the Constitution and the laws of the United States of America, in order to expand the scope of the national emergency declared in Proclamation 6867 of March 1, 1996, based on the disturbance or threatened disturbance of the international relations of the United States caused by actions taken by the Cuban government, and in light of steps taken over the past year by the Cuban government to worsen the threat to United States international relations, and,

WHEREAS the United States has determined that Cuba is a state-sponsor of terrorism and it is subject to the restrictions of section 6(j)(1)(A) of the Export Administration Act of 1979,

section 620A of the Foreign Assistance Act of 1961, and section 40 of the Arms Export Control Act;

WHEREAS the Cuban government has demonstrated a ready and reckless willingness to use excessive force, including deadly force, against U.S. citizens, in the ostensible enforcement of its sovereignty, including the February 1996 shoot-down of two unarmed U.S.-registered civilian aircraft in international airspace, resulting in the deaths of three American citizens and one other individual;

WHEREAS the Cuban government has demonstrated a ready and reckless willingness to use excessive force, including deadly force, against U.S. citizens and its own citizens, including on July 13, 1995, when persons in U.S.-registered vessels that entered into Cuban territorial waters suffered injury as a result of the reckless use of force against them by the Cuban military, and including the July 1994 sinking of an unarmed Cuban-registered vessel, resulting in the deaths of 41 Cuban citizens;

WHEREAS the Cuban government has impounded U.S.-registered vessels in Cuban ports and forced the owners, as a condition of release, to violate U.S. law by requiring payments to be made to the Cuban government;

WHEREAS the entry of any U.S.-registered vessels into Cuban territorial waters could result in injury to, or loss of life of, persons engaged in that conduct, due to the potential use of excessive force, including deadly force, against them by the Cuban military, and could threaten a disturbance of international relations;

WHEREAS the unauthorized entry of vessels subject to the jurisdiction of the United States into Cuban territorial waters is in violation of U.S. law and contrary to U.S. policy;

WHEREAS the objectives of U.S. policy regarding Cuba are the end of the dictatorship and a rapid, peaceful transition to a representative democracy respectful of human rights and characterized by an open market economic system;

WHEREAS a critical initiative by the United States to advance these U.S. objectives is to deny resources to the repressive Cuban government, resources that may be used by that government to support terrorist activities and carry out excessive use of force against innocent victims, including U.S. citizens;

WHEREAS the unauthorized entry of U.S.-registered vessels into Cuban territorial waters is detrimental to the foreign policy of the United States, which is to deny monetary and material support to the repressive Cuban government, and, therefore, such unauthorized entries threaten to disturb the international relations of the United States by facilitating the Cuban government's support of terrorism, use of excessive force, and continued existence;

WHEREAS the Cuban government has over the course of its 45-year existence repeatedly used violence and the threat of violence to undermine U.S. policy interests. This same regime continues in power today, and has since 1959 maintained a pattern of hostile actions contrary to U.S. policy interests. Among other things, the Cuban government established a military alliance with the Soviet Union, and invited Soviet forces to install nuclear missiles in Cuba capable of attacking the United States, and encouraged Soviet authorities to use those weapons against the United States; it engaged in military adventurism in Africa; and it helped to form and provide material and political support to terrorist organizations that sought the violent overthrow of democratically elected governments in Central America and elsewhere in the hemisphere allied with the United States, thereby causing repeated disturbances of U.S. international relations;

WHEREAS the Cuban government has recently and over the last year taken a series of steps to destabilize relations with the United States, including threatening to abrogate the Migration Accords with the United States and to close the U.S. Interests Section, and Cuba's most senior officials repeatedly asserting that the United States intended to invade Cuba, despite explicit denials from the U.S. Secretaries of State and Defense that such action is planned, thereby causing a sudden and worsening disturbance of U.S. international relations;

WHEREAS U.S. concerns about these unforeseen Cuban government actions that threaten to disturb international relations were sufficiently grave that on May 8, 2003, the United States warned the Cuban government that political manipulations that resulted in a mass migration would be viewed as a "hostile act;"

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America,

including section 1 of title II of Public Law 65–24, ch. 30, June 15, 1917, as amended (50 U.S.C. 191), sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code, in order to expand the scope of the national emergency declared in Proclamation 6867 of March 1, 1996, and to secure the observance of the rights and obligations of the United States, hereby authorize and direct the Secretary of Homeland Security (the "Secretary") to make and issue such rules and regulations as the Secretary may find appropriate to regulate the anchorage and movement of vessels, and authorize and approve the Secretary's issuance of such rules and regulations, as authorized by the Act of June 15, 1917.

* * * *

On July 8, 2004, the United States Coast Guard ("USCG"), Department of Homeland Security, implemented Presidential Proclamation 7757 in a final rule, effective July 2, 2004, entitled "Unauthorized Entry into Cuban Territorial Waters." 69 Fed. Reg. 41,367 (July 8, 2004). Excerpts below describe the effect of the new rule. *See also* 69 Fed. Reg. 41,366 (July 8, 2004), publishing Secretary of Homeland Security Order 2004–01 directing and authorizing the Commandant of the U.S. Coast Guard, and subject to the direction of the Commandant, the Commanders of Coast Guard Areas or Districts, to implement Proclamation 7757.

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Among other things, Proclamation 7757 authorizes the Secretary of Homeland Security ("the Secretary") to issue rules and regulations to ensure that Coast Guard decisions regarding entry of U.S. vessels into Cuban territorial waters are made in a manner consistent with the decisions of other agencies responsible for economic sanctions enforcement. . . .

* * * *

. . . [I]n order for covered vessels to receive a Coast Guard permit to enter Cuban territorial waters, the Coast Guard will require the permit application to include a copy of a valid and

applicable license issued to the applicant by the U.S. Department of Commerce, Bureau of Industry and Security (BIS), pursuant to the Export Administration Regulations, 15 CFR chapter VII, subchapter C, parts 730–774 for the export of the vessel to Cuba. The Coast Guard will also require the permit application to include a copy of a valid and applicable specific license issued by the U.S. Department of the Treasury (OFAC), pursuant to the Cuban Assets Control Regulations, 31 CFR part 515, authorizing the applicant's travel-related transactions in Cuba. Applicants who do not require such an OFAC specific license are required to make a written certification to that effect identifying which OFAC general license applies or explaining why no OFAC license is required. Applications must provide the documentation required for each person to which this rule applies on board the particular vessel. The Coast Guard will work closely with OFAC and BIS to ensure alignment of effort in the enforcement of the economic sanctions against Cuba. This will allow the Coast Guard to ensure that its decisions on permits for entry into Cuban territorial waters are made in a manner which is consistent with the decisions of those agencies responsible for economic sanctions enforcement.

This rule removes the security zone around the Florida peninsula, because it is no longer necessary as the new rule applies nationwide to all covered vessels and persons within U.S. territorial waters.

* * * *

The Coast Guard has determined that controlling entry of U.S. vessels, and vessels without nationality, into Cuban waters and controlling the departure of U.S. vessels, and vessels without nationality, bound for Cuba is necessary to protect the safety of United States citizens and residents, to improve enforcement of the economic sanctions against the Government of Cuba, and to prevent threatened disturbance of the international relations of the United States.

* * * *

Vessels and persons to which the rule applies cannot move within or depart U.S. territorial waters and thereafter enter Cuban territorial waters without a Coast Guard permit. If issued, the

permit must be kept on board the vessel. The Coast Guard may issue appropriate orders to control the movement and anchorage of all vessels covered by the rule. Additionally, the Coast Guard may remove all persons not specifically authorized by the Coast Guard to go or remain on board covered vessels, may place guards on covered vessels, and may take full or partial possession or control of any such vessel or part thereof. Such actions to be taken are in the discretion of the Coast Guard as deemed necessary to ensure compliance with the provisions of the rule or any other order issued under the authority of the rule. Nothing in this rule precludes the Coast Guard, or any other agency, from taking action pursuant to any other applicable authority.

Even if a covered vessel has not applied for a permit, where there is an articulable basis to believe that the vessel intends to enter Cuban territorial waters, as a condition of moving in or departing from U.S. territorial waters, the Coast Guard has the discretion to require the owner, agent, master, officer, or person in charge, or any member of the crew of any covered vessel to provide verbal assurance to the Coast Guard that the vessel will not enter Cuban territorial waters. Likewise, the Coast Guard may require the owners, agents, masters, officers, or persons in charge of covered vessels to identify all persons on board the vessel and provide verbal assurances that all persons on board have received actual notice of these regulations. The failure of an owner, agent, master, officer, or person in charge, or any member of the crew of any vessel (including all auxiliary vessels) to provide requested verbal assurances shall not be used as the sole basis for seizing the vessel for forfeiture under this rule. Additionally, where there is an articulable basis to believe that a covered vessel located in U.S. territorial waters intends to enter Cuban territorial waters, the Coast Guard may require that the vessel apply for a permit as a condition of departure.

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c. Responses to Cuban UN initiatives

On October 28, 2004, Ambassador Oliver Garza, Area Advisor, U.S. Mission to the United Nations, provided an explanation

of the U.S. vote on agenda item 28: "The Necessity of Ending the Economic, Commercial and Financial Embargo imposed by the United States against Cuba," in the UN General Assembly. The full text of his statement, excerpted below, is available at *www.un.int/usa/04_212.htm.*

The United States trade embargo against Cuba is a bilateral issue that should not come before the General Assembly. The resolution is an attempt to blame the communist regime's failed economic policies on the United States and to divert attention from its human rights record.

Arguments that the United States is denying Cuba access to food and medicine are baseless. Since 1992, the United States has licensed over $1.1 billion dollars in the sales and donations of medicine and medical equipment—80 percent in the form of donations. Moreover, since 2001, the U.S. government has licensed the export of over $5 billion worth of agricultural commodities. In that same period, over $700 million in agricultural commodities have actually been exported to Cuba. Let us remember that the United States is the single largest source of humanitarian assistance to Cuba. Remittances from U.S. persons to Cuba have been estimated at close to $1 billion annually. It is also manifestly true that Cuba can and does buy everything it needs—an estimated $4.3 billion in imports annually—from nations other than the United States.

Let there be no doubt: If Cubans are jobless, hungry, or lack medical care, as the regime admits, it is because of the failings of the current government.

The government has shown no interest whatsoever in implementing any economic or political reform that would lead to democratic change and a free-market economy. A case in point: As of October 1, the Cuban government no longer issues new licenses for 40 different categories of self-employment. That means the government will no longer allow you to run a small restaurant out of your home or even be a clown at a children's party. That is absurd. More recently, the regime imposed confiscatory penalties on the use of dollars in Cuba, reversing a decade-old policy. This kind of economic mismanagement is the reason why a country

that 45 years ago had a per capita income equal to that of Spain is now one of Latin America's most economically desperate.

The Cuban government is not a victim, as it contends. Rather, it is a tyrant, aggressively punishing anyone who dares to have a differing opinion. Castro has steadfastly refused to allow any kind of political opening and continues to deny Cubans the human rights and fundamental freedoms as set forth in the Universal Declaration of Human Rights.

The March 2003 crackdown, in which 75 members of the opposition, including independent journalists, economists, trade unionists, and human rights advocates, were sentenced to an average of 20 years in prison, was brutal even by Cuban standards. The regime continues to harass even those who have been released, subjecting them to near-daily, hours-long interrogations. Cuba has for nearly two years defied the very notion of respecting the will of the High Commissioner for Human Rights by refusing to permit a visit by its personal representative.

As in the past, the Cuban government will once again portray support for this resolution as support for its repressive policies. We, for one, cannot support an economic opening with a country with such an abysmal record on economic and political issues.

We will vote against this draft resolution, and we encourage all delegations to do the same.

4. Liberia

On March 12, 2004, the UN Security Council unanimously adopted Resolution 1532 calling for freezing of the assets of Charles Taylor, his immediate family, and some of the senior officials of the former Liberian Government. In keeping with Resolution 1532, President Bush issued Executive Order 13348 of July 22, 2004, "Blocking Property of Certain Persons and Prohibiting the Importation of Certain Goods from Liberia." 69 Fed. Reg. 44,885 (July 27, 2004). Excerpts from the executive order follow, setting forth the blocking of assets and prohibiting importation of any round log or timber product originating in Liberia.

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.) (NEA), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code, and in view of United Nations Security Council Resolutions 1521 of December 22, 2003, and 1532 of March 12, 2004,

I, GEORGE W. BUSH, President of the United States of America, note that the actions and policies of former Liberian President Charles Taylor and other persons, in particular their unlawful depletion of Liberian resources and their removal from Liberia and secreting of Liberian funds and property, have undermined Liberia's transition to democracy and the orderly development of its political, administrative, and economic institutions and resources. I further note that the Comprehensive Peace Agreement signed on August 18, 2003, and the related ceasefire have not yet been universally implemented throughout Liberia, and that the illicit trade in round logs and timber products is linked to the proliferation of and trafficking in illegal arms, which perpetuate the Liberian conflict and fuel and exacerbate other conflicts throughout West Africa. I find that the actions, policies, and circumstances described above constitute an unusual and extraordinary threat to the foreign policy of the United States and hereby declare a national emergency to deal with that threat. To address that threat, 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)), 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, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:
(i) the persons listed in the Annex to this order; and

(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:
(A) to be or have been an immediate family member of Charles Taylor;
(B) to have been a senior official of the former Liberian regime headed by Charles Taylor or otherwise to have been or be a close ally or associate of Charles Taylor or the former Liberian regime;
(C) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, the unlawful depletion of Liberian resources, the removal of Liberian resources from that country, and the secreting of Liberian funds and property by any person whose property and interests in property are blocked pursuant to this order; or
(D) 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.

(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 or 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 this order, and I hereby prohibit such donations as provided by paragraph (a) of this section.

(c) 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 whose property or interests in property are blocked pursuant to this order, and
(ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 2. Except to the extent 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 effective date of this order, the direct or indirect importation into the United States of any round log or timber product originating in Liberia is prohibited.

* * * *

Sec. 5. For those persons whose property and interests in property are blocked pursuant to section 1 of this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

* * * *

The Office of Foreign Assets Control ("OFAC"), U.S. Department of the Treasury, added entries to its Specifically Designated Nationals list to implement the executive order on July 23, 2004. *See www.treas.gov/offices/enforcement/ofac/sdn/.*

5. Côte d'Ivoire

On November 15, 2004, the UN Security Council, acting under Chapter VII, adopted Resolution 1572, U.N. Doc. S/RES/1572 (2004). In Resolution 1572 the Security Council deplored the resumption of hostilities and violations of the May 3, 2003, ceasefire agreement in Côte d'Ivoire, and expressed its deep concern with the humanitarian situation. Among other things, the resolution imposed an embargo on the export of arms and related material, as well as defense services, with certain exceptions; required states to prevent the entry into or transit through their territories of persons designated by an implementing committee (established in paragraph 14 of the resolution) who "constitute a threat to the peace and national reconciliation process in Côte d'Ivoire"; and also required States to freeze funds and other financial assets and economic resources on their territories owned or controlled by such designated persons, with certain exceptions. At the end of 2004, the asset freezing component had not yet been implemented by the Committee.

In a Federal Register notice dated December 14, 2004, the Department of State, Bureau of Political-Military Affairs, announced that, "in accordance with U.N. Security Council Resolution 1572,"

> it is the policy of the U.S. Government to deny all applications for licenses and other approvals to export or otherwise transfer defense articles and defense services to Côte d'Ivoire. . . . In addition, U.S. manufacturers and exporters and any other affected parties are hereby notified that the Department of State has suspended all previously issued licenses and approvals to export or otherwise transfer defense articles and defense services to Cote d'Ivoire.

69 Fed. Reg. 74,560 (Dec. 14, 2004).

On December 21, 2004, President Bush terminated a 2002 designation of Côte d'Ivoire as a beneficiary sub-Saharan African country under section 506A(a)(1) of the Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1978, 19 U.S.C. § 2466a. Presidential Proclamation 7858, 69 Fed. Reg. 77,603 (Dec. 27, 2004). Côte d'Ivoire had been entitled to certain textile and apparel trade benefits pursuant to that designation and a 2003 determination that the country had "adopted an effective visa system and related procedures to prevent unlawful transshipment and the use of counterfeit documents and that Côte d'Ivoire had implemented and followed, or was making substantial progress toward implementing and following, certain customs procedures that assist the United States Customs Service in verifying the origin of the products," *See* 68 Fed. Reg. 70,333 (Dec. 17, 2003). In Proclamation 7858 the President terminated the designation because he determined that Côte d'Ivoire was not "making continual progress in meeting the requirements described in section 506A(a)(1)"*; the President also amended the

* Section 506A(a)(1) provides as follows:

(a) In general. The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country—

Harmonized Tariff Schedule to reflect this change in status, effective January 1, 2005.

6. Cuba, Sudan, and Iran: Publishing Activities

Effective December 17, 2004, the Office of Foreign Assets Controls ("OFAC"), U.S. Department of the Treasury, issued a final rule revising the Cuban Assets Control Regulations ("CACR") (31 CFR part 515), the Sudanese Sanctions Regulations ("SSR") (31 CFR part 538), and the Iranian Transactions Regulations ("ITR") (31 CFR part 560) to add general licenses pertaining to certain publishing activities. 69 Fed. Reg. 75,468 (Dec. 17, 2004). Excerpts below from

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(1) has established, or is making continual progress toward establishing—
(A) a market-based economy that protects private property rights, incorporates an open rules-based trading system, and minimizes government interference in the economy through measures such as price controls, subsidies, and government ownership of economic assets;
(B) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law;
(C) the elimination of barriers to United States trade and investment, including by—
(i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;
(ii) the protection of intellectual property; and
(iii) the resolution of bilateral trade and investment disputes;
(D) economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of capital markets through micro-credit or other programs;
(E) a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and
(F) protection of internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health[.]

the Federal Register describe the change being made; language similar to that excerpted from the amended CACR was also included for the SSR and ITR.

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The Treasury Department's Office of Foreign Assets Control ("OFAC") is amending the CACR, SSR and ITR to authorize certain activities relating to publishing that otherwise entail the prohibited exportation of services to, or prohibited importation of services from, Cuba, Sudan or Iran.

With certain exceptions, the exportation and importation of information and informational materials to or from any country are exempt from regulation by the President under TWEA and IEEPA. See 50 U.S.C. App. 5(b)(4) and 50 U.S.C. 1702(b)(3), respectively. OFAC is issuing the new general licenses set forth at 31 CFR 515.577, 31 CFR 538.529 and 31 CFR 560.538 to authorize transactions not already exempt from regulation that directly support the publishing and marketing of manuscripts, books, journals, and newspapers, in paper or electronic format.

Each of the general licenses is similar in structure and scope, authorizing a variety of activities relating to publishing with appropriate exceptions, such as those for the governments of each of the sanctioned countries. Section 515.545, a pre-existing general license pertaining to information and informational materials remains in effect, but is being revised to include a note referring to the further authorizations contained in § 515.577.

* * * *

(a) . . . Pursuant to [§ 515.577 of the Cuban Assets Control Regulations], the following activities are not prohibited, provided that persons subject to the jurisdiction of the United States ensure that they are not engaging, without specific authorization, in the activities identified in paragraph (d) of this section:

(1) Commissioning and making advance payments for identifiable written publications not yet in existence, to the extent consistent with industry practice;

(2) Collaborating on the creation and enhancement of written publications;
(3) Augmenting written publications through the addition of items such as photographs, artwork, translation, and explanatory text;
(4) Substantive editing of written publications;
(5) Payment of royalties for written publications;
(6) Creating or undertaking a marketing campaign to promote a written publication; and
(7) Other transactions necessary and ordinarily incident to the publishing and marketing of written publications as described in this paragraph (a).

(b) This section does not authorize transactions involving the provision of goods or services not necessary and ordinarily incident to the publishing and marketing of written publications as described above. For example, this section does not authorize persons subject to the jurisdiction of the United States:

(1) To provide or receive individualized or customized services (including, but not limited to, accounting, legal, design, or consulting services), other than those necessary and ordinarily incident to the publishing and marketing of written publications, even though such individualized or customized services are delivered through the use of information and informational materials;
(2) To create or undertake for any person a marketing campaign with respect to any service or product other than a written publication, or to create or undertake a marketing campaign of any kind for the benefit of the Government of Cuba;
(3) To engage in the exportation or importation of goods, other than information and informational materials, to or from Cuba;
(4) To operate a publishing house, sales outlet, or other office in Cuba; or
(5) To engage in transactions related to travel to, from and within Cuba.

(c) This section does not authorize persons subject to the jurisdiction of the United States to engage the services of publishing houses or translators in Cuba unless such activity is primarily for the dissemination of written publications in Cuba.

(d) This section does not authorize [certain other specified transactions].

(e) Specific licenses may be issued on a case-by-case basis authorizing the travel-related transactions set forth in § 515.560(c) for purposes necessary and ordinarily incident to the publishing and marketing of written publications.

B. TOTAL OR PARTIAL TERMINATION OF SANCTIONS

1. Easing of Sanctions Against Libya

a. Preliminary actions

On December 19, 2003, Libya announced that it would rid itself of weapons of mass destruction and MTCR-class missile programs. *See Digest 2003* at 1068–69. Steps taken to implement this commitment and steps Libya had taken in recent years to address other U.S. and international concerns resulted in significant changes in U.S.-Libyan bilateral relations during 2004. At the end of 2004, U.S. sanctions had been significantly eased, as discussed below, although Libya continued to be designated as a state sponsor of terrorism. *See also Digest 2003* at 160–67 concerning resolution of other issues with Libya and adoption of UN Security Council Resolution 1506, lifting UN sanctions. Steps taken by Libya relating to weapons of mass destruction in 2004 and resulting changes in sanctions under the Arms Export Control Act and Export Administration Regulations are discussed in Chapter 18.C.7. and 10.

On April 23, 2004, the White House announced that it was easing the economic embargo against Libya. As explained in excerpts from the press release of that date below, this action was taken in recognition of steps Libya had taken in eliminating weapons of mass destruction and renouncing

terrorism. The full text of the press release is available at *www.whitehouse.gov/news/releases/2004/04/20040423-9.html. See also www.whitehouse.gov/news/releases/2004/02/20040226-1.html.*

Since December 19 [2003], Libya has taken significant steps eliminating weapons of mass destruction programs and longer range missiles, and has reiterated its pledge to halt all support for terrorism. In the last two months, the Government of Libya has removed virtually all elements of its declared nuclear weapons program, signed the IAEA Additional Protocol, joined the Chemical Weapons Convention, destroyed all of its declared unfilled chemical munitions, secured its chemical agent pending destruction under international supervision, submitted a declaration of its chemical agents to the Organization for the Prevention of Chemical Weapons, ["OPCW"] eliminated its Scud-C missile force, and undertaken to modify its Scud-B missiles.

Officials from the United States, United Kingdom, OPCW, and IAEA, invited by the Libyan government to assist in and verify the elimination of its WMD programs, have received excellent cooperation and support.

Through its actions, Libya has set a standard that we hope other nations will emulate in rejecting weapons of mass destruction and in working constructively with international organizations to halt the proliferation of the world's most dangerous systems. Libyan actions since December 19 have made our country and the world safer.

The President made clear on December 19 that Libya's actions to voluntarily dismantle its WMD and longer range missile programs, as well as renounce terrorism, would open the path to better relations with the United States.

In recognition of the steps it has taken over the last two months to repudiate WMD and to build the foundation for Libya's economic growth and reintegration with the international community, the United States will take the following steps:

Today, the President has terminated the application of the Iran and Libya Sanctions Act ["ILSA"] with respect to Libya, and

the Treasury Department has modified sanctions imposed on U.S. firms and individuals under the authority of the International Emergency Economic Powers Act to allow the resumption of most commercial activities, financial transactions, and investments. U.S. companies will be able to buy or invest in Libyan oil and products. U.S. commercial banks and other financial service providers will be able to participate in and support these transactions.

Controls on exports with respect to Libya will be maintained consistent with Libya's continued presence on the State Sponsors of Terrorism List. Restrictions will continue to apply to exports of dual use items with military potential, including potential for WMD or missile applications. Exports to Libya of defense articles and services on the U.S. Munitions List remain prohibited. Direct air service between the U.S. and Libya and third country code-sharing are not yet authorized, nor is the release of frozen Libyan Government assets.

In conjunction with our enhanced economic relations, we will begin a dialogue on trade, investment, and economic reform, and will take steps to encourage Libya's reintegration with the global market. In particular, we will drop our objection to Libyan efforts to begin WTO accession process.

In recognition of our deepening dialogue and diplomatic engagement on a broader range of issues, the Department of State intends to establish a U.S. Liaison Office in Tripoli, pending Congressional notification. Our protecting power relationship with Belgium, whose support in Tripoli over the years has been greatly appreciated, would end. Direct diplomatic dealings with Libya will reflect the reality on the ground over the last several months of bilateral cooperation and dialogue.

The U.S. will continue to promote humanitarian and joint programs that advance people-to-people ties between America and Libya. As a result of the lifting of commercial restrictions on Libya, Libyan students will be eligible to study in the United States, subject to admission to an American educational institute and meeting the eligibility requirements for a student visa.

A U.S. education delegation will travel to Libya on April 23, to begin consultations on cooperation in the education sector and in educational exchanges.

The United States has underscored to Libya the importance of a complete renunciation of all ties to terrorism. The President's certification to Congress under ILSA that Libya has fulfilled the requirements of relevant United Nations Security Council resolutions relating to the bombing of Pan Am 103 does not prejudge the removal of Libya from the Terrorism List or detract from Libya's obligation to fulfill its continuing Pan Am 103 commitments. The necessity of ending any tie to terrorist groups or activities will continue to be a central issue in relations with Libya.

Assistant Secretary of State for Near Eastern Affairs William Burns will continue our political economic dialogue with Libya on issues that include terrorism, human rights, political and economic modernization, and foreign policy in Africa.

As noted in the press release above, also on April 2 the President terminated the application to Libya of the Iran and Libya Sanctions Act of 1996, Pub. L. No. 104–172; 50 U.S.C. § 1701 note, as amended by Pub. L. No. 107–24 (2001). *See also* Presidential Determination No. 2004–30 determining and certifying that Libya had fulfilled the requirements of UN Security Council Resolutions 731 (1992), 748 (1992), and 883 (1993). 69 Fed. Reg. 24,907 (May 5, 2004).

On the same date, the Office of Foreign Assets Control, Department of the Treasury, issued a general license, available at *www.treas.gov/offices/enforcement/ofac/sanctions/archived_libya.shtml* and referred to in the White House press release. The license authorized certain transactions but provided for the continued blocking of assets and specifically prohibited flights to or from Libya and flights to or from the United States by Libyan air carriers." *See* Chapter 18.C.10 concerning implementation of the general license through amendments to the Export Administration Regulations.

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Earlier in the month, on April 2, 2004, OFAC had amended restrictions on travel and residence transactions related to Libya; *see www.treas.gov/offices/enforcement/ofac/sanctions/libya_gl1a.pdf*. On April 8, 2004, the Department

of Transportation issued Order 2004-4-9 implementing a partial liberalization of aviation restrictions applicable to Libya, available at *www.dot.gov/ost/ogc/subject/faqs/international/Order%202004-4-9.pdf.*

OFAC and the Department of Transportation further liberalized aviation restrictions on August 10, 2004. *See* Department of Transportation Order 2004-8-5 available at *www.dot.gov/ost/ogc/subject/faqs/international/Order%202004-8-5.pdf.*

b. Termination of national emergency

On September 20, 2004, the President found that "the situation that gave rise to the declaration of a national emergency in Executive Order 12543 of January 7, 1986, with respect to the policies and actions of the Government of Libya, and that led to the steps taken in that order and in Executive Order 12544 of January 8, 1986, and Executive Order 12801 of April 15, 1992, has been significantly altered by Libya's commitments and actions to eliminate its weapons of mass destruction programs and its Missile Technology Control Regime (MTCR)—class missiles, and by other developments." The President accordingly revoked Executive Orders 12543, 12544, 12801, and 12538. *See* Executive Order 13357, 69 Fed. Reg. 56,665 (Sept. 22, 2004).

Excerpts below from the President's message to Congress on the termination of the national emergency explain the effect of E.O. 13357 and remaining sanctions in place. 40 WEEKLY COMP. PRES. DOC. 2067 (Sept. 27, 2004). *See also* Chapter 11.G.4.b.(2) concerning action allowing foreign tax credit. These actions did not affect Libya's continued designation as a state sponsor of terrorism nor its designation as a country not fully cooperating with U.S. antiterrorism efforts, with related sanctions. *See* Chapter 3.B.2.a. and c.

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Executive Order 12543 of January 7, 1986, imposed sanctions on Libya in response to policies and actions of the Government of

Libya that constituted an unusual and extraordinary threat to the national security and foreign policy of the United States. Those sanctions were modified in Executive Order 12544 of January 8, 1986, Executive Order 12801 of April 15, 1992, and supplemented Executive Order 12538 of November 15, 1985.

Based on Libya's recent commitments and actions to implement its December 19, 2003, commitment to eliminate its weapons of mass destruction programs and its MTCR-class missiles, and other developments, I have determined that the situation that gave rise to the national emergency declared in Executive Order 12543 has been significantly altered. My order, therefore, terminates that national emergency with respect to Libya and revokes Executive Orders 12543, 12544, and 12801, and lifts the trade, commercial, and travel sanctions imposed against Libya based on that national emergency. The order also revokes Executive Order 12538, which blocked the import of petroleum products refined in Libya into the United States.

While the order formally lifts sanctions under the national emergency with respect to Libya, it will not lift a wide variety of other sanctions imposed on Libya due to its designation as a state sponsor of terrorism under section 620A of the Foreign Assistance Act (restriction on foreign assistance), section 40 of the Arms Export Control Act (restriction on arms exports), and section 6(j) of the Export Administration Act of 1979 (restriction on exports of certain items on the Commodity Control List), as well as other statutory restrictions applicable to Libya.

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A fact sheet of September 20, 2004, from the Office of the Spokesman, U.S. Department of State, provided further details concerning the termination of the national emergency.

The fact sheet, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2004/36328.htm. See also* additional actions during 2004 at *www.treas.gov/offices/enforcement/ofac/sanctions/archived_libya.shtml.*

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Over the last nine months, Libya has worked closely with international organizations including the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons, and has invited the assistance of the United States and United Kingdom, to transparently and verifiably eliminate its WMD and MTCR-class missile programs. . . .

As a result of this effort, concerns over weapons of mass destruction no longer pose a barrier to the normalization of U.S.-Libyan relations. In responding to Libya's announcement on December 19, 2003 that it would voluntarily give up its WMD and MTCR-class missile programs, the President committed to respond to concrete Libyan actions in good faith, noting that Libya "can regain a secure and respected place among the nations and, over time, better relations with the United States."

The Executive Order signed today by the President:

- Terminates the National Emergency declared in 1986 under the International Emergency Economic Powers Act;
- Removes remaining economic restrictions on aviation services with Libya, permitting direct scheduled air service and regular passenger charter flights, subject to standard safety and any other regulatory requirements; and
- Unblocks approximately $1.3 billion in assets frozen under the Libya sanctions program, belonging to both Libyan and non-Libyan entities.

In accordance with a general policy of providing a level playing field for U.S. business in Libya, the President has:

- waived a statutory prohibition in order to enable certain programs of the Departments of Agriculture and Commerce, including export credit guarantee programs. [*See* 69 Fed. Reg. 58,035 (Sept. 29, 2004)].
- determined to waive the prohibition on the ability of U.S. taxpayers to claim foreign tax credits for taxes paid to Libya. [*See* 69 Fed. Reg. 61,703 (Oct. 20, 2004), Chapter 11.G.4.b.(2).]

In the future, this general policy will be furthered through the use of U.S. Government programs such as those administered by the Export–Import Bank of the United States, the Overseas Private Investment Corporation, and the Trade Development Agency. Where necessary, the Administration intends to use statutory waiver authorities—and in some cases seek legislative relief—to overcome statutory restrictions that would otherwise stand in the way of these programs.

Today's actions protect the interests of American victims of Libyan terrorism. We expect the families of the victims of Pan Am 103 to receive over $1 billion in additional compensation under their settlement: money which otherwise would have reverted to Libya. With respect to other cases involving claims of U.S. citizens, Libya has reaffirmed to us that it has a policy of carrying out agreed-upon settlements and responding in good faith to legal cases, and we will hold it to that assurance. The Libyan government also recognizes that assets it owns and is introducing into the U.S. as part of economic normalization could be at risk if it doesn't implement any resulting court judgments.

Libya remains designated a State Sponsor of terrorism. The termination of the national emergency will not effect a wide variety of other sanctions imposed on Libya due to its designation as a State Sponsor of terrorism under 620A of the Foreign Assistance Act (restrictions on foreign assistance), section 40 of the Arms Export Control Act (restrictions on arms exports), and section 6(j) of the Export Administration Act of 1979 (restrictions on exports of certain items on the Commodity Control List), as well as other statutory restrictions applicable to Libya.

2. Sierra Leone and Liberia

On January 15, 2004, President Bush issued Executive Order 13324 terminating the emergency with respect to Sierra Leone and Liberia. 69 Fed. Reg. 2823 (Jan. 20, 2004). The President stated:

> I, GEORGE W. BUSH, President of the United States of America, find that the situations that gave rise to the

> declaration of a national emergency in Executive Order 13194 of January 18, 2001, with respect to Sierra Leone and the expansion of the scope of that emergency in Executive Order 13213 of May 22, 2001, with respect to Liberia, have been significantly altered given that in January 2002 the Government of Sierra Leone, the Sierra Leonean rebel group Revolutionary United Front (RUF), and the United Nations Mission in Sierra Leone declared the war in Sierra Leone to have ended; the parties to the Liberian civil war entered into a Comprehensive Peace Agreement in August 2003; the RUF no longer exists as a military organization; Charles Taylor, who was the prime instigator of violence both in Sierra Leone and in Liberia, has resigned from the Liberian presidency and gone into exile; the Government of Sierra Leone has established a rough diamond certification regime that meets the minimum standards of the Kimberley Process Certification Scheme; and the United States has implemented the Clean Diamond Trade Act (Public Law 108–19), prohibiting the importation into the United States of rough diamonds that are not controlled through the Kimberley Process Certification Scheme, currently including rough diamonds from Liberia. Accordingly, I hereby terminate the national emergency declared and expanded in scope in those two prior orders, revoke those orders, . . .

The Clean Diamond Act (Pub. L. No.108–19, 117 Stat. 631 (2003), 19 U.S.C. § 3901 note, *see Digest 2003* at 704) referred to in the order implemented the Kimberly Process Certification Scheme, in keeping with UN Security Council Resolution 1521 of December 23, 2003. In Resolution 1521 the Security Council once again "decide[d] that all States shall take the necessary measures to prevent the direct or indirect import of all rough diamonds from Liberia to their territory, whether or not such diamonds originated in Liberia." *See* A.4. *supra* for subsequent executive order imposing trade sanctions related to Liberia.

Cross-references

Revocation of Passport Restrictions on Libya, **Chapter 1.B.1.**
Terrorism sanctions, **Chapter 3.B.2.**
Counternarcotics sanctions, **Chapter 3.B.4.**
Money-laundering sanctions, **Chapter 3.B.5.b.**
Trafficking in persons sanctions, **Chapter 3.B.5.b.(1).**
Related to International Criminal Court, **Chapter 3.C.3.e.(2).**
Non-proliferation sanctions, **Chapter 18.C.6.**

CHAPTER 17

International Conflict Resolution and Avoidance

A. PEACE PROCESS AND RELATED ISSUES

1. Haiti

Efforts to resolve the political crisis in Haiti continued during the first months of 2004. On January 9, 2004, the United States "condemned the actions of the Haitian Government" in responding to political demonstrations on January 7 in Port-au-Prince. In a press statement, Richard Boucher, U.S. Department of State Spokesman, stated that the involvement of some elements of the police and the actions of "government-sponsored gangs" in attacking demonstrators and causing damage in the capital "contradict the government's own declarations that it seeks compromise and a peaceful resolution of Haiti's political crisis. . . . The Government of Haiti must end immediately its efforts to suppress peaceful dissent, must punish those who commit violent acts of repression, and must undertake the fundamental reforms necessary to restore the rule of law in Haiti, in accordance with OAS Resolution 822." The press statement is available at *www.state.gov/r/pa/prs/ps/2004/28036.htm*. *See Digest 2002* at 926–31 concerning adoption of Resolution 822*; see also Digest 2003* at 942–43.

On February 5, 2004, a group sometimes known as the Artibonite Resistance Front seized control of the town

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of Gonaïves. On February 13 the United States joined the Caribbean Community ("CARICOM"), the Organization of American States ("OAS") and Canada, to issue a statement on Haiti, set forth below. The joint statement is available at *www.state.gov/r/pa/prs/ps/2004/29386.htm*.

We have met today to coordinate efforts to support a peaceful, negotiated, democratic, and constitutional resolution to the political crisis in Haiti. We share deep concern over the suffering of the people of Haiti, and deplore the loss of life that has occurred in the latest wave of violence and lawlessness. We condemn such violence and call on the Government of Haiti to respect the rights, especially the human rights, of all citizens and residents of Haiti, and call on all Haitians to respect the rule of law. We call also on the Government of Haiti and on all others to ensure that supplies of fuel, food and medicines are able to reach the people who need them throughout the country.

We urge the Government of Haiti to implement the actions to which it has committed itself under OAS Resolutions 806, 822, and 1959, and as reiterated by its adherence to the current initiative begun by the Caribbean Community. Only through urgent implementation of the confidence-building measures outlined in these documents can consensus be built to allow a resolution of Haiti's political crisis, in accordance with the Inter-American Democratic Charter.

We call specifically on the political opposition and civil society to act responsibly, refrain from violence and fulfill their responsibilities and engage in the democratic process in accordance with the CARICOM proposal.

As the Government of Haiti moves forward on these measures, the international community will undertake renewed efforts to restore the rule of law, including professionalization of the Haitian National Police. Through these steps, we expect all Haitians to be able to again enjoy their constitutionally-mandated freedoms and participate meaningfully in the democratic process.

On February 25, 2004, President Bush reported to Congress that he had responded to a "climate of insecurity for the U.S. Embassy and its supporting facilities in Port-au-Prince, Haiti," by sending a combat-equipped security force of about 55 U.S. military personnel to Haiti to augment the Embassy security forces. The President stated that "[a]lthough the U.S. forces are equipped for combat, this movement was undertaken solely for the purpose of protecting American citizens and property." 40 WEEKLY COMP. PRES. DOC. 284 (Mar. 1, 2004).

President Jean-Bertrand Aristide resigned as president of Haiti on February 29, 2004, and Supreme Court President Boniface Alexandre was sworn in as interim head of state in accordance with Haiti's constitution. A statement by Spokesman Richard Boucher is set forth in full below and is available at *www.state.gov/r/pa/prs/ps/2004/29990.htm. See also* statement by President Bush on the same date, available at 40 WEEKLY COMP. PRES. DOC. 310 (Mar. 8, 2004).

Jean-Bertrand Aristide has resigned as president of the Republic of Haiti, submitting a letter of resignation before departing Port-au-Prince safely early this morning. At President Aristide's request, the United States facilitated his safe departure from Haiti.

In conformity with Haiti's constitution, Supreme Court President Boniface Alexandre has been sworn in as head of state until presidential elections are held. We have been informed that Prime Minister Yvon Neptune will continue to serve as Haiti's head of government until a successor is appointed in the next days, within the framework of the Caribbean Community (CARICOM) Plan of Action.

We call on all Haitians to respect this peaceful and constitutional succession and to refrain from any actions that will undermine national reconciliation. We urge all Haitians to cooperate with the international community as it supports measures to build a more just society and to help defeat the scourge of poverty and disease.

The decision by President Aristide to resign resolves the political impasse that is the root of the violent unrest in Haiti in recent weeks. Therefore, the United States will deploy a contingent of U.S. Marines as the initial contingent of a multinational interim force. We have been informed that several other countries are prepared to move quickly to join this mission.

During the course of the day we will continue consulting with our partners in CARICOM and the Organization of American States, as well as Canada and France, to seek a resolution of the United Nations Security Council authorizing international support for a peaceful and constitutional transition in Haiti. As envisaged under the CARICOM plan, the international community will facilitate the urgent formation of an independent government that will represent the interests of all of the Haitian people.

Also on February 29, the UN Security Council adopted Resolution 1529 (U.N. Doc. S/RES/1529 (2004)), in which, acting under Chapter VII, it "[c]all[ed] on Member States to support the constitutional succession and political process now under way in Haiti and the promotion of a peaceful and lasting solution to the current crisis" and demanded that "all the parties to the conflict in Haiti cease using violent means." In addition, the resolution authorized "the immediate deployment of a Multinational Interim Force for a period of not more than three months from adoption of this resolution" and declared "its readiness to establish a follow-on United Nations stabilization force to support continuation of a peaceful and constitutional political process and the maintenance of a secure and stable environment . . ."

In a letter to Congress dated March 2, 2004, President Bush reported as follows concerning U.S. involvement. 40 WEEKLY COMP. PRES. DOC. 317 (Mar. 8, 2004).

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On February 29, 2004, approximately 200 additional U.S. combat-equipped, military personnel from the U.S. Joint Forces Command deployed to Port-au-Prince, Haiti, to secure key facilities, to facilitate

the continued repatriation of Haitian migrants, to help create conditions in the capital for the anticipated arrival of the Multinational Interim Force, to protect American citizens as may be required, and for other purposes consistent with United Nations Security Council Resolution 1529 (2004). I anticipate additional combat-equipped military personnel will be deployed to Haiti until the situation in Haiti stabilizes. The forces that the United States deployed and continues to deploy will be part of the Multinational Interim Force.

It is anticipated U.S. forces will redeploy when the Mulitnational Interim Force has transitioned to a follow-on United Nations stabilization force.

I have taken this action pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. I am providing this report as part of my efforts to keep the Congress informed, consistent with the War Powers Resolution.

On March 4, 2004, a Tripartite Council was formed, consisting of one representative each from Artistide's Fanmi Lavalas Party, the opposition movement's Democratic Platform, and the international community. Gerard Latortue was installed as Prime Minister of the Interim Government of Haiti on March 17, upon recommendation to President Alexandre from the Council of Eminent Persons, a seven-member council chosen by the Tripartite Council.

The United States welcomed the Security Council's creation of a follow-on force, the United Nations Stabilization Mission in Haiti ("MINUSTAH") on April 30, 2004. U.N. Doc. S/RES/1542 (2004). *See www.un.int/usa/04_070.htm.* In Resolution 1542 the Security Council, acting under Chapter VII, established MINUSTAH for an initial period of six months "with the intention to renew for further periods." Transfer of authority from the U.S.-led Multinational Interim Force to MINUSTAH, under Brazilian leadership, took place over the course of June-August, 2004. On November 29, 2004, the Security Council extended the mandate of MINUSTAH until June 1, 2005, again with the stated intention of renewal. U.N. Doc. S/RES/1576 (2004). *See*

Department of State fact sheet available at *www.state.gov/p/io/fs/2004/48612.htm*.

2. Ethiopia-Eritrea

On January 21, 2004, Deputy Spokesman Adam Ereli, U.S. Department of State, issued a statement calling on Ethiopia and Eritrea to live up to their obligations under the peace accord signed by the two countries in Algiers in December 2000, excerpted below. The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2004/28294.htm*.

The United States is concerned about the possibility of renewed hostilities between Ethiopia and Eritrea, which would have dire consequences for the people of the two countries in relations and programs with the United States.

The Algiers Peace Accord, ending the Ethiopian Eritrean conflict, must be respected without qualification. Both Ethiopia and Eritrea agreed to accept unequivocally the Eritrea Ethiopia Boundary Commission's decision as final and binding. The United States expects each government to uphold its commitment to abide by this agreement. The United States urges both parties to implement the Eritrea Ethiopia Boundary Commission's decision peacefully, fully and without delay. As the process moves forward, communication directly between the two countries will be imperative.

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3. Great Lakes

On July 19, 2004, the United States released the text of a communiqué agreed to by the Democratic Republic of the Congo, Rwanda, and Uganda, in Washington, D.C., addressing peace in the Great Lakes region. The communiqué is set forth below and available at *www.state.gov/r/pa/prs/ps/2004/34472.htm*.

The representatives of the Democratic Republic of the Congo, Rwanda, and Uganda, with the facilitation efforts of the United States, met in Washington, DC on July 14–15, 2004, the second meeting of these parties.

The three Great Lakes countries, in order to enhance peace in the region, reaffirmed their commitment to existing agreements and resolved to:

- Continue to work on the Joint Verification Mechanism as agreed in Abuja and Addis Ababa;
- Disarm armed groups, including in particular genocidal forces, with the assistance of an international force; and,
- Normalize the security situation along the common borders between the Democratic Republic of the Congo and its neighbors, and that each state commits itself not to train, harbor on its territory, or render any form of support to elements or armed opposition movements seeking to destabilize the three countries.

The three Great Lakes countries further noted their appreciation for the support of the United States government and its continued commitment to facilitate the establishment of a trilateral mechanism to foster cooperation in the region.

The three Great Lakes countries declared their commitment to promote the strengthening of relations and the creation of a mechanism to address regional instability and resolved to:

- Enhance their efforts to prevent the use of their territories to arm and support negative forces in the region;
- Continue to encourage the return of refugees in the region to their country of origin;
- Support the transitional government of the Democratic Republic of the Congo;
- Move forward with a process of political and diplomatic rapprochement; and,
- Support institution building to help support peace and stability in eastern Congo.

4. Middle East

a. International Court of Justice advisory opinion

On January 30, 2004, at the invitation of the Court, the United States submitted a written statement to the International Court of Justice ("ICJ") concerning the request by the UN General Assembly for an advisory opinion on the question of the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory." In its submission, the United States reiterated its opposition to the adoption of the referral resolution in the General Assembly because the "United States believes that the giving of an advisory opinion in this matter risks undermining the peace process and politicizing the Court." The statement also expressed the U.S. view that "in deciding whether to address the different issues that may be presented in written and oral submissions, the Court should give due regard to the principle that advisory opinion jurisdiction is not intended as a means of circumventing the rights of States to determine whether to submit their disputes to judicial settlement." The full text of the U.S. submission to the ICJ, excerpted below (footnotes omitted), is available at: *www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm. See Digest 2003* at 949–51 concerning the U.S. vote against the adoption of UN General Resolution ES-10/14 requesting the advisory opinion (U.N. Doc. A/RES/ES-10/14 (2003)).

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1.1 In its Order dated 19 December 2003, this Court invited States to submit written statements on the question of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The United States submits this Statement to apprise the Court of the Middle East peace process for which the United States shares responsibility and to identify concerns it has regarding the Court's consideration of the General Assembly's request for an advisory opinion.

1.2 The United States is a co-sponsor, along with the Russian Federation, of the Middle East peace process initiated at the 1991 Madrid Conference. Since 2002, the United States, together with the Russian Federation, the European Union and the United Nations Secretary-General, has worked as a member of the Quartet to promote a peaceful, negotiated resolution of the Israeli-Palestinian conflict within the framework of the Madrid Conference principles. The goal of this process is a comprehensive peace that will include not only Israel and a new Palestinian State, but also Lebanon and Syria.

1.3 Both the United Nations General Assembly and the United Nations Security Council have endorsed the Quartet's "Performance-based Road Map to a Permanent Two-State Solution to the Israel-Palestinian Conflict" (the "Roadmap"). The General Assembly and Security Council have also called upon the Israelis and Palestinians to fulfill their responsibilities under the Roadmap in cooperation with the Quartet to achieve the vision of two States living side by side in peace and security. Thus, the United States, as a co-sponsor of the Madrid peace process and as a member of the Quartet, has an important role in assisting the efforts to achieve peace between Israelis and Palestinians under relevant United Nations resolutions and previous agreements between the parties.

1.4 In light of this role the United States submits this Statement. As made clear in its statement in opposition to the adoption of the referral resolution in the General Assembly, the United States believes that the giving of an advisory opinion in this matter risks undermining the peace process and politicizing the Court. The United States also feels a special responsibility to bring to the Court's attention the essential elements of the Madrid peace process, particularly as it pertains to resolving the Israeli-Palestinian conflict. This Statement therefore initially describes the Roadmap and the negotiating process it embodies (Chapter II: Background). In this context it is possible to evaluate the General Assembly's request and its relationship to the negotiations designed to bring peace to the area.

1.5 The Statement next identifies some of the key factors relevant to the Court's decision whether to provide an advisory opinion

(Chapter III: Considerations Relating to the Judicial Propriety of Giving an Advisory Opinion). Because of the manner in which this proceeding has arisen, including the formulation of the question, it is not clear what issues might be engaged in this case. The United States therefore wishes to emphasize that, in deciding whether to address the different issues that may be presented in written and oral submissions, the Court should give due regard to the principle that advisory opinion jurisdiction is not intended as a means of circumventing the rights of States to determine whether to submit their disputes to judicial settlement. As the Court has itself recognized, this principle is important to preserve the independence and sovereign rights of States and to maintain the appropriate judicial character of the Court in an advisory opinion context. The United States believes this principle has special importance where there is an established framework for addressing disputed issues through a negotiating process.

1.6 Finally, this Statement highlights two key aspects of the Middle East peace process that the United States does not believe the General Assembly's resolution invites the Court to disturb (Chapter IV: Considerations Relating to the Negotiating Process More Generally). First, it is a fundamental principle of this process that the permanent status issues at the core of the Israeli-Palestinian conflict are, by agreement and under the applicable international framework, to be resolved through negotiations by the parties to the dispute. It would be inconsistent with the resolutions of the Security Council and the General Assembly, and create a serious risk to the peace process, if any party unilaterally, or this Court, were to seek to determine the outcome of any of the permanent status issues.

1.7 Second, Israelis and Palestinians must fulfill their security responsibilities, separately and in coordination and cooperation with one another. These responsibilities are spelled out in their prior agreements. All parties and international organizations must continue to emphasize the responsibility of both Israelis and Palestinians to fulfill their security undertakings in order for the peace process to succeed.

* * * *

4.8 As reflected in the "Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13", the dispute between the Israelis and Palestinians over Israel's construction of a barrier centers largely on their different views of how to address the problem of terrorist attacks against Israel. Should the Court deem it appropriate to consider the issues underlying this dispute, it is crucial that in doing so it emphasize the responsibilities of both parties to address this serious threat to the Roadmap and the overall peace process.

4.9 . . . [T]he first phase of the Roadmap is entitled "Ending Terror and Violence, Normalizing Palestinian Life, and Building Palestinian Institutions". . . .

4.10. The focus in the Roadmap on the need for viable and effective security measures between the parties is consistent with their previously concluded agreements. The Interim Agreement, which established the framework for security cooperation in the West Bank, . . . provides generally that . . . "Both sides shall take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against each other, against individuals falling under the other's authority, and against their property and shall take legal measures against offenders."

* * * *

4.12. The Interim Agreement sets out in detail the respective security responsibilities of each party in its area of operation. . . .

4.13. Against this complex backdrop, it is essential that the Court . . . not call into question the detailed security arrangements previously agreed upon by the parties. To do so could create a vacuum, which either or both sides might feel compelled to fill unilaterally. This could further reduce the prospects for ending violence and restarting the negotiating process. Even more seriously, it could embolden those opposed to peace in their violent efforts to disrupt the process. It is vital . . . that both the Israelis and Palestinians carry out their security responsibilities, while at the same time addressing their other obligations under the Roadmap. Since this view is shared by the General Assembly, the Court should treat this as part of the essential framework for addressing the General Assembly's question.

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5.4 The matter referred by the General Assembly to the Court—the barrier under construction by Israel—is of concern to the United States. But so is protecting the peace process agreed upon by the parties and endorsed by the Security Council and the General Assembly. For that reason, the United States respectfully requests that the Court consider the points in this submission carefully in deciding how to respond to the General Assembly's request to ensure that nothing it might do undermines the Roadmap or the negotiating process. Meanwhile, with the other members of the Quartet, the United States will continue its own efforts to promote progress in implementing the Roadmap so that issues such as barriers give way to normal, peaceful relations between two equal, sovereign States.

* * * *

On July 9, 2004, the ICJ announced its decision to comply with the request for an opinion, and concluded, in paragraph 163 of its advisory opinion, among other things, that the "construction of the wall being built by Israel . . . and its associated régime, are contrary to international law" and that Israel "is under an obligation to terminate its breaches of international law," including dismantling the wall and repealing "legislative and regulatory acts relating thereto" as well as to make reparations. *See www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.*

On July 16, 2004, in a statement to the UN General Assembly, meeting in the tenth emergency special session, Ambassador John C. Danforth explained the opposition of the United States to a draft resolution endorsing the decision of the ICJ. A revised version of the resolution, which "acknowledged" the opinion and demanded that Israel comply with its legal obligations "as mentioned" in the opinion, was adopted by the UNGA on August 2, 2004, over a U.S. negative vote. U.N. Doc. A/Res/ES-10/15.

The full text of Ambassador Danforth's statement is available at *www.un.int/usa/04_130.htm.*

The resolution before us and the opinion of the International Court of Justice it endorses point away from a political solution to the Israel-Palestinian conflict that would embody the vision of two states, Israel and Palestine, living side by side in peace and security. We must reject the resolution.

If there is to be a solution to the tragedy of the Middle East, it must be political, entailing the agreement by both parties to a reasonable compromise. The judicial process is not the political process, and the International Court of Justice was not the appropriate forum to resolve this conflict. The nature of a political solution is balance. The claims of each side must be accommodated, or there can be no agreement.

The resolution before us is not balanced. It is wholly one-sided. It does not mention the threat terrorists pose to Israel. It follows a long line of one-sided resolutions adopted by the General Assembly, none of which has made any contribution to peace in the Middle East. Last year, the General Assembly adopted more than twenty such resolutions.

The resolution before us is the very opposite of the measures outlined in the Roadmap to peace, endorsed by the UN Security Council.

In implementing the Roadmap, the two parties would achieve progress through reciprocal steps by the two parties in the political, security, economic, humanitarian and institution-building fields. The destination is a final and comprehensive settlement of the Israel-Palestinian conflict and the emergence of an independent, democratic and viable Palestinian state living side by side in peace and security with Israel.

The Court itself stressed that the only way forward is through a negotiated solution, and emphasized the importance of the Roadmap in this respect. The resolution before us points in the opposite direction.

Some members have pointed out that the opinion of the International Court of Justice is complex, and that it requires careful analysis. The rush to pass this resolution, just one week after the Court's opinion and after only hours of debate denies us the time for reflection that such a critical subject deserves.

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b. Israeli disengagement plan

On April 14, 2004, Israeli Prime Minister Ariel Sharon exchanged letters with President Bush at the White House concerning resolution of the Israeli-Palestinian dispute. In remarks to the press with Prime Minister Sharon, President Bush stated:

> Israel plans to remove certain military installations and all settlements from Gaza, and certain military installations and settlements from the West Bank. These are historic and courageous actions. If all parties choose to embrace this moment they can open the door to progress and put an end to one of the world's longest running conflicts.

The text of President Bush's letter is set forth below and available at *www.whitehouse.gov/news/releases/2004/04/20040414-3.html. See also* statement of the same date by President Bush at *www.whitehouse.gov/news/releases/2004/04/20040414-2.html.* A June 6, 2004, statement by the White House Office of the Press Secretary welcoming the Government of Israel's decision to approve Prime Minister Sharon's disengagement plan is available at *www.whitehouse.gov/news/releases/2004/06/20040606-4.html.*

Thank you for your letter setting out your disengagement plan.

The United States remains hopeful and determined to find a way forward toward a resolution of the Israeli-Palestinian dispute. I remain committed to my June 24, 2002 vision of two states living side by side in peace and security as the key to peace, and to the roadmap as the route to get there.

We welcome the disengagement plan you have prepared, under which Israel would withdraw certain military installations and all settlements from Gaza, and withdraw certain military installations and settlements in the West Bank. These steps described in the plan will mark real progress toward realizing my June 24, 2002 vision, and make a real contribution towards peace. We also understand

that, in this context, Israel believes it is important to bring new opportunities to the Negev and the Galilee. We are hopeful that steps pursuant to this plan, consistent with my vision, will remind all states and parties of their own obligations under the roadmap.

The United States appreciates the risks such an undertaking represents. I therefore want to reassure you on several points.

First, the United States remains committed to my vision and to its implementation as described in the roadmap. The United States will do its utmost to prevent any attempt by anyone to impose any other plan. Under the roadmap, Palestinians must undertake an immediate cessation of armed activity and all acts of violence against Israelis anywhere, and all official Palestinian institutions must end incitement against Israel. The Palestinian leadership must act decisively against terror, including sustained, targeted, and effective operations to stop terrorism and dismantle terrorist capabilities and infrastructure. Palestinians must undertake a comprehensive and fundamental political reform that includes a strong parliamentary democracy and an empowered prime minister.

Second, there will be no security for Israelis or Palestinians until they and all states, in the region and beyond, join together to fight terrorism and dismantle terrorist organizations. The United States reiterates its steadfast commitment to Israel's security, including secure, defensible borders, and to preserve and strengthen Israel's capability to deter and defend itself, by itself, against any threat or possible combination of threats.

Third, Israel will retain its right to defend itself against terrorism, including to take actions against terrorist organizations. The United States will lead efforts, working together with Jordan, Egypt, and others in the international community, to build the capacity and will of Palestinian institutions to fight terrorism, dismantle terrorist organizations, and prevent the areas from which Israel has withdrawn from posing a threat that would have to be addressed by any other means. The United States understands that after Israel withdraws from Gaza and/or parts of the West Bank, and pending agreements on other arrangements, existing arrangements regarding control of airspace, territorial waters, and land passages of the West Bank and Gaza will continue. The United States is strongly committed to Israel's security and well-being as

a Jewish state. It seems clear that an agreed, just, fair, and realistic framework for a solution to the Palestinian refugee issue as part of any final status agreement will need to be found through the establishment of a Palestinian state, and the settling of Palestinian refugees there, rather than in Israel.

As part of a final peace settlement, Israel must have secure and recognized borders, which should emerge from negotiations between the parties in accordance with UNSC Resolutions 242 and 338. In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949, and all previous efforts to negotiate a two-state solution have reached the same conclusion. It is realistic to expect that any final status agreement will only be achieved on the basis of mutually agreed changes that reflect these realities.

I know that, as you state in your letter, you are aware that certain responsibilities face the State of Israel. Among these, your government has stated that the barrier being erected by Israel should be a security rather than political barrier, should be temporary rather than permanent, and therefore not prejudice any final status issues including final borders, and its route should take into account, consistent with security needs, its impact on Palestinians not engaged in terrorist activities.

As you know, the United States supports the establishment of a Palestinian state that is viable, contiguous, sovereign, and independent, so that the Palestinian people can build their own future in accordance with my vision set forth in June 2002 and with the path set forth in the roadmap. The United States will join with others in the international community to foster the development of democratic political institutions and new leadership committed to those institutions, the reconstruction of civic institutions, the growth of a free and prosperous economy, and the building of capable security institutions dedicated to maintaining law and order and dismantling terrorist organizations.

A peace settlement negotiated between Israelis and Palestinians would be a great boon not only to those peoples but to the peoples of the entire region. Accordingly, the United States believes that

all states in the region have special responsibilities: to support the building of the institutions of a Palestinian state; to fight terrorism, and cut off all forms of assistance to individuals and groups engaged in terrorism; and to begin now to move toward more normal relations with the State of Israel. These actions would be true contributions to building peace in the region.

Mr. Prime Minister, you have described a bold and historic initiative that can make an important contribution to peace. I commend your efforts and your courageous decision which I support. As a close friend and ally, the United States intends to work closely with you to help make it a success.

Representatives of the Quartet, UN Secretary General Kofi Annan, Foreign Minister Sergey Lavrov of the Russian Federation, Foreign Minister Brian Cowen of Ireland in the Capacity of EU Presidency, High Representative for Common Foreign and Security Policy of the EU Javier Solana, European Commissioner for External Relations Chris Patten, and U.S. Secretary of State Colin L. Powell, met at the United Nations on May 4, 2004. In an exchange with a reporter at a joint press conference on that date, Secretary of State Powell addressed the relationship between the April 14 exchange of letters and the Quartet's Roadmap.

The full text of the press conference, excerpted below, is available at *www.state.gov/r/pa/prs/ps/2004/32161.htm*.

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If you look carefully at the exchange of letters and statements of President Bush and Prime Minister Sharon, you'll see a commitment to not prejudging final status issues; you will see a commitment to final status issues being resolved by agreement between the two parties; you will see a commitment to 242, 338 and the other relevant resolutions; you will see a commitment to the roadmap process.

Nothing anticipated . . . , as we go forward, will be inconsistent with the roadmap. So if you read carefully what the President said, and what he put into the letter to Prime Minister Sharon, you will see that it is all consistent with what we are doing here today.

And, in fact, what we have done here today is note the new opportunity that exists for progress in the Middle East because, for the first time, we have an Israeli Prime Minister who has stood up and said that he wants to evacuate the settlements: . . . 21 in Gaza and 4 in the West Bank.

. . . In the process of discussing this matter with the Israelis, the President and the Prime Minister took into account certain realities that we believed were appropriate to be taken into account with respect to right of return and with respect to alignment of the armistice lines that might be appropriate.

Previous negotiations knew that these features would have to be taken into account, these realities would have to be taken into account, and any future negotiations would have to take them into account. And the President made it explicit.

I think what we have to look at now is how to move forward, and that's what the Quartet was focused on today: how to take advantage of this new opportunity of the evacuation of settlements, as opposed to just relying on the statements of the past, but something that can actually occur—the evacuation of settlements—and how we can get the Palestinians ready to take advantage of this opportunity and to get back into the roadmap, get back on the path to peace.

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On May 19, 2004, a statement by the White House Office of the Press Secretary expressed "deep[]regret [for] the loss of life of innocent Palestinian civilians today in Gaza" during an Israeli raid in which ten Palestinians were reported killed. The statement continued:

> While we believe that Israel has the right to act to defend itself and its citizens, we do not see that its operations in Gaza in the last few days serve the purposes of peace and security. They have worsened the humanitarian situation and resulted in confrontations between Israeli forces and Palestinians, and have not, we believe, enhanced Israel's security.

See www.state.gov/p/nea/rls/32760.htm.

c. Statements concerning role of UN bodies

On September 14, 2004, the Department of State released a fact sheet reiterating its commitment to the Roadmap to peace in the Middle East and its views on the need for balance in the UN General Assembly treatment of the Israeli-Palestinian conflict.

The fact sheet, set forth below, is available at *www.state.gov/p/io/fs/2004/36411.htm*. On issues related to the roadmap, *see also* Mideast Roadmap website maintained by the United Nations at *www.un.org/apps/news/infocusRel.asp?infocusID=70&Body=Palestin&Body1=*.

The United States continues to actively pursue President Bush's goal of Israel and Palestine living together in peace and security. To this end, the U.S. is working to achieve the goals of the Roadmap, which is a performance-based approach to a permanent two-state solution to the Israeli-Palestinian conflict.

The 58th UN General Assembly adopted 21 resolutions concerning the Israeli-Palestinian conflict. Many of those resolutions implied that only Israel has obligations and responsibilities to make peace. They failed to address both sides of the larger security context of the Middle East, including devastating suicide attacks against Israel. One-sided resolutions only serve to undermine the ability of the United Nations to play a constructive role in promoting peace. We believe all resolutions on Israeli-Palestinian peace should reflect the balance of mutual responsibilities embodied by the Roadmap.

The Roadmap, endorsed in Security Council Resolution 1515, outlines the obligations and responsibilities of both parties to achieve peace and security. To facilitate that solution, the United States seeks to bring balance to the number and content of Middle East resolutions in the General Assembly.

As in previous years, the U.S. will encourage the General Assembly to reduce the overall number of Middle East resolutions introduced. The U.S. also hopes the General Assembly will adopt a resolution condemning anti-Semitism and make more references

to anti-Semitism in pertinent resolutions. The U.S. will continue to advocate for the abolition of the Special Committee to Investigate Israeli Practices and other bodies that are biased against Israel.

The international community has long recognized that resolution of this conflict must come through negotiated settlement. The United States seeks to bring balance to Middle East resolutions to better support the peace process and the implementation of the Roadmap.

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Similarly, at the Special Sitting of the 60th Session of the UN Commission on Human Rights, March 24, 2004, Ambassador Richard S. Williamson objected to "one-sided, anti-Israel resolutions," stating:

> The Quartet envoys met Monday in Cairo, and at that critical juncture, the international community must remain focused on how to achieve the peace we all seek. There should be no detours: one-sided, unbalanced resolutions can only detract from Quartet efforts.
>
> This is not the time to consider this matter, particularly in this forum. The United States is dismayed that the Commission on Human Rights is taking up an issue with which the Security Council is seized at this very moment. It is the U.N. Security Council, not a functional commission of ECOSOC, that has primary responsibility for such questions. It is precisely this sort of politicization of Commission deliberations that discredits our work and diminishes the effectiveness of this body.

See www.humanrights-usa.net/2004/statements/0324SpecialSitting.htm; see also U.S. explanations of votes against specific resolutions at *www.humanrights-usa.net/2004/statements/0415L19EOV.htm, www.humanrights-usa.net/2004/statements/0415L12SyrianGolan.htm,* and *www.humanrights-usa.net/2004/statements/0415-L6-Palestine.htm*.

d. U.S.-U.K. joint statement following death of Yasser Arafat

Palestinian Authority President Yasser Arafat died November 11, 2004. President Bush and Prime Minister Blair, meeting in Washington, D.C., issued a joint statement on November 12, 2004. Stating that "[n]ow is the time to seize the opportunity of new circumstances in the region to redouble our efforts" to achieve peace, the two leaders laid out "steps we look forward to taking with our international partners and the parties," including that:

> the President and the Prime Minister have agreed to mobilize international support behind a plan to ensure that the Palestinians have the political, economic, and security infrastructure they need to create a viable state. There will be no lasting solution without a Palestinian state that is democratic and free, including free press, free speech, an open political process, and religious tolerance. Such a state will need a credible and unified security structure capable of providing security for the Palestinians and fighting terrorism. There must also be effective economic development and transparent financial structures which provide for the economic and social needs of the Palestinian people. The plan will be developed intensively over the coming period of time in concert with all the relevant partners.

See www.whitehouse.gov/news/releases/2004/11/20041112-3.html.

5. Sudan

During 2004 the United States remained engaged in efforts to restore peace in Sudan by resolving the long-standing civil war (often referred to as the "North-South" peace talks) and addressing the crisis in the western region of Darfur. Progress during the year culminated in agreement at year's end on the final elements of a North-South settlement, with

signature of the Comprehensive Peace Agreement on January 9, 2005.* *See* fact sheet, "Chronology of U.S. Engagement in the Sudan Peace Process," from March 2001 through December 2004, released by the Department of State Office of the Spokesman, January 8, 2005, available at *www.state.gov/r/pa/prs/ps/2005/40459.htm*. *See also* Chapter 6.D.1. on the humanitarian crisis and genocide in Darfur, Chapter 5.A.3. on Comprehensive Peace in Sudan Act of 2004, *Digest 2002* at 919–25, and *Digest 2003* at 940–42.

a. North-South peace talks

On January 7, 2004, the Government of Sudan ("GOS") and the Sudan People's Liberation Movement/Army ("SPLM/A") signed the Agreement on Wealth Sharing During the Pre-Interim and Interim Period, resolving one of the key issues in the North-South negotiations. The agreement is available at *www.usip.org/library/pa/sudan/wealth_sharing_01072004.pdf*. On May 26, 2004, the GOS and SPLM/A signed three protocols resolving remaining substantive issues on power sharing and conflict resolution in three areas (Southern Kordofan/Nuba Mountains, Blue Nile, and Abyei): the Protocol Between the Government of Sudan and the Sudan People's Liberation Movement on Power Sharing, the Protocol Between the Government of Sudan and the Sudan People's Liberation Movement on the Resolution of Conflict In Southern Kordofan/Nuba Mountains and Blue Nile States, and the Protocol Between the Government of Sudan and the

* On April 21, 2004, President Bush issued Presidential Determination No. 2004-29, certifying "that the Government of Sudan and the Sudan People's Liberation Movement are negotiating in good faith and that negotiations should continue." 69 Fed. Reg. 24,905 (May 5, 2004). The determination with memorandum of justification and an assessment from the President's special envoy, submitted in the Sudan Peace Act report to Congress, is available at *www.state.gov/p/af/rls/rpt/32018.htm*. A similar certification was signed by Secretary of State Powell, by delegation, on October 22, 2004, available at *www.state.gov/documents/organization/37483.pdf*.

Sudan People's Liberation Movement/Army on the Resolution of [the] Abyei Conflict. *See www.usip.org/library/pa/sudan/pa_sudan.html.*

Secretary of State Colin L. Powell welcomed these developments while stressing the need also to resolve the crisis in Darfur. Secretary Powell's statement is set forth below and is available at *www.state.gov/secretary/former/powell/remarks/32867.htm*.

The United States welcomes the May 26 signing of three protocols by the Government of Sudan and the Sudan People's Liberation Movement. These protocols, taken together with the agreements reached previously, resolve the outstanding substantive issues that were at the heart of Sudan's civil war. We commend both sides for their commitment to peace and urge them to move quickly to work out details of a formal ceasefire and related security arrangements, as well as the means for implementing the agreements signed today.

The people of Sudan can now hope for a new future of peace and prosperity. The United States is deeply committed to assist in the implementation of the peace agreement and in the process of reconstruction and development. We intend to work closely with the international community to ensure that Sudan enjoys the full benefits of peace.

However, Sudan will not be at peace until the problem of Darfur is resolved. We reiterate our call to the Government of Sudan to take the necessary steps to stop the violence being perpetrated by the jingaweit militias; protect civilians, facilitate unrestricted humanitarian access; and cooperate in the deployment of international monitors, and create conditions for the safe return of internally displaced people and refugees as soon as appropriate.

We look forward to embarking on a new relationship with a peaceful Sudan, including beginning the process of normalization of bilateral relations once the problems of Darfur are also resolved.

On June 5, 2004, the parties to the North-South talks, meeting in Nairobi, Kenya, issued The Nairobi Declaration

on the Final Phase of Peace in the Sudan, available at *www.usip.org/library/pa/sudan/nairobi_06052004.pdf.* The declaration reconfirmed agreements embodied in the four May documents as well as the Machakos Protocol, July 20, 2002, and the Agreement on Security Arrangements During the Interim Period, September 25, 2003. The parties also committed "to conclude a peaceful, durable, negotiated solution to the long-standing conflict in the Sudan."

The UN Security Council adopted Resolution 1547 on June 11, 2004, welcoming the June 5 Nairobi declaration. U.N. Doc. S/RES/1547 (2004). The resolution, introduced by the United States and the United Kingdom, also declared the readiness of the Security Council to consider establishing a United Nations peace support operation to support the implementation of a Comprehensive Peace Agreement. On June 26, 2004, at an EU-U.S. summit in Shannon, Ireland, President Bush, Prime Minister of Ireland Bertie Ahern, and President of the European Commission Romano Prodi issued a declaration by the United States and the European Union welcoming the Nairobi Declaration and emphasizing the need for strong action in connection with Darfur. The U.S.-EU declaration is set forth below and is available at *www.whitehouse.gov/news/release/2004/06/20040626-3.html.*

The United States and the European Union welcome the Nairobi Declaration of 5 June 2004 on the Final Phase of Peace in Sudan which paves the way for the signature of a comprehensive peace agreement, putting an end to 20 years of conflict in southern Sudan, and commend all those who have worked with the parties to bring the peace talks to this point, in particular the Inter-Governmental Authority on Development (IGAD) and the host nation to the talks, Kenya. The protocols signed at Naivasha on 26 May 2004 demonstrate the continued commitment by both parties and the international community to end this longest-running civil war in Africa. We urge the Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) to sustain the momentum towards an early conclusion of a comprehensive

peace agreement. We reiterate our firm commitment to support a faithfully implemented comprehensive peace agreement designed to bring peace to all areas of Sudan. The United Nations has an important role to play in achieving this goal. We fully support the work of the U.N. in addressing the humanitarian and human rights crises in Darfur.

We express grave concern at the continuing humanitarian crisis in Darfur, western Sudan, where the lives of hundreds of thousands of civilians, who live in desperate conditions and require immediate life-saving relief, are at great risk. We strongly condemn the human rights violations that have been perpetrated there, particularly by Jingaweit militias. We reiterate our call on the Government of Sudan to immediately stop the violence perpetrated by the Jingaweit, ensure the protection and security of civilians and humanitarian workers, disarm the militias and allow full and unimpeded access by humanitarian groups to Darfur. We also reiterate that those responsible for the atrocities must be held accountable. In addition, we call on all signatories to the cease-fire agreement of 8 April 2004, and their proxy militias, to fully respect the terms of the cease-fire and to cooperate with the African Union-led monitoring mission presently being deployed in Darfur.

We commend the African Union for assuming a leading role in its monitoring mission. To support the AU-led mission, we are actively participating, contributing financially as well as sending observers. We encourage all parties to the conflict in Darfur to initiate a dialogue to begin addressing the underlying political and social problems that have led to this crisis.

We call on the Government of Sudan to stop supporting the aggressive actions by militia groups in the Upper Nile region.

b. Darfur

The April 8, 2004, cease-fire agreement referred to in the EU-U.S. declaration *supra*, was signed by the GOS, the Sudan Liberation Movement/Army, and the Sudanese Justice and Equality Movement in N'Djamena, Chad. The United States welcomed the cease-fire as "a crucial first step toward ending

atrocities and reversing the humanitarian crisis in Darfur." A press statement by Department of State Deputy Spokesman Adam Ereli, issued April 9, 2004, and excerpted below, is available at *www.state.gov/r/pa/prs/ps/2004/31271.htm.* The cease-fire agreement is available at *www.usip.org/library/pa/sudan/sudan_ceasefire_04082004.html.*

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. . . All parties agreed to "neutralize the armed militias." This refers to the government-supported Jingaweit militias that have been brutalizing the local population. We have made clear to the Government of Sudan that we expect it to take immediate steps to stop the violence and atrocities being perpetrated by the Jingaweit militias.

The United States was intensively involved in the discussions in N'Djamena, and we are encouraged by the progress that has been made. We intend to keep the situation in Darfur under intense review. We will use all appropriate means and will cooperate fully with the international community to obtain precise information regarding what is happening on the ground throughout the implementation process. We will work with the parties and will maintain pressure to ensure that the humanitarian cease-fire agreement is fully implemented, that there is unrestricted humanitarian access to all needy populations, and that the monitoring arrangements are quickly put into place.

On July 30, 2004, the Security Council adopted Resolution 1556, sponsored by the United States. U.N. Doc. S/RES/1556 (2004). The resolution, among other things, expressed concern at reports of violations of the April cease-fire and, acting under Chapter VII, imposed an arms embargo with respect to "all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur and West Darfur." The Security Council also urged the parties to the ceasefire "to conclude a political agreement without delay" and expressed "its full support for the African Union-led ceasefire commission and monitoring mission in Darfur."

On August 26, 2004, President Bush "welcome[d] the African Union's efforts to bring a lasting solution to the Darfur conflict by sponsoring political talks between the Government of Sudan and Darfur rebels in Abuja, Nigeria." He also commended the African Union's "deployment of cease-fire monitors and a protection force to Darfur." White House Office of the Press Secretary, August 26, 2004, available at *www.state.gov/p/af/rls/prsrl/35782.htm*. *See also* testimony by Secretary of State Colin L. Powell on September 9, 2004, excerpted in Chapter 6.A.3.

The United States sponsored Security Council Resolution 1564, adopted September 18, 2004, which, among other things, declared that, in the event the Government of Sudan fails to comply fully with resolution 1556 or 1564, the Security Council "shall consider taking additional measures as contemplated in Article 41 of the Charter of the United Nations, such as actions to affect Sudan's petroleum sector and the Government of Sudan or individual members of the Government of Sudan, in order to take effective action to obtain such full compliance or full cooperation." Paragraph 12 of the resolution requested the Secretary-General to

> rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable [and further], in conjunction with the Office of the High Commissioner for Human Rights, to take appropriate steps to increase the number of human rights monitors deployed to Darfur.

Paragraph 12 also called on "all parties to cooperate fully with such a commission."

Two Darfur-related documents were signed on November 9, 2004: (1) Protocol between the Government of the Sudan ("GOS"), the Sudan Liberation Movement/Army

("SLM/A") and the Justice and Equality Movement ("JEM") on the Improvement of the Humanitarian Situation in Darfur, and (2) Protocol between GOS, the SLM/A and the JEM on the Enhancement of the Security Situation in Darfur in Accordance with the N'Djamena Agreement.

c. UN Security Council Nairobi extraordinary session

On November 19, 2004, the Security Council held an extraordinary session in Nairobi, Kenya, on Sudan. Concerning the North-South process, on that date the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Army signed the Declaration on the Conclusion of [Intergovernmental Authority On Development (IGAD)] Negotiations on Peace in the Sudan. Among other things, the declaration affirmed "that the six Protocols referred to in the Nairobi Declaration of 5th June, 2004, constitute and form the core Peace Agreement and therefore invite the UN Security Council in this its Nairobi sitting to pass a resolution endorsing the six Protocols" and declared their commitment to conclude and sign the Comprehensive Peace Agreement no later than December 31, 2004. The declaration stated that it was signed "in the presence of the United Nations Security Council," followed by the signatures of the fifteen Permanent Representatives.

The Security Council adopted Resolution 1574, which, among other things, in paragraph 1 welcomed the declaration, attached to the resolution, and "*strongly endorse[d]* the parties' commitment to reach a final comprehensive agreement by 31 December 2004 and *expect[ed]* that it will be fully and transparently implemented, with the appropriate international monitoring." U.N. Doc. S/RES/1574 (2004) (emphasis in the original).

As to Darfur, in paragraph 10 of the resolution the Security Council underlined the importance of progress in the peace talks in Abuja, and

> *insist[ed]* that all parties to the Abuja peace talks negotiate in good faith to reach agreement speedily, *welcome[d]*

> the signature of the Humanitarian and Security Protocols on 9 November 2004, *urge[d]* the parties to implement these rapidly, and look[ed] forward to the early signature of a Declaration of Principles with a view to a political settlement.

(emphasis in the original).

On April 9, 2004, Deputy Department of State Spokesman Adam Ereli issued a press statement welcoming the actions taken at the Nairobi meeting:

> The United States welcomes the signing of a Declaration between the Government of Sudan and the Sudan People's Liberation Movement, and the passage of United Nations Security Council Resolution 1574. The Declaration reaffirms the parties' commitment to expeditiously conclude the Comprehensive Peace Agreement by the end of the year, while the resolution underscores the international community's support for the peace process and for an end to the violence in Darfur. The Security Council's extraordinary efforts on Sudan helped energize the parties and have generated momentum for the final weeks of the negotiations.

See www.state.gov/r/pa/prs/ps/2004/38504.htm. In explaining the vote of the United States to adopt Resolution 1574, Ambassador John C. Danforth commented as follows. The full text of his statement is available at *www.un.int/usa/04_253.htm.*

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I have stated that this is an historic meeting. Because it is only the fourth meeting of the Council outside New York since 1952, it is in some sense historic almost by definition. But the only real measure of the success of this occasion, the only measure of whether this proves to be a truly significant event, rests with the parties to the conflict in Sudan.

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. . . The process of turning Sudan into a prosperous nation at peace with itself and its neighbors must move forward immediately. Sudan must become a nation that respects human rights, and that replaces violence with political dialogue. This process must proceed with dispatch—without posturing, without grandstanding, without empty words.

* * * *

And that brings me to Darfur—where chaos and cruelty remain the order of the day. As political institutions are established nationwide, as security is established across the country, the process of bringing justice to the oppressed people of Darfur must continue. But I want to be very clear: the violence and atrocities being perpetrated in Darfur must end now. You have heard this message clearly from the Security Council—heed it. I cannot emphasize this point more strongly.

When the North-South agreement is in place, the flow of support for all of Sudan will increase on the understanding that the parties are fulfilling all their commitments, including those agreed in Abuja and N'djamena. Peace support operations will also take place across the country—including in the West. Working alongside the parties, and with the continuing and vital leadership of the African Union and IGAD, we can use the conclusion of the North-South peace process as a springboard to end the suffering in Darfur.

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As noted above, the Comprehensive Peace Agreement ending the North-South civil war in Sudan was signed January 9, 2005. Several of the agreements within the Comprehensive Peace Agreement are available at *www.usip.org/library/pa/sudan/pa_sudan.html.*

B. PEACEKEEPING MISSIONS AND RELATED ISSUES

1. Haiti

See A.1. *supra* for discussion of U.S.-led Multinational Force.

2. Bosnia and Herzegovina: End of NATO-led mission

On December 2, 2004, Secretary of State Colin L. Powell announced that the mission of the NATO-led Stabilization Force ("SFOR") in Bosnia and Herzegovina on that date "came to a successful conclusion." He continued:

> The people of Bosnia have welcomed a continued international security presence as they take the remaining steps on the path of reform which will bring them closer to Europe and to the transatlantic community. We are pleased that the European Union will establish a military mission, Operation Althea, to help with stability during this crucial period. . . .
>
> . . . The United States remains committed to the security and stability of Bosnia and Herzegovina through a significant contribution to the headquarters and a continued presence at Camp Eagle in Tuzla.

Secretary Powell's statement is available at *www.state.gov/secretary/former/powell/remarks/39330.htm.*

Cross-references

Suspension of entry related to corruption, **Chapter 1.C.3.**
Exception to sanctions against Sudan for peace activities, **Chapter 3.B.5.b.**
Commission of genocide in Darfur, **Chapter 6.A.3.**
Rule of law and democracy promotion, **Chapter 6.I.**
Protocols for accession to NATO, **Chapter 7.B.2.**
Economic sanctions, **Chapter 16.**

CHAPTER 18

Use of Force, Arms Control and Disarmament, and Nonproliferation

A. USE OF FORCE

1. General

a. Role and significance of international law

On October 27, 2004, U.S. State Department Legal Adviser, William H. Taft IV, participated in a conference at the Georgetown University Law Center entitled "Role and Significance of International Law Governing the Use of Force in the New Global Context Confronting the United States After 9/11". Excerpts from Mr. Taft's remarks below provide an overview of the U.S. views regarding the use of force under international law. The full text of the speech is available at *www.state.gov/s/l/c8183.htm*.

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While the United States has given a lot of thought to the use of force after September 11th, our view of the fundamental principles regarding when force may be used and the manner in which it may be used have not changed. As in the past, so today the United States is prepared to deploy its forces, first, in self-defense in the face of an actual or imminent attack and, second, in cases in which there is authorization by the U.N. Security Council. At the outset I should also say that the right to use force preemptively in

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self-defense, which was affirmed in President Bush's National Security Strategy, announced in September 2002, is not a novel concept in international law or in the history and experience of the United States. It is a natural adaptation of the concept of "imminence" to an era of weapons of mass destruction. Let me elaborate these points.

Self-Defense

The U.N. Charter restricts the use of force by states to resolve international disputes, but it expressly recognizes the "inherent right" of states to use force in self-defense. Article 51 of the U.N. Charter states that "Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations." The United States has long held that, consistent with Article 51 and customary international law, a state may use force in self-defense in the event of an actual or imminent attack.

* * * *

The events of September 11th clearly constituted an armed attack that required a military response in self-defense. Indeed, in Resolutions 1368 and 1373, the Security Council reaffirmed the inherent right of individual or collective self-defense and expressed its determination to combat, by all means, threats to international peace and security caused by terrorist acts. Secretary General Annan confirmed that the U.S.-led coalition "set their current military action in Afghanistan in that context." Evidently, where a state uses terrorism to conduct an armed attack against another state, or allows its territory to be used as a base for such purposes, the state under attack has the same right to defend itself as it does when attacked by more conventional means.

Preemption

Of course, it is also well established that states have the right to use force before an actual attack has taken place—when an attack is "imminent." President Bush reaffirmed this right in his National Security Strategy: The United States will use force where it faces a credible, imminent threat and peaceful remedies have

been exhausted. The use of force in advance of an actual attack should, however, be supported by careful, timely intelligence and any such action must be proportionate to the threat that is being confronted. The National Security Strategy stressed this point, too.

The National Security Strategy finally elaborated on the concept of imminence as it operates in an era of weapons of mass destruction. The right of self-defense could be meaningless if a state cannot prevent an aggressive first strike involving weapons of mass destruction. The right of self-defense must attach early enough to be meaningful and effective, and the concept of "imminence" must take into account the threat posed by weapons of mass destruction, the intentions of those who possess such weapons and the catastrophic consequences of their use. The right to use force preemptively in situations involving weapons of mass destruction, as set out in the National Security Strategy, arises from considerations of these factors.

* * * *

Besides the use of force in self-defense and in cases in which there is authorization by the U.N. Security Council, some states have proposed other rationales for the use of force. While we have considered them carefully and they have some merits, to this point the United States has not embraced them.

Of particular note, the idea that humanitarian catastrophes must be avoided has been asserted as a reason for rethinking what actions international law permits in a number of situations. NATO's intervention in Kosovo in 1999 is a case to consider in this connection. In defending the legality of NATO's actions, the United Kingdom and several other allies asserted a doctrine of humanitarian intervention, under which states have a right to use force if it is necessary to prevent genocide, a major loss of civilian life, or a large scale forced movement of a population, which would destabilize other states and threaten international peace and security.

In this view, the humanitarian intervention doctrine is often presented as a necessary extension of humanitarian law as it has evolved since 1945. Significantly, the doctrine was invoked in the absence of authorization by the UN Security Council. The United

States did not, however, adopt this theory as a basis for the NATO intervention in Kosovo, and instead pointed to a range of other factors to justify its participation in the Kosovo campaign.

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Lastly, some argue that where a group of people is fighting against colonial domination or an alien occupation in the exercise of their right of self-determination, such groups have a right to use force in the same way as if they were engaged in an international armed conflict and acting in self-defense. The Declaration of Independence sets out something close to this rationale, and the United States has traditionally been slow to condemn groups resorting to the use of force in wars of national liberation. Recently, however, many groups have too easily claimed the right to use force on this basis, and the reputation of this rationale has not been enhanced by the fact that those using it have often sought to justify not just the use of force as permitted by the laws of war, but terrorist acts. Such disregard for the basic humanitarian rules concerning necessity, proportionality, the requirement to minimize civilian casualties and so forth has given this rationale a very bad name and is never acceptable.

* * * *

The United States has historically fought its enemies in accordance with international law and—following the attacks of September 11th—the United States remains committed to defeating terrorism in accordance with the rules of international law. The United States and the Security Council have expressly recognized the right of self-defense against terrorist actions, and the right to use force preemptively in self-defense in appropriate circumstances is well established.

b. International Court of Justice: Language on use of force issues

On July 9, 2004, the International Court of Justice issued an advisory opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory."

See Chapter 17.A.4.a. In its opinion, the Court stated as follows concerning the applicability of Article 51 of the UN Charter.

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138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: "the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)". More specifically, Israel's Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that "the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter"; the Security Council resolutions referred to, he continued, "have clearly recognized the right of States to use force in self-defence against terrorist attacks", and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation

is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

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In remarks to the press on July 13, 2004, U.S. Representative to the United Nations Ambassador John C. Danforth commented on this language, as excerpted below. The full text is available at www.un.int/usa/04_127.htm.

. . . [T]he decision of the International Court of Justice hangs on an interpretation of Article 51 of the UN Charter, which is just flatly wrong. According to the Court, there is a right of self-defense if there is an attack of one state against another state, but of course in the world we live in today it's not so much the threat of a state attacking another state, it's the threat of individuals or groups or non-state entities conducting the attacks. To so limit and plainly rewrite the plain meaning of Article 51 really would be a remarkable and rather difficult precedent for most countries to live with. . . .

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On November 6, 2003, the International Court of Justice issued its decision in *Case Concerning Oil Platforms, Iran v. United States of America (Merits)*, 2003 I.C.J. (Nov. 6), available at *www.icj-cij.org/icjwww/idocket/iop/iopframe.htm*. For a detailed discussion of the procedural history of the case, excerpts from United States submissions and oral arguments in the case, as well as excerpts from the 2003 Court opinion, *see Digest 2003* at 1036–66 and *Cumulative Digest 1991–1999* at 2182–86. In 2004 State Department Legal Adviser William H. Taft IV set forth the U.S. views on language contained in that decision addressing use of force issues. *Self-Defense and the Oil Platforms Decision*, 29 Yale J.

Int'l L. 295 (2004). Mr. Taft summarized the U.S. legal conclusions as follows (footnotes omitted):

> The U.N. Charter restricts the use of force by States to resolve international disputes. It also expressly recognizes, however, the "inherent right" of States to use force in self-defense. As the Charter's drafting history makes clear, "The use of arms in legitimate self-defense remains admitted and unimpaired." Although the U.N. Security Council plays an important role in addressing threats to international peace, it is often unable to deter or put an end to the use of force. The right of States to act individually and collectively in self-defense, therefore, remains a central pillar of international peace and security.
>
> The Court's statements in the Oil Platforms case concerning self-defense, although unnecessary to resolve the case and part of a judgment that is binding only with respect to the particular dispute and the particular parties, might be read as suggesting a number of limitations on the right of self-defense. In particular, there is language in the opinion that might be read to suggest:
>
> - that an attack involving the use of deadly force by a State's regular armed forces on civilian or military targets is not an "armed attack" triggering the right of self-defense unless the attack reaches some unspecified level of gravity;
> - that an attack must have been carried out with the intention of harming a specific State before that State can respond in self-defense;
> - that self-defense may be directed only against targets of the attacking State that have been the subject of specific prior complaints by the defending State; and
> - that measures taken in self-defense must be proportional to the particular attack immediately preceding the defensive measures rather than proportional to the overall threat being addressed.

As explained below, international law and practice do not support these limitations on the right of self-defense. Furthermore, such limitations would undermine the ability of States to deter aggression and would therefore have the unfortunate effect of encouraging, rather than discouraging, the use of force. The United States presumes that the Court did not intend to suggest these limitations.

2. Detainee Issues

a. Continued detention of enemy combatants at Guantanamo, Cuba

On March 12, 2002, the Inter-American Commission on Human Rights ("IACHR" or "Commission") requested that the United States apply precautionary measures with respect to certain individuals ("detainees") held at the U.S. Naval Station in Guantanamo Bay, Cuba. *See Digest 2002* at 1008–17. Specifically, the Commission requested that the United States "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal. . . . in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights."

In its response of April 11, 2002, the United States submitted that the Commission lacked jurisdiction to apply international humanitarian law, that the Commission did not have authority to request precautionary measures from States that are not parties to the American Convention on Human Rights, and that precautionary measures were neither necessary nor appropriate. Nevertheless, on July 23, 2002, the Commission advised the United States by letter of its decision to maintain its request for precautionary measures. On October 23, 2003, and July 29, 2004, the Commission

forwarded additional communications to the United States Government concerning detention and treatment at Guantanamo Bay.

The United States submitted detailed replies, including its reply dated December 16, 2004, excerpted below. The submission details the status of U.S. federal court actions on detainee issues, as well as internal U.S. government investigations, reviews, and actions relevant to the issues of the continued detention and treatment of detainees.

The full text of the 2004 submission is available at *www.state.gov/s/l/c8183.htm*.

The Government of the United States appreciates the opportunity to respond to the above-mentioned Commission communication dated July 29, 2004, relating to individuals detained at the U.S. Naval Station in Guantanamo Bay, Cuba ("Guantanamo") (hereinafter "communication"). The communication and the attached petition express numerous concerns and also reference legal developments in the United States, notably ongoing court challenges to the U.S. Government's detention of enemy combatants at Guantanamo. The Commission also suggests that information has come to light that appears to be at odds with certain factual statements made in the U.S. Government's previous submissions. Commission letter dated July 29, 2004, page 2.

The United States' policy has not changed. It is the United States' policy to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with the commitments made by the United States in ratifying the Convention Against Torture to prevent torture and other cruel, inhuman or degrading treatment or punishment. . . .

I

Inadmissibility. The U.S. Government respectfully submits that the matter addressed by the petition and by the Commission is not admissible because it fails to meet established criteria for consideration, in particular the requirement for exhaustion of domestic remedies. There are numerous federal court and

other proceedings that are ongoing in the United States and at Guantanamo that are providing the petitioners a hearing and the potential for appropriate relief if warranted.

Dismissing this petition would quintessentially advance the rationale underlying the exhaustion doctrine—to permit domestic proceedings to run their course, thereby affording the State the opportunity to fashion any appropriate remedy under its domestic law. Domestic habeas corpus proceedings for Guantanamo detainees are available and are not unduly delayed. Thus, the customary international law doctrine of exhaustion of domestic remedies, which is incorporated into the rules of the Commission, compels the finding that the petition is not admissible and should be dismissed.

Moreover, the availability of timely domestic proceedings, including the Combatant Status Review Tribunals operated by the U.S. Department of Defense at Guantanamo and federal habeas corpus litigation for each detainee who files a habeas petition, demonstrates that procedures under U.S. domestic law are available that address the concerns raised by the Commission in its request for precautionary measures.

The U.S. Government further respectfully submits that the Commission does not have jurisdiction over the matter raised in the petition and in its communication because it raises claims under the Geneva Conventions of 1949 and the law of armed conflict, which is the law that governs the status and treatment of persons during armed conflict, matters that are not within the purview of the Commission. Indeed, in this case the Commission recognized that international humanitarian law is the *lex specialis* that may govern the issues surrounding Guantanamo detention. As the Commission stated:

> "In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of the Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*."

IACHR Request to the United States for Precautionary Measures, in Detainees in Guantanamo Bay, Cuba, dated March 12, 2002, at page 3.

The Commission's jurisdiction and competence do not extend to the laws and customs of war. This is a second and independent basis for dismissal of the petition.

Additionally, for reasons elaborated at length in our earlier filings in this matter, the U.S. Government reaffirms its position that the Commission lacks the competence to issue precautionary measures in this case.

Failure to Exhaust Domestic Remedies. Supreme Court Rulings. Under article 31 of the Commission's Rules of Procedure, the petition is inadmissible on the basis that remedies under domestic law have not been previously exhausted. For example, as the Commission is aware, on June 28, 2004, the U.S. Supreme Court, the highest judicial body in the United States, issued its decisions in *Rasul v. Bush*, No. 03-334 (U.S. S. Ct. June 28, 2004), *Hamdi v. Rumsfeld*, No. 03-6696 (U.S. S. Ct. June 28, 2004) and *Rumsfeld v. Padilla*, No. 03-1027 (U.S. S. Ct. June 28, 2004). Among other issues, the Supreme Court reviewed whether the appropriate federal district court would have jurisdiction to consider a habeas corpus petition filed on behalf of enemy combatants held at Guantanamo and challenging the legality of their detention. *Rasul* and its companion case *Al Odah*, cases brought on behalf of two Australians and twelve Kuwaitis, presented "the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." (*Rasul* Slip Opinion at 1). The same issue is squarely raised in the IACHR communication.

The Supreme Court held in *Hamdi* that our nation is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The Court stated the detention of such individuals "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate' force Congress has authorized the President to use" against "nations, organizations, or persons" associated with the September 11, 2001 terrorist attacks. (Slip Op. at 10, 11).

The Supreme Court ruled in *Rasul* that the District Court for the District of Columbia had jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals at Guantanamo. (Slip Op. at 15–16).

Further Court Proceedings. The Supreme Court in *Rasul* decided only the question of jurisdiction. The Court accordingly remanded the proceedings to the federal district (trial) court to address the claims that the detentions at issue in those cases are unlawful. "Whether and what further proceedings may become necessary after [the United States Government] make their response to the merits of petitioners' claims are matters that we need not address now." (Slip Op. at 17). Thus, the Supreme Court ruling has resulted in further proceedings at the federal trial and appellate court levels.

As of December 2, 2004, there are nineteen (19) habeas corpus cases involving 69 Guantanamo detainees pending before ten district court judges. These include 2 Australians, 12 Kuwaitis, 29 Yemenis, 4 British, 1 Libyan, 1 Sudanese, 1 Pakistani, 1 Qatari, 6 Bahrainis, 1 Turk, 1 Canadian, 1 French, and 7 Algerians. Other detainees may have since filed a habeas corpus petition or may file suit in the near future.

The various habeas corpus petitions seek the detainees' release, claiming that the detentions violate the Fifth, Sixth, Eighth and Fourteenth Amendments and the War Powers and Article 1 Suspension clauses of the Constitution. Different petitions have also alleged claims under the Administrative Procedure Act, the Alien Tort Statute, Army Regulation 190–8, customary international law, and international treaties including the International Covenant on Civil and Political Rights and the Geneva Conventions of 1949.

During the course of these habeas corpus proceedings, the federal courts are reviewing numerous motions and other requests including motions to dismiss the petition, motions for a restraining order, requests for discovery, and motions relating to procedures regulating access of attorneys to individuals. For example, in August 2004, the federal district court in the cases of *Gherebi*, *Boumediene* and *El Banna* separately denied requests by petitioners for relief enjoining ongoing Combatant Status Review Tribunal (CSRT) proceedings. The judges ruled that any defect in the CSRT

proceedings could be addressed in determining whether petitioners were ultimately entitled to any relief with regard to their detention.

Further, pursuant to briefing orders issued by Senior Judge Green, who is coordinating the numerous detainee cases, the government has filed factual returns in most of the cases indicating both the classified and unclassified factual bases for the enemy combatant status of each petitioner-detainee based on the record of CSRT proceedings.

Additionally, in the *Al Odah* case, the federal district court issued a decision on October 20, 2004, denying the Government's proposed monitoring of attorney-client communications between three detainees and their counsel. The court also imposed a number of conditions on detainees' counsel, including that any disclosure by counsel of communications with a detainee be subjected to a pre-disclosure classification review by the government.

Further, on November 8, 2004, in the case of *Hamdan v. Rumsfeld*, Civil Action No. 04-1519 (JR), the U.S. District Court for the District of Columbia ruled that the petitioner may not be tried by military commission unless and until an appropriately constituted tribunal determines that he is not entitled to Prisoner of War status under the Third Geneva Convention and until a procedural rule is altered regarding closure of the hearing to the detainee. On November 12, 2004, the U.S. Government appealed the ruling to the U.S. Court of Appeals for the District of Columbia Circuit. The U.S. Court of Appeals ordered an expedited case schedule that requires briefing by the parties to be completed by January 10, 2005. Oral argument in that case will be held in early March 2005.

In short, domestic judicial proceedings are available, ongoing, and timely. Under the customary international law doctrine of exhaustion and under principles of sovereignty, timely and available domestic proceedings must be respected and allowed to run their course prior to international adjudication.

* * * *

Moreover, the availability and timeliness of judicial proceedings in the United States, which afford the detainees review of the lawfulness of their detention, fulfill the objective of the

precautionary measures requested by the Commission. In its letter of March 12, 2002, the Commission requested that the United States "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal . . . in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess. . . ." The actions of the CSRTs and federal courts of the United States, operating under U.S. law, are addressing concerns raised by the Commission in its precautionary measures request. It is wholly unnecessary and improper for the Commission to retain jurisdiction over this proceeding.

* * * *

U.S. Department of Defense (DoD) Combatant Status Review Tribunals. On July 7, 2004, the Department of Defense announced the formation of Combatant Status Review Tribunals for Guantanamo detainees. See *www.defenselink.mil/transcripts/2004/tr200440707-0981.html*; (DOD Briefing on Combatant Status Review Tribunal, dated July 7, 2004); *www.defenselink.mil/releases/2004/nr20040707-0992.html* (DOD July 7 Press Release). These tribunals serve as forums of first resort for detainees to contest their status as enemy combatants and supplement the prior screening procedures. The Tribunals draw upon the guidance contained in the U.S. Supreme Court decisions in *Rasul* and *Hamdi*. In the *Hamdi* case, the U.S. Supreme Court held that a citizen-detainee held in the United States must receive notice of the factual basis for his classification as an enemy combatant and a fair opportunity to rebut the government's assertion before a neutral decision maker. This decision only applied to the detention of U.S. citizens, but the Department of Defense is providing all non-citizen detainees under its control at Guantanamo with the opportunity to contest their status through a Combatant Status Review Tribunal. As detailed below, this is an unprecedented level of process being provided to enemy combatants in time of war.

The Deputy Secretary of Defense issued an order establishing the tribunals. See *www.defenselink.mil/news/Jul2004/*

d20040707review.pdf (hereinafter DOD Order). A fact sheet was also published regarding the tribunal process and procedures. See *www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf*

Since the July 7, 2004, order, the Secretary of the Navy has given several press conferences regarding the procedures. See *www.defenselink.mil/transcripts/2004/tr20040709-0986.html* (Secretary of the Navy England's Briefing dated July 9, 2004); *www.defenselink.mil/transcripts/2004/tr20040716-1006.html* (Secretary of the Navy England's Briefing dated July 16, 2004). Furthermore, on July 29, 2004, Secretary England issued the implementation directive for the Combatant Status Review Tribunals, giving specific procedural and substantive guidance on the implementation of the DOD Order (hereinafter DOD Implementing Directive). See *www.dod.mil/releases2004nr20040730-1072.html* (July 30, 2004); *www.defenselink.mil/news/Jul2004/d20040730comb.pdf*.

All detainees held at Guantanamo were notified on July 12, 13 or 14, 2004, of their opportunity to contest their enemy combatant status under this process. (Enclosure 4 of DOD Implementing Directive.) The first tribunal commenced in Guantanamo on July 30, 2004. All detainees have also been notified of the fact that a federal court has jurisdiction to entertain a petition for habeas corpus brought on their behalf. They will also be informed of how to challenge their detention in federal court by filing a habeas corpus petition.

* * * *

As of December 6, 2004, 466 detainees had gone before a Combatant Status Review Tribunal, and 194 of those detainees have had final decisions rendered in their respective cases. In 193 of those 194 final decisions, the Tribunal found the detainee in question correctly identified as an enemy combatant. See *http://www.defenselink.mil/transcripts/2004/tr20041001-1344.html* (Secretary of Navy England's Briefing dated October 1, 2004). In the case of the detainee found not to be an enemy combatant, provisions were made to return him to his home country, Pakistan, on September 18, 2004. *Id*. The remainder of the Tribunals are scheduled to be completed by the end of December 2004.

The Combatant Status Review Tribunals do not foreclose the filing of a habeas corpus petition in federal court, nor do they supplant the annualized review procedure for Guantanamo detainees announced earlier this year (Administrative Review Board (ARB) discussed below). Instead, CSRTs are fact-based proceedings to review whether individuals detained at Guantanamo are enemy combatants and to permit each detainee the opportunity to contest such designation.

It is important to note that the U.S. Armed Forces has conducted these tribunals with transparency, offering the media and the International Committee of the Red Cross ("ICRC") an opportunity to observe tribunal proceedings. Members of the media have accepted the invitation and attended tribunal proceedings. See *http://www.defenselink.mil/news/Aug2004/n08132004_2004081304.html (August 13, 2004); http://www.defenselink.mil/news/Aug2004/n08292004_2004082902.html* (August 29, 2004).

In sum, there are several ongoing and available review processes provided under domestic law and procedure for detainees at Guantanamo seeking to challenge their detention. These review procedures amply demonstrate that domestic remedies are available to, and have not been exhausted by, Guantanamo detainees, thereby requiring a finding that the petition is inadmissible.

* * * *

II

Without prejudice to or waiver of our position that the petition is inadmissible and that the Commission lacks jurisdiction over this matter, we provide the Commission with the following information as a matter of courtesy and in a spirit of cooperation.

Law of War. It is important to recall the context of the Guantanamo detentions. The war against al Qaida and its affiliates is a real (not a rhetorical) war, and the United States must fight it that way. On September 11, 2001, the United States was the victim of massive and brutal terrorist attacks carried out by 19 al Qaida suicide attackers who hijacked and crashed four U.S. commercial

jets, two into the World Trade Center towers in New York City, one into the Pentagon near Washington, D.C., and a fourth into a field in Shanksville, Pennsylvania, leaving approximately 3000 innocent individuals dead or missing.

The United Nations Security Council condemned the terrorist attacks of September 11, 2001 as a "threat to international peace and security" and recognized the "inherent right of individual and collective self-defence in accordance with the Charter." See U.N. Security Council Resolution 1368, U.N. Doc. No. S/RES/1368 (September 12, 2001); see also U.N. Security Council Resolution 1373, U.N. Doc. No. S/RES/1373 (September 28, 2002). The North Atlantic Treaty Organization (NATO), the Organization of American States (OAS) under the 1947 Inter-American Treaty of Reciprocal Assistance (Rio Treaty), and Australia under the ANZUS Treaty, similarly considered the terrorist attacks on the United States as an armed attack, justifying action in self-defense. See Statement of Australian Prime Minister on September 14, 2001 (Article IV of ANZUS applies to the 9/11 attacks); Statement of October 2, 2001 by NATO Secretary General Lord Robertson (9/11 attacks regarded as an action covered by Article 5 of the Washington treaty); OAS publication, United Against Terrorism, *www.oas.org/assembly/GAAssembly2000/Gaterrorism.htm*.

On October 7, 2001, President Bush invoked the United States' inherent right of self-defense and, as Commander in Chief of the U.S. Armed Forces, ordered the U.S. Armed Forces to initiate action in self-defense against the terrorists and the Taliban regime that harbored them in Afghanistan. The United States was joined in the operation by the United Kingdom and coalition forces, comprising (as of December 2003) 5,935 international military personnel from 32 countries.

It is clear from the foregoing that the U.S. Government, and indeed the international community, have concluded that al Qaida and related terrorist networks are in a state of armed conflict with the United States. Al Qaida attacks have deliberately targeted civilians and protected sites and objects (see the United States submission in this case dated December 24, 2003, at pages 5–6, for a detailed discussion of al Qaida attacks and operations), and

the fight is ongoing. Recent examples include the bombing on November 8, 2003, of a Riyadh housing compound, and the bombings in Istanbul in 2003 that killed the British Consul.

The law of war applies to the conduct of war, and allows the United States—and any other country—to hold enemy combatants without charges or access to counsel for the duration of hostilities. Detention is not an act of punishment but of security and military necessity. It serves the purpose of preventing combatants from continuing to take up arms against the United States. These are the long-standing, applicable rules of the law of war, a fact recognized by the U.S. Supreme Court in its recent decisions.

* * * *

Over the past three years, the U.S. Armed Forces have employed a multi-layered screening process to verify an individual's enemy combatant status and to assess the threat the detainee may pose. *In Afghanistan, approximately 10,000 individuals have been captured, screened by the United States, and released.* Fewer than ten percent of those screened have been transferred to Guantanamo, and 202 Guantanamo detainees have been released or transferred. The detainees at Guantanamo, who as of December 14 number approximately 550, see also *http://www.dod.mil/releases/2004/nr20040922-1310.html*, include jihadists who took up arms against the United States and also senior al Qaida and Taliban operatives who would pose a serious threat of violence to the international community if released. Some of those detained in Guantanamo are among the worst jihadists, posing a significant threat to U.S. security. Generally, the detention population represents a broad number of countries from almost every continent and region.

* * * *

The United States has no interest in detaining enemy combatants longer than necessary. On an ongoing basis, it is constantly reviewing the continued detention of each enemy combatant, based on security, war crime involvement, and intelligence concerns. As a result of this process, as of December 14, 2004, two hundred two (202) detainees have departed Guantanamo, with 145 transferred for release, and 57 transferred to the control of other governments

for further investigation and prosecution, as appropriate. Of those 57 detainees who have been transferred to the control of other governments, 29 were transferred to Pakistan, seven to Russia, five to Morocco, five to Great Britain, four to France, four to Saudi Arabia, one to Denmark, one to Spain, and one to Sweden. *Id.* September 22, 2004 marks the most recent announcement of transfers, which saw the release of 11 detainees from Guantanamo Bay.

Juveniles. There are no juveniles currently detained in Guantanamo. As we stated in our letter to the Commission dated February 11, 2004, three juveniles under the age of sixteen detained at Guantanamo were transferred to Afghanistan under conditions intended to provide for their safety and rehabilitation. As with all detainees, these juveniles were originally detained on the basis that they were enemy combatants who posed a threat to U.S. security; their subsequent transfer for release was based on the determination that they no longer posed a significant threat. With the assistance of non-governmental organizations, the juveniles were resettled in their home country. The goal of the United States was to return the juveniles to an environment where they have an opportunity to reintegrate into civil society. DOD News Release "Transfer of Juvenile Detainees Completed" (January 29, 2004) at *www.dod.mil*. However one juvenile (who is no longer a juvenile) returned to the fight and was re-captured.

* * * *

Administrative Review Boards (ARB). In an action unprecedented under the law of war, on May 11, 2004, the Department of Defense established special administrative review procedures to provide an annual individualized review of the detention of each enemy combatant at Guantanamo. The May 11, 2004 order was effective immediately. *See www.dod.mil/releases/2004/nr20040518-0806.html* (May 18, 2004 announcing the May 11 order.) *See www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf* (May 18, 2004). The process permits the enemy combatant to explain personally why he or she is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates or supporters,

or to explain why release would otherwise be appropriate. Such procedures are not required by the law of war, but the Department of Defense has elected to implement them in order to address some unique and unprecedented characteristics of the current conflict.

Under this order, each enemy combatant is provided with an unclassified written summary of the primary factors favoring continued detention and the primary factors favoring release or transfer from Guantanamo. The detainee has an opportunity to appear in person before a board of three military officers and to present information in his or her behalf. The detainee is provided a military officer to meet with him in advance of the hearing and to assist him or her in the detainee's appearance before the board. In addition, the review board accepts written information from the family and national government of the detainee. Based on all of this information, as well as submissions by other U.S. Government agencies, the board, by majority vote, makes a written assessment of whether there is reason to believe that the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict and any other factors bearing on the need for continued detention. The board also provides a written recommendation on whether detention should be continued. *Id.*

* * * *

As noted above, the grant of an annual individualized process to determine whether to release or transfer a detainee is, as far as we are aware, unprecedented in the history of warfare. Similarly, the release of enemy combatants prior to the end of a war is a significant departure from past wartime practices. Enemy combatants are detained for a very practical reason: to prevent them from returning to the fight. Indeed, the release of detainees has come with substantial risk. According to an Associated Press report, as of October 17, 2004, at least seven of the former detainees have returned to terrorism. See *http://hosted.ap.org/dynamicstoriesGGUANTANAMO_BACKSLIDERS?SITE=DCTMS&SECTION=HOME&TEMPLATE=DEFAULT* (October 17, 2004). *See also http://www.defenselink.mil/transcripts/2004/tr20041019-1461.html*. Recidivists include the following:

- Most recently, a Danish detainee transferred from Guantanamo back to Denmark declared publicly his intention to join the fight in Chechnya.
- One of the former Guantanamo detainees reportedly killed an Afghan judge as the judge was leaving a mosque.
- Another former Guantanamo detainee, who the United State released in January 2004, was recaptured in May when he shot at U.S. forces. At the time of his recapture he carried a letter of introduction from the Taliban.
- Two detainees, released from Guantanamo in May 2003 and April 2004, respectively, were killed this summer in combat operations in Afghanistan.

The potential for enemy combatants to return to the fight is why the law of war permits their detention until the end of an armed conflict. Although military operations against al Qaida and its affiliates in Afghanistan and globally are ongoing, the Department of Defense has decided as a matter of policy to institute these review procedures, which will assist DOD in fulfilling its commitment to help ensure that no one is detained any longer than is necessary for the security of the United States or its allies. See *www.defenselink.mil/releases/2004/nr20040303-0403.html* (March 3, 2004).

Mistreatment of Detainees. Concerns have been raised about conditions of detention at Guantanamo. The Department of Defense is committed to treating all detainees it holds at Guantanamo humanely. The petition referred to the August 1, 2002 Department of Justice memorandum as potentially justifying abuse of detainees, and we take this opportunity to confirm that that memorandum was not so intended and has, in all events, been withdrawn. As quoted below, the President has made clear that the United States stands against and will not tolerate torture and that the United States remains committed to complying with its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The United States is aware of previous allegations of mistreatment of detainees at Guantanamo as reflected in recently released Federal Bureau of Investigation documents and concerns about

treatment reportedly expressed by officials of the International Committee of the Red Cross. The United States deeply regrets any instances of abuse of detainees anywhere. Allegations of abuse are investigated by appropriate U.S. officials, and steps are taken to hold accountable persons found responsible for such acts. Major independent investigations have documented eight instances of infractions at Guantanamo. Investigation revealed that each case had been thoroughly investigated, and that the military command had taken swift and appropriate action, ranging from admonishment to court-martial, to address the actions of those involved in wrongdoing.

The Department of Defense denies any allegations of torture at Guantanamo. As recently as December 8, 2004, the Defense Department reaffirmed that it does not permit, tolerate, or condone torture under any circumstances. . . .

Indeed, on United Nations International Day in Support of Victims of Torture, June 26, 2004, the President stated that:

> "The United States reaffirms its commitment to the worldwide elimination of torture. . . . To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction.
>
> "The United States also remains steadfastly committed to upholding the Geneva Conventions. . . .
>
> "The American people were horrified by the abuse of detainees at Abu Ghraib prison in Iraq. These acts were wrong. They were inconsistent with our policies and our values as a Nation. I have directed a full accounting for the abuse of the Abu Ghraib detainees, and investigations are underway to review detention operations in Iraq and elsewhere. . . .
>
> "These times of increasing terror challenge the world. Terror organizations challenge our comfort and our

> principles. The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere."

On June 22, 2004, upon the authorized release of numerous government documents related to U.S. laws regarding torture and to interrogation techniques, Counsel to the President Alberto Gonzales stated the following:

> "The administration has made clear before, and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws. ". . . [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable." White House Press Release of June 22, 2004.

* * * *

To prevent instances of misconduct, it is U.S. policy that military personnel are trained, disciplined, and informed on the laws and customs of armed conflict. United States forces are subject to the Uniform Code of Military Justice, which provides for penalties for many military offenses that are more severe if committed during an armed conflict. A Department of Defense Directive requires that incidents involving violations of the law of war committed by U.S. persons be promptly reported, thoroughly investigated, and when factually substantiated, remedied by corrective action. Guantanamo personnel are trained on this requirement and are regularly briefed of their responsibility to report mistreatment.

Further, regarding training procedures, personnel assigned to Guantanamo go through an extensive professional and sensitivity training process to ensure they understand the procedures for protecting the rights and dignity of detainees at Guantanamo . . .

* * * *

The Commission inquired about interrogation techniques used at Guantanamo. On June 22, 2004, the U.S. Department of Defense issued a press release with extensive accompanying documentation explaining in detail the various interrogation techniques approved and disapproved for use at Guantanamo from the period beginning January 2002. See *www.dod.mil/releases/2004/nr20040622-0930.html* (June 22, 2004). The Commission is referred to this site and accompanying documents for a comprehensive treatment of the subject of interrogation techniques at Guantanamo. . . .

The facility at Guantanamo is continually open to members of the International Committee of the Red Cross, chaplain staff and legal staff, and foreign and domestic media. All allegations of illegal conduct by US personnel are reviewed, and when appropriate investigated and addressed in a timely manner.

* * * *

Non-refoulement. In its actions involving the possible repatriation of Guantanamo detainees to other countries, the United States takes seriously the principle of *non-refoulement*. It is U.S. policy not to "expel, return ('*refouler*') or extradite" individuals to other countries where the United States believes it is "more likely than not" that they will be tortured.

The President rejected a legislative proposal in September–October 2004 that would have had the effect of permitting the return of certain dangerous aliens even if they were more likely than not to be tortured. . . .

* * * *

Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, the U.S. policy is to obtain specific assurances from the receiving country that it will not torture the individual being

transferred to that country. The United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored. Further, if a case were to arise in which the assurances the United States has obtained from another government are not sufficient when balanced against an individual's specific claim, the United States would not transfer a detainee to the control of that government unless those protection concerns were satisfactorily resolved.

Additional Corrective Actions in Iraq and Elsewhere. The petition also raised questions about interrogation techniques at Abu Ghraib. Although it is not our intent to focus on Iraq in this submission, which relates to detention at Guantanamo Bay Naval Base, we are pleased to provide the following information.

As the President stated on June 26, 2004, "The American people were horrified by the abuse of detainees at Abu Ghraib in Iraq." Importantly, the response to and investigation of these and other incidents revealed the military chain of command following procedures appropriately, military personnel bringing wrongdoing to light, and investigators and command authorities continuing their efforts to bring to justice those who committed misconduct. The Department of Defense has taken several actions in an attempt to address allegations of any prisoner abuse by U.S. military personnel abroad. As one of eight major reviews or investigations, on May 7, 2004, Secretary Rumsfeld announced that four prominent and independent experts agreed to review DOD detention operations and provide independent, professional advice to the Secretary on issues related to the treatment of detainees. The Independent Panel issued its final report on August 24, 2004, which the United States Government would be pleased to provide to the Commission upon request. The report addressed issues such as force structure, training, organization, detention policy and procedures, interrogation policy and procures, command relationships and operational practices. . . .

Thus far, more than 50 individuals have been referred for court martial, some of whom have already been convicted and sentenced to serve up to eight years in prison. Additionally, others have been disciplined, removed from command, or separated from the U.S. Armed Forces.

Additionally, on June 10, 2004, the Secretary of Defense issued new guidance on procedures for investigations into deaths of any person held as a detainee in the custody of the U.S. Armed Forces. The guidance details very strict procedures to ensure that the U.S. Department of Defense can establish and record an official cause and manner of death in all cases involving persons in U.S. custody. The directive is part of a series of efforts to strengthen policies and eliminate procedural weaknesses that have come to light as a result of the events at Abu Ghraib prison. *www.dod.mil/releases/2004/nr20040610-0892.html* (June 10, 2004).

* * * *

Summary. For the foregoing reasons, the United States respectfully requests that the petition be declared inadmissible, because it fails to establish the exhaustion of available domestic remedies, a core principle under customary international law and expressly incorporated in Inter-American Commission procedural requirements. The petition also raises issues under the Geneva Conventions and the law of war that are beyond the competence of the Commission, and it fails to establish the existence of violations of human rights. For all of the reasons stated in the submission above, the petition must be deemed inadmissible.

Without prejudice to this position, the United States underscores that there are several available and ongoing judicial and administrative procedures for Guantanamo detainees to seek review of their detention. These include a *habeas corpus* petition in U.S. federal court, a Combatant Status Review Tribunal, and an annual individualized review of continued detention (ARB).

Further, the President has reaffirmed the policy of the United States that all detainees held by the armed forces in connection with the war on terrorism be treated humanely. The United States has instituted additional measures to prevent any prisoner abuse and has reaffirmed that persons responsible for acts of torture against detainees in U.S. custody will be investigated and prosecuted.

In conclusion, the United States respectfully submits that the petition is inadmissible and that the Commission lacks jurisdiction over the matter.

b. Detainee cases before U.S. Courts

As noted above in the U.S. submission to the IACHR, 20 cases seeking the release of 69 Guantanamo Bay detainees were pending in U.S. federal courts by the end of 2004.

Three detainee cases, *Al Odah v. United States, Rasul v. Bush,* and *Habib v. Bush*, were filed in 2002 and then dismissed by the District Court for the District of Columbia on jurisdictional grounds. *See Digest 2002* at 980–97, *Digest 2003* at 1027–30. On June 28, 2004, the Supreme Court decided in *Rasul v. Bush* (together with *Al Odah*), 542 U.S. 466 (2004), that aliens being detained in Guantanamo Bay, Cuba, as enemy combatants could bring habeas actions in federal court to challenge the legality of their detention and to pursue other statutory claims. Excerpts from the Supreme Court's decision in *Rasul* follow (footnotes omitted).

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* * * *

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

I

On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. . . . In response to the attacks, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. 107–40, §§ 1–2, 115 Stat. 224. Acting pursuant to that authorization, the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. Since early 2002, the U. S. military has held them—along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad—at the Naval Base at Guantanamo Bay. Brief for United States 6. The United States occupies the Base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas." In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect "[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo."

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U. S. District Court for the District of Columbia challenging the legality of their detention at the Base. All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts. They also alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal. App. 29, 77, 108.

The two Australians, Mamdouh Habib and David Hicks, each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations, and other relief. *Id.*, at 98–99, 124–126. Fawzi Khalid Abdullah Fahad Al Odah and the 11 other Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal. *Id.*, at 34. They claimed that denial of these rights violates the Constitution, international law, and treaties of the United States. Invoking the

court's jurisdiction under 28 U. S. C. §§ 1331 and 1350, among other statutory bases, they asserted causes of action under the Administrative Procedure Act, 5 U. S. C. §§ 555, 702, 706; the Alien Tort Statute, 28 U. S. C. § 1350; and the general federal habeas corpus statute, §§ 2241–2243. App. 19.

Construing all three actions as petitions for writs of habeas corpus, the District Court dismissed them for want of jurisdiction. The court held, in reliance on our opinion in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that "aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus." 215 F. Supp. 2d 55, 68 (DC 2002). The Court of Appeals affirmed. Reading *Eisentrager* to hold that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign,'" 321 F.3d 1134, 1144 (CADC 2003) (quoting *Eisentrager*, 339 U.S., at 777–778), it held that the District Court lacked jurisdiction over petitioners' habeas actions, as well as their remaining federal statutory claims that do not sound in habeas. We granted certiorari, 540 U.S. 1003 (2003), and now reverse.

Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §§ 2241(a), (c)(3). The statute traces its ancestry to the first grant of federal court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners "in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. In 1867, Congress extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. See *Felker v. Turpin*, 518 U.S. 651, 659–660 (1996).

* * * *

The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive

detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

III

Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager*. In that case, we held that a Federal District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. The Court of Appeals in *Eisentrager* had found jurisdiction, reasoning that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Eisentrager v. Forrestal*, 174 F.2d 961, 963 (CADC 1949). In reversing that determination, this Court summarized the six critical facts in the case:

> "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." 339 U.S., at 777.

On this set of facts, the Court concluded, "no right to the writ of *habeas corpus* appears." *Id.*, at 781.

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. *Id.*, at 777. The Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.*, at 768.

* * * *

IV

Putting *Eisentrager* and *Ahrens* [*v. Clark*, 335 U.S. 188 (1948)] to one side, respondents contend that we can discern a limit on § 2241 through application of the "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934 Treaty, Art. III. Respondents themselves concede that the habeas

statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Tr. of Oral Arg. 27. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

* * * *

In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Cf. *Braden*, 410 U.S., at 495. Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.

V

In addition to invoking the District Court's jurisdiction under § 2241, the *Al Odah* petitioners' complaint invoked the court's jurisdiction under 28 U. S. C. § 1331, the federal question statute, as well as § 1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed the claims founded on § 1331 and § 1350 for lack of jurisdiction, even to the extent that these claims "deal only with conditions of confinement and do not sound in habeas," because petitioners lack the "privilege of litigation" in U. S. courts. 321 F.3d, at 1144 (internal quotation marks omitted). Specifically, the court held that because petitioners' § 1331 and § 1350 claims "necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute," they, like claims founded on the habeas statute itself, must be "beyond the jurisdiction of the federal courts." *Id.*, at 1144–1145.

As explained above, *Eisentrager* itself erects no bar to the exercise of federal court jurisdiction over the petitioners' habeas corpus claims. It therefore certainly does not bar the exercise of

federal-court jurisdiction over claims that merely implicate the "same category of laws listed in the habeas corpus statute." But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the "privilege of litigation" in U.S. courts. 321 F.3d, at 1139. The courts of the United States have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights"). And indeed, 28 U. S. C. § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims.

VI

Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

In a separate decision issued on the same day as *Rasul*, the Supreme Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507, (2004), that due process required that a United States citizen being held as enemy combatant be given a meaningful opportunity to contest the factual basis for his detention. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, concluded that although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that Hamdi be given a meaningful opportunity to contest the

factual basis for that detention before a neutral decision-maker. Justice Souter, joined by Justice Ginsburg, concluded that Hamdi's detention was unauthorized, but joined with the plurality to conclude that on remand he should have a meaningful opportunity to offer evidence that he is not an enemy combatant. Justice Scalia filed a dissenting opinion, in which Justice Stevens joined, concluding that Hamdi was entitled to habeas corpus relief unless criminal proceedings were promptly brought or Congress suspended the writ of habeas corpus. Justice Thomas filed a dissenting opinion concluding that the President was acting within his authority and that Hamdi received all the process to which he was due under the circumstances of his detention as an enemy combatant. Excerpts from the Court's decision in *Hamdi* follow.

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* * * *

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born an American citizen in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an "enemy combatant," and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.

* * * *

II

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "'part of or supporting forces hostile to the United States or coalition partners'" in Afghanistan and who "'engaged in an armed conflict against the United States'" there. . . . We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the [Authorization for Use of Military Force, Pub. L. 107–40, §§ 1–2, 115 Stat. 224 ("AUMF")] .

* * * *

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal

agreement and practice," are "important incident[s] of war." *Ex parte Quirin*, 317 U.S., at 28, 63 S. Ct. 2. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. . . .

There is no bar to this Nation's holding one of its own citizens as an enemy combatant. In *Quirin*, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. 317 U.S., at 20, 63 S. Ct. 2. We held that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war." *Id.*, at 37–38, 63 S. Ct. 2. While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities. . . . Nor can we see any reason for drawing such a line here. A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized the *indefinite* detention to which he is now subject. The Government responds that "the detention of enemy combatants during World War II was just as 'indefinite' while that war was being fought." *Id.*, at 16. We take Hamdi's objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention. We recognize that the national security underpinnings of the "war on terror," although crucially important, are broad and malleable. As the Government concedes, "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement." *Ibid.* The prospect Hamdi raises is therefore not

far-fetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, TIAS. No. 3364 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"). See also Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1817 (as soon as possible after "conclusion of peace"); Hague Convention (IV), *supra*, Oct. 18, 1907, 36 Stat. 2301 ("conclusion of peace" (Art. 20)); Geneva Convention, *supra*, July 27, 1929, 47 Stat. 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace (Art. 75)); Paust, Judicial Power to Determine the Status and Rights of Persons Detained without Trial, 44 Harv. Int'l L.J. 503, 510–511 (2003) (prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences" (citing Arts. 118, 85, 99, 119, 129, Geneva Convention (III), 6 T IAS, at 3384, 3392, 3406, 3418)).

* * * *

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that

understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. . . . The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

* * * *

III

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that "extrajudicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not comport with the Fifth and Fourteenth Amendments. . . . The Government counters that any more process than was provided below would be both unworkable and "constitutionally intolerable." . . . Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance.

A

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. . . . Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241. . . . Further, all agree that § 2241 and its companion provisions provide at least a skeletal outline of the

procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that "the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts," and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of § 2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process. The Government recognizes the basic procedural protections required by the habeas statute, *Id.*, at 37–38, but asks us to hold that, given both the flexibility of the habeas mechanism and the circumstances presented in this case, the presentation of the [declaration attached to the Government's petition from Michael Mobbs ("Mobbs Declaration"), a Defense Department official, alleging various details regarding Hamdi's trip to Afghanistan and his affiliation with the Taliban] to the habeas court completed the required factual development. . . .

* * * *

. . . The ordinary mechanism that we use for balancing . . . serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," U.S. Const., Amdt. 5, is the test that we articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). . . . *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. 424 U.S., at 335, 96 S. Ct. 893. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute safeguards." *Ibid.* We take each of these steps in turn.

1

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's "private interest . . . affected by the official action," *ibid.*, is the most elemental of liberty interests—the interest in being free from physical detention by one's own government. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"). . . .

Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for "[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection," *Jones v. United States*, 463 U.S. 354, 361, 103 S. Ct. 3043, 77 L.Ed.2d 694 (1983) (emphasis added; internal quotation marks omitted), and at this stage in the *Mathews* calculus, we consider the interest of the *erroneously* detained individual. *Carey v. Piphus*, 435 U.S. 247, 259, 98 S. Ct. 1042, 55 L.Ed.2d 252 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"). . . . Indeed, as *amicus* briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real. . . . Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. . . . Because we live in a society in which "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty," *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L.Ed.2d 396 (1975), our starting point for the *Mathews v. Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated. We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own

government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

2

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above . . . the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. *Department of Navy v. Egan*, 484 U.S. 518, 530, 108 S. Ct. 818, 98 L.Ed.2d 918 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S. Ct. 863, 96 L.Ed. 1153 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. . . . To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

3

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is

American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–165, 83 S. Ct. 554, 9 L.Ed.2d 644 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action"); see also *United States v. Robel*, 389 U.S. 258, 264, 88 S. Ct. 419, 19 L.Ed.2d 508 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile").

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, "the risk of erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases. *Mathews*, 424 U.S., at 335, 96 S. Ct. 893.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. . . . These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.

Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. 424 U.S., at 335, 96 S. Ct. 893.[2]

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. . . . Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord

[2] Because we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him similar access to a tribunal for a determination of his status.

the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. *Korematsu v. United States*, 323 U.S. 214, 233–234, 65 S. Ct. 193, 89 L.Ed. 194 (1944) (Murphy, J., dissenting) ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled"); *Sterling v. Constantin*, 287 U.S. 378, 401, 53 S. Ct. 190, 77 L.Ed. 375 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions").

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.

D

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube*, 343 U.S., at 587, 72 S. Ct. 863. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual

liberties are at stake. . . . Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. . . . Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

* * * *

Because we conclude that due process demands some system for a citizen detainee to refute his classification, the proposed "some evidence" standard is inadequate. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. As the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof. Brief for Respondents 35. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. . . .

Today we are faced only with such a case. Aside from unspecified "screening" processes, . . . , and military interrogations in which the Government suggests Hamdi could have contested his classification, . . . , Hamdi has received no process. An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker. . . . That even purportedly fair adjudicators "are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey v. Ohio*, 273 U.S. 510,

522, 47 S. Ct. 437, 71 L.Ed. 749 (1927). Plainly, the "process" Hamdi has received is not that to which he is entitled under the Due Process Clause.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190–8, § 1–6 (1997). In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. Both courts below recognized as much, focusing their energies on the question of whether Hamdi was due an opportunity to rebut the Government's case against him. The Government, too, proceeded on this assumption, presenting its affidavit and then seeking that it be evaluated under a deferential standard of review based on burdens that it alleged would accompany any greater process. As we have discussed, a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return. We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

IV

Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. . . . Since our grant of certiorari in this case, Hamdi has

been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case.

* * * *

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

Subsequent to the above decisions, the U.S. Department of Defense instituted the Combatant Status Review Tribunals ("CSRTs") to conduct administrative hearings to formally determine the enemy combatant status of each Guantanamo Bay detainee, as explained in 2.a. *supra*. A July 7, 2004, DOD fact sheet provides additional information on the CSRTs, as excerpted below. The full text of the fact sheet is available at *www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf*.

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In response to last week's decisions by the Supreme Court, the Deputy Secretary of Defense today issued an order creating procedures for a Combatant Status Review Tribunal to provide detainees at Guantanamo Bay Naval Base with notice of the basis for their detention and review of their detention as enemy combatants. Each of these individuals has been determined to be an enemy combatant through multiple levels of review by the Department of Defense. The procedures for the Review Tribunal are intended to reflect the guidance the Supreme Court provided in its decisions last week.

* * * *

The Court specifically cited certain existing military regulations, Army Regulation 190–8, which it suggested might be sufficient to meet the standards it articulated. The tribunals established under

those regulations are relatively informal and occur without counsel or a personal representative. The process is a streamlined process designed to allow for expeditious determinations; in citing it, the Court recognized the military's need for flexibility and indicated that the process might provide all that was needed even for a citizen. Even in a traditional conflict, such a hearing is not provided to everyone who is detained, but only in cases of doubt as to the basis for detention.

The Process—The order issued today creates tribunals very much like those cited favorably by the Court to meet the unique circumstances of the Guantanamo detainees, and will provide an expeditious opportunity for non-citizen detainees to receive notice and an opportunity to be heard. It will not preclude them from seeking additional review in federal court.

Notice. By July 17, each detainee will be notified of the review of his detention as an enemy combatant, of the opportunity to consult with a personal representative, and of the right to seek review in U.S. courts.

Personal Representative. Each detainee will be assigned a military officer as a personal representative to assist in connection with the Tribunal process. This person is not a lawyer but provides assistance to the detainee that is not normally offered in the process cited favorably by the Supreme Court or required by the Geneva Conventions.

Tribunals. Detainees will be afforded an opportunity to appear before and present evidence to a Tribunal composed of three neutral commissioned military officers, none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee.

Hearings.

- The detainee will be allowed to attend all proceedings of the Tribunal except for those involving deliberation and voting or which would compromise national security if held in the presence of the detainee.
- The detainee will be provided with an interpreter and his personal representative will be available to assist at the hearing.

- The detainee will be allowed to present evidence, to call witnesses if reasonably available, and to question witnesses called by the Tribunal.
- The detainee will have the right to testify or otherwise address the Tribunal in oral or written form, but may not be compelled to testify.

Decision. The Tribunal will decide whether a preponderance of evidence supports the detention of the individual as an enemy combatant, and there will be a rebuttable presumption in favor of the Government's evidence.

Non-Enemy Combatant Determination. If the Tribunal determines that the detainee should no longer be classified as an enemy combatant, the Secretary of Defense will advise the Secretary of State, who will coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy.

Two other habeas cases, *Gherebi v. Bush*[1] and *Hamdan v Rumsfeld,*[2] involving Guantanamo detainees were pending at

[1] In 2003 the Ninth Circuit held in this case that habeas jurisdiction exists in the U.S. district courts for claims filed by detainees held at Guantanamo Bay. *See Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003). Respondents then filed a petition for writ of certiorari to the Supreme Court. Following the *Rasul* decision, the Court granted the petition for writ of certiorari, but vacated the Ninth Circuit's judgment and remanded the case to the Ninth Circuit for further consideration in light of *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). *See Bush v. Gherebi*, 542 U.S. 952 (Mem), June 30, 2004). On July 8, 2004, the Ninth Circuit issued an amended opinion in which it concluded that "[i]t appears to us that the proper venue for this proceeding is in the District of Columbia." *Gherebi v. Bush*, 274 F. 3d 727 at 739 (9th Cir. July 8, 2004). In accordance with this decision, the Ninth Circuit transferred the case to the District Court for the District of Columbia. *Id.*

[2] Petitioner Salim Ahmed Hamdan originally filed his habeas petition in the United States District Court for the Western District of Washington (Seattle) on April 6, 2004. That court transferred the case on August 9, 2004 to the United States District Court for the District of Columbia pursuant to

the time of the Supreme Court decision in *Rasul*. They were both transferred to the U.S. District Court for the District of Columbia for further proceedings following that decision. On September 14, 2004, the district court, in executive session, issued a Resolution providing that these cases and any similar cases filed in the future were to be transferred to Judge Green for coordination and management, and to decide any common procedural and substantive issues, with the transferring judges retaining the cases for all other purposes.

Three detainees, including Salim Ahmed Hamdan, had also directly challenged the legality of military commissions, before which they were to be tried for war crimes. On November 8, 2004, a decision was rendered in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C.2004), granting the petitioner's motion in part, and concluding, *inter alia*, that trial of Hamdan by military commission procedures would be unlawful because a competent tribunal had not yet determined whether he was a prisoner-of-war, and thus subject to the protections of the Geneva Conventions. The United States filed a notice of appeal on November 12, 2004. Action on all military commissions was suspended in December 2004 in response to the district court decision in *Hamdan*. Excerpts from the district court's decision in *Hamdan* follow (footnotes omitted).

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* * * *

Salim Ahmed Hamdan petitions for a writ of habeas corpus, challenging the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission convened under

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the Supreme Court decision in *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711 (2004), and the Ninth Circuit decision in *Gherebi v. Bush*, 274 F. 3d 727 at 739 (9th Cir. July 8, 2004).

special orders issued by the President of the United States, rather than before a court-martial convened under the Uniform Code of Military Justice. The government moves to dismiss. Because Hamdan has not been determined by a competent tribunal to be an offender triable under the law of war, 10 U.S.C. § 821, and because in any event the procedures established for the Military Commission by the President's order are "contrary to or inconsistent" with those applicable to courts-martial, 10 U.S.C. § 836, Hamdan's petition will be granted in part. The government's motion will be denied. The reasons for these rulings are set forth below.

* * * *

Hamdan's petition is stated in eight counts. It alleges the denial of Hamdan's speedy trial rights in violation of Article 10 of the Uniform Code of Military Justice, 10 U.S.C. § 810 (count 1); challenges the nature and length of Hamdan's pretrial detention as a violation of the Third Geneva Convention (count 2) and of Common Article 3 of the Geneva Conventions (count 3); challenges the order establishing the Military Commission as a violation of the separation of powers doctrine (count 4) and as purporting to invest the Military Commission with authority that exceeds the law of war (count 7); challenges the creation of the Military Commission as a violation of the equal protection guarantees of the Fifth Amendment (count 5) and of 42 U.S.C. § 1981 (count 6); and argues that the Military Order does not, on its face, apply to Hamdan (count 8).

. . . The issues before me will be resolved as a matter of law. The only three facts that are necessary to my disposition of the petition for habeas corpus and of the cross-motion to dismiss are that Hamdan was captured in Afghanistan during hostilities after the 9/11 attacks, that he has asserted his entitlement to prisoner-of-war status under the Third Geneva Convention, and that the government has not convened a competent tribunal to determine whether Hamdan is entitled to such status. All of those propositions appear to be undisputed.

* * * *

2. No proper determination has been made that Hamdan is an offender triable by military tribunal under the law of war.

a. The President may establish military commissions only for offenders or offenses triable by military tribunal under thelaw of war.

The major premise of the government's argument that the President has untrammeled power to establish military tribunals is that his authority emanates from Article II of the Constitution and is inherent in his role as commander-in-chief. None of the principal cases on which the government relies, *Ex parte Quirin*, 317 U.S. 1 (1942), *Application of Yamashita*, 327 U.S. 1 (1946), and *Madsen v. Kinsella*, 343 U.S. 341 (1952), has so held. . . .

* * * *

b. The law of war includes the Third Geneva Convention, which requires trial by court-martial as long as Hamdan's POW status is in doubt.

. . . The United States has ratified the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the Third Geneva Convention). Afghanistan is a party to the Geneva Conventions. The Third Geneva Convention is acknowledged to be part of the law of war, 10/25/04 Tr. at 55; Military Commission Instruction No. 2, §(5)(G) (Apr. 30, 2003); 32 C.F.R. § 11.5(g), *http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf*. It is applicable by its terms in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Third Geneva Convention, art. 2. That language covers the hostilities in Afghanistan that were ongoing in late 2001, when Hamdan was captured there. If Hamdan is entitled to the protections accorded prisoners of war under the Third Geneva Convention, one need look no farther than Article 102 for the rule that requires his habeas petition to be granted:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according

> to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

The Military Commission is not such a court. Its procedures are not such procedures. The government does not dispute the proposition that prisoners of war may not be tried by military tribunal. Its position is that Hamdan is not entitled to the protections of the Third Geneva Convention at all, and certainly not to prisoner-of-war status, and that in any event the protections of the Third Geneva Convention are not enforceable by way of habeas corpus.

(1) The government's first argument that the Third Geneva Convention does not protect Hamdan asserts that Hamdan was captured, not in the course of a conflict between the United States and Afghanistan, but in the course of a "separate" conflict with al Qaeda. That argument is rejected. The government apparently bases the argument on a Presidential "finding" that it claims is "not reviewable." See Motion to Dismiss at 33, Hicks v. Bush (D.D.C. No. 02-00299) (October 14, 2004). The finding is set forth in Memorandum from the President, to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), *http://www.library.law.pace.edu/research/020207_bushmemo.pdf*, stating that the Third Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees captured in Afghanistan, because al Qaeda is not a state party to the Geneva Conventions. Notwithstanding the President's view that the United States was engaged in two separate conflicts in Afghanistan (the common public understanding is to the contrary, . . .), the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with. See Amicus Brief of General David M. Brahms (ret.), Admiral Lee F. Gunn (ret.), Admiral John D. Hutson (ret.), General Richard O'Meara (ret.) (Generals and Admirals Amicus Brief) at 17 (citing Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to

the President ¶ 3 (Feb. 2, 2002), *http://www.fas.org/sgp/othergov/taft.pdf*). Thus at some level—whether as a prisoner-of-war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3,—the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there.

(2) The government next argues that, even if the Third Geneva Convention might theoretically apply to anyone captured in the Afghanistan theater, members of al Qaeda such as Hamdan are not entitled to POW status because they do not satisfy the test established by Article 4(2) of the Third Geneva Convention—they do not carry arms openly and operate under the laws and customs of war. Gov't Resp. at 35. See also The White House, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), *http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html*. We know this, the government argues, because the President himself has determined that Hamdan was a member of al Qaeda or otherwise involved in terrorism against the United States. *Id*. Presidential determinations in this area, the government argues, are due "extraordinary deference." 10/25/04 Tr. at 38. Moreover (as the court was advised for the first time at oral argument on October 25, 2004) a Combatant Status Review Tribunal (CSRT) found, after a hearing on October 3, 2004, that Hamdan has the status of an enemy combatant "as either a member of or affiliated with Al Qaeda." 10/25/04 Tr. at 12. Article 5 of the Third Geneva Convention provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

. . . There is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions. Hamdan has appeared before the Combatant Status Review Tribunal, but the CSRT

was not established to address detainees' status under the Geneva Conventions. It was established to comply with the Supreme Court's mandate in Hamdi, supra, to decide "whether the detainee is properly detained as an enemy combatant" for purposes of continued detention. Memorandum From Deputy Secretary of Defense, to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 3 (July 7, 2003), *http://www.defenselink.mil/news/Jul2004/d20040707review.pdf*; *see also* Memorandum From Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), *http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf*.

The government's legal position is that the CSRT determination that Hamdan was a member of or affiliated with al Qaeda is also determinative of Hamdan's prisoner-of-war status, since the President has already determined that detained al Qaeda members are not prisoners-of-war under the Geneva Conventions, see 10/25/04 Tr. at 37. The President is not a "tribunal," however. The government must convene a competent tribunal (or address a competent tribunal already convened) and seek a specific determination as to Hamdan's status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.

(3) The government's next argument, that Common Article 3 does not apply because it was meant to cover local and not international conflicts, is also rejected. It is universally agreed, and is demonstrable in the Convention language itself, in the context in which it was adopted, and by the generally accepted law of nations, that Common Article 3 embodies "international human norms," *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002), and that it sets forth the "most fundamental requirements of the law of war." *Kadic v. Karadzic*, 70 F.3d at 232, 243 (2d Cir. 1995). The International Court of Justice has stated it plainly: "There is no doubt that, in the event of international armed conflicts . . . [the rules articulated in Common Article 3] . . . constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international

conflicts; and they are rules which, in the Court's opinion, reflect what the court in 1949 called 'elementary considerations of humanity'." *Nicaragua v. United States*, 1986 I.C.J. 14, 114 (Judgment of June 27). The court went on to say that, "[b]ecause the minimum rules applicable to international and non-international conflicts are identical, there is no need to address the question whether . . . [the actions alleged to be violative of Common Article 3] must be looked at in the context of the rules which operate for one or the other category of conflict." *Id.*

The government has asserted a position starkly different from the positions and behavior of the United States in previous conflicts, one that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad. *Amici* remind us of the capture of U.S. Warrant Officer Michael Durant in 1993 by forces loyal to a Somali warlord. The United States demanded assurances that Durant would be treated consistently with protections afforded by the Convention, even though, if the Convention were applied as narrowly as the government now seeks to apply it to Hamdan, "Durant's captors would not be bound to follow the convention because they were not a 'state' ".

(4) The government's putative trump card is that Hamdan's rights under the Geneva Conventions, if any, and whatever they are, are not enforceable by this Court—that, in effect, Hamdan has failed to state a claim upon which relief can be granted—because the Third Geneva Convention is not "self-executing" and does not give rise to a private cause of action.

As an initial matter, it should be noted Hamdan has not asserted a "private right of action" under the Third Geneva Convention. The Convention is implicated in this case by operation of the statute that limits trials by military tribunal to "offenders . . . triable under the law of war." 10 U.S.C. § 821. The government's argument thus amounts to the assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation.

Treaties made under the authority of the United States are the supreme law of the land. U.S. Const. art. VI, cl. 2. United States

courts are bound to give effect to international law and to international agreements of the United States unless such agreements are "non-self-executing." . . .

. . . [I]t is quite clear from the legislative history of the ratification of the Geneva Conventions that Congress carefully considered what further legislation, if any, was deemed "required to give effect to the provisions contained in the four conventions," S. Rep. No. 84–9, at 30 (1955), and found that only four provisions required implementing legislation. Articles 5 and 102, which are dispositive of Hamdan's case, supra, were not among them. . . .

Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty. . . .

* * * *

3. In at least one critical respect, the procedures of the Military Commission are fatally contrary to or inconsistent with those of the Uniform Code of Military Justice.

In most respects, the procedures established for the Military Commission at Guantanamo under the President's order define a trial forum that looks appropriate and even reassuring when seen through the lens of American jurisprudence. . . .

The Military Commission is remarkably different from a court-martial, however, in two important respects. The first has to do with the structure of the reviewing authority after trial; the second, with the power of the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him. Petitioner's challenge to the first difference is unsuccessful. It is true that the President has made himself, or the Secretary of Defense acting at his direction, the

final reviewing authority, whereas under the Uniform Code of Military Justice there would be two levels of independent review by members of the Third Branch of government—an appeal to the Court of Appeals for the Armed Forces, whose active bench consists of five civilian judges, and possible review by the Supreme Court on writ of certiorari. The President has, however, established a Review Panel that will review the trial record and make a recommendation to the Secretary of Defense, or, if the panel finds an error of law, return the case for further proceedings. . . .

The second difference between the procedures adopted for the Military Commission and those applicable in a court-martial convened under the Uniform Code of Military Justice is far more troubling. That difference lies in the treatment of information that is classified; information that is otherwise "protected"; or information that might implicate the physical safety of participants, including witnesses, or the integrity of intelligence and law enforcement sources and methods, or "other national security interests." See Military Commission Order No. 1(6)(B)(3); 32 C.F.R. § 9.6(b). Under the Secretary of Defense's regulations, the Military Commission must "[h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer." *Id.* Detailed military defense counsel may not be excluded from proceedings, nor may evidence be received that has not been presented to detailed defense counsel, Military Commission Order No. 1(6)(B)(3), (6)(D)(5); 32 C.F.R. §§ 9.6(b)(3),(d)(5). The accused himself may be excluded from proceedings, however, and evidence may be adduced that he will never see (because his lawyer will be forbidden to disclose it to him). *See id.*

Thus, for example, testimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts. See Military Commission Order No. 1(6)(D); 32 C.F.R. § 9.6(d). The Presiding Officer or the Appointing Authority may receive it in evidence if it meets the "reasonably probative" standard but forbid it to be shown to Hamdan. *See id.* As counsel for Hamdan put it at

oral argument, portions of Mr. Hamdan's trial can be conducted "outside his presence. He can be excluded, not for his conduct, [but] because the government doesn't want him to know what's in it. They make a great big deal out of I can be there, but anybody who's practiced trial law, especially criminal law, knows that where you get your cross examination questions from is turning to your client and saying, 'Did that really happen? Is that what happened?' I'm not permitted to do that." 10/25/04 Tr. at 97.

It is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court, particularly after Justice Scalia's extensive opinion in his decision this year in *Crawford v. Washington*, 124 S. Ct. 1354 (2004). It is also apparent that the right to trial "in one's presence" is established as a matter of international humanitarian and human rights law. But it is unnecessary to consider whether Hamdan can rely on any American constitutional notions of fairness, or whether the nature of these proceedings really is, as counsel asserts, akin to the Star Chamber, 10/25/04 Tr. at 97 (and violative of Common Article 3), because—at least in this critical respect—the rules of the Military Commission are fatally "contrary to or inconsistent with" the statutory requirements for courts-martial convened under the Uniform Code of Military Justice, and thus unlawful. In a general court-martial conducted under the UCMJ, the accused has the right to be present during sessions of the court. . . .

* * * *

. . . The relationship between the right to be present and the adequacy of defense is recognized by military courts, which have interpreted Article 39 of the UCMJ in the light of Confrontation Clause jurisprudence. The leading Supreme Court case is *Maryland v. Craig*, 497 U.S. 836 (1990) (one-way television viewing of witness in child abuse case permissible under rule of necessity), which noted that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact" and that the "elements of confrontation"—"physical presence, oath, cross-examination, and

observation of demeanor by the trier of fact," serve among other things to enhance the accuracy of factfinding by "reducing the risk that a witness will wrongfully implicate an innocent person." *Id*. at 846 (internal citations omitted).

Following *Craig* in a military case involving child abuse, the Court of Appeals for the Armed Forces found that a military judge had misapplied the Supreme Court's holding when he excluded the defendant from the courtroom during a general court-martial:

> There [in *Craig*], the witness was outside the courtroom and the defendant was present. Here, the witness was in the courtroom and appellant was excluded. While appellant could observe J's testimony, he could not observe the reactions of the court members or the military judge, and they could not observe his demeanor. He could not communicate with his counsel except through the bailiff, who was not a member of the defense team. We hold that this procedure violated the Sixth Amendment, Article 39, and RCM 804. While *Craig* and [*United States v. Williams*, 37 M.J. 289 (C.M.A. 1993)] permit restricting an accused's face-to-face confrontation of a witness, they do not authorize expelling an accused from the courtroom.

United States. v. Daulton, 45 M.J. 212, 219 (C.A.A.F. 1996); *see also United States v. Longstreath*, 45 M.J. 366 (C.A.A.F. 1996) (defendant separated from witness by television but present in courtroom).

A tribunal set up to try, possibly convict, and punish a person accused of crime that is configured in advance to permit the introduction of evidence and the testimony of witnesses out of the presence of the accused is indeed substantively different from a regularly convened court-martial. If such a tribunal is not a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," it is violative of Common Article 3. That is a question on which I have determined to abstain. In the meantime, however, I cannot stretch the meaning of the Military Commission's rule enough to find it

consistent with the UCMJ's right to be present. 10 U.S.C. § 839. A provision that permits the exclusion of the accused from his trial for reasons other than his disruptive behavior or his voluntary absence is indeed directly contrary to the UCMJ's right to be present. I must accordingly find on the basis of the statute that, so long as it operates under such a rule, the Military Commission cannot try Hamdan.

* * * *

It is now clear, by virtue of the Supreme Court's decision in *Hamdi*, that the detentions of enemy combatants at Guantanamo Bay are not unlawful per se. The granting (in part) of Hamdan's petition for habeas corpus accordingly brings only limited relief. The order that accompanies this opinion provides: (1) that, unless and until a competent tribunal determines that Hamdan is not entitled to POW status, he may be tried for the offenses with which he is charged only by court-martial under the Uniform Code of Military Justice; (2) that, unless and until the Military Commission's rule permitting Hamdan's exclusion from commission sessions and the withholding of evidence from him is amended so that it is consistent with and not contrary to UCMJ Article 39, Hamdan's trial before the Military Commission would be unlawful; and (3) that Hamdan must be released from the pre-Commission detention wing of Camp Delta and returned to the general population of detainees, unless some reason other than the pending charges against him requires different treatment. Hamdan's remaining claims are in abeyance.

* * * *

On October 20, 2004, on remand the district court in *Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004), denied the government's motion "to conduct real time monitoring of meetings between counsel and Petitioners . . . and to conduct a classification review of notes taken during these meetings and of legal mail sent between these Petitioners and counsel." The denial was, however, made "contingent on Petitioners' compliance with the framework set out by the court at the August 16, 2004,

hearing, and to which Petitioners agreed." Excerpts from the district court's decision, including a description of that framework, follow (footnotes omitted).

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* * * *

Although there are a number of proposed Procedures for Counsel Access to Detainees that will bear on the detainees held at Guantanamo Bay, the Court has confined its present inquiry to the attorney access issues that uniquely affect the three named Petitioners in this case. Accordingly, the Court considers whether the Government can impose real time monitoring on the three Petitioners. In order to make this determination, the Court first considers what entitlement the detainees have to representation by counsel while pursuing their claims in federal court. The Court then considers whether, in light of this first determination, the Government can encroach on the detainees' relationship with counsel by subjecting them to real time monitoring of their meetings, and post hoc classification review of meeting notes.

The Court finds that Petitioners are entitled to be represented by counsel pursuant to the federal habeas statute, 28 U.S.C. § 2241, the Criminal Justice Act, 18 U.S.C. § 3006A, and the All Writs Act, 28 U.S.C. § 1651. In light of this finding, the Court determines that the Government is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship and its concomitant attorney-client privilege covering communications between them.

* * * *

The Supreme Court's holding in *Rasul* has made it clear that this Court has jurisdiction to consider Petitioners' "habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base" brought under 28 U.S.C. § 2241, as well as Petitioners' claims brought under 28 U.S.C. § 1331, the federal question statute, and 28 U.S.C. § 1350, the Alien Tort Statute. *Rasul*, 124 S. Ct. at 2692–99.

* * * *

In addition to the authority to issue writs of habeas corpus under 28 U.S.C. § 2241, the All Writs Act states that the courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). . . .

* * * *

It is clear then, that Petitioners are entitled to present the facts surrounding their confinement to the Court. It is equally clear that the Court is authorized to craft the procedures necessary to make this possible, in order that the Court might fully consider Petitioners' challenge to their detention . . .

* * * *

[Concerning appointment of counsel] . . . , this Court finds that Petitioners in the instant case have clearly presented a nonfrivolous claim. They have been detained virtually incommunicado for nearly three years without being charged with any crime. To say that Petitioners' ability to investigate the circumstances surrounding their capture and detention is "seriously impaired" is an understatement. The circumstances of their confinement render their ability to investigate nonexistent. Furthermore, it is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. Petitioners face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system. Finally, this Court's ability to give Petitioners' claims the "careful consideration and plenary processing" which is their due would be stymied were Petitioners to proceed unrepresented by counsel.

The Supreme Court has found that Petitioners have the right to bring their claims before this Court, and this Court finds that Petitioners cannot be expected to exercise this right without the assistance of counsel. . . .

Having determined that Petitioners are entitled to representation while pursuing their claims, the Court turns now to the Government's intention to impose limitations on Petitioners' relationship with counsel. Specifically, the Court addresses the

Government's proposed real time monitoring of Petitioners' meetings with their attorneys, and the Government's intention to review attorney notes taken during these meetings and legal mail sent between the attorneys and detainees.

* * * *

. . . [T]he Government argues that its "procedures governing counsel access are more than reasonable and permit petitioners to obtain assistance of counsel in this habeas proceeding, while still maintaining essential national security protections." *Id.* The Court finds that the Government's position is both thinly supported and fails to fully consider the nature of the attorney-client privilege. The Government has not presented the Court with law sufficient to sustain their proposed inroads into Petitioners' relationship with their attorneys. The privilege that attaches to communications between counsel and client has long held an exceptional place in the legal system of the United States . . . .

* * * *

Furthermore, the courts have protected an attorney's notes taken in the course of representation. The Supreme Court has rejected attempts by the Internal Revenue Service to obtain "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties," noting that "it is essential that a lawyer work with a certain degree of privacy," and that if discovery of the material was allowed "much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice. . . . And the interests of the clients and the cause of justice would be poorly served." *Upjohn*, 449 U.S. at 397–98, 101 S. Ct. 677 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510–11, 67 S. Ct. 385, 91 L.Ed. 451 (1947)).

The Government's proposal that it monitor these meetings and conduct a classification review of meeting notes flies in the face of the foundational principle of the attorney-client privilege. In fact, the courts have found that intrusion by the government, in particular, would lay waste to the value of the attorney-client privilege. . . .

In proportion to the importance granted the attorney-client privilege, the District of Columbia Circuit Court takes the strictest position on its waiver. This Circuit utilizes the traditional approach that any disclosure of privileged material works a waiver of the privilege.

* * * *

The only example produced by [the] Government specifically addressing the possibility of monitoring attorney-client meetings is a Bureau of Prisons Regulation, 28 C.F.R. § 501.3, which was cited briefly in *Padilla*, 233 F.Supp.2d at 604. This regulation authorizes the director of the Bureau of Prisons to implement special administrative measures where there is a "reasonable suspicion . . . that a particular inmate may use communications with attorneys . . . to further or facilitate acts of terrorism. . . ." 28 C.F.R. § 501.3(d). The director may "provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys . . . who are traditionally covered by the attorney-client privilege. . . ." *Id.* The only case addressing even tangentially the monitoring feature of this regulation is *Al-Owhali v. Ashcroft*, 279 F.Supp.2d 13 (D.D.C. 2003), in which . . . this Court found that the prisoner did not have standing to challenge the monitoring provision. Therefore, there is no case law considering the propriety of this regulation, and the mere fact that such a regulation exists is not, itself, sufficient to persuade the Court that such monitoring is proper.

* * * *

In response to the Government's legitimate national security concerns, the Court proposed a specific framework for counsel access at the August 16, 2004, hearing, which would allow counsel to meet with Petitioners unmonitored. (citation omitted). . . .

This framework would allow for one attorney to meet with each Petitioner, and the attorney-client privilege would cover their communications. (citation omitted) The attorney would be required to treat all information subject to the attorney-client privilege as confidential, and would not disclose this information to anyone. (citation omitted) In the event that the attorney wanted to disclose

the information to anyone, including law firm colleagues or support staff, counsel would have to agree to the Government's proposed classification review, and would have to abide by the Government's decision to approve or prohibit the disclosure, if based on properly asserted national security concerns. (citation omitted) Although the Court set out its framework at the hearing as a possible way to allow counsel to have unmonitored meetings with Petitioners, at this stage the Court shall consider the attorneys' notes taken during those meetings and legal mail between counsel and Petitioners under the same rubric. If counsel agree to treat all these written communications as confidential, and to submit the written communications for classification review in the event that the individual attorney wants to disclose the information to anyone, the Court shall consider them covered by the attorney-client privilege, and exempt from review under the proposed framework.

The Court's framework also proposed a protective order, consistent with the District of Columbia Rules of Professional Conduct, requiring counsel to disclose to the Government any information from the detainee involving future events that threaten national security or involve immediate violence. (citation omitted) The attorney-client privilege does not cover the intention to commit a crime, and under the District of Columbia Rules of Professional Conduct counsel would be permitted to disclose any information gleaned in the course of their representation about future threats to national security to the Court. *See* D.C.R. Prof'l Conduct 1.6(c)(1) ("A lawyer may reveal client confidences and secrets, to the extent reasonably necessary . . . [t]o prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm. . . ."); *see also* D.C.R. Prof'l Conduct 1.6(d)(2) ("A lawyer may use or reveal client confidences or secrets . . . [w]hen . . . required by law or court order. . . .").

Counsel would be required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee, and would be prohibited from sharing with the detainee any classified material learned from other sources. (citation omitted) The Court pointed out that the Government's decision to grant an individual attorney a security clearance amounts to a determination that the attorney can be

trusted with information at that level of clearance. (citation omitted) Furthermore, any attorney granted the clearance would receive appropriate training with respect to the handling of classified information, commensurate with the level of clearance granted and the type of classified material to which the attorney would be expected to have access. (citation omitted) The Court also indicated that there are significant statutory sanctions relating to the misuse or disclosure of classified information. (citation omitted); *see, e.g.*, 18 U.S.C. § 793 (addressing sanctions for gathering, transmitting or losing defense information); 18 U.S.C. § 798 (addressing sanctions for disclosure of classified information). Finally, the Court's framework presupposes full compliance by Petitioners' counsel.

With respect to the three Petitioners, the Court finds that the Government's national security concerns can be addressed by the framework the Court proposed at the August 16, 2004, hearing and detailed above. . . .

* * * *

c. *Abuse of detainees at Abu Ghraib, Iraq*

Reports of alleged abuse of detainees at the hands of the U.S. military both at Guantanamo and in Iraq began to surface in 2003; early in 2004 photographs were released publicly that showed scenes of alleged detainee abuse at the Abu Ghraib prison in Baghdad. Excerpts follow from the May 7, 2004, testimony of U.S. Secretary of Defense, Donald Rumsfeld, before the Senate and House Armed Services Committees, the full text of which is available at: *www.defenselink.mil/speeches/2004/sp20040507-secdef1042.html. See also* Chapter 6.E.

In recent days, there has been a good deal of discussion about who bears responsibility for the terrible activities that took place at Abu Ghraib. These events occurred on my watch. As Secretary of Defense, I am accountable for them. I take full responsibility. It

is my obligation to evaluate what happened, to make sure those who have committed wrongdoing are brought to justice, and to make changes as needed to see that it doesn't happen again.

* * * *

We take this seriously. It should not have happened. Any wrongdoers need to be punished, procedures evaluated, and problems corrected.

* * * *

What I want to do is to inform you of the measures underway to remedy some of the damage done and to improve our performance in the future.

Before I do that, let me make one further note: As members of this Committee are aware, each of us at this table is either in the chain of command or has senior responsibilities in the Department. This means that anything we say publicly could have an impact on legal proceedings against those accused of wrongdoing in this matter. Our responsibility at this hearing, and in our public comments, is to conduct ourselves consistent with that well known fact. So please understand that if some of our responses are measured, it is to ensure that pending cases are not jeopardized by seeming to exert "command influence" and that the rights of any accused are protected.

Now let me tell you the measures we are taking to deal with this issue.

When this incident came to light and was reported within the Chain of Command, we took several immediate actions. These will be discussed in detail by others here today, but let me highlight them.

- General Sanchez launched a criminal investigation immediately.
- He then asked for an administrative review of procedures at the Abu Ghraib facility. That is the so-called Taguba Report.

These two investigations have resulted thus far in criminal or administrative actions against at least 12 individuals, including the relief of the prison chain of command and criminal referrals of several soldiers directly involved in abuse.

- The Army also launched an Inspector General Review of detainee operations throughout Afghanistan and Iraq. That review continues.
- The Army has initiated an investigation of Reserve training with respect to military intelligence and police functions.
- General Sanchez also asked for an Army Intelligence review of the circumstances discussed in General Taguba's report and that is ongoing.
- And, I also asked the Navy Inspector General to review procedures at Guantanamo and the Charleston Naval Brig.

As these investigations mature, we will endeavor to keep you informed. But there is more to be done.

First, to ensure we have a handle on the scope of this catastrophe, I will be announcing today the appointment of several senior former officials who are being asked to examine the pace, breadth, and thoroughness of the existing investigations, and to determine whether additional investigations need to be initiated. They are being asked to report their findings within 45 days of taking up their duties. I am confident these distinguished individuals will provide a full and fair assessment of what has been done thus far—and recommend whether further steps may be necessary.

I will encourage them to meet with members of Congress to keep them apprised of their progress. I look forward to their suggestions and recommendations.

Second, we need to review our habits and procedures. One of the things we've tried to do since September 11th is to get the Department to adjust its habits and procedures at a time of war, and in the information age. For the past three years, we have looked for areas where adjustments were needed, and regrettably, we have now found another one.

* * * *

Third, I am seeking a way to provide appropriate compensation to those detainees who suffered grievous and brutal abuse and cruelty at the hands of a few members of the U.S. military. It is the right thing to do. I'm told we have the ability to do so. And so we will—one way or another.

* * * *

The fact that abuses take place—in the military, in law enforcement, and in our society—is not surprising. But the standard by which our country and our government should be judged is not by whether abuses take place, but rather how our nation deals with them. We are dealing with them forthrightly. These incidents are being investigated and any found to have committed crimes or misconduct will receive the appropriate justice. Most of the time, at least, the system works.

None of this is meant to diminish the gravity of the recent situation at Abu Ghraib. To the contrary, that is precisely why these abuses are so damaging—because they can be used by the enemies of our country to undermine our mission and spread the false impression that such conduct is the rule and not the exception—when, in fact, the opposite is true.

Which is why it is so important that we investigate them publicly and openly, and hold people accountable in similar fashion. And that is exactly what we are doing.

QUESTIONS:

* * * *

Some have asked: Hasn't a climate allowing for abuses to occur been created because of a decision to "disregard" the Geneva Convention?

No. Indeed, the U.S. Government recognized that the Geneva Conventions apply in Iraq, and the armed forces are obliged to follow them. DoD personnel are trained in the law of war, including the Geneva Conventions. Doctrine requires that they follow those rules and report, investigate, and take corrective action to remedy violations.

We did conclude that our war against al-Qaeda is not governed precisely by the Conventions, but nevertheless announced that detained individuals would be treated consistent with the principles of the Geneva Conventions.

* * * *

At a press briefing of June 22, 2004, discussed in Chapter 6.E.1. and in 2.a. *supra*, White House Counsel Alberto

Gonzales announced that the administration was releasing documents "that highlight the thorough deliberative process the administration used to make policy decisions on how we wage a global war against a [terrorist] organization." Mr. Gonzales reiterated that "the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws" and that "[a]ll interrogation techniques actually authorized have been carefully vetted, are lawful, and do not constitute torture." Excerpts below from the press briefing respond to questions concerning Abu Ghraib. The full text of the press briefing is available at: *www.whitehouse.gov/news/releases/2004/06/20040622-14.html#*.

* * * *

[MR. GONZALES] . . . [A] few of the misinformed have asked whether the President's February 7th determination [on the applicability of the Geneva Conventions to the Taliban and Al Qaida; *see Digest 2002* at 976–977] contributed to the abuses at Abu Ghraib. We categorically reject any connection. There are two separate legal regimes that govern action in those arenas. In Iraq, it has always been U.S. position that Geneva applies. From the early days of the conflict, both the White House and the Department of Defense have been very public and clear about that.

The President made no formal determination with respect to our conflict in Iraq because it was automatic that Geneva would apply. Our soldiers are trained from the first day in our service to follow the Geneva Conventions.

Now, interrogation and detention policies in Iraq were issued by General Sanchez in the field. They do not involve input from Washington and are not related to legal opinions I have discussed concerning the war against al Qaeda. The war in Iraq is covered by the Geneva Conventions, so our policies there must meet those standards, in addition to the torture convention. And military lawyers in the field determine that the policies embodied in those memos comply with Geneva Conventions.

As for the incidents at Abu Ghraib, they were not authorized and have nothing to do with the policies contained in any of these memos. The President has made clear that he condemns this conduct. He has made clear that these activities are inconsistent with the specific policy guidance. As you know, full investigations into the abuses at Abu Ghraib are ongoing, and those engaged in this conduct will be held accountable.

Two final points before quickly summarizing documents. First, this briefing does not include CIA activities. I will say that all interrogation techniques authorized for use by the Agency against the Taliban and al Qaeda and in Iraq are lawful and do not constitute torture. But to disclose anything more would be irresponsible during this period of ongoing conflict.

* * * *

[DOD GENERAL COUNSEL WILLIAM HAYNES] Now, as you listen to this next briefing, I'd like you to remember a couple of things. When one talks about interrogation techniques, one must remember that they always come in a context. They come in the context of a governing legal regime, first off. They come in the context of an individual who interrogates with particular characteristics. They come in the context of the circumstances under which somebody is questioned. They come in the context of how techniques may be combined under certain circumstances and, of course, the context of how they're all applied with all those in place.

But the bottom line, from the Defense Department's perspective, is that they must be lawful. As the President has told us, they also must be humane. The President told the Secretary of Defense that the detainees held by the Department of Defense must be treated humanely and consistent with military necessity, consistent with the principles of Geneva Convention. The values that America holds dear must also be in mind as we do that. And, of course, an important value is to continue to protect the American people.

* * * *

Q: Judge Gonzales, maybe this is for you. When we're talking about Afghanistan and the al Qaeda and Taliban detainees that

Geneva did not apply to, a variety of you have said that in Iraq it was all Geneva all the time. It seems like that line was drawn pretty quickly. Can you just give us a sense of why that line was drawn so quickly, since the President, himself, talked about al Qaeda and Iraq being allies?

MR. HAYNES: I can take a stab at answering that. The conflict in Iraq is a conflict between two states that are parties to the Geneva Conventions. It's a traditional war, and the conventions are clear that they apply and that the treaties apply and that's the way the Defense Department has operated.

Q: Okay. And just a quick follow up. We hear a lot about Mr. Zarqawi in the context of the conflict in Iraq. How, then, would he be handled, in the context of a place where Geneva rules all the time?

* * * *

MR. HAYNES: I don't want to get into providing legal opinions on the fly. But the conflict that—let me try to put it, to approach it this way. The Geneva Conventions govern conflicts between parties, or internal conflicts. Our activity in Iraq, without question, was governed by the Geneva Conventions, whether it's the 3rd (inaudible) treatment of prisoners of war, or the 4th Geneva Convention (inaudible) to the treatment of civilians.

Each of those—so there's no question but that they apply in Iraq to that conflict, period. How one deals with the conduct of the war, given the fact that they govern, is a matter of treaty application. And as specific circumstances arise, you have to look to the relevant provisions of the treaty. In some cases that may be many relevant provisions that must be considered. . . .

* * * *

As noted above, several investigations were conducted resulting in official government reports with regard to the situation at Abu Ghraib. One of these reports, generally referred to as the Fay Report after its principal author, was released in August 2004. The Fay Report was ordered initially by LTG Ricardo S. Sanchez, Commander, Combined Joint

Task Force Seven (CJTF-7). LTG Sanchez appointed MG George R. Fay to investigate allegations that members of the 205th Military Intelligence Brigade ("205 MI BDE") were involved in detainee abuse at the Abu Ghraib Detention Facility. On June 16, 2004, General Paul J. Kern, Commander, U.S. Army Materiel Command ("AMC") became the new appointing authority for the investigation; he appointed LTG Anthony R. Jones, Deputy Commanding General, US Army Training and Doctrine Command, as an additional investigating officer. According to the report, the "investigative teams conducted a comprehensive review of all available background documents and statements pertaining to Abu Ghraib from a wide variety of sources [including] the reports written by MG Geoffrey Miller, MG Donald Ryder, MG Antonio Taguba and the Department of Army Inspector General . . . MG Fay's team conducted over 170 interviews concerning the interviewees' knowledge of interrogation and detention operations at Abu Ghraib and/or their knowledge of and involvement in detainee abuse." Some brief excerpts from the summary, as well as from the findings and recommendations, of this report follow. The report is available in full at *http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.*

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. . . This investigation identified forty-four (44) alleged instances or events of detainee abuse committed by MP [Military Police] and MI [Military Intelligence] Soldiers, as well as civilian contractors. On sixteen (16) of these occasions, abuse by the MP Soldiers was, or was alleged to have been, requested, encouraged, condoned, or solicited by MI personnel. The abuse, however, was directed on an individual basis and never officially sanctioned or approved. MI solicitation of MP abuse included the use of isolation with sensory deprivation, removal of clothing and humiliation, the use of dogs as an interrogation tool to induce fear, and physical abuse. In eleven (11) instances, MI personnel were found to be directly involved in the abuse. MI personnel were also found not to have fully comported with established interrogation procedures

and applicable laws and regulations. Theater Interrogation and Counter-Resistance Policies (ICRP) were found to be poorly defined, and changed several times. As a result, interrogation activities sometimes crossed into abusive activity.

. . . This investigation found that certain individuals committed offenses in violation of international and US law to include the Geneva Conventions and the UCMJ [Uniform Code of Military Justice] and violated Army Values. Leaders in key positions failed properly to supervise the interrogation operations at Abu Ghraib and failed to understand the dynamics created at Abu Ghraib. Leaders also failed to react appropriately to those instances where detainee abuse was reported, either by other service members, contractors, or by the International Committee of the Red Cross (ICRC). . . .

* * * *

. . . Detainee Abuse at Abu Ghraib.

. . . Physical and sexual abuses of detainees at Abu Ghraib were by far the most serious. The abuses spanned from direct physical assault, such as delivering head blows rendering detainees unconscious, to sexual posing and forced participation in group masturbation. At the extremes were the death of a detainee in OGA [Other Government Agency] custody, an alleged rape committed by a US translator and observed by a female Soldier, and the alleged sexual assault of a female detainee. These abuses are, without question, criminal. They were perpetrated or witnessed by individuals or small groups. Such abuse cannot be directly tied to a systemic US approach to torture or approved treatment of detainees. The MPs being prosecuted claim their actions came at the direction of MI. Although self-serving, these claims do have some basis in fact. The environment created at Abu Ghraib contributed to the occurrence of such abuse and the fact that it remained undiscovered by higher authority for a long period of time. What started as nakedness and humiliation, stress and physical training (exercise), carried over into sexual and physical assaults by a small group of morally corrupt and unsupervised Soldiers and civilians.

* * * *

. . . Finding: Interrogator training in the Laws of Land Warfare and the Geneva Conventions is ineffective.

Explanation: The US Army Intelligence Center and follow on unit training provided interrogators with what appears to be adequate curriculum, practical exercises and manhours in Law of Land Warfare and Geneva Conventions training. Soldiers at Abu Ghraib, however, remained uncertain about what interrogation procedures were authorized and what proper reporting procedures were required. This indicates that Initial Entry Training for interrogators was not sufficient or was not reinforced properly by additional unit training or leadership.

Recommendation: More training emphasis needs to be placed on Soldier and leader responsibilities concerning the identification and reporting of detainee abuse incidents or concerns up through the chain of command, or to other offices such as CID, IG or SJA [Criminal Investigation Command, Inspector General, and Staff Judge Advocate, respectively]. This training should not just address the rules, but address case studies from recent and past detainee and interrogation operations to address likely issues interrogators and their supervisors will encounter. Soldiers and leaders need to be taught to integrate Army values and ethical decision-making to deal with interrogation issues that are not clearly prohibited or allowed. Furthermore, it should be stressed that methods employed by US Army interrogators will represent US values.

. . . Finding: MI, MP, and Medical Corps personnel observed and failed to report instances of abuse at Abu Ghraib. Likewise, several reports indicated that capturing units did not always treat detainees IAW [In Accordance With] the Geneva Convention.

Recommendation: DoD should improve training provided to all personnel in Geneva Conventions, detainee operations, and the responsibilities of reporting detainee abuse. (DoD)

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. . . Finding: Other Government Agency (OGA) interrogation practices led to a loss of accountability at Abu Ghraib.

Explanation: While the FBI, JTF-121 [Joint Task Force-121], Criminal Investigative Task Force, Iraq Survey Group, and the CIA were all present at Abu Ghraib, the acronym "Other Government

Agency" referred almost exclusively to the CIA. Lack of military control over OGA interrogator actions or lack of systemic accountability for detainees plagued detainee operations in Abu Ghraib almost from the start. Army allowed CIA to house "Ghost Detainees" who were unidentified and unaccounted for in Abu Ghraib. This procedure created confusion and uncertainty concerning their classification and subsequent DoD reporting requirements under the Geneva Conventions. Additionally, the treatment and interrogation of OGA detainees occurred under different practices and procedures which were absent any DoD visibility, control, or oversight. This separate grouping of OGA detainees added to the confusion over proper treatment of detainees and created a perception that OGA techniques and practices were suitable and authorized for DoD operations. No memorandum of understanding on detainee accountability or interrogation practices between the CIA and CJTF-7 [Combined Joint Task Force-7] was created.

Recommendation: DoD must enforce adherence by OGA with established DoD practices and procedures while conducting detainee interrogation operations at DoD facilities.

. . . Finding: There was neither a defined procedure nor specific responsibility within CJTF-7 for dealing with ICRC visits. ICRC recommendations were ignored by MI, MP and CJTF-7 personnel.

Explanation: Within this investigation's timeframe, 16 September 2003 through 31 January 2004, the ICRC visited Abu Ghraib three times, notifying CJTF-7 twice of their visit results, describing serious violations of international Humanitarian Law and of the Geneva Conventions. In spite of the ICRC's role as independent observers, there seemed to be a consensus among personnel at Abu Ghraib that the allegations were not true. Neither the leadership, nor CJTF-7 made any attempt to verify the allegations.

Recommendation: DoD should review current policy concerning ICRC visits and establish procedures whereby findings and recommendations made by the ICRC are investigated. Investigation should not be done by the units responsible for the facility in question. Specific procedures and responsibilities should be developed for ICRC visits, reports, and responses. There also needs to be specific inquiries made into ICRC allegations of abuse or maltreatment

by an independent entity to ensure that an unbiased review has occurred. (DoD/CJTF-7)

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3. Multinational Force in Iraq and Transition Issues

In anticipation of the the end of the occupation and assumption of sovreign authority by the Iraqi Interim Government ("IIG"), Iraqi Prime Minister of the IIG Dr. Ayad Allawi and U.S. Secretary of State Colin Powell wrote to the President of the Security Council concerning the transition and the need for a new UNSC Resolution on the mandate of the Multinational Force in Iraq ("MNF"). The two letters are annexed to UN Security Council Resolution 1546, adopted June 8, 2004. U.N. Doc. S/RES/1546 (2004).

Prime Minister Allawi's June 5 letter seeking a renewal of the MNF mandate is excerpted below.

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* * * *

On my appointment as Prime Minister of the Interim Government of Iraq, I am writing to express the commitment of the people of Iraq to complete the political transition process to establish a free and democratic Iraq and to be a partner in preventing and combating terrorism. As we enter a critical new stage, regain full sovereignty and move towards elections, we will need the assistance of the international community.

The Interim Government of Iraq will make every effort to ensure that these elections are fully democratic, free and fair. Security and stability continue to be essential to our political transition. There continue, however, to be forces in Iraq, including foreign elements, that are opposed to our transition to peace, democracy, and security. The Government is determined to overcome these forces, and to develop security forces capable of providing adequate security for the Iraqi people. Until we are able to provide security for ourselves, including the defence of Iraq's land, sea and air space, we ask for the support of the Security Council and the international community

in this endeavour. We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the United Nations Security Council. The Government requests that the Security Council review the mandate of the MNF at the request of the Transitional Government of Iraq, or twelve moths from the date on which such a resolution is adopted.

* * * *

We are ready to take sovereign responsibility for governing Iraq by June 30. We are well aware of the difficulties facing us, and of our responsibilities to the Iraqi people. The stakes are great, and we need the support of the international community to succeed. We ask the Security Council to help us by acting now to adopt a Security Council resolution giving us necessary support.

* * * *

Excerpts from Secretary Powell's letter of the same date confirming the continued willingness of the MNF to serve in Iraq follow.

Recognizing the request of the government of Iraq for the continued presence of the Multi-National Force (MNF) in Iraq, and following consultations with Prime Minister Allawi of the Iraqi Interim Government, I am writing to confirm that the MNF under unified command is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq. The goal of the MNF will be to help the Iraqi people to complete the political transition and will permit the United Nations and the international community to work to facilitate Iraq's reconstruction.

* * * *

. . . We will work . . . to reach agreement on the full range of fundamental security and policy issues, including policy on sensitive foreign operations, and will ensure full partnership between MNF and Iraqi forces, through close coordination and consultation.

. . . [T]he MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. A further objective will be to train and equip Iraqi security forces that will increasingly take responsibility for maintaining Iraq's security. The MNF also stands ready as needed to participate in the provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance requested by the Iraqi Interim Government and in line with previous Security Council resolutions.

In addition, the MNF is prepared to establish or support a force within the MNF to provide for the security of personnel and facilities of the United Nations. . . .

In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.

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In Resolution 1546, the Security Council recognized the request by Prime Minister Allawi and the "willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq in support of the political transition" as set forth in Secretary Powell's letter. Acting under Chapter VII, the Security Council noted that "the presence of the multinational force in Iraq is at the request

of the incoming Interim Government of Iraq", and thus reaffirmed "the authorization for the multinational force under unified command established under resolution 1511 (2003) . . . " The Security Council further decided that "the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, *inter alia*, . . . the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities . . ." Additionally, the Security Council determined that "the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process . . ." or earlier if requested by the Government of Iraq. Of further import to the MNF in Iraq, the Security Council decided that "the prohibitions related to the sale or supply to Iraq of arms and related materiel under previous resolutions shall not apply to arms or related materiel required by the Government of Iraq or the multinational force to serve the purposes of this resolution," as discussed in Chapter 16.A.1. With regard to the MNF, the Security Council determined that "the provisions of paragraph 22 of resolution 1483 (2003) shall continue to apply, except that the privileges and immunities provided in that paragraph shall not apply with respect to any final judgement arising out of a contractual obligation entered into by Iraq after 30 June 2004 . . ." Finally, the resolution requested that the United States, on behalf of the multinational force, report to the Council within three months from the date of this resolution on the efforts and progress of this force, and on a quarterly basis thereafter." An oral summary of the U.S. report of December 2004 is contained in U.N. Doc. S/PV.5099 (Dec. 13, 2004).

On August 4, 2004, in response to continued violence, and in particular to the increased surge in kidnappings following the assumption of sovereign authority by the Interim Iraqi Government on June 28, 2004, the MNF in Iraq issued a statement on terrorism condemning the "kidnapping and murder of innocent civilians . . ." The members of the MNF "operating under UN Security Council Resolution 1546" stated their "resolve to make no concessions to terrorists nor succumb to terrorist threats. We are committed to making sure that the perpetrators of terrorist acts against our citizens and soldiers are brought to justice. We understand that conceding to terrorists will only endanger all members of the Multinational Force, as well as other countries contributing to Iraqi reconstruction and humanitarian assistance . . ." The full text of the MNF Statement on Terrorism is available at *www.state.gov/r/pa/prs/ps/2004/34926pf.htm*.

4. Convention on Conventional Weapons

The United States presented its views on issues relating to landmines and humanitarian law at the Seventh and Eighth Sessions of the Group of Governmental Experts, Convention on Certain Conventional Weapons ("CCW"), held in Geneva in March and July of 2004, respectively.

Specifically in 2004, the U.S. delegation to the Group of Experts reiterated its support for the "30 Nation Proposal" —a proposal to create a Protocol On Prohibitions Or Restrictions On The Use And Transfer Of Mines Other Than Anti-Personnel Mines, to the CCW as a means of advancing international custom and practice in the area of landmines. This proposal, originally tabled in 2002, is designed primarily to add to the Amended Mines Protocol to cover anti-vehicle mines. *See* text of proposal and "Rationale for Proposal" prepared by the U.S. delegation and other documents of the U.S. delegation at *www.ccwtreaty.com/statements.html; see also Digest 2001* at 840–41. Excerpts from the text of the

Opening Statement of Steve Solomon, Deputy Legal Adviser, U.S. Mission Geneva, delivered on July 5, 2004, discussing this proposed protocol follow. The full text is available at *www.ccwtreaty.com/070604SolomonOpening.htm.*

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. . . [T]he practical relevance of the Convention on Conventional Weapons to contemporary armed conflict has grown remarkably over the last ten years. In that time, two new protocols have been added to it, one of its original protocols has been amended in its entirety, and the primary article of the main convention has been revised and improved. These four accomplishments have worked to promote the humanitarian value[s] of the Convention at a time when the number of armed conflicts, especially internal armed conflicts, shows no sign of diminishing.

This year, Mr. Chairman, we have before us an opportunity to add an important new element to that record of achievement. A new protocol to address the problems posed by misuse of anti-vehicle mines, a class of weapons that remain largely unregulated under international law, has been proposed by 30 nations, including my own. We strongly believe we should seize this opportunity and promptly address the unnecessary risks posed by the use of such weapons.

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In this connection, permit me to briefly review some key features of the proposal known as the 30-Nation proposal. It is a straightforward proposition with two key features.

It would, first of all, prohibit entirely the use of non-detectable anti-vehicle mines. From a humanitarian perspective, such a prohibition would greatly facilitate the detection and clearance of antivehicle mines, especially on roads used by civilian traffic and humanitarian vehicles. Today, and for the foreseeable future, humanitarian demining operations rely on conventional metal detectors. Mines that remain invisible to such detectors are a humanitarian problem and should not be used. The military advantage

to be gained from the use of non-detectable mines is dubious. Even the most persuasive case made for their military utility pales next to the undeniable humanitarian cost they exact.

Secondly, our proposal would prohibit the use of remotely delivered anti-vehicle mines without self-destruct or self-neutralization mechanisms and a back-up self-deactivation mechanism.

Persistent, remotely delivered mines pose serious risks to the civilian population since they could remain active in areas used by civilians long after they served their military purpose.

Self-destruct or self-neutralization mechanisms and self-deactivation features on such mines would address that problem.

Self-destruct also makes sense from a military perspective, reducing the risks to one's own forces, without compromising legitimate military uses of remotely-delivered mines.

"Remotely delivered mines" refers to mines delivered by artillery or aircraft. Let me stress that anti-vehicle mines that are not remotely delivered would not be subject to the self-destruct requirement.

Let me make a few general points about the 30-Nation proposal that I hope will address some of the questions we continue to encounter.

First, it is important to emphasize that the proposal does not cover, at all, issues of stockpiling. This means that states can adopt, indeed even ratify, the anti-vehicle mine protocol without having to change, modify or destroy their stockpiles. They comply as long as the mines, when actually used, that is, when emplaced, satisfy the requirements.

Second, it follows that if a state already has non-detectable mines in the ground, the proposal would not require removing them since it concerns the use—the emplacement—of mines after entry into force, not before.

Third, it bears repeating that the proposal does not require self-destruction mechanisms for mines that are not remotely-delivered. Hand-emplaced mines that are typically used in long-term border minefields are not affected by the self-destruction requirement.

Fourth, the proposal applies the same reliability numbers for self-destruct and self-deactivation (SD/SDA) for remotely-delivered

anti-vehicle mines as for remotely-delivered AP mines agreed to in 1996 when the [Amended Mine Protocol] AMP was adopted.

The technology for reliable SD/SDA devices for anti-vehicle mines is exactly the same as the technology for SD/SDA devices for anti-personnel mines. State parties, of course, accepted this technology for remotely-delivered anti-personnel mines when they adopted the [AMP] in 1996.

Fifth, the proposal incorporates key provisions of the 1996 [AMP] important to many countries, such as provisions on general restrictions, on technological cooperation and assistance, and on penal sanctions.

Sixth, and finally, it is our sense that a new protocol on anti-vehicle mines—a broadly relevant issue, particularly in developing areas—offers the possibility of attracting the interest of a wide group of states not yet party to CCW. The relevance of the regime for many states and regions would, we believe, increase. Far from inhibiting progress towards universalization, the anti-vehicle mine proposal serves it.

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. . . [O]ur hope this session and this year is to build upon the record of CCW achievements and to find a consensus solution to this problem of anti-vehicle mines. Such an achievement would be a success for CCW and, more importantly, for the humanitarian purposes it is designed to serve.

Thank you very much.

B. ARMS CONTROL AND DISARMAMENT

1. The Strategic Arms Reduction Treaty

In 2004 the Twenty-sixth Session of the Strategic Arms Reduction Treaty ("START" or "Treaty") Joint Compliance and Inspection Commission ("JCIC-XXVI") met in March and October in Geneva. On March 24, 2004, the Parties (the United States, Russia, Ukraine, Kazakhstan, and Belarus) finalized coordinated plenary statements on the resolution of a longstanding concern from the former Soviet Union states

related to U.S. B-1 heavy bombers. Excerpts from the U.S. statement (which was also issued, *mutatis mutandis*, by the other four Parties), follow; the full text of the U.S. statement is available at *www.state.gov/s/c8183.htm*. For further discussion of START, *see Cumulative Digest 1991–1999* at 2207–17.

To resolve the issue of the replacement of long-range nuclear [Air-Launched Cruise Missile ("ALCM")] pylon attachment joint covers on B-1 heavy bombers, the Parties to the Treaty agree on the following:

Not later than 30 days after this statement is delivered, the United States will forward to the other Parties a schedule for inspecting all B-1 heavy bombers present at each air base for B-1 heavy bombers. Such inspections would begin within 60 days of the date such schedule is received and would finish not later than 90 days after the date on which the inspections begin. Such inspections will not count against the quotas provided for by the Treaty.

Before the beginning of each such inspection at each of the air bases, the United States will conduct a briefing for inspectors, during which it will explain the sequence of the actions it performed to replace the covers of the pylon attachment joints for long-range nuclear ALCMs on the B-1 heavy bombers. The United States will identify to the inspectors the B-1 heavy bombers attributed to each air base but absent from it at the time of such inspection, as well as provide an explanation for their absence. Thereafter, the inspectors will be given the opportunity to inspect each B-1 heavy bomber present at the air base. The inspections of absent heavy bombers may be conducted during the course of future data update inspections.

The United States notes that the Brooks/Nazarkin letters* concerning B-1 heavy bombers reflect an agreement between the

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* Editor's note: Letters exchanged between U.S. Ambassador Linton F. Brooks and U.S.S.R. Ambassador Yuri K. Nazarkin on July 30 and 31, 1991, were related to, but not part of, the START Treaty. *See* S. Treaty Doc. No. 102–20 at 703 (1991).

Parties on the distinguishability of B-1 heavy bombers. The Parties agreed that, with the distinguishing features listed in the letters and Annex G to the Memorandum of Understanding, B-1 heavy bombers would be considered heavy bombers equipped for nuclear armaments other than long-range nuclear ALCMs.

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START provides, in Article XV, that the Parties may "agree upon such additional measures as may be necessary to improve the viability and effectiveness of [the] Treaty." This allows the Parties to agree on administrative or technical changes to improve the implementation of the Treaty that would not affect the substantive rights and obligations of the Parties. Such documents, in the START regime, have taken two forms: JCIC Agreements, in which a provision of one of the Treaty's Protocols (or, possibly, another of the Treaty documents, such as the Treaty's Memorandum of Understanding) is amended; or JCIC Joint Statements, in which the Parties come to a legally-binding "understanding" as to how a specific provision of the Treaty or of a Protocol should be interpreted.

In the October session of JCIC-XXVI, the Parties completed a JCIC Agreement regarding the Bershet' facility subject to suspect-site inspection. Removal of a facility from the list of facilities subject to suspect-site inspection is specifically provided for under Paragraph 5 of Section VIII of the Inspection Protocol to START. A facility subject to suspect-site inspection is a facility where production of mobile missiles has ceased and which is no longer subject to monitoring by the other side, but which is subject to short-notice inspections. Russia's Bershet' facility was such a facility; the United States had no objection to it being removed from the list of such facilities that is maintained in the MOU. The Parties completed the JCIC Agreement on October 28, 2004, the text of which is available at *www.state.gov/s/l/c8183.htm*.

2. The Moscow Treaty

a. The Bilateral Implementation Commission

The Moscow Treaty on Strategic Offensive Reductions, which entered into force on June 1, 2003, provided that both Parties (the Russian Federation and the United States of America) would reduce their strategic nuclear warheads so that by December 31, 2012, the aggregate number of such warheads will not exceed 1,700–2,200 for each Party. *See Digest 2002* at 1017–23 and *Digest 2003* at 1068. The treaty established the Bilateral Implementation Commission ("BIC") for the Parties to meet for the purposes of implementing the treaty. Although the Treaty provides that the BIC would meet "at least twice a year," the Parties informally agreed that the BIC would not meet until they worked out procedures. Those procedures were agreed in early 2004, and the first meeting of the BIC was held on April 8–9, 2004, with the second meeting held in October 2004. The Parties finalized agreement on the procedures by an exchange of diplomatic notes in May of 2004.

The substantive paragraphs of the U.S. diplomatic note proposing "understandings regarding the scope of authority and procedures" for the BIC are set forth below.

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The status of the Bilateral Implementation Commission for the Moscow Treaty derives from Article III of the Treaty, which came into force with the exchange of the instruments of ratification on June 1, 2003. To consider and resolve issues related to implementation of the Treaty, the Treaty Parties will hold meetings of the Bilateral Implementation Commission at least twice a year.

Within the framework of the Bilateral Implementation Commission, the Parties will exchange information relating to each Party's implementation of the Treaty and will discuss each Party's plans, and otherwise exchange information on how reductions in strategic nuclear warheads under the Moscow Treaty will proceed, with subsequent exchanges of information on the actual implementation of these plans.

The Parties, through their respective representatives to the Commission, will consider any questions or concerns relating to implementation of the Treaty, in accordance with the Presidential Joint Declaration of May 24, 2002, and as appropriate will take steps to remove or resolve such concerns. In keeping with the Parties' new strategic relationship, it is envisioned that such concerns will be resolved through consultations.

Operation of the Bilateral Implementation Commission will be based on the following general principles:

— each Party may raise in the Commission any questions related to implementation of the Treaty;
— the work of the Commission will be confidential, unless otherwise agreed;
— if any agreements are concluded, they will be made public, unless otherwise agreed;
— meetings of the Commission shall be held either in Geneva, Switzerland, or other locations as agreed;
— the time and place for holding meetings of the Commission will be agreed through diplomatic channels.

This note, together with the Ministry of Foreign Affairs' response, will constitute an understanding between the United States of America and the Russian Federation on the scope of authority and procedures of the Bilateral Implementation Commission for the Moscow Treaty.

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b. Privileges and immunities for arms control delegations in Geneva

The Swiss Government has in the past accorded privileges and immunities to members of arms control delegations consistent with those granted to the U.S. Delegation to the Strategic Arms Limitation Talks (SALT Talks), pursuant to an exchange of notes between the United States and Switzerland on November 21 and 22, 1972 (23 U.S.T. 3736; TIAS 7523). Delegates to the Joint Compliance and Inspection

Commission (START Treaty) and the Special Verification Commission (INF Treaty) have, for many years, received Swiss "*cartes de legitimisation.*" In the summer of 2003, however, the Swiss Government stopped renewing the cards and indicated they were reviewing their policy on issuing them to U.S. delegates and any other delegates to these commissions.

The United States conveyed a diplomatic note to Berne on June 22, 2004, the substantive paragraphs of which follow.

[The United States] . . . has the honor to advise that a meeting between representatives of the United States of America and the Russian Federation within the framework of the Bilateral Implementation Commission ("the BIC") was held in Geneva on April 8 and 9, 2004. The BIC is the implementation forum created by Article III of the Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions ("the Moscow Treaty"), which was signed at Moscow on May 24, 2002, and entered into force on June 1, 2003.

Under the terms of the Moscow Treaty, the BIC will meet at least twice a year. The Parties will determine the locations for subsequent meetings, but the United States anticipates that many, if not most, of the meetings will also take place in Geneva, assuming that you have no objections.

The United States requests that the Government of the Swiss Confederation grant members of the U.S. Delegation to the BIC the same privileges and immunities accorded to the United States Delegation to the Strategic Arms Limitation Talks by the Exchange of Notes of November 21 and 22, 1972, between the United States of America and the Swiss Confederation. The Embassy understands that a similar request has been made by the Embassy of the Russian Federation.

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In July, the United States received a note in reply "confirm[ing] to the Embassy that, when the meetings of the

Commission are held in Switzerland, the U.S. delegation will, upon its arrival in Switzerland and throughout the duration of the Commission's meetings, be treated in accordance with the Convention on Special Missions of December 8, 1969." The dates of the meetings of the Commission and composition of the U.S. delegation, must be notified in due time to the Embassy of the United States of America, Bern.

3. Chemical Weapons Convention

On November 29, 2004, Ambassador Eric M. Javitz, head of the U.S. delegation, addressed the Ninth Conference of States Parties of the Organization for the Prohibition of Chemical Weapons ("OPCW," the body that oversees the implementation of the Chemical Weapons Convention ("CWC")) at The Hague. Ambassador Javitz's remarks, excerpted below, are available at: w*ww.state.gov/t/ac/rls/rm/2004/39161.htm*.

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It has been a good year for the Chemical Weapons Convention. Our ranks have grown to 167 member states. Chemical weapons have now been outlawed across the vast majority of the world. Libya made a strategic choice to abandon its programs for development of weapons of mass destruction, and acceded to the Convention. That welcome decision to abandon its chemical weapons program generated challenges for the OPCW throughout this year: a substantial, unexpected workload for the Verification Division and the Inspectorate, both of which performed ably, and a political challenge for member states in the form of a proposed technical change to the Convention. The Executive Council also performed effectively, and unanimously endorsed that proposal. The technical change will allow Libya to convert the Rabta chemical weapons production facility to produce low-cost pharmaceuticals to treat AIDS, malaria, and tuberculosis throughout the African continent and the developing world—a "peace dividend" if there

ever was one. It is my hope and my expectation that the 90-day review period will expire in January without any objections being raised, allowing the change to enter into force.

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Mr. Chairman, this conference finds us at the mid-point of the Action Plan we agreed to a year ago on implementation of Article VII obligations. The Action Plan was an important initiative, undertaken at the instruction of the first Review Conference in 2003. Our goal is not just a Convention that is universal, but a Convention that is universally implemented. And in today's security environment, where terrorists armed with weapons of mass destruction are among the gravest threats we face, effective national measures to implement Convention obligations play a vital role in assuring our collective safety.

The plan of action has specific targets that all member states agreed to fully implement by the time the Conference meets next year. It is a major undertaking, and there has indeed been progress, but a substantial amount of work remains to be done. As I have stated previously, the U.S. finds it disturbing, if not scandalous, that some States Parties have not even met their obligation to designate a National Authority, some seven years after entry into force of the Convention.

Meeting the goals of the Action Plan will require that we redouble our efforts in the coming year. Our efforts over the past year were significant, but we have not achieved our goals. Nevertheless, we believe that every State Party should now have an understanding of what the Convention requires, and we believe that sufficient support and assistance is available to permit every State Party to reach our shared goals. We are, then, cautiously optimistic that a large majority of member states will be in compliance with their Article VII obligations by the time we meet at next year's Conference, especially in view of the passage of UN Security Council Resolution 1540 earlier this year. At that point—roughly a year from today—member states will need to consider how to deal with those who still have not met their Article VII obligations.

In the meantime, the U.S. stands ready to assist the Technical Secretariat and member states through bilateral contacts, close

coordination with the TS, responses to requests for assistance, and participation in regional workshops. . . .

We can all be proud of the fact that since the last Conference we have added nine new States Party to the Convention. We commend the work of the staff and the facilitator for universality, Hela Lahmar of Tunisia, for their tireless efforts to promote universal adherence to the Convention. It is clear that we are increasingly facing the challenge of dealing with the truly difficult cases—states that have yet to be persuaded of the security benefits of renouncing chemical weapons. The difficulty of bringing in the last, reluctant holdouts increases the need to improve coordination within the Technical Secretariat, between the staff and member states, and among member states in order to encourage non-States Parties to join the Convention. We must continue to send a clear, unanimous message to those holdouts: the development, production, acquisition, possession, transfer, or use of chemical weapons is unacceptable under any circumstances. Once again, I pledge the continuing support of the U.S. to assist in these efforts.

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4. Biological Weapons Convention

On August 4, 2004, Guy Roberts, acting head of the U.S. delegation, delivered remarks on "U.S. Views on Enhancing International Capabilities to Investigate, Respond to, and Mitigate the Effects of Alleged Use of Biological Weapons or Suspicious Outbreaks of Disease" to the Annual Meeting of Experts for the Biological Weapons Convention ("BWC"), held in Geneva. The full text of his remarks, excerpted below, is available at *www.state.gov/t/isn/bw/rmks/2004/34941.htm*. *See also* address by Ambassador Donald Mahley, Deputy Assistance Secretary for Arms Control Implementation, to the Annual Meeting of the States Parties for the BWC on December 6, 2004, in Geneva, Switzerland, available at *www.state.gov/t/ac/rls/rm/2004/39512.htm*.

This week our charge is to discuss ways of "enhancing international capabilities for responding to, investigating and mitigating the effects of cases of alleged use of biological or toxin weapons or suspicious outbreaks of disease."

The Biological Weapons Convention implicitly addresses the question of the use of disease as a weapon, with due regard to the 1925 Geneva Protocol banning use of chemical and biological agents. Although not explicitly prohibited by the BWC, States Parties at the Fourth Review Conference recognized that use is "*effectively* prohibited." As any predicate act by a State Party resulting in the use of a biological weapon is prohibited by the Convention, it is not legally permissible to use biological weapons for hostile purposes or in armed conflict without in some respect violating the prohibitions of Article I [core obligations of the Convention]. Further, the Convention's Preamble identifies the prevention of BW use as the overarching objective. Consequently, BW use by a State Party would provide confirmation of other non-compliance with the BWC.

During this week, U.S. experts will address two aspects of the suspicious outbreak/use issue: investigations and mitigation/response. The first aspect is international capabilities for *investigating* cases of alleged use or suspicious outbreak of disease. Any use of biological weapons is of serious concern to all States Parties to the Convention.

Effective investigation of any suspected BW event, whether through national, international, cooperative, or other means is essential for promoting international peace and security. For the United States, any possibility of BW use—evidence of release, exposure or suspicious outbreak of disease—would in the first instance be investigated by national law enforcement and public health authorities, with due emphasis on protection of the forensic evidence necessary to determine attribution. In situations where countries lack sufficient expertise or resources to conduct an effective national investigation, assistance could be sought from other countries or international organizations. Related to the investigatory aspect, our experts will offer presentations on U.S. national investigation procedures, the process of rapid detection, International Cooperation in Cases of Suspicious Outbreaks

or Alleged Misuse, and case studies on the West Nile and Monkey Pox outbreaks.

Where national investigation gives rise to a concern that a BW attack by a state has occurred, there are several avenues for follow up internationally. The Biological Weapons Convention itself provides means under Article V and Article VI for pursuing these concerns:

— BWC's Article VI provides that any State Party may lodge a complaint with the UN Security Council if it finds that any other State Party is acting in breach of its obligations. Pursuant to Article VI, the Security Council may in accordance with the UN Charter initiate an "investigation" on the basis of the complaint and State Parties "undertake to cooperate in carrying out any investigation." In the history of the BWC, no complaint under Article VI has ever been submitted to the UN Security Council. Nevertheless, Article VI continues to provide an international process for addressing, and potentially investigating, allegations of use and suspicious outbreaks of disease.
— BWC's Article V offers another international procedure for addressing allegations of BW use and suspicious outbreaks of disease, elaborated upon by the Third and Fourth Review Conferences. As detailed in the Report of the Fourth Review Conference in 1991, any State Party pursuant to Article V of the Convention may request a formal consultative meeting to "consider any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention." These implementation provisions have been invoked once since the Fourth Review Conference.

Outside the context of the BWC is the UN Secretary-General authority, "to investigate, with the assistance of qualified experts, information that might be brought to his attention by any Member State concerning activities that might constitute a violation of the Geneva Protocol or of the relevant rules of customary international law," established in 1982 pursuant to UN General Assembly

Resolution 35/98D. To this end, the General Assembly also authorized the Secretary-General, with the cooperation of Member States, to compile and maintain a list of qualified experts whose services could be made available at short notice to undertake investigations, and of laboratories with the capability to undertake testing for the presence of agents whose hostile use is prohibited. Over the last 20 years, the Secretary-General has used this authority to follow up allegations of CBW use. The authority stands and, in our view, should not be tinkered with. The mechanism exists outside the auspices of the BWC and it would, therefore, not be the place of BWC States Parties to revise it. States Parties could make a national contribution to the existing mechanism, however, by updating their contributions for the list of qualified experts and laboratories which, to our knowledge, has not been updated since 1988. For our part, we will provide in the near future an updated list of experts and laboratories to the World Health Organization and the UN Secretary-General. It would be useful, in our view, if other States Parties in a position to do so would also provide their own national updates.

The second aspect of our work here is the consideration of international capabilities for responding to and mitigating the effects of alleged use of biological weapons or suspicious outbreaks of disease. The U.S. experts will speak to a number of related issues, including preparedness and management aspects of Public Health Emergencies, and the new U.S. Strategy on "Biodefense for the 21st Century." The U.S. welcomes the extremely important work being undertaken by the WHO, FAO, and OIE in the context of detecting and remediating suspicious outbreaks of disease. The WHO program on "Preparedness for Deliberate Epidemics," designed to support Member States in enhancing their own preparedness and response programs, merits our strong support. In that context, the U.S. continues to demonstrate its support for these organizations, both substantively and financially, and encourages other States Parties to do the same. In the same vein, the U.S. takes its commitment to the BWC and its Article VII commitment seriously and would welcome information from other Parties about national programs to provide assistance consistent with Article VII.

5. Hemispheric Security: Monterrey Summit of the Americas Declaration

The United States participated in the Special Summit of the Americas held in Monterrey, Nuevo León, Mexico, on January 12–13, 2004. Although the summit focused primarily on economic issues, hemispheric security and combating terrorism were also addressed in the summit's Declaration of Nuevo León. For more on the summit, including the full text of the declaration, excerpted below, *see www.summit-americas.org/Eng-2004/previous-summits.htm.*

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This is our first meeting since the tragic events of September 11, 2001. We reiterate that terrorism, as well as the proliferation of weapons of mass destruction, constitute grave threats to international security, to the institutions and the democratic values of States, and to the well-being of our peoples. We resolve to intensify our efforts and strengthen cooperation in confronting these threats.

We will take all necessary steps to prevent and counter terrorism and its financing in full compliance with our obligations under international law, including international human rights, refugee, and humanitarian law. Similarly, we commit to fight all forms of transnational crime, including illicit trafficking in drugs, arms, and persons, particularly when they generate funds used in support of terrorist organizations. We also commit to adhere to global anti-money laundering and anti-terrorist financing standards.

We call upon all countries that have not yet done so to ratify the Inter-American Convention against Terrorism, the 12 United Nations conventions and protocols on terrorism, as well as other related instruments. We further call upon all countries to urgently consider signing and ratifying the Inter-American Convention on Mutual Assistance in Criminal Matters and to participate actively in the Network on Mutual Legal Assistance in Criminal Matters.

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6. Missile Defense

On December 17, 2004, Stephen Rademaker, Assistant Secretary of State for Arms Control, delivered a speech, "America's Cooperative Approach to Missile Defense," at the American Foreign Policy Council's 2004 Conference on Missile Defenses and American Security, citing several significant bilateral developments on missile defense in 2004. The full text of this speech, excerpted below, is available at *www.state.gov/t/isn/rls/rm/2004/39920.htm*.

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The governments with which we are either carrying out or discussing missile defense cooperation include Japan, the United Kingdom, Denmark, Australia, Canada, Israel, The Netherlands, Germany, Italy, Russia, Turkey, Spain, Poland, the Czech Republic, Hungary, Ukraine, Taiwan, and India. With your indulgence, I will describe the particulars of our cooperation with some of these governments.

. . . The United States and Japan expect to sign in the near future a Framework Memorandum of Understanding, or a Framework MoU, for short, that will further facilitate the extensive industrial cooperation already underway.

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British Defense Minister Hoon and Secretary of Defense Rumsfeld signed a Ballistic Missile Defense Cooperation Framework MoU, on June 12, 2003. This agreement establishes the basis for U.S.-U.K. industrial collaboration in the field of missile defense. An Annex to the Framework MoU regarding the Fylingdales early warning radar was signed on December 18, 2003, authorizing us to upgrade that radar for use in missile defense. These upgrades will allow the radar to generate the information necessary to direct a midcourse missile defense interceptor to the general area of the intercept. This event marked the first time a U.S. ally permitted deployment of a missile defense system component on its territory to assist us in defending U.S. territory.

Another Annex on Missile Defense Research, Development, Testing and Evaluation (RDT&E) cooperation was signed on October 12, 2004. To assist in both government-to-government, and industry-to-industry RDT&E cooperation in missile defense, the U.K. established its Missile Defence Centre in July 2003. The Centre attempts to bring U.K. government and industry expertise together by providing a centralized clearinghouse for the ultimate purpose of establishing closer technical and industrial cooperation.

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. . . . The United States and Australia signed a Framework MoU on missile defense cooperation on July 7th of this year, which will facilitate bilateral government-to-government and industry-to-industry cooperation. . . .

. . . We exchanged diplomatic notes with Canada on August 5, 2004, to amend the [North American Aerospace Defense Command ("NORAD")] Agreement in order to permit NORAD to provide Integrated Tactical Warning/Attack Assessment in support of [U.S. Northern Command's] execution of the missile defense mission. This agreement does not commit Canada to participate in our missile defense system. The fundamental principles guiding the direction of U.S.-Canada missile defense cooperation were spelled out in an exchange of letters between the Secretary of Defense and the Minister of National Defence on January 15, 2004, which was publicly released.

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On January 12th of this year, President Bush and then-Prime Minister Vajpayee announced the "Next Steps in Strategic Partnership" ("NSSP") initiative.* This initiative includes a strategic stability dialogue with India, including an expanding discussion

* Editor's note: For more information on the NSSP, which also includes expanded cooperation in civilian nuclear activities, civilian space programs and high-technology trade, see *www.bxa.doc.gov/News/2004/US-IndiaNextStep.htm*.

of missile defense. The United States and India have also conducted joint missile defense workshops.

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MEADS: U.S., Germany, and Italy

The governments of Germany, Italy, and the United States have been pursuing a multilateral research and development program to field a new mobile air and missile defense system capable of providing protection for forces on the move called the Medium Extended Air Defense System (MEADS). MEADS is expected to replace the U.S. Army's Patriot system in the next decade and has the potential to become the core short-range missile defense capability for the Alliance.

Italy recently signed a memorandum of understanding with the U.S. in September 2004. Both Germany and Italy support MEADS and have programmed funding for the next phase of activities. Germany, in spite of national fiscal constraints, is projected to spend about $1.4 billion to field 12–24 MEADS units.

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7. Open Skies Treaty

During 2004 the Russian Federation and the Republic of Belarus conducted their first two observation missions over the territory of the United States pursuant to the Treaty on Open Skies, signed in Helsinki, Finland, on March 24, 1992, entered into force on January 1, 2002. The observation missions were carried out in June and September 2004; the United States has conducted thirteen missions over the territories of the Russian Federation and the Republic of Belarus since the treaty's entry into force. Further information on the observation missions is available in U.S. Department of State fact sheets available at *www.state.gov/t/ac/rls/fs/2004/33148.htm* and *www.state.gov/r/pa/prs/ps/2004/36261.htm*.

During 2004 two additional countries submitted instruments of accession: the Republic of Slovenia and the Republic of Croatia. The treaty entered into force for the

two countries on September 25, 2004, and January 1, 2005, respectively. The text of the Open Skies Treaty is available at *www.state.gov/t/ac/trt/33393.htm*; *see also Cumulative Digest 1991–1999* at 2238–41, and a Department of State fact sheet on the treaty at *www.state.gov/t/ac/rls/fs/2004/33147.htm*.

8. International Traffic in Arms Regulations: Democratic Republic of the Congo

On February 17, 2004, the Office of Defense Trade Controls Management, U.S. Department of State, issued a final rule amending the International Traffic in Arms Regulations ("ITAR") by modifying the denial policy for the Democratic Republic of the Congo ("DRC"). *See* 69 Fed. Reg. 7349 (Feb. 17, 2004). Excerpts below from the Federal Register explain the action taken.

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On April 29, 1993, the Department imposed a suspension and denial policy for all licenses and other approvals to export or otherwise transfer defense articles or defense services to Zaire (currently the DRC) (58 FR 26024, April 29, 1993). That action was taken in response to the violence and death fueled by the regime of President Mobutu. Zaire was added to the proscribed destination list at section 126.1 of the ITAR on July 22, 1993 (58 FR 39312, July 22, 1993).

UN Security Council Resolution 1493 (July 28, 2003) imposed an arms embargo on all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-Inclusive Agreement, in the DRC [with certain exceptions.]

This amendment adds a new paragraph (i) at section 126.1 of the ITAR that modifies the policy to deny licenses, other approvals, exports and imports of defense articles and defense services, destined for or originating in the DRC [c]onsistent with UN Security Council Resolution 1493. . . .

* * * *

2. Section 126.1 is amended by revising paragraph (a) and adding paragraph (i) to read as follows:

* * * *

§ Sec. 126.1 Prohibited exports and sales to certain countries.

(a) General. It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. This policy applies to Belarus, Cuba, Iran, Libya, North Korea, Syria and Vietnam. This policy also applies to countries with respect to which the United States maintains an arms embargo (e.g., Burma, China, Haiti, Liberia, Somalia, and Sudan) or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States. Information regarding certain other embargoes appears elsewhere in this section. Comprehensive arms embargoes are normally the subject of a State Department notice published in the Federal Register. The exemptions provided in the regulations in this subchapter, except Sec. 123.17 of this subchapter, do not apply with respect to articles originating in or for export to any proscribed countries, areas, or persons in this Sec. 126.1.

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(i) Democratic Republic of the Congo. It is the policy of the United States to deny licenses, other approvals, exports or imports of defense articles and defense services destined for or originating in the Democratic Republic of the Congo except for non-lethal equipment and training (lethal and non-lethal) to the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), and the transitional National Unity Government of the Democratic Republic of the Congo, and the integrated Congolese national army and police forces, and humanitarian or protective use, and related assistance and training as notified in advance to the UN. An arms embargo exists with respect to all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-inclusive Agreement, in the Democratic Republic of the Congo.

9. Organization for Security and Co-operation in Europe Decisions: Small Arms and Light Weapons

The Forum for Security Co-operation of the Organization for Security and Co-operation in Europe ("OSCE") adopted two decisions during 2004 related to small arms and light weapons ("SALW"). Decision No. 5/04 (FSC.DEC/5/04) established agreed elements for the issuance and verification of end-user certificates for small arms and light weapons. Decision No. 8/04 (FSC.DEC/8/04) established agreed principles for the regulation and issuance of licenses for brokering the sale of small arms and light weapons. In the negotiations leading up to its adoption, the United States attempted to extend Decision No. 8/04 to make all brokers subject to their national legislation, regardless of location, but the extraterritorial nature of such an extension could not achieve consensus among the participating states. Although the decisions constituted political commitments and were not legally binding, the United States and other participating states took care to ensure that the decisions were consistent with legitimate national and European Union practices while establishing standards that would curtail those practices that were considered unacceptable and contributed to nonproliferation concerns. The decisions were endorsed by the OSCE Ministerial Council held in Sofia, Bulgaria on December 6–7, 2004.

The text of Decision No. 5/04 is available at *www.osce.org/documents/fsc/2004/11/3809_en.pdf*; Decision No. 8/04 is available at *www.osce.org/documents/fsc/2004/11/3833_en.pdf*.

10. The General Framework Agreement for Peace in Bosnia and Herzegovina

In October 1995 parties to the conflict caused by the breakup of Yugoslavia agreed to proximity talks hosted by the United States at Wright-Patterson Air Force Base, Dayton, Ohio. The resulting General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Accords," *reprinted*

in 35 I.L.M. 75 (1996)) was signed by the Republic of Bosnia and Herzegovina, the then newly-created Federal Republic of Yugoslavia, and the Republic of Croatia on December 14, 1995; the United States and other members of the Contact Group, as well as a representative of the European Union, signed as witnesses. *See Cumulative Digest 1991–1999* at 1979–82.

On September 28, 2004, Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and Republika Srpska agreed to terminate the Agreement on Confidence- and Security-Building Measures in Bosnia and Herzegovina (the "Article II Agreement" also known as the "Vienna Agreement"), entered into pursuant to Article II of Annex 1B of the General Framework Agreement. The termination was countersigned by the Personal Representative of the OSCE Chairman-in-Office for Article II as a witness to the proceedings as was the original Article II Agreement. The termination was based on the common belief that the defense reforms undertaken in Bosnia and Herzegovina made the continuation of the Article II Agreement unnecessary and, based on its origin as a measure designed to operate with three separate and distinct entities, the continued operation of the Agreement could retard future progress in the area of defense consolidation.

The text of the termination document is available at *www.state.gov/sl/c8183.htm*.

C. NONPROLIFERATION

1. New Initiatives

On February 11, 2004, President Bush delivered an address, excerpted below, at the National Defense University outlining the Administration's nonproliferation policies. The full text of the address is available at *www.whitehouse.gov/news/releases/2004/02/20040211-4.html*; *see also*www.whitehouse.gov/news/releases/2004/02/20040211-5.html.

* * * *

In the past, enemies of America required massed armies, and great navies, powerful air forces to put our nation, our people, our friends and allies at risk. In the Cold War, Americans lived under the threat of weapons of mass destruction, but believed that deterrents made those weapons a last resort. What has changed in the 21st century is that, in the hands of terrorists, weapons of mass destruction would be a first resort—the preferred means to further their ideology of suicide and random murder. These terrible weapons are becoming easier to acquire, build, hide, and transport. Armed with a single vial of a biological agent or a single nuclear weapon, small groups of fanatics, or failing states, could gain the power to threaten great nations, threaten the world peace.

America, and the entire civilized world, will face this threat for decades to come. We must confront the danger with open eyes, and unbending purpose. I have made clear to all the policy of this nation: America will not permit terrorists and dangerous regimes to threaten us with the world's most deadly weapons.

* * * *

We're determined to confront those threats at the source. We will stop these weapons from being acquired or built. We'll block them from being transferred. We'll prevent them from ever being used. One source of these weapons is dangerous and secretive regimes that build weapons of mass destruction to intimidate their neighbors and force their influence upon the world. . . .

* * * *

A.Q. Khan is known throughout the world as the father of Pakistan's nuclear weapons program. What was not publicly known, until recently, is that he also led an extensive international network for the proliferation of nuclear technology and know-how.

* * * *

As a result of our penetration of the network, American and the British intelligence identified a shipment of advanced centrifuge parts manufactured at the Malaysia facility. We followed the shipment of these parts to Dubai, and watched as they were transferred

to the BBC China, a German-owned ship. After the ship passed through the Suez Canal, bound for Libya, it was stopped by German and Italian authorities. They found several containers, each forty feet in length, listed on the ship's manifest as full of "used machine parts." In fact, these containers were filled with parts of sophisticated centrifuges.

The interception of the BBC China came as Libyan and British and American officials were discussing the possibility of Libya ending its WMD programs. The United States and Britain confronted Libyan officials with this evidence of an active and illegal nuclear program. About two months ago, Libya's leader voluntarily agreed to end his nuclear and chemical weapons programs, not to pursue biological weapons, and to permit thorough inspections by the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons. We're now working in partnership with these organizations and with the United Kingdom to help the government of Libya dismantle those programs and eliminate all dangerous materials.

* * * *

We know that Libya was not the only customer of the Khan network. Other countries expressed great interest in their services. These regimes and other proliferators like Khan should know: We and our friends are determined to protect our people and the world from proliferation.

Breaking this network is one major success in a broad-based effort to stop the spread of terrible weapons. We're adjusting our strategies to the threats of a new era. America and the nations of Australia, France and Germany, Italy and Japan, the Netherlands, Poland, Portugal, Spain and the United Kingdom have launched the Proliferation Security Initiative to interdict lethal materials in transit. Our nations are sharing intelligence information, tracking suspect international cargo, conducting joint military exercises. We're prepared to search planes and ships, to seize weapons and missiles and equipment that raise proliferation concerns, just as we did in stopping the dangerous cargo on the BBC China before it reached Libya. Three more governments—Canada and Singapore and Norway—will be participating in this initiative. We'll continue

to expand the core group of PSI countries. And as PSI grows, proliferators will find it harder than ever to trade in illicit weapons.

There is a consensus among nations that proliferation cannot be tolerated. Yet this consensus means little unless it is translated into action. . . . Today, I announce seven proposals to strengthen the world's efforts to stop the spread of deadly weapons.

First, I propose that the work of the Proliferation Security Initiative be expanded to address more than shipments and transfers. Building on the tools we've developed to fight terrorists, we can take direct action against proliferation networks. We need greater cooperation not just among intelligence and military services, but in law enforcement, as well. PSI participants and other willing nations should use the Interpol and all other means to bring to justice those who traffic in deadly weapons, to shut down their labs, to seize their materials, to freeze their assets. We must act on every lead. We will find the middlemen, the suppliers and the buyers. Our message to proliferators must be consistent and it must be clear: We will find you, and we're not going to rest until you are stopped.

Second, I call on all nations to strengthen the laws and international controls that govern proliferation. At the U.N. last fall, I proposed a new Security Council resolution requiring all states to criminalize proliferation, enact strict export controls, and secure all sensitive materials within their borders. The Security Council should pass this proposal quickly. And when they do, America stands ready to help other governments to draft and enforce the new laws that will help us deal with proliferation.

Third, I propose to expand our efforts to keep weapons from the Cold War and other dangerous materials out of the wrong hands. In 1991, Congress passed the Nunn-Lugar legislation. Senator Lugar had a clear vision, along with Senator Nunn, about what to do with the old Soviet Union. Under this program, we're helping former Soviet states find productive employment for former weapons scientists. We're dismantling, destroying and securing weapons and materials left over from the Soviet WMD arsenal. We have more work to do there.

And as a result of the G-8 Summit in 2002, we agreed to provide $20 billion over 10 years—half of it from the United States—to

support such programs. We should expand this cooperation elsewhere in the world. We will retrain WMD scientists and technicians in countries like Iraq and Libya. We will help nations end the use of weapons-grade uranium in research reactors. I urge more nations to contribute to these efforts. The nations of the world must do all we can to secure and eliminate nuclear and chemical and biological and radiological materials.

As we track and destroy these networks, we must also prevent governments from developing nuclear weapons under false pretenses. The Nuclear Non-Proliferation Treaty was designed more than 30 years ago to prevent the spread of nuclear weapons beyond those states which already possessed them. Under this treaty, nuclear states agreed to help non-nuclear states develop peaceful atomic energy if they renounced the pursuit of nuclear weapons. But the treaty has a loophole which has been exploited by nations such as North Korea and Iran. These regimes are allowed to produce nuclear material that can be used to build bombs under the cover of civilian nuclear programs.

So today, as a fourth step, I propose a way to close the loophole. The world must create a safe, orderly system to field civilian nuclear plants without adding to the danger of weapons proliferation. The world's leading nuclear exporters should ensure that states have reliable access at reasonable cost to fuel for civilian reactors, so long as those states renounce enrichment and reprocessing. Enrichment and reprocessing are not necessary for nations seeking to harness nuclear energy for peaceful purposes.

The 40 nations of the Nuclear Suppliers Group should refuse to sell enrichment and reprocessing equipment and technologies to any state that does not already possess full-scale, functioning enrichment and reprocessing plants. This step will prevent new states from developing the means to produce fissile material for nuclear bombs. Proliferators must not be allowed to cynically manipulate the NPT to acquire the material and infrastructure necessary for manufacturing illegal weapons.

For international norms to be effective, they must be enforced. It is the charge of the International Atomic Energy Agency to uncover banned nuclear activity around the world and report those violations to the U.N. Security Council. We must ensure that the

IAEA has all the tools it needs to fulfill its essential mandate. America and other nations support what is called the Additional Protocol, which requires states to declare a broad range of nuclear activities and facilities, and allow the IAEA to inspect those facilities.

As a fifth step, I propose that by next year, only states that have signed the Additional Protocol be allowed to import equipment for their civilian nuclear programs. Nations that are serious about fighting proliferation will approve and implement the Additional Protocol. I've submitted the Additional Protocol to the Senate. I urge the Senate to consent immediately to its ratification.

We must also ensure that IAEA is organized to take action when action is required. So, a sixth step, I propose the creation of a special committee of the IAEA Board which will focus intensively on safeguards and verification. This committee, made up of governments in good standing with the IAEA, will strengthen the capability of the IAEA to ensure that nations comply with their international obligations.

And, finally, countries under investigation for violating nuclear non-proliferation obligations are currently allowed to serve on the IAEA Board of Governors. For instance, Iran—a country suspected of maintaining an extensive nuclear weapons program—recently completed a two-year term on the Board. Allowing potential violators to serve on the Board creates an unacceptable barrier to effective action. No state under investigation for proliferation violations should be allowed to serve on the IAEA Board of Governors—or on the new special committee. And any state currently on the Board that comes under investigation should be suspended from the Board. The integrity and mission of the IAEA depends on this simple principle: Those actively breaking the rules should not be entrusted with enforcing the rules.

* * * *

2. Proliferation Security Initiative

The Proliferation Security Initiative ("PSI"), referred to above and announced by President Bush on May 31, 2003, seeks to

establish cooperative partnerships worldwide to prevent the flow of weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. *See Digest 2003* at 1095–99. The first three shipboarding agreements under the PSI were signed and entered into force in 2004: with Liberia (signed February 11, entered into force December 8, 2004), Panama (signed May 12, entered into force December 1, 2004) and the Marshall Islands (signed August 13, entered into force November 24, 2004).

A press statement issued at the time of the signing of the Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea is set forth below and available at *www.state.gov/t/isn/c12387.htm*.

The United States and Liberia signed an agreement on Wednesday, February 11, on ship boarding in support of the Proliferation Security Initiative, a Presidential initiative announced last May. The boarding agreement provides authority on a bilateral basis to board sea vessels suspected of carrying illicit shipments of weapons of mass destruction, their delivery systems, or related materials. This is a tangible example of nonproliferation cooperation, which President Bush advocated in his speech yesterday at National Defense University. Liberia has the world's second largest ship registry and this agreement sends a strong signal to proliferators that the United States and Liberia will not allow the use of their vessels for the transport or transfer of items of proliferation concern. The conclusion of this ship boarding agreement is an important step in further operationalizing the Proliferation Security Initiative and strengthening the mechanisms that we have at our disposal to interdict suspect weapons of mass destruction-related cargoes. The ship boarding agreement is modeled after similar arrangements that exist in the counter-narcotics arena.

The text of the agreement with Libya is excerpted below and is available in full at: *www.state.gov/t/isn/trty/32403.htm*.

The Government of the United States of America and the Government of the Republic of Libya (hereinafter, "the Parties");

Deeply concerned about the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials, particularly by sea, as well as the risk that these may fall into the hands of terrorists;

Recalling the 31 January 1992 United Nations Security Council Presidential statement that proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for Member States of the UN to prevent proliferation;

Further recalling the International Ship and Port Facility Security Code, adopted by the International Maritime Organization on 12 December 2002;

Mindful of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris 13 January 1993; the Treaty on Nonproliferation of Nuclear Weapons, done at Washington, London and Moscow 1 July 1968; and 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 10 April 1972;

Acknowledging the widespread consensus that proliferation and terrorism seriously threaten international peace and security;

Convinced that trafficking in these items by States and non-state actors of proliferation concern must be stopped;

Inspired by the efforts of the International Maritime Organization to improve the effectiveness of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome 10 March 1988;

Reaffirming the importance of customary international law of the sea, and mindful of the provisions in that respect of the 1982 United Nations Convention on the Law of the Sea;

Committed to cooperation to stop the flow by sea of WMD, their delivery systems, and related materials to or from States or non-state actors of proliferation concern;

Have agreed as follows:

Article 1

Definitions

In this Agreement, unless the context otherwise requires:

1. "Proliferation by sea" means the transportation by ship of weapons of mass destruction, their delivery systems, and related materials to or from States or non-state actors of proliferation concern.

2. "Weapons of mass destruction" (WMD) means nuclear, chemical, biological and radiological weapons.

3. "Related materials" means materials, equipment and technology, of whatever nature or type, that are related to and destined for use in the development, production, utilization or delivery of WMD.

4. "Items of proliferation concern" means WMD, their delivery systems, and related materials.

5. "States or non-state actors of proliferation concern" means those countries or entities that should be subject to interdiction activities because they are or are believed to be engaged in: (1) efforts to develop or acquire WMD or their delivery systems; or (2) trafficking (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

6. "Security Force Officials" means:

a. for the United States, uniformed or otherwise clearly identifiable members of the United States Coast Guard and the United States Navy, who may be accompanied by clearly identifiable law enforcement officials of the Departments of Homeland Security and Justice, and other clearly identifiable officials duly authorized by the Government of the United States of America and notified to the Competent Authority of the Republic of Liberia; and

b. for Liberia, uniformed or otherwise clearly identifiable members of the armed forces or law enforcement authorities of Liberia, duly authorized by the Government of the Republic of Liberia and notified to the Competent Authority of the United States.

7. "Security Force vessels" means warships and other vessels of the Parties, or of third States as may be agreed upon by the Parties, on which Security Force Officials of either or both Parties may be embarked, clearly marked and identifiable as being on government service and authorized to that effect, including any vessel and aircraft embarked on or supporting such vessels.

8. "Suspect vessel" means a vessel used for commercial or private purposes in respect of which there are reasonable grounds to suspect it is engaged in proliferation by sea.

9. "International waters" means all parts of the sea not included in the territorial sea, internal waters and archipelagic waters of a State, consistent with international law.

10. "Competent Authority" means for the United States, the Commandant of the United States Coast Guard (including any officer designated by the Commandant to perform such functions), and for Liberia, the Agent of the Commissioner of Maritime Affairs appointed under section 13 of Title 21 (the Maritime Law) of the Laws of the Republic of Liberia.

Article 2

Object and Purpose of Agreement

1. The object and purpose of this Agreement is to promote cooperation between the Parties to enable them to prevent the transportation by vessel of items of proliferation concern.

2. The Parties shall carry out their obligations and responsibilities under this Agreement in a manner consistent with the principles of international law pertaining to the sovereign equality and territorial integrity of States.

3. The Parties shall cooperate to the fullest extent possible, subject to the availability of resources and in compliance with their respective laws.

Article 3

Cases of Suspect Vessels

Operations to suppress proliferation by sea pursuant to this Agreement shall be carried out only against suspect vessels, including suspect vessels without nationality, suspect vessels assimilated to vessels without nationality, and suspect vessels registered under the law of one of the Parties under a bareboat charter notwithstanding an underlying registration in another State not party to this Agreement, but not against a vessel registered under the law of one of the Parties while bareboat chartered in another State not party to this Agreement.

Article 4

Operations in International Waters

1. Authority to Board Suspect Vessels. Whenever the Security Force Officials of one Party ("the requesting Party") encounter a suspect vessel claiming nationality in the other Party ("the requested Party") located seaward of any State's territorial sea, the requesting Party may request through the Competent Authority of the requested Party that it:

a. confirm the claim of nationality of the suspect vessel; and
b. if such claim is confirmed:
   i. authorize the boarding and search of the suspect vessel, cargo and the persons found on board by Security Force Officials of the requesting Party; and
   ii. if evidence of proliferation is found, authorize the Security Force Officials of the requesting Party to detain the vessel, as well as items and persons on board, pending instructions conveyed through the Competent Authority of the requested Party as to the actions the requesting Party is permitted to take concerning such items, persons and vessels.

2. Contents of Requests. . . .

3. Responding to Requests.

a. If the nationality is verified, the requested Party may:
   i. decide to conduct the boarding and search with its own Security Force Officials;
   ii. authorize the boarding and search by the Security Force Officials of the requesting Party;
   iii. decide to conduct the boarding and search together with the requesting Party; or
   iv. deny permission to board and search.
b. The requested Party shall answer through its Competent Authority requests made for the verification of nationality within two hours of its acknowledgment of the receipt of such requests.
c. If the nationality is not verified within the two hours, the requested Party may, through its Competent Authority:
   i. nevertheless authorize the boarding and search by the Security Force Officials of the requesting Party; or
   ii. refute the claim of the suspect vessel to its nationality.
d. If there is no response from the Competent Authority of the requested Party within two hours of its acknowledgment of receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel to determine if it is engaged in proliferation by sea.

4. Right of Visit. Notwithstanding the foregoing paragraphs of this Article, the Security Force Officials of one Party ("the first Party") are authorized to board suspect vessels claiming nationality in the other Party that are not flying the flag of the other Party, not displaying any marks of its registration or nationality, and claiming to have no documentation on board the vessel, for the purpose of locating and examining the vessel's documentation. If documentation or other physical evidence of nationality is located, the foregoing paragraphs of this Article apply. If no documentation or other physical evidence of nationality is available,

the other Party will not object to the first Party assimilating the vessel to a ship without nationality consistent with international law.

5. Use of Force. The authorization to board, search and detain includes the authority to use force in accordance with Article 9 of this Agreement.

6. Shipboarding Otherwise in Accordance with International Law. This Agreement does not limit the right of either Party to conduct boardings of vessels or other activities consistent with international law whether based, inter alia, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, or an authorization from the Flag or Coastal State, or other appropriate bases in international law.

Article 5

Exercise of Jurisdiction over Detained Vessels, as well as Items and Persons on Board

1. Jurisdiction of the Parties. In all cases covered by Article 4 concerning the vessels of a Party located seaward of any State's territorial sea, that Party shall have the primary right to exercise jurisdiction over a detained vessel, cargo or other items and persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the Party with the right to exercise primary jurisdiction may, subject to its Constitution and laws, waive its primary right to exercise jurisdiction and authorize the enforcement of the other Party's law against the vessel, cargo or other items and persons on board.

2. Jurisdiction in the contiguous zone of a Party. In all cases not covered by Article 4 involving the vessel of a Party that arise in the contiguous zone of a Party and in which both Parties have authority to board and to exercise jurisdiction to prosecute—

a. except as provided in paragraph (b), the Party which conducts the boarding shall have the primary right to exercise jurisdiction;
b. in cases involving suspect vessels fleeing from the territorial sea of a Party in which that Party has the authority to

board and to exercise jurisdiction, that Party shall have the primary right to exercise jurisdiction. . . .

* * * *

Article 7

Conduct of Security Force Officials

1. Compliance with Law and Practices. Each Party shall ensure that its Security Force Officials, when conducting boardings and searches pursuant to this Agreement, act in accordance with its applicable national laws and policies and consistent with international law and accepted international practices.

* * * *

Article 9

Use of Force

1. All uses of force pursuant to this Agreement shall be in strict accordance with the applicable laws and policies of the Party conducting the boarding and applicable international law.

2. Each Party shall avoid the use of force except when and to the degree necessary to ensure the safety of Security Force Officials and vessels or where Security Force Officials are obstructed in the execution of their duties.

3. Only that force reasonably necessary under the circumstances may be used.

4. Boarding and search teams and Security Force vessels have the inherent right to use all available means to apply that force reasonably necessary to defend themselves or others from physical harm.

5. Whenever any vessel subject to boarding under this Agreement does not stop on being ordered to do so, the Security Force vessel should give an auditory or visual signal to the suspect vessel to stop, using internationally recognized signals. If the suspect vessel does not stop upon being signaled, Security Force vessels may take other appropriate actions to stop the suspect vessel.

* * * *

Article 16

Cooperation and Assistance

1. The Competent Authority of one Party may request, and the Competent Authority of the other Party may authorize, Security Force Officials to provide technical assistance, such as specialized assistance in the conduct of search of suspect vessels, for the boarding and search of suspect vessels located in the territory or waters of the requesting Party.

2. Nothing in this Agreement precludes a Party from authorizing the other Party to suppress proliferation in its territory, waters or airspace, or to take action involving suspect vessels or aircraft claiming its nationality, or from providing other forms of cooperation to suppress proliferation.

* * * *

Article 18

Rights for Third States

1. The Parties agree that the Government of the Republic of Liberia may extend, mutatis mutandis, all rights concerning suspect vessels claiming its nationality under the present Agreement to such third States as it may deem appropriate, on the understanding that such third States shall likewise comply with all conditions set forth in the present Agreement for the exercise of such rights, and subject to agreement by that Party and such third States on the designation of points of contact in accordance with Article 11.

2. Such third States shall enjoy rights and be subject to all conditions governing their exercise as set forth in paragraph 1 of this Article effective on the date of a notification by the third State to that Party that it will comply with the conditions for the exercise of those rights.

3. Such rights shall be revocable by that Party or the third State in writing. Such rights shall be revoked, and the conditions governing their exercise shall cease to apply, effective on the date of notification.

4. Such rights shall be subject to modification by mutual concurrence in writing of that Party and the third State. Upon

establishment of such mutual written concurrence by that Party and the third State in question, such rights shall be modified effective on the date agreed between that Party and the third State.

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A memorandum prepared by the Office of the Legal Adviser providing an article-by-article analysis of the Liberia agreement is excerpted below (most footnotes deleted). The full text is available at *www.state.gov/s/l/c8183.htm*.

Article 1. Definitions

- Definitions 1–5 are based on the Proliferation Security Initiative (PSI) Statement of Principles.[1]
- Definitions 6–7 and 10 are based on Titles 10 U.S.C. 101 and 374, and 14 U.S.C. 1, 2 and 89.
- Definition 9 is based on the international law of the sea accepted by the United States.

Article 2, Object and Purpose of Agreement

- Paragraph I defines the object and purpose of the agreement to be "to promote cooperation between the Parties to enable them to prevent the transportation by sea of items of proliferation concern." This is consistent with 18 U.S.C. 2339B and Note in the context of international terrorism.
- Paragraph 2 is based upon UN Charter Articles 1(1), 2(1) and 2(4).
- Paragraph 3 on cooperation is limited to availability of resources and compliance with domestic law. 14 U.S.C. 142.

Article 3, Cases of Suspect Vessels, limits the factual scope of operations (targets) under the agreement.

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[1] The Statement of Principles may be found at *http://www.state.gov/t/isn/rls/fs/23764.htm*.

Article 4, Operations in International Waters

- Paragraphs 1–3 provide the administrative and operational procedures for obtaining authority to board suspect vessels, but does not compel any particular response. USCG authority to board US vessels or any vessel subject to the jurisdiction, or to the operation of any law, of the United States, is contained in 14 U.S.C. 89.
- Paragraph 4 preserves the existing international right of visit for unidentifiable go-fast vessels (High Seas Convention article 22; Law of the Sea Convention article 110).
- Paragraph 6 preserves other bases in existing international law for boarding of foreign flag ships in international waters.

Article 5, Exercise of Jurisdiction over Detained Vessels, as well as Items and Persons on Board

- Paragraph 1 comports with the right of the flag State to exercise enforcement jurisdiction over its vessels (consistent with article 6 of the High Seas Convention and Articles 92 and 94 of the Law of the Sea Convention), but permits the flag State to waive this right in favor of the boarding State, consistent with the flag State's domestic laws and Constitution (consistent with article 22.1 of the High Seas Convention and article 110 of the Law of the Sea Convention).
- Paragraph 2 provides rules for allocating enforcement jurisdiction over foreign flag vessels in the boarding State's contiguous zone, where both States have a concurrent right to exercise jurisdiction consistent with LOS Convention article 33 and Presidential Proclamation 7219, September 2, 1999. It allocates jurisdiction to the boarding state except in cases of hot pursuit, where pursuant to article 111 of LOS and article 23 of the High Seas Convention the coastal State has exercised that right before the boarding takes place.
- Paragraph 3 requires decisions on disposition to be taken without delay or expeditiously, but does not mandate any particular disposition or manner of disposition.

- Paragraph 4 provides guidance as to the form of waiver of enforcement jurisdiction, which must in all cases be consistent with the Constitution and laws of the waiving State. Under U.S. law, most waivers to the U.S. occur with regard to persons in international waters. Waiver by the U.S. over persons on board U.S. flag vessels are generally within the discretion of the Executive Branch.

  Extradition would be required only in the case of Germany and the Netherlands with whom our extradition treaties expressly apply at sea.

The ability of the United States to exercise enforcement jurisdiction over a particular defendant turns on whether the facts constitute a substantive offense under the domestic law of the United States and whether that offense applies extraterritorially.[7]

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[7] Potential offenses include 18 U.S.C. § 2332 (Terrorist Acts Abroad Against United States Nationals, which makes it a federal crime for a terrorist overseas to kill a United States national, attempt to murder a United States national, conspire to murder a United States national, or to engage in physical violence with the intent to cause serious bodily injury to a United States national or with the result that serious bodily injury is caused to a United States national); 18 U.S.C. § 2332b (Terrorism Transcending National Boundaries, which is intended to reach violent international terrorist activity that takes place within the United States where at least a part of that activity also occurs outside the United States); 18 U.S.C. § 2339A (Providing Material Support to Terrorists, which reaches those persons who provide material support to terrorists knowing that such support will be used to commit one of the offenses specified in the statute, and requires only that the supplier of the material support have knowledge of its intended use, rather than whatever specific intent the perpetrator of the actual terrorist act must have to commit one of the specified offenses); 18 U.S.C. § 2339B (Providing Material Support to Designated Terrorist Organizations, which makes it unlawful, within the United States, or for any person who is subject to the jurisdiction of the United States anywhere, to knowingly provide material support to a foreign terrorist organization that has been designated by the Secretary of State); 18 U.S.C. §§ 175, 831, 2332c, 2332a (Use of Biological, Nuclear, Chemical or Other Weapons of Mass Destruction, which provide criminal jurisdiction over the use of biological (§ 175), chemical (§ 2332c), nuclear (§ 831), and other weapons of mass destruction (§ 2332a), including the use and threatened

Article 7, Conduct of Security Force Officials

- Paragraph 1 requires compliance with domestic law and policy, which in the case of the U.S. Coast Guard is found in the Maritime Law Enforcement Manual, a written instruction issued by the Commandant (COMDTINST 16247.1 (series)). In the case of the U.S. Navy, such direction is contained in the applicable operations and other orders promulgated by the Secretary of Defense, Combatant Commanders, and subordinated commanders, and U.S. Navy directives.

* * * *

Article 9, Use of Force provides limitations on the use of force that are consistent with USCG and DoD use of force policies (provided for in Chapter 4 of the Maritime Law Enforcement Manual, Navy directives, and the CJCS Standing Rules of Engagement) and are consistent with existing international law accepted by the United States.

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Article 16, Cooperation and Assistance, permits but does not require the United States to provide technical assistance or permit entry into its territorial sea.

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use of WMD committed within the United States, and, extraterritorially, whenever the perpetrator of the offense is a national of the United States, or a United States national, including property of the United States Government in most instances, is a victim of the offense). U.S. criminal law may also provide actionable offenses under the Arms Export Control Act, 22 U.S.C. § 2778, and the rules and regulations promulgated thereunder, 22 C.F.R. § 121–130, which prohibit the importation and exportation of arms, ammunition and implements of war without a license from the Department of State. Likewise, pursuant to the Trading with the Enemy Act, 50 U.S.C. App. 5(b), the Secretary of the Treasury has promulgated regulations prohibiting unlicensed transactions between U.S. nationals and certain designated foreign countries and their nationals. *See* 31 C.F.R. § 500.101.

Article 18, Rights for Third States, permits Liberia, but not the United States, to extend the provisions of the agreement to third States that also have the capability to conducting boardings at sea of suspect vessels, such as Canada, Australia and the UK, and who wish to take advantage of this Agreement. This provision is based on VCLT Articles 34–37.

A fact sheet released concerning the May 12, 2004, signing of the United States and Panama maritime ship boarding agreement explained that

> Panama is the world's largest ship registry and its signing of the boarding agreement demonstrates a commitment by Panama to engender greater confidence and security in its flag registry. . . . The combination of Panama, Liberia, and Proliferation Security Initiative core partner commitments means that almost 50 percent of commercial shipping fleet dead weight tonnage is now subject to rapid action consent procedures for boarding, search, and seizure.

The agreement with Panama amended an existing maritime law enforcement assistance arrangement between the two countries originally intended mainly to apply to illicit trafficking in narcotics. *See* February 5, 2002, Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the March 18, 1991 Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice (TIAS 11833).

Links to the Panama agreement and related material are available at *www.state.gov/t/isn/c12390.htm*. The agreement with the Marshall Islands is available at *www.state.gov/t/isn/trty/35237.htm*.

3. UN Security Council Resolution 1540

On April 28, 2004, the United Nations Security Council unanimously adopted Resolution 1540. U.N. Doc. S/RES/1540 (2004), originally sponsored by the United States. Acting under Chapter VII of the United Nations Charter, the Security Council determined that States shall take certain measures designed to prevent terrorists and other non-state actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical, or biological weapons and their means of delivery. Pursuant to the resolution, States must take and enforce effective measures to establish domestic controls to prevent the proliferation of such weapons and their means of delivery. Controls include measures to secure and protect such items, export and border controls, law enforcement efforts, and the development and improvement of appropriate legislation and administrative provisions. Resolution 1540 also calls upon States to submit a report to a Committee established by the resolution on steps they have taken to implement the resolution. President George W. Bush welcomed the adoption of Resolution 1540:

> Last September, I called on the United Nations Security Council to urge the cooperative action of all UN members against the illicit trafficking of nuclear, chemical, and biological weapons. I commend today's unanimous Security Council resolution, which answers that call.
>
> It now remains for all member states to act on the measures urged by this resolution. Member states should enact strict export controls, criminalize the proliferation of weapons of mass destruction, and secure all related materials within their borders.

The full text of the President's statement is available at *http://www.state.gov/t/isn/rls/prsrl/31947.htm*. Excerpts below from an October 12, 2004, presentation by Andrew Semmel, Principal Deputy Assistant Secretary of State for Nuclear Nonproliferation, at the London Conference on Global Nonproliferation and Counterterrorism provide the

views of the United States on UNSCR 1540. The full text of Mr. Semmel's presentation is available at: *www.state.gov/t/isn/rls/rm/37145.htm*.

* * * *

United Nations Security Council Resolution 1540 (UNSCR 1540) is the latest in a series of internationally-directed, concrete measures aimed at preventing WMD proliferation and, most particularly, preventing and countering terrorist acquisition and use of these deadly weapons.

As the original sponsor of UNSCR 1540, the United States took a leading role in the international community in developing and adding this tool to our collective "toolbox" of measures to prevent proliferation. My remarks today offer a look back at the conditions prompting the call for UNSCR 1540 and our priorities in negotiating the resolution. I will also look forward at how the United States hopes Resolution 1540 will contribute to more effective and more robust responses to terrorist efforts to acquire WMD.

A Layered Nonproliferation Defense

Over the years, while working with others, we have built a complex nonproliferation regime to deal with diverse proliferation threats. With each "layer" or initiative added, the regime has sought to adapt to new challenges presented by advances in technology, evolving security dynamics, and other events. The first line of nonproliferation defense are the global nonproliferation treaties—the Nuclear Nonproliferation Treaty, Chemical Weapons Convention, and Biological Weapons Convention. They have served us well for decades by creating widely-accepted norms against WMD acquisition, stockpiling, and proliferation and they continue to advance dialogue and cooperation among nations. However, we have learned hard lessons with North Korea, Libya, Iraq, and Iran. These treaties have established strong global norms, but their ability to prevent WMD acquisition is only as strong as States Parties' willingness to comply with their treaty-based obligations and the resolve of compliant parties to hold others to their obligations.'

The multilateral export control regimes—the Nuclear Suppliers Group, Zangger Committee, Missile Technology Control Regime, Australia Group, and Wassenaar Arrangement—are a second, important layer of our nonproliferation defense. Each of these export control regimes plays a critical role in identifying key WMD and missile-related material, technology and appropriate approaches to control access to such items. In the case of the Zangger, NSG, and Australia Group, these limited membership export control regimes have given greater specificity to items of concern under the NPT and CWC and have broadened the materials or techno-logies controlled.

However, recent experience—such as the clandestine A.Q. Khan nuclear trafficking network—make clear that having strong supplier state commitments and solid control lists do not automatically translate into prevention of illicit exports. Proliferators have adapted and often stayed one step ahead of preventors and prevention. We, too, must adapt and stay one step ahead of them. Proliferators have become adept at circumventing export controls through falsification of end use information, end user documentation, or cargo manifests; illicit suppliers and shippers collude and use transport routes and transshipment points in countries that lack strong controls and enforcement mechanisms.

In addition to nonproliferation treaties and regimes, the United States and other countries have engaged in a variety of ad hoc bilateral dialogues, partnerships with key like-minded states, and other measures to enhance national controls over sensitive technologies and to reduce, secure, or eliminate sources of sensitive materials and technology. While seeking positive solutions, we have not shied away from use of sanctions and other punitive measures to achieve nonproliferation goals.

In general, this "layered nonproliferation defense" has worked well, where implemented, to impede and slow efforts of state and non-state actors to acquire WMD. But progress has been spotty and even frustrating, since not all states are willing or able to take seriously the appeal for stronger nonproliferation measures. Though countries can agree generally on the danger posed by weapons of mass destruction, rarely can they agree on concrete responses.

* * * *

Resolution 1540 builds on UN Security Council Resolution 1373. Passed in the immediate aftermath of the 9/11 terrorist attacks, resolution 1373 requires states to put in place measures to ensure their banks do not finance terrorist activities, they do not allow terrorist travel, and their territories do not support training for a next terrorist attack. UNSCR 1373 foreshadowed 1540, in that it highlighted the importance of controlling the flow of critical technologies across borders. Resolution 1540 takes this call to a new level, requiring that states establish and enforce legal barriers to acquisition of WMD whether by terrorists or by states.

The crux of UNSCR 1540 requires states to ensure that they have the infrastructure in place to address the threat posed by non-state actor involvement in any aspect of WMD proliferation. It decides that states shall not support non-state actors involved in such activities and that states shall enact and enforce the necessary laws to prevent these activities on their territories. It requires states to monitor and control sensitive technologies, materials, and equipment that exist in, are manufactured by, or transit their territories. The aim is to prevent terrorists from acquiring them, but also, as we saw with A.Q. Khan, to prevent non-state actor involvement in trafficking of materials, equipment and technology, as well as transshipment and financing.

* * * *

We also expect that states will take seriously paragraph four of the resolution and submit comprehensive reports to the 1540 Committee on their efforts to comply with the resolution's operative elements. These reports will be an important tool in understanding the scope of the challenge before us and how best it can be addressed. We live in an era of global economies and growing interdependence. No state will remain unaffected by WMD proliferation; none of us is stronger than the weakest link. It is in all our interests to be frank and open about our capabilities to respond to proliferation threats. Each state's critical review of its own laws and regulations will help locate gaps. This process may facilitate an understanding of "best practices" by countries. The Nonproliferation Committee's review of these reports will help match assistance with the needs of member states. As President Bush has noted, the United States is prepared to assist where it can.

The United States has compiled a Report that provides a comprehensive accounting on the range of U.S. laws, programs, and initiatives to address proliferation. A multi-agency effort, our report provides detailed information on U.S. efforts to implement the resolution. The report also includes detailed reporting on our efforts to assist other states, support existing nonproliferation treaties, and establish cooperation among states to prevent illicit trafficking. These are key aspects of 1540 that ought not be overlooked. The U.S. report is a snapshot in time—albeit a long one at 62 pages in length—but offers a valuable resource for those interested in knowing how the United States Government has approached this particular problem. We are scheduled to submit our report to the 1540 Committee in New York today.

The Nonproliferation Committee in New York is working to assemble a panel of experts to review country reports. Though 1540 has been structured under Chapter VII, we do not envision "enforcement" as a role for the Committee. We believe that there is strong international support for this resolution and that states will comply with 1540's provisions without the need for Council action. If asked, the United States will work with states on a bilateral basis, or in partnership with other states, to assist them in fulfilling their responsibilities under 1540. This includes identifying what countries require assistance and how best that assistance can be provided. We of course will revisit this view if it becomes evident that countries are not taking their 1540 obligations seriously or are ignoring their responsibility to put in place the legal and regulatory infrastructure required under the resolution.

* * * *

The United States submitted its report under Resolution 1540 described in Mr. Semmel's presentation *supra*, on September 27, 2004. The report describes the efforts and commitments of the United States to implement its obligations under each paragraph of 1540. Excerpts from the U.S. report related to paragraphs 1–3 and 8(c) of the resolution follow (footnotes omitted). The full report is available at *www.state.gov/t/isn/rls/37375.htm*.

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1. Decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;

- As reiterated by President Bush in his February 11, 2004 speech to National Defense University, U.S. policy aims to prevent any form of support to non-State actors that attempt the activities listed in operative paragraph 1 of the Resolution.
- U.S. policy is also expressed in the *U.S. National Security Strategy*, a crucial aspect of which is the fight against all forms of terrorism, including those that comprise the use of WMD. An integral element of the National Security Strategy, the *U.S. National Strategy to Combat Weapons of Mass Destruction (December 2002)*, is a comprehensive effort to counter, in all of its dimensions, the threat posed by weapons of mass destruction (WMD) whether in the possession of hostile states or terrorists. In accordance with these strategies, the United States continues to work to strengthen both international and domestic U.S. non-proliferation efforts and to dissuade or impede those who seek to engage in prohibited activities. To this end, the United States adheres to multiple international treaties and multilateral regimes and has undertaken political commitments that prohibit such support. The United States also cooperates actively with other countries to strengthen barriers against proliferation to state or non-state actors of concern.
- U.S. law makes it a crime to provide material support or resources within the United States to a person intending to use the support or resources, or to prepare for, the commission of a wide variety of terrorism-related crimes, including specifically those involving weapons of mass destruction. These laws are described under Paragraph 2 of this report.
- The United States also maintains a wide array of domestic controls over relevant trade, transport, and commercial production activities as well as over financial transactions

and services with a view to preventing non-State actor attempts to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery. See Paragraph 3 of this report for a detailed description of these controls.

2. Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;

- To combat the proliferation of nuclear, chemical, or biological weapons, as well as their means of delivery, the United States has enacted, and vigorously enforces, a variety of domestic criminal laws. In particular, the U.S. law enforcement community endeavors to prevent future proliferation-related threats or attacks through the investigation and prosecution of individuals or entities involved in the illicit possession or movement of weapons of mass destruction (WMD).
- As a general matter, except under certain very limited circumstances, individuals in the United States are prohibited by federal criminal law from acquiring, transferring, or possessing materials that could constitute biological, chemical, or nuclear weapons. In accordance with its obligations under several international agreements, the United States has enacted national implementing statutes, which prohibit the illegal possession or transfer of such weapons. In addition, conspiracies, attempts, or threats to use such weapons are also proscribed.
- Executive Order 12333 assigns to the Director of the Federal Bureau of Investigation (FBI), under the supervision of the Attorney General and pursuant to such regulations as the Attorney General may establish, responsibility for

conducting and coordinating counterintelligence (CI) activities in the United States against intelligence and terrorist activities conducted for, or on behalf of foreign powers, organizations, or persons. The *National Strategy for Counterintelligence*, dated August 2002, sets forth national priorities and strategic objectives for CI activities. In this context, the primary goal of the FBI's national Strategy for CI is to prevent or neutralize the foreign acquisition of nuclear, chemical, biological or other means of delivery-related information, technology, or equipment, which, if acquired, would constitute an immediate danger to the United States.

* * * *

Nuclear Weapons

- In the United States, no person may transfer, receive, manufacture, produce, acquire, possess, import, or export any nuclear weapon or nuclear explosive device except as provided by law. (42 U.S.C. § 2122). A violation of this provision subjects a person to ten years imprisonment or, alternatively, a life sentence, if he/she intended to injure the United States or secure an advantage to a foreign nation. (42 U.S.C. § 2272). Likewise, under U.S. law, a person may not receive, possess, use, transfer, alter, dispose of, or disperse any nuclear material, or nuclear byproduct material, which causes (or is likely to cause) death, serious bodily injury, or substantial damage to property or the environment. (18 U.S.C. § 831(a)).
- A person may also be subject to criminal liability for obtaining nuclear material through intimidation, fraud, or in an otherwise unauthorized manner. In addition, threatening to use nuclear material to injure persons or destroy property is prohibited. (18 U.S.C. § 831(a)). In this context, "nuclear material" means material containing any of the following: plutonium, uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature, enriched uranium or uranium 233. These enforcement provisions are in accord with the treaty

obligations under the Convention on the Physical Protection of Nuclear Material (ratified by the United States in 1982 with entry into force of the Convention in 1987).

- The United States is actively working with its international partners to amend the CPPNM to include criminal prohibitions against nuclear smuggling and nuclear sabotage.

- Under U.S. law, the means of delivery for a nuclear weapon, such as rockets and missiles, likely will be deemed "destructive devices" and thus entail numerous criminal prohibitions. (18 U.S.C. § 921 et seq. and 26 U.S.C. § 5841 et seq.) Certain individuals (e.g. felons, illegal aliens) are categorically forbidden from possessing such devices, while the failure to register the devices with the federal government will subject a person to criminal prosecution. Domestic U.S. law also bars persons from teaching or demonstrating the use, or making, of a "destructive device or a weapon of mass destruction." (18 U.S.C. § 8424(p)(2)). Finally, accomplices who provide the "means of delivery" that enable others to illegally possess or use nuclear material are criminally liable as if they possessed or used the material themselves. (18 U.S.C. §§ 2, 831).
- Depending on the circumstances, a person convicted of such an offense could face up to life imprisonment. (18 U.S.C. § 831(b), 18 U.S.C. § 844, 18 U.S.C. § 924).

Chemical Weapons

- Under U.S. law, a person may not develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use a chemical weapon. 18 U.S.C. § 229(a). Depending on the circumstances, a person convicted of such an offense faces up to life imprisonment. 18 U.S.C. § 229A(a)(1). If death results from the offense, the offender may also be subject to the death penalty. 18 U.S.C. § 229A(a)(2).

- These prohibitions and enforcement provisions are in accord with the treaty obligations under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993).

* * * *

Biological Weapons

- Under U.S. law, a person may not develop, produce, stockpile, transfer, acquire, retain, or possess any biological agent, toxin, or delivery system for use as a weapon, or knowingly assist a foreign state or organization to do so. Depending on the circumstances, a person convicted of such an offense faces up to life imprisonment. 18 U.S.C. § 175(a).
- U.S. law also criminalizes the possession of biological agents, toxins, or delivery systems of a type or quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose. 18 U.S.C. § 175(b). There is a ten-year statutory maximum for a violation of this provision.

* * * *

Catch-all or General Provisions

- Weapons of Mass Destruction—Apart from the foregoing specific provisions, U.S. law also prohibits anyone from using, or threatening, attempting, or conspiring to use, a "weapon of mass destruction." 18 U.S.C. § 2332a.

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- Demonstrating Use of WMDs—U.S. law prohibits not only the use of weapons of mass destruction but also bars teaching or demonstrating how to make or use a weapon of mass destruction to further a Federal crime of violence. 18 U.S.C. § 842(p)(2)(A). A person convicted of such an offense faces up to 20 years imprisonment.
- Material Support or Resources—Since the mid-1990's, U.S. law has prohibited the provision of "material support or

resources" to terrorists or terrorist organizations. Instances involving the proliferation of biological, chemical, or nuclear weapons could potentially be prosecuted under these laws. 18 U.S.C §§ 2339A, 2339B.

* * * *

- Financial Transactions—Crimes involving the proliferation of biological, chemical, or nuclear weapons may also implicate the money laundering and forfeiture laws.

  - Pursuant to 18 U.S.C. §§ 1956 and 1957, whoever conducts or attempts to conduct a financial transaction knowing it to involve the proceeds of specified unlawful activity (SUA), or engages in monetary transactions in property derived from specified unlawful activity, commits a money laundering offense. All property involved in "transactions or attempted transactions in violation of the money laundering statutes is subject to civil and criminal forfeiture." 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1). The quoted phrase encompasses not only laundering commissions, but also the property laundered, or any property derived from or traceable to such property, and any property that facilitated the laundering.
  - Violation of the biological, chemical and nuclear nonproliferation statutes (18 U.S.C. §§ 175, 229, and 831) became money laundering SUAs in September 2001 when the USA PATRIOT Act added these crimes to the list of predicate crimes ("racketeering activity") under the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1961(1)(G). All RICO predicates are SUAs. 18 U.S.C. § 1956(c)(7)(A).

* * * *

3. Decides also that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related

materials and to this end shall: 3(a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;

Accounting for, and Securing, Nuclear Weapons

- Department of Defense (DoD) Directives provide appropriate effective measures to account for and secure nuclear weapons and their means of delivery, storage or transport. Under Department of Defense Directive (DoDD) 3150.2, the DoD Nuclear Weapon System Safety Program provides general guidance in the form of your safety standards that govern all DoD nuclear stockpile operations. . . .
- DoDD 5210.42, the Nuclear Weapon Personnel Reliability Program, provides guidance to ensure only properly screened and monitored personnel are permitted to conduct operations involving nuclear weapons. Only those personnel who have demonstrated the highest degree of individual reliability for allegiance, trustworthiness, conduct, behavior, and responsibility shall be allowed to perform duties associated with nuclear weapons, and they shall be evaluated continuously for adherence to PRP standards. . . .

Transportation of Nuclear Weapons and Special Nuclear Materials

- DOD Directive 4540.5 (Logistic Transportation of Nuclear Weapons) provides guidance for the safe and secure transportation of all nuclear weapons in DoD custody. . . .
- The Department of Energy transports nuclear weapons, nuclear components, and other materials under guidelines authorized by Department regulations under the control of the Transportation Safeguards System (TSS). . . .

Accounting for, and Securing, Nuclear Materials

- Under the Atomic Energy Act of 1954, as amended (AEA), and the Energy Reorganization Act of 1974, as amended

(ERA), the U.S. Nuclear Regulatory Commission (NRC) is the independent, non-Executive Branch Agency (separate from DOE) responsible for establishing and enforcing regulatory controls to ensure the safe and peaceful civilian use of byproduct, source and special nuclear materials.

- NRC regulatory controls, set forth in Title 10, Chapter 1, U.S. Code of Federal Regulations Parts 1–199 (10 CFR Parts 1–199), are designed to ensure adequate protection of public health and safety, promote the common defense and security of the United States, and protect the environment by establishing "defense-in-depth" or a series of mutually reinforcing licensing requirements.
- The National Nuclear Security Administration (NNSA), a separately organized agency within the Department of Energy, is responsible for maintaining and enhancing the safety, reliability, and performance of the United States nuclear weapons stockpile; directing, managing, and overseeing the nuclear weapons production facilities; and directing, managing and overseeing assets to respond to incidents involving nuclear weapons and materials under the authority in the Atomic Energy Act of 1954, Pub. L. No. 83–703, as amended, the Energy Reorganization Act of 1974, Pub. L. No. 93–438, as amended and the National Nuclear Security Administration Act, Pub. L. No. 106–65, 50 U.S.C. 2401, et seq., as amended.

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- Both the DOE and NRC refer criminal investigations to the Department of Justice (DOJ) for possible prosecution.

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Accounting for, and Securing, Chemical Weapons

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- The DoD continually assesses potential threats to ensure effective physical security measures are in place to protect the CW stockpile and their means of delivery from theft

or diversion. Department of Defense Directive 5210.65 specifically addresses requirements for safeguarding chemical agents and chemical weapons awaiting destruction. . . .

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Accounting for, and Securing, Biological Materials

- The United States uses a "Select Agents" list as the basis for accounting measures, personnel controls, and other security procedures appropriate to ensure the secure handling and transfer of biological agents and toxins. Criteria for establishing lists of select agents are set forth under both the Public Health Security and Bioterrorism Response Act of 2002 and the Agricultural Bioterrorism Protection Act of 2002 (the Bioterrorism Acts). These regulations provide a list of biological agents and toxins having the potential to pose a severe threat to human public health and safety (HHS Select Agents and toxins); animal or plant health or to animal and plant products (USDA Select Agents and toxins); or to both human and animal health (Overlap Select Agents and toxins). Some of these agents also have the potential to be used as weapons.

* * * *

Accounting for Certain Toxic Chemicals and Precursors

- Pursuant to the Chemical Weapons Convention (CWC) and the U.S. Chemical Weapons Convention Implementation Act of 1998, U.S. CWC Regulations (15 C.F.R. §§ 710–729) impose annual declaration requirements to account for the production, processing, consumption, export and import of certain toxic chemicals and precursors related to chemical weapons. . . .

3(b): Develop and maintain appropriate effective physical protection measures: Physical Protection Measures for Nuclear Weapons

- Department of Defense (DoD) Directives provide appropriate effective physical protection measures for nuclear weapons, nuclear materials and their means of delivery (i.e. delivery vehicles). The foundation Directive is DoDD 5210.41, Security Policy for Protecting Nuclear Weapons. This directive lays out the basic tenets for maintaining the security of U.S. nuclear forces and states that it is DoD policy to protect nuclear weapons from loss, theft, sabotage, unauthorized use, and unauthorized or accidental damage or destruction. . . .
- The Department of Energy policy for safeguards and security programs identifies and characterizes potential adversary threats to all laboratories, plants and facilities, personnel, property and information, specifically: nuclear weapons; nuclear weapon components; Special Nuclear Material (SNM) and nuclear material; chemical weapons awaiting demilitarization; chemical and biological agents retained in compliance with U.S. policy and treaty regulations; classified matter and proprietary information.

* * * *

Physical Security of Nuclear Materials Used for Civilian Purposes

- NRC regulations (10 CFR Part 73) require licensees to implement and maintain various levels of physical protection for nuclear material and facilities. Physical protection requirements are implemented in a graded approach commensurate with the consequences associated with the loss of special nuclear material or sabotage of nuclear facilities.

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Physical Security of Nuclear Weapons Production Sites

- The process for securing Department of Energy nuclear weapons production and materials sites is based on DOE's Site Safeguards and Security Plans (SSSP). These plans

require documentation, and, as appropriate, upgrades to overall site protection.

* * * *

Physical Protection Measures for Chemical Weapons

- The U.S. Department of Defense Directive 5210.65 specifically addresses requirements for safeguarding chemical agents and chemical weapons, including their means of delivery. Accordingly, the U.S. Army implements chemical surety and security programs (AR 50–6) to ensure personnel reliability and safety in accessing chemical agents, chemical weapons and chemical weapon destruction site activities. Under AR 190–59, the Army enforces strict physical security controls for safeguarding the U.S. CW stockpile and their means of delivery, while they await destruction.
- The United States has enacted measures to implement fully its obligations under the OPCW inspection regime, which contributes to global efforts under the CWC to foreclose diversion of sensitive chemicals and to prevent chemical weapon proliferation.

Physical Protection Measures for Biological Materials

- The Select Agent Rule establishes specific physical security requirements for handling listed biological agents. HHS and Agriculture have established requirements, guidelines, and guidance covering laboratory safety (biosafety), laboratory security (biosecurity), transportation of infectious substances, outbreak and containment advisories, radiation and chemical safety, facility emergency response programs, employee occupational health programs, and the development of employee training and outreach initiatives in these areas. In addition, HHS works with WHO, the Pan American Health Organization, the World Organization for Animal Health (OIE), and the UN Committee of Experts on the Transport of Dangerous Goods, and others

in developing international guidelines and guidance taking into account U.S. domestic requirements and experience.

3(c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent, and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;

Border Controls

- The Department of Homeland Security and its agencies (principally Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), the United States Coast Guard (USCG), and the Transportation Security Administration (TSA)) exercise substantial domestic legal authorities in connection with border control to interdict and prevent the illegal introduction, export or transit of weapons of mass destruction (WMD), missiles, and related components, precursors and technologies in the United States. Where such items are being imported, exported, or are transiting U.S. land borders, waters or airspace, a variety of U.S. customs, export control, transportation security, and criminal laws provide authority for the performance of law enforcement and homeland security functions, including screening, search, detention, seizure, arrest, and investigation of persons, cargo, merchandise and conveyances.
- ICE and CBP officers may conduct inbound and outbound searches of merchandise, cargo, and conveyances and non-intrusive searches of persons at the border without a warrant. Additional law enforcement powers are conferred upon CBP and ICE officers pursuant to the Tariff Act of 1930, as amended, and the Immigration and Nationality Act, as amended. See, e.g., 19 U.S.C. 482, 1589a, 1499, 1581, 1582, 1595a, and 8 U.S.C. 1357. Beside the border enforcement authorities, ICE agents (and to some extent CBP agents) are also authorized to exercise traditional

federal law enforcement powers that include the ability to make arrests, serve warrants, conduct undercover operations, carry firearms, conduct electronic surveillance, exchange information, summon records and testimony, and in conjunction with CBP, pursue civil and criminal sanctions, including the forfeiture of property, proceeds, and conveyances used in or derived from the illegal import or export of articles contrary to law. See 18 U.S.C. §§ 545, 19 U.S.C. 1595a, and 22 U.S.C. § 401.

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- The U.S. Coast Guard (USCG) is the lead maritime law enforcement agency responsible for maritime and port security. Qualified Coast Guard law enforcement personnel may "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." See 14 U.S.C. 89. Coast Guard personnel may also carry firearms and make arrests at any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States. See 46 U.S.C. § 70118; 33 U.S.C. § 1226 (b)(3).
- With respect to U.S.-flagged vessels on the high seas, the Coast Guard has plenary power to stop, board, and inspect those vessels without any suspicion of criminal activity. During such inspections, where probable cause develops, the Coast Guard may take further law enforcement authority consistent with U.S. domestic law. With respect to foreign-flagged vessels, the Coast Guard may take law enforcement action pursuant to agreements or arrangements between the United States and the flag country of the vessel in question, or as is otherwise consistent with international law.

* * * *

The International Emergency Economic Powers Act, 50 U.S.C. 1702 ("IEEPA") and the Trading with the Enemy Act, 50 U.S.C. App. 1, et seq. ("TWEA").

- The President may declare embargoes or limit certain activities with respect to foreign countries. ICE and CBP officers enforce import/export embargoes and restrictions under IEEPA and TWEA, in coordination with the Treasury Department's Office of Foreign Assets Control.

Freezing Assets . . . Law Enforcement. . . . International Law Enforcement Cooperation*

* * * *

- The United States is presently engaged in multilateral negotiations at the International Maritime Organization (IMO) to amend the 1988 UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), which applies to terrorist activities on ships. The proposed amendments would . . . criminalize the transport of WMD, their delivery systems, and related materials by sea, as well as provide detailed shipboarding procedures.

3(d). Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;

- U.S. law contains a variety of civil and criminal penalties for the unlicensed export, transit, trans-shipment or re-export of items or services related to nuclear, chemical or biological weapons.

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* Editor's note: For further discussion of these issues, *see, e.g., Digest 2001* at 881–925 concerning asset freezing and law enforcement cooperation, including excerpts of a report submitted pursuant to UN Security Council Resolution 1373.

- The U.S. Government requires licenses for the export of defense articles (which includes technical data) and defense services pursuant to the Arms Export Control Act (AECA), which prohibits the illicit transfer of U.S.-origin defense items to any unauthorized person. See 22 U.S.C. § 2778, and the implementing regulations, the International Traffic in Arms Regulations (ITAR), 22 C.F.R. Parts 120–130. Any person who violates any license, order or regulation issued pursuant to the AECA may be subject to civil fines, and those who willfully violate, or willfully attempt to violate any license, order or regulation issued pursuant to the AECA may be subject to criminal penalties including fines or imprisonment of up to 10 years.
- The U.S. Government also requires licenses for the export and re-export of sensitive U.S.-origin dual-use items and nuclear-related items consistent with the Department of Commerce's statutory and regulatory authorities for dual-use export controls (see Export Administration Act (EAA) of 1979, 50 U.S.C. App. §§ 2401–2420, [fn. omitted] the Export Administration Regulations (EAR), 15 C.F.R Parts 730–799) and the export controls administered by the Nuclear Regulatory Commission (see Atomic Energy Act of 1954, 42 U.S.C. §§ 2011–2297q-4, and implementing regulations governing the export and import of nuclear equipment and materials, 10 C.F.R. §110.2).

* * * *

- Pursuant to E.O. 12938, if the Secretary of State determines a foreign person has contributed or attempted to contribute materially to the efforts of any foreign country, project, or entity of proliferation concern to use, acquire, design, develop, produce or stockpile weapons of mass destruction or missiles capable of delivering them, the measures specified in E.O. 12938 are to be imposed on that foreign person to the extent determined by the Secretary of State in consultation with certain agencies. The measures include a procurement ban on U.S. Government procurement of goods, technology, or services from the designated foreign

person; an assistance ban on any U.S. Government assistance to the designated foreign person; and an import ban.

- Implementation of the import ban is delegated to the Secretary of the Treasury. E.O. 12938 provides that the Secretary of the Treasury shall prohibit the importation into the United States of goods, technology, or services produced or provided by the designated foreign persons on which the Secretary of State has determined to impose an import ban. (Information or informational materials within the meaning of § 203(b)(3) of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1702(b)(3), are exempt from this prohibition.) The Regulations, in turn, implement the import ban.

* * * *

NRC Administers Controls On Exports and Imports of Nuclear Material and Equipment

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- The AEA establishes required NRC review procedures including obtaining judgments from interested Executive Branch agencies (Departments of Commerce, Defense, Energy, and State) as to whether specific export licensing criteria are satisfied. The level of reviews and stringency of the criteria correspond to the perceived nuclear proliferation or explosive risk posed by materials, facilities or equipment involved. NRC regulations setting forth the levels of review and criteria governing approval of exports and imports of the various types of nuclear materials, facilities and equipment under NRC jurisdiction are found in 10 CFR Part 110.

* * * *

Department of Energy Controls on Exports of Nuclear Technology and Other Transfers

- Under Section 57b of the Atomic Energy Act of 1954, as amended, it is unlawful for any person to engage directly or indirectly in the production of special nuclear material

(plutonium or enriched uranium) outside the United States, except as authorized by the Secretary of Energy or otherwise provided by law. Department of Energy (DOE) regulations 10 CFR Part 810 govern exports of nuclear technologies and services. To authorize such an export, the Secretary of Energy must have the concurrence of the Department of State and must consult the Departments of Defense and Commerce and the Nuclear Regulatory Commission. Controls on nuclear technology transfers, as well as reviews on items subject to Department of Commerce, Department of State, or Nuclear Regulatory Commission licensing jurisdiction, are administered by the National Nuclear Security Administration's Office of Export Control Policy and Cooperation.

- The Part 810 regulations reflect U.S. obligations as a member of the Non-Proliferation Treaty, as well as U.S. commitments undertaken in the Nuclear Exporters Committee (Zangger Committee) and the Nuclear Suppliers Group, as well unilateral U.S. nonproliferation controls.

* * * *

The Department of Commerce Administers Dual-Use Export Controls

- The Department of Commerce controls exports of dual-use items, which are commercial items that while not designed as weapons, delivery systems, or for terrorist purposes, have the potential for this type of misuse. The Department of Commerce is responsible for controlling sensitive items identified on the Commerce Control List (CCL), which the United States considers to be of significant value to the development, testing, deployment, and delivery of Weapons of Mass Destruction (WMD) and other military programs of concern. Certain items on the CCL may require a license for export to all destinations while other items may be eligible for a license exception if intended for a close ally or partner.
- The Department of Commerce in conjunction with the Department of Justice conducts civil and criminal investigations

of violations relating to dual-use export controls. The U.S. Government may impose civil, administrative, or criminal sanctions for dual-use export controls violations under the authority of the International Emergency Economic Powers Act (IEEPA), as amended, (50 U.S.C. §§ 1701–1706), and consistent with the Export Administration Act of 1979, as amended (EAA) (50 U.S.C. app. §§ 2401–2420), the Export Administration Regulations (EAR) (15 C.F.R. Parts 730–774) and the Chemical Weapons Convention Implementation Act of 1998 (CWCIA) (22 U.S.C. §§ 6701–6771).

- The Department of Commerce also enforces industry compliance with the Chemical Weapons Convention export controls requirements, reviews visa applications of foreign nationals to help prevent illegal technology transfers; ensures compliance with export license conditions through end-use inspections; and conducts cooperative enforcement activities with foreign counterparts.

* * * *

Deemed Export Controls

- Also under the EAR (15 C.F.R. 734.2(b)(2)(ii)), the Commerce Department administers export licensing of dual-use technology transfers to foreign nationals in the United States. Transfer of controlled technology to a foreign national is "deemed" to be an export to the foreign national's home country. If the controlled technology would require a license for a direct export to that foreign national's home country, then a "deemed" export license is required for a foreign national to have access to that technology here in the United States. The vast majority of "deemed" export licenses are for foreign nationals on H1B working visas that require access to controlled technology because of their employment. The foreign national's employer is required to submit a license application and have that application approved before the foreign national can have access to controlled technology.

"Catch-all" Export Controls

- Under 15 C.F.R. Part 744, the United States implements "catch-all controls," that require exporters to obtain a license to export any U.S.-origin item, even a non-controlled item, if they know or are informed that the item will be used in or by certain countries for prohibited nuclear activities, chemical or biological weapons programs, or the design, development, or production of missiles, or in facilities engaged in such activities.
- In addition, catch-all controls extend to the activities of U.S. persons. Under the EAR (15 C.F.R. Part 744.6), U.S. persons may not perform any contract, service, or employment knowing it will directly assist in chemical and biological weapons or missile activities in or by certain countries.
- The United States is currently strengthening its national missile technology and chemical/biological catch-all controls by applying catch-all controls on a global basis. Strengthened controls, by virtue of this global approach, will apply to terrorists and other non-state actors such as illicit traffickers and brokers. The United States is also developing a terrorism catch-all policy that will prohibit the export or re-export of U.S.-origin items where the exporter knows the item will be used for a terrorism end-use.

Restrictions on Exports to Specific End-Users and End-Uses

- The EAR (15 C.F.R. Part 744.2, 744.3, 744.4, 744.5) generally prohibit exports and re-exports of items subject to the EAR to certain nuclear, missile, chemical, and biological activities and nuclear maritime end-users and prohibits other actions in support of such activities.

* * * *

8(c) To renew and fulfil their commitment to multilateral cooperation, in particular within the framework of the International Atomic Energy Agency, the Organization for the Prohibition

of Chemical Weapons and the Biological and Toxin Weapons Convention, as important means of pursuing and achieving their common objectives in the area of non-proliferation and of promoting international cooperation for peaceful purposes;

Organization for the Prohibition of Chemical Weapons (OPCW)

- The Organization for the Prohibition of Chemical Weapons (OPCW) is the international organization established in 1997 by the Chemical Weapons Convention (CWC) to ensure the CWC works effectively and achieves its purpose. The United States is a permanent member of the Executive Council, one of the top-policy making organs of the OPCW, and maintains a permanent Delegation to the OPCW in The Hague. The United States actively supports the efforts of the OPCW Technical Secretariat. The United States is an active participant in the meetings of the Executive Council and annual Conference of States Parties.

The Biological and Toxin Weapons Convention (BWC)

- As a State Party to the Biological Weapons Convention (BWC), the United States fully supports and is actively involved in the 2003–2005 agreed Work Program of BWC States Parties. The BWC Work Program is bringing experts together to review and promote national actions on critical issues such as national implementation measures, disease surveillance, response, and mitigation, investigation of suspicious outbreaks, or alleged use, pathogen security and codes of conduct for scientists. The United States attends and actively participates in the annual Experts Meetings and meetings of BWC States Parties.

International Atomic Energy Agency

- The United States successfully led international efforts to increase the IAEA's regular budget for safeguards. In addition, the United States has provided over $50 million

in voluntary cash and in kind assistance to the IAEA in each of the last four years.

- The United States is also calling for a special committee of the IAEA Board of Governors to focus intensively on safeguards and verification and strengthen the IAEA's ability to ensure compliance with international non-proliferation obligations.
- The United States continues to encourage IAEA Board members to adopt the policy that states under investigation because of significant safeguards failings should not be selected to serve on the Board or the Special Committee and should not participate in decisions by either body regarding their own cases.
- The United States strongly supported and continues to support establishment and implementation of common international guidelines governing exports and imports of high-risk radioactive materials to prevent their diversion and use in radiological dispersion devices. The IAEA approved and issued a major revision to the Code of Conduct on the Safety and Security of Radioactive Sources (Code of Conduct), which can be found at *http://www.iaea.org/Publications/Standards/index.html*. The United States also played a key role in multilateral efforts to develop a corresponding guidance document for export and import activities involving high-risk radioactive material. This guidance document will likely be approved for publication as an IAEA Information Circular (INFCIRC) in the near future.

Updating Australia Group Control Lists

- The United States has proposed and the Australia Group adopted the addition of eight new toxins to the Australia Group Control List as well as new controls on related equipment to make the development of WMD more difficult for both state and non-state proliferators. The United States has also championed the addition of "catch-all" controls within the Australia Group and other export control

regimes to limit the ability of all proliferators to easily gain access to any commodity, controlled or not, or any relevant service or contract and thus deny aid to proliferators in any way, shape or form.

* * * *

4. Additional Protocol

On March 26, 2004, the U.S. Senate gave its advice and consent to ratification of the Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency ("IAEA") for the Application of Safeguards in the United States, with annexes, signed at Vienna on June 12, 1998 (the "Additional Protocol"), subject to two conditions and eight understandings. *See* S. Exec. Rpt. 108–12 (2004); 150 CONG. REC. S3213 (Mar. 26, 2004); *see also* S. Treaty Doc. No. 107–7 (2002).

As noted in the President's letter of transmittal to the Senate, excerpted in *Digest 2002* at 1058–60, the United States, as a nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") is not obligated to accept IAEA safeguards on its nuclear activities but has permitted the application of such safeguards since 1967—except in instances of direct national security significance. In keeping with this policy, Article 1(b) allows the United States to exclude the application of the Additional Protocol only in "instances where its application would result in access by the Agency to activities with direct national security significance to the United States or to locations or information associated with such activities." Article 1(c) also differs from the Model Protocol in allowing the United States "to have the right to use managed access in connection with activities with direct national security significance to the United States or in connection with locations or information associated with such activities." During the hearing before the Senate Foreign Relations Committee on the subject of the Additional Protocol, held January 29, 2004, several administration

officials, including Acting Assistant Secretary of State for Nonproliferation Susan Burk and Department of Energy National Nuclear Security Administrator Linton Brooks, testified in support of ratification. Excerpts from their prepared statements describe the importance of the Additional Protocol and the protections included for U.S. interests, including those articulated in Articles 1(b) and (c), above.

The full texts of the statements and oral testimony, as well as answers to questions submitted for the record, are reprinted in S. Exec. Rpt. 108–12.

Ms. Burk:

* * * *

The process of refining and strengthening IAEA safeguards has been ongoing since their inception. The IAEA, with strong U.S. support, undertook a major strengthening effort in the 1990s, in direct response to discoveries made during IAEA inspections in Iraq following the first Gulf War. These inspections uncovered an ambitious clandestine nuclear weapons program in Iraq, involving a number of undeclared installations. Of particular significance was a covert enrichment facility located adjacent to a declared nuclear facility where the Agency had been applying its safeguards for years. The IAEA had not detected this concealed activity before the war because its Member States only required it to ensure against the non-diversion of declared material. The existing safeguards system was designed almost exclusively for detecting diversion of nuclear material only at declared facilities. Under the then-existing safeguards system, the IAEA had only a limited capability to determine whether Iraq (or any other state) was engaged in undeclared or clandestine nuclear activities. To address this and other deficiencies, the United States and other IAEA member states conducted a review of the nuclear safeguards system. Subsequently, the IAEA Board of Governors decided to make broader use of the Agency's existing authority and to provide the additional authority and tools needed by IAEA inspectors to uncover undeclared nuclear activities.

During the course of this review of the safeguards system, the IAEA identified some meaningful rights whose full use could meaningfully improve the capabilities of the system, e.g., special inspections and environmental sampling. A number of deficiencies in the system were also noted. To fill these gaps in the IAEA's authority, the IAEA Board of Governors created an open-ended negotiating committee of Member States that met 55 times during 1996–1997 to agree upon the text for a Model Additional Protocol. The resulting text for the Model Additional Protocol was approved by the Board of Governors in 1997. The United States worked hard to bring these negotiations to a successful conclusion, and believes that the measures contained in the Model Additional Protocol greatly improve the IAEA's ability to uncover undeclared nuclear material and activities. The United States signed its Protocol on June 12, 1998.

Application of the Additional Protocol to Non-Nuclear Weapon States

The IAEA uses the Model Additional Protocol for negotiation and conclusion of Additional Protocols that amend and strengthen states' existing comprehensive safeguards agreements. As such, Additional Protocols broaden the information states are required to give to the IAEA and provide additional access rights for IAEA inspectors to verify those declarations when necessary. Non-nuclear weapon states must incorporate all the measures in the Model Additional Protocol in negotiating their Additional Protocols. Nuclear weapon states and countries not party to the NPT, however, are free to chose among or limit the application of the provisions of the Model Additional Protocol, since they have not made a commitment to place all nuclear activities under safeguards.

The United States, consistent with our rights as a nuclear weapon state, has chosen to limit the application of the Protocol's provisions. I will outline briefly for you the provisions of the Model Additional Protocol, then discuss how the Protocol's provisions will be applied in the United States.

Provisions of the Model Additional Protocol

The Model Additional Protocol requires states to declare to the IAEA a number of nuclear and nuclear-related items, materials, and activities that, while they could be part of a peaceful nuclear

program, would be required for a covert nuclear weapons program. Specifically, the Protocol requires states to report exports of nuclear-related items controlled by the Nuclear Suppliers Group, confirm imports of such items, and report domestic manufacturing of key items. It also requires states to report exports, imports, and stockpiles of raw uranium and thorium that could be used as feed material for a covert nuclear program, and also report information related to uranium mines, uranium and thorium concentration plants, uses of buildings on the sites of safeguarded nuclear facilities, construction of new nuclear facilities, and certain nuclear-related research and development work not involving nuclear material.

A proliferator having an Additional Protocol in force would have to successfully conceal a much broader range of activities and facilities in its covert nuclear program to escape detection. The IAEA would have more types of information available as triggers for access requests. Import and export reporting would give the IAEA opportunities to compare declarations from different countries to detect suspicious activity, thereby requiring air-tight connivance between regulatory authorities in supplier and recipient counties in order to deceive the IAEA. The requirement that countries declare R&D activities, mining and materials stocks, facility construction, and manufacturing and the uses of unsafeguarded buildings at nuclear facilities increases the potential avenues by which information acquired by the IAEA could be used to reveal the existence of covert nuclear programs in their early stages: such revelations would be actionable immediately, since they would be based upon state-provided declarations.

* * * *

Benefit of the Additional Protocol for U.S. National Security

The Model Additional Protocol's provisions regarding declarations and access are aimed at making it harder for cheaters to hide undeclared nuclear activities, either at declared facilities or at other locations. Iraq had co-located clandestine nuclear activities with their declared nuclear facilities in order to mask its covert activities and for reasons of convenience and economy. For this reason, the Protocol gives the IAEA access rights in short time frames at sites of declared nuclear facilities. If an Additional Protocol has been in

force, safeguards inspectors at Iraq's Tuwaitha facility could have required access to other buildings at that site within a period as short as two hours, enabling them to detect undeclared activities. In this way, the Protocol seeks to force a proliferator from hiding its covert activities away from its declared nuclear activities rendering it easier to detect.

Iraq and others have also carried out covert activities far from declared sites to avoid IAEA access. This is why the Additional Protocol gives the IAEA the authority to seek access at undeclared locations, based on questions and inconsistencies that arise regarding the State's declaration. The IAEA can thus act on evidence uncovered in its internal information evaluation efforts or provided by member states or other credible sources.

Having gained access, the IAEA has the ability, particularly through sensitive sampling techniques that detect trace signatures of nuclear activities, to find evidence of covert activities. It was IAEA sampling in North Korea in 1992 that demonstrated significant omissions in North Korea's declarations concerning its plutonium production activities, making clear to the world that the DPRK was cheating on its nonproliferation obligations. More recently, IAEA sampling demonstrated the presence of enriched uranium at certain locations in Iran, despite initial Iranian assertions by Iran that it had not carried out enrichment activities.

Of course, proliferators may also resist IAEA demands for access to the incriminating facilities or information. A refusal of access, however, can be itself significant evidence of noncompliance. It was the DPRK's refusal to cooperate with the IAEA in providing access to sites that ultimately led to the IAEA Board of Governors finding the DPRK in noncompliance with its safeguards agreement. Given the broader IAEA access rights under the Additional Protocol, a state refusing to permit access in order to hide a clandestine nuclear weapons program is likely to raise concerns at an earlier stage of the program, enabling the Board of Governors and the international community to respond sooner.

Perhaps the best example of the benefits of the Protocol is the present situation in Iran. While there have long been grounds for concern about Iran's nuclear activities, the existing safeguards system permitted Iran to carry out many aspects of its program

undetected. For example, Iran was not required to declare the construction of key facilities. Moreover, once challenged by the IAEA, Iran was slow to grant access to a variety of locations, and balked at IAEA use of sensitive environmental sampling techniques at a key location suspected of enrichment-related activities. If Iran had had an Additional Protocol in force, it would have had an obligation to declare many of these and other activities at an early stage in their construction; there would have been no doubt about the IAEA's right to access and no legitimate grounds for Iran to deny or delay. Resistance to inspection, or discovery of these facilities in advanced stages of construction would have been unambiguous violations of Iran's obligations.

Thus, a key nonproliferation goal of the United States has been to increase non-nuclear weapon state adherence to the Additional Protocol. Entry into force of the U.S.-IAEA Additional Protocol would provide a powerful tool in furthering this goal, and thereby enhance U.S. national security.

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U.S.-IAEA PROTOCOL

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The Treaty on the Non-Proliferation of Nuclear Weapons (the "NPT") requires non-nuclear weapon state parties to accept IAEA safeguards on all nuclear material in all of their peaceful nuclear activities. The United States, as a nuclear weapon state party to the NPT, is under no obligation to accept such safeguards. However, beginning with President Johnson's 1967 pledge, it has been the announced policy of the United States since then to permit the application of IAEA safeguards to all of its nuclear facilities, except for those facilities and activities excluded for national security reasons. By submitting itself to the same safeguards on all of its civil nuclear facilities that non-nuclear weapon state parties are subject to, the United States intended to demonstrate that adherence to the NPT did not place other countries at a commercial disadvantage. This offer was critical to gaining acceptance of the NPT by countries such as Germany and Japan.

U.S. NATIONAL SECURITY EXCLUSION

The U.S. Additional Protocol, which would amend the U.S. Voluntary Offer of 1980, includes all the provisions contained in the Model Protocol. However, it includes one other major provision that is unique to our status as a nuclear weapon state: the "national security exclusion." This provision states that the United States will apply and permit the Agency to apply the provisions of the Protocol "excluding only instances where its application would result in access by the Agency to activities with direct national security significance to the United States or to locations or information associated with such activities." Thus, implementation of the USAP will be entirely different in both practice and concept than in non-nuclear weapon states. Similarly, unlike the CWC, the INF, and other treaties that rely on procedural restraints on inspectors to protect U.S. national security interests, the United States has the right to deny access or exclude inspection activities on the basis of the national security exclusion. Since the national security exclusion makes clear that the United States will have undeclared nuclear material and activities, both the United States and the IAEA, as well as IAEA Member States, recognize that inspections in the United States serve primarily the symbolic purpose of demonstrating U.S. commitment to safeguards and its willingness to accept the burdens their application may entail. In particular, the United States:

- will not provide to the IAEA information of direct national security significance to the United States or access to activities and locations of direct national security significance to the United States; and
- will exclude inspector activities that are inconsistent with the national security exclusion at a given location.

The national security exclusion, therefore, gives the United States an extraordinary legal means to protect and prevent the transfer of information to the IAEA and exclude inspectors' access in the United States wherever required for the protection of activities of direct national security significance to the United States or of information or locations associated with such activities.

Because the IAEA will have the legal right to conduct all activities permitted under our Protocol, steps have been taken to ensure that our national security interests are protected if and when the IAEA decides to exercise those rights. At the same time, the United States has important equities in promoting a strong and effective nuclear nonproliferation regime, including the need to avoid disclosure of nuclear weapon information to non-nuclear weapon states, which would violate our NPT obligations.

* * * *

The Administration has determined that some provisions of the U.S.-IAEA Additional Protocol are not self-implementing. These include:

— declarations of U.S. civil nuclear activities and related industry;
— restrictions on disclosure of information; and
— IAEA access to locations in the United States.

Implementing legislation, therefore, is required in order to give these provisions effect within the United States. The administration was pleased to provide its recommended legislation to the Congress late last year. We look forward to working closely with you on preparation of the final legislation.

In this regard, I would like to reinforce how important it is to the Administration that the implementing legislation for the U.S. Additional Protocol restricts appropriately the disclosure of information provided by U.S. entities to the United States Government in execution of Protocol obligations. Under the Administration's proposal, such information could be disclosed only to U.S. Government officials, U.S. Government contractor personnel, and officials of the IAEA Secretariat with a clear "need to know." This practice will ensure that the data collected under the Protocol will be used exclusively for the purposes of the safeguards regime. We, therefore, request that the implementing legislation for the Additional Protocol exempt information obtained by the United States Government in implementing the provisions of the Additional Protocol from disclosure under the Freedom of Information Act (FOIA).

In conclusion, Mr. Chairman, the Administration believes that Senate advice and consent to ratification of the U.S. Additional Protocol will advance the national security interests of the United States by strengthening the global nuclear non-proliferation regime. At the same time, the Administration believes that adequate protections have been built into the Protocol to ensure that its application in the United States will not compromise activities or information of direct national security significance.

Ambassador Brooks:

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IMPACT ON THE DEPARTMENT OF ENERGY COMPLEX

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At the same time that the Additional Protocol provides the IAEA with important tools to ferret out undeclared military activities in non-nuclear weapons states, the Additional Protocol also includes a set of robust mechanisms by which DOE can protect its commercially sensitive, export-controlled, and classified assets. The first method is managed access, also referred to as "Article 7 managed access." This managed access involves a wide range of measures, such as shrouding, closing doors, or turning off computers and other equipment to prevent IAEA inspectors from coming into contact with "proliferation sensitive information or proprietary or commercially sensitive information." Second, the United States can unilaterally, and without explanation, invoke a national security exclusion (NSE) under Article 1 that enables the U.S. not to declare or allow IAEA complementary access to "activities with direct national security significance to the United States or to locations or information associated with such activities."

Third, under Article 1, the United States also has the right to use managed access associated with the NSE. Managed access under Article 1 is more robust than the Article 7 managed access. We would employ this managed access under Article 1 of the Additional Protocol only where our security evaluation shows that such managed access would mitigate, in a manner acceptable to

us, any risk of inadvertent disclosure of national security activities or information to the inspector. I would reiterate that the use of the NSE or managed access under the NSE is entirely unilateral, and the IAEA has no right to challenge or question the U.S. invocation of the national security exclusion. With managed access and the national security exclusion rights combined with Additional Protocol-specific security plans and DOE's past experience with IAEA inspections, DOE is confident that it can fully manage the risks associated with the Additional Protocol.

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PROTECTION OF NATIONAL SECURITY EQUITIES

Before I continue any further, I would like to highlight the steps that the Department of Energy is currently taking and will take in the future to protect the very important national security equities at our sites and facilities. DOE already has a great deal of practical experience in preparing declarations and carrying out inspections under the current U.S.-IAEA Safeguards Agreement (also known as the Voluntary Offer Agreement [VOA]), while still protecting adjacent national security equities. Since 1994, the IAEA has been carrying out monthly inspections of highly enriched uranium and plutonium at multiple DOE facilities, and currently carries out inspections at three DOE facilities: the Y-12 Complex near Oak Ridge, Tennessee; the Hanford Site near Richland, Washington; and the Savannah River Site near Aiken, South Carolina.

In preparation for these traditional IAEA safeguards inspections, comprehensive vulnerability assessments were completed, and specific, detailed security plans were developed and implemented to prevent inadvertent disclosure of sensitive and classified information to the inspectors. The Department will conduct site-specific vulnerability assessments (VAs) for DOE facilities where potentially declarable activities under the Additional Protocol are taking place, to determine whether or not we can offer the IAEA access to those activities.

DOE will only declare an activity for which complementary access could be granted without posing a risk to national security equities. Let me be clear on this. If DOE cannot provide access,

for whatever reason, we will not declare the activity. We will make full use of managed access measures where we are confident that they will protect our national security equities, including proliferation sensitive information. Likewise, we will protect from disclosure proprietary or commercially sensitive information. In short, we will make full use of our rights under the Additional Protocol to protect these interests, while meeting our obligations under the Protocol.

I want to be equally clear that our exercise of our NSE rights under the AP will not allow Non-Nuclear Weapon States (NNWS) to follow suit. That is because the NSE right in Article 1 of the U.S. Additional Protocol, which is available to us as a Nuclear Weapon State in NPT terms, is not available to NNWS. The NSE in the US AP parallels the exclusion of defense nuclear materials under our Voluntary Offer safeguards agreement with the IAEA, which is similarly unique.

* * * *

CONCLUSION

Let me conclude by reiterating the Administration's commitment to the IAEA and the Additional Protocol. The risk of nuclear weapons falling into the hands of rogue states or terrorists is one of the greatest threats to U.S. national security today, and the international nuclear non-proliferation regime is a primary line of defense. Protocols in Non-Nuclear Weapon States will strengthen our efforts to prevent the diversion or clandestine production of fissile material, directly enhancing the national security of the United States. We believe that the widespread adoption of the Additional Protocol is strongly in U.S. interests and that U.S. leadership in adopting the Protocol ourselves is critical. I urge you to provide your advice and consent to this Protocol in an expeditious manner. Thank you for your time and attention. . . .

5. Nonproliferation Regimes

a. Nuclear Suppliers Group

On January 26, 2004, China filed an application to become a Participating Government of the Nuclear Suppliers Group ("NSG"), and on May 27, 2004, the Participating Governments accepted China's application for membership. John S. Wolf, Assistant Secretary for Nonproliferation, testified before the House International Relations Committee, May 18, 2004, that the U.S. responded positively on the issue of China's admission to the NSG for a number of reasons:

- First, we raised NSG membership with China in 1995 as one of the steps we wanted China to take at the time—with Zangger Committee membership as an acceptable alternative. . . .
- Second, for over a decade, we have been trying to bring China into the international nuclear nonproliferation arena. As Secretary Powell has said, we welcome a global role for China.
- Third, China has continued to take steps to control nuclear and dual-use exports and to demonstrate its willingness to adopt global norms. To that end, we can cite the adoption of nuclear and dual-use export controls, full-scope safeguards as a condition of supply, the broad-scale cessation of nuclear cooperation with Iran, the Chinese white-paper on nonproliferation, and the increasing cooperation with the United States in the areas of export controls, safeguards, and physical protection.

In informing China of our support for membership, we also informed Chinese officials that we expect China's support for the President's initiatives involving the NSG, and specifically for the ban on further transfer of enrichment and reprocessing technology, and for making the Additional Protocol a condition of supply for trigger list items by the end of 2005.

The full text of Assistant Secretary Wolf's testimony is available at *www.state.gov/t/isn/rls/rm/32570.htm*

b. Australia Group

During the Australia Group's ("AG") annual plenary in Paris (June 7–10, 2004), the AG welcomed five new member countries (Estonia, Latvia, Lithuania. Malta and Slovenia). The AG issued a press release on its plenary meeting available at *www.australiagroup.net/en/releases/press_2004_06.htm*. Excerpts from that release follow.

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The 2004 Plenary was held against the backdrop of significant developments in global non-proliferation—including Libya's decision to forgo its chemical weapons program, the revelation of the Khan proliferation network and unanimous adoption of UN Security Council Resolution 1540. The resolution calls on states to establish effective national export controls, among other non-proliferation measures. The work of the Australia Group will play a key role in international efforts to implement United Nations Security Council Resolution 1540.

Against this background, participants noted growing acceptance of Australia Group measures as the international benchmark in relation to export controls directed at chemical and biological weapons, owing in large part to the Group's ongoing outreach activities. Accordingly, participants agreed [on] strategies for better targeted training and assistance, particularly at a regional level, to assist key supplier and transshipping countries and other interested countries outside the Group to enhance their export controls.

In response to increasingly sophisticated procurement activities, the Australia Group agreed to consider the issue of brokering controls. Such controls could play a key role in curtailing the activities of intermediaries and front companies.

As part of the Group's ongoing efforts to keep its common control lists up to date and scientifically relevant, participants agreed

to add five plant pathogens to the control lists—the first such addition since 1993—and to expand medical exemptions for one of the controlled toxins. Participants also advanced consideration of further additions to the control lists, including airborne spraying and fogging systems capable of dispersing biological agents in aerosol form.

Discussions dealing with information sharing and enforcement provided clearer insights into proliferation behaviour by state and non-state actors and mechanisms for more effectively enforcing export controls.

* * * *

In response to the understandings reached at the Australia Group plenary session, the Department of Commerce, Bureau of Industry and Security, published a final rule to amend the Export Administration Regulations ("EAR"). 69 Fed. Reg. 77,890 (Dec. 29, 2004), "Implementation of the Understandings Reached at the June 2004 Australia Group (AG) Plenary Meeting and Through a Subsequent AG Intercessional Decision; Clarifications to the Scope of ECCNs 1A004, 1A995, and 2B351; Corrections to Country Group D and ECCNs 1C355, 1C395, and 1C995; Additions to the List of States Parties to the Chemical Weapons Convention." As explained in the Federal Register:

> Specifically, this final rule amends the EAR by adding three new bacteria and two new viruses to the list of AG-controlled plant pathogens described on the Commerce Control List (CCL) . . . [and] amends the EAR to indicate that certain medical products identified on the CCL, which contain AG-controlled conotoxins, no longer require a license for chemical/biological (CB) reasons. . . . This rule also amends the EAR to reflect the addition of five new member countries to the Australia Group. . . . This rule also amends the EAR to implement an AG intercessional decision . . . by adding nine precursor chemicals to the list of AG-controlled precursor chemicals described on the CCL.

Id.

Further, the rule amended the EAR to revise a CCL entry "containing protective and detection equipment identified on the Wassenaar Arrangement dual-use list to indicate that chemical/biological (CB) controls in the EAR apply to certain chemical detection systems and dedicated detectors therefore. . . ." *Id.*

6. Nonproliferation Sanctions Imposed by the United States

a. Missile technology

(1) Russian entity

Effective July 22, 2004, sanctions were imposed against the Federal Research and Production Complex Altay of Russia for engaging in proliferation of missile technology activities. 69 Fed. Reg. 43,875 (July 22, 2004).

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Pursuant to Section 73(a)(1) of the Arms Export Control Act (22 U.S.C. 2797b(a)(1)); Section 11B(b)(1) of the Export Administration Act of 1979 (50 U.S.C. app. 2410b(b)(1)), as carried out under Executive Order 13222 of August 17, 2001 (hereinafter cited as the "Export Administration Act of 1979"); and Executive Order 12851 of June 11, 1993; a determination was made on June 15, 2004, that the following foreign person has engaged in missile technology proliferation activities that require the imposition of the sanctions described in Section 73(a)(2)(A) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(A)) and Section 11B(b)(1)(B)(i) of the Export Administration Act of 1979 (50 U.S.C. app. 2410b(b)(1)(B)(i)) on the following entity and its subunits and successors: Federal Research and Production Complex Altay (Russia)

Accordingly, the following sanctions are being imposed on this entity:

(A) New individual licenses for exports to the entity described above of MTCR Annex equipment or technology controlled pursuant to the Export Administration Act of 1979 will be denied for two years;
(B) New licenses for export to the entity described above of MTCR Annex equipment or technology controlled pursuant to the Arms Export Control Act will be denied for two years; and
(C) No new United States Government contracts relating to MTCR Annex equipment or technology involving the entity described above will be entered into for two years.

With respect to items controlled pursuant to the Export Administration Act of 1979, the export sanction only applies to exports made pursuant to individual export licenses.

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On November 18, 2004, the sanctions noted above were terminated at the same time that a determination was made to impose sanctions against Altay under a separate authority. 69 Fed. Reg. 67,617–02 (Nov. 18, 2004). Effective November 18, 2004, the Bureau of Nonproliferation, Department of State, imposed sanctions against Altay for missile technology proliferation as set forth below. 69 Fed. Reg. 67,617–03 (Nov. 18, 2004).

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Pursuant to the authorities vested in the 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 Arms Export Control Act (22 U.S.C. 2751 et seq.), and Section 301 of title 3, United States Code, and Executive Order 12938 of November 14, 1994, as amended, the U.S. Government determined that the following Russian entity has engaged in proliferation activities that require the imposition of measures pursuant to sections 4(b), 4(c), and 4(d) of Executive Order 12938: Federal Research and Production Complex Altay (Russia).

Accordingly, pursuant to the provisions of Executive Order 12938, the following measures are imposed on this entity, its subunits, and successors for two years:

1. All departments and agencies of the United States Government shall not procure or enter into any contract for the procurement of any goods, technology, or services from these entities including the termination of existing contracts;
2. All departments and agencies of the United States government shall not provide any assistance to these entities, and shall not obligate further funds for such purposes;
3. The Secretary of the Treasury shall prohibit the importation into the United States of any goods, technology, or services produced or provided by these entities, other than information or informational materials within the meaning of section 203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).

These measures shall be implemented by the responsible departments and agencies as provided in Executive Order 12938.

In addition, pursuant to section 126.7(a)(1) of the International Traffic in Arms Regulations, it is deemed that suspending the above-named entity from participating in any activities subject to Section 38 of the Arms Export Control Act would be in furtherance of the national security and foreign policy of the United States. Therefore, for two years, the Department of State is hereby suspending all licenses and other approvals for: (a) Exports and other transfers of defense articles and defense services from the United States; (b) transfers of U.S.-origin defense articles and defense services from foreign destinations; and (c) temporary import of defense articles to or from the above-named entity.

Moreover, it is the policy of the United States to deny licenses and other approvals for exports and temporary imports of defense articles and defense services destined for this entity.

(2) Chinese entity

Effective September 20, 2004, the United States Government also imposed measures under Executive Order 12938 against

a Chinese entity Xinshidai for missile technology proliferation. 69 Fed. Reg. 56,260 (Sept. 20, 2004), as corrected, 69 Fed. Reg. 57,746 (Sept. 27, 2004). Licenses and other approvals were suspended in this case, however, "until further notice" rather than for the two-year period imposed against Altay.

b. Iran Nonproliferation Act of 2000

Effective April 1, 2004, the Bureau of Nonproliferation at the U.S. Department of State imposed sanctions against thirteen entities of or under the jurisdiction of one of the following countries—Russia, China, Belarus, Macedonia, North Korea, United Arab Emirates and Taiwan—pursuant to the Iran Nonproliferation Act of 2000 for transfers to Iran of equipment and technology controlled under multilateral export control lists "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." 69 Fed. Reg. 18,415 (April 7, 2004).

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Pursuant to sections 2 and 3 of the Iran Nonproliferation Act of 2000 (Pub. L. 106–178), the U.S. Government determined on March 19, 2004, that the measures authorized in section 3 of the Act shall apply to the [thirteen] . . . foreign entities identified . . . :

Accordingly, pursuant to the provisions of the Act, the following measures are imposed on these entities:

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of, any goods, technology, or services from these foreign persons;
2. No department or agency of the United States Government may provide any assistance to these foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government;

3. No United States Government sales to these foreign persons of any item on the United States Munitions List (as in effect on August 8, 1995) are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and,
4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

* * * *

Effective September 23, 2004, the Bureau of Nonproliferation, U.S. Department of State, imposed the same sanctions against fourteen foreign entities of or under the jurisdiction of one of the following countries—China, Belarus, North Korea, India, Russia, Spain, and Ukraine—under the Iran Nonproliferation Act of 2000 for a period of two years. *See* 69 Fed. Reg. 58,212 (Sept. 29, 2004).

Effective November 24, 2004, the Bureau of Nonproliferation, U.S. Department of State, imposed the same sanctions against five foreign entities of or under the jurisdiction of either China or North Korea under the Iran Nonproliferation Act of 2000 for the transfer to Iran of equipment and technology controlled under multilateral export control lists 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." 69 Fed. Reg. 69,989 (Dec. 1, 2004).

c. Chemical and biological weapons proliferation

On April 1, 2004, the United States terminated sanctions imposed on a foreign person who had engaged in chemical weapons proliferation activities that required the imposition of sanctions pursuant to the Arms Export Control Act and

the Export Administration Act of 1979. 69 Fed. Reg. 17,259 (April 1, 2004). The action was based on a determination by the Under Secretary of State for Arms Control and International Security Affairs that "reliable information indicated that the following foreign person has ceased to aid or abet any foreign government, project, or entity in its efforts to acquire chemical and biological weapons capability: Anatoliy Kuntsevich"

d. Lethal military equipment

Effective October 22, 2004, the Bureau of Nonproliferation, U.S. Department of State imposed discretionary measures against two Bulgarian entities for transfer of certain lethal military equipment to a state sponsor of terrorism, notice of which was issued in 69 Fed. Reg. 62,112 (October 22, 2004). These measures were imposed pursuant to authorities in the Foreign Assistance Act of 1961, Section 38(g) of the Arms Export Control Act, Section 126.7(a) of the International Trade in Arms Regulations (ITAR, 22 CFR 120–130) (2004), and Federal Acquisition Regulation 9.406–2(c). As a result:

> Procurement from these entities and new licenses for the import and export of defense articles and services insuring these entities will be banned for a period of one year and that U.S. government procurement from these entities and new licenses for the import and export of defense articles and services involving these entities will be banned for a period of one year.

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7. Global Threat Reduction Initiative

On May 26, 2004, U.S. Secretary of Energy Spencer Abraham announced the Global Threat Reduction Initiative ("GTRI") with IAEA senior officials at the IAEA headquarters in Vienna.

The purpose of the GTRI is to minimize the amount of nuclear material throughout the world available for use in nuclear weapons. The GTRI also seeks to put into place mechanisms to ensure that nuclear and radiological materials and related equipment worldwide are not used for malicious purposes. Under the GTRI initiative, the United States will work with the IAEA and global partners to repatriate Russian-origin fresh high enriched uranium fuel ("HEU") in cooperation with Russia and the countries in which it is found (with the goal of repatriating this fuel by the end of 2005), and to accelerate and complete the repatriation of Russian-origin spent fuel by 2010. In this manner, Russian-origin HEU in multiple countries can be returned to Russia where it can be centrally stored and/or eliminated under the Russian Research Reactor Fuel Return ("RRRFR") program described below.

In addition the GTRI aims to accelerate and complete the repatriation of all U.S.-origin research reactor spent fuel worldwide, convert the cores of civilian research reactors that use HEU to use low enriched uranium ("LEU") worldwide, and to identify nuclear and radiological materials and related equipment not covered under other threat reduction efforts to ensure that terrorists do not acquire these materials for malevolent purposes. Additional information about the GTRI is available in an August 10, 2004, U.S Department of Energy press release available at *www.energy.gov/news/72.htm*.

a. Russian Research Reactor Fuel Return program

On May 27, 2004, the United States and the Russian Federation signed the Agreement between the Government of the United States and the Government of the Russian Federation Concerning Cooperation for the Transfer of Russian-Produced Research Reactor Nuclear Fuel to the Russian Federation ("U.S.-Russian fuel return agreement"). The primary objective of the U.S.-Russian Federation fuel return agreement is to further U.S. national security interests and nonproliferation objectives by reducing the threat from,

and preventing the illicit trafficking in, weapon-usable nuclear material, by supporting the transfer to Russia of Soviet- and Russian-supplied high-enriched uranium ("HEU") and low-enriched uranium ("LEU") spent and fresh fuel on the condition that recipient countries with still-operating reactors agree to convert from HEU to LEU or shut down. Under the U.S.-Russian fuel return agreement, the Russian Federation agrees to accept nuclear fuel from eligible countries under certain conditions, including the requirement that shipping and fuel management costs are paid by the eligible country, the United States, or another third party, and that the eligible country agrees to convert its research/test reactor(s) to LEU fuel use as soon as practicable or to shut such reactor(s) down.

Trilateral discussions among the United States, the Russian Federation, and the International Atomic Energy Agency ("IAEA"), which began in 1999, identified more than 20 research reactors in 17 countries that have Soviet- or Russian-supplied fuel. Of this number, 14 countries expressed varying levels of interest in participating in a fuel return program, assisted by U.S. Government funding, as proposed in a September 29, 2000, letter from the IAEA Director General. (Belarus, Bulgaria, Czech Republic, Egypt, Germany, Hungary, Kazakhstan, Latvia, Poland, Romania, Ukraine, Uzbekistan, Vietnam, and Yugoslavia). To date, the Department of Energy has concluded research reactor fuel return assistance agreements with counterpart ministries and agencies in Uzbekistan (March 2002) and Romania (July 2004) and has tabled proposed agreements with Kazakhstan, Latvia, and Ukraine.

Excerpts from a May 27, 2004, DOE press release detailing the U.S.-Russian fuel return agreement follow. *See www.energy.gov/news/71.htm.*

. . . On May 27, 2004, the U.S. Secretary of Energy Spencer Abraham and Director Rumyantsev of the Russian Federal Agency for Atomic Energy signed a bilateral agreement between the U.S. and Russian Federation governments concerning the repatriation

of Russian-origin high-enriched uranium (HEU) research reactor fuel to Russia. Under this agreement, more than a dozen countries are eligible to receive financial and technical assistance from the United States and others to ship their fresh and spent research reactor fuel to Russia for safe and secure management. This agreement reaffirms the United States and Russian Federation's shared commitment to reduce global stockpiles of weapons-usable nuclear materials, to reduce the threat of international terrorism, and to prevent the proliferation of weapons of mass destruction.

"With today's agreement, we are moving forward to complete the important work of repatriating fresh and spent HEU fuel, which will reduce the threat of terrorism and prevent the proliferation of weapons-grade uranium," Secretary Abraham stated.

* * * *

On several occasions DOE announced transfers of HEU to Russia. On September 9, 2004, for instance, it announced that "eleven kilograms of enriched uranium fuel, including highly enriched uranium (HEU) that could be used for nuclear weapons, were safely returned to Russia from Uzbekistan in a secret mission conducted by the United States, Uzbekistan, and Russia." *See www.energy.gov/news/72.htm.*

Similarly, a press release of December 22, 2004, provided as excerpted below. *See www.energy.gov/news/73.htm*

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. . . Six kilograms of highly enriched uranium (HEU) that could be used for nuclear weapons were safely returned to the Russian Federation from the Czech Republic in a secret mission . . . U.S. Energy Secretary Spencer Abraham announced today. The mission was a joint effort between the United States, the Czech Republic, Russia, and the International Atomic Energy Agency (IAEA) and is another accomplishment of the Bush Administration's Global Threat Reduction Initiative (GTRI).

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The nuclear fuel was originally supplied to the Czech Republic by the Soviet Union for use in the Soviet-designed 10 megawatt LVR-15 multi-purpose research reactor, located in Rez near the Czech capital, Prague. In 2000, NNSA and the Czech Nuclear Research Institute completed a joint project to upgrade security of the nuclear material at Rez until it could be returned to Russia. Earlier this year, Secretary Abraham and Russian Federal Atomic Energy Agency Director Alexander Rumyantsev signed a bilateral agreement between the U.S. and Russian Federation governments to facilitate the repatriation of Russian-origin HEU research reactor fuel to Russia.

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This is the sixth successful shipment of HEU being returned to Russia. In the past two years, NNSA has repatriated a total of 51 kg of HEU to Russia from Romania, Bulgaria, Libya, and Uzbekistan. And in August 2002, 48 kg of Russian-origin HEU were repatriated from a research reactor near Belgrade, Serbia.

b. Repatriation of U.S.-origin fuel

On August 5, 2004, DOE completed the first return of U.S.-origin spent fuel from three research reactors in Germany, described as follows in a press release of August 10:

> The shipment, the first such shipment since the establishment of the GTRI, contained 126 spent nuclear fuel assemblies of U.S. origin composed of highly-enriched and low-enriched uranium and took place in the framework of the existing Foreign Research Reactor (FRR) Spent Nuclear Fuel (SNF) Acceptance Program. This program, which supports the return of U.S.-origin spent nuclear fuel from foreign research reactors to the United States, was integrated as a key element into the new GTRI.

The full text of the August 10 press release is available at *www.energy.gov/news/72.htm.*

8. Iran

In a December 29, 2003, note verbale to the IAEA, Iran stated that it intended to suspend certain of its nuclear program activities. *See* Report of the Director General to the Board of Governors, on the Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Sept. 1, 2004, GOV/2004/60, at 9. (IAEA documents cited in this section are available on the IAEA website, *www.iaea.org.*) On February 24, 2004, Iran invited the IAEA to verify that it had undertaken certain voluntary measures, including the suspension of the assembly and testing of centrifuges, and the domestic manufacture of centrifuge components.

Also on February 24, 2004, the Director General of the IAEA submitted a report to the IAEA Board of Governors on the implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran in response to a request by the Board in its resolution of November 26, 2003, *see* GOV/2003/81. The report detailed agency inspections in December 2003, safeguards inspections carried out in January 2004, and further inspections in February of 2004. The report described evidence that called into question the completeness of Iran's declarations and noted that Iran's omissions were a matter of serious concern given the sensitivity of the nuclear fuel cycle activities involved.

On March 13, 2004, the IAEA Board of Governors adopted a resolution on the IAEA's verification of Iran's nuclear program. This resolution noted that Iran had signed the Additional Protocol on December 18, 2003, but had not yet ratified it as called for by the Board's resolutions of September 12, 2003, and November 26, 2003. The resolution further noted that Iran had decided on February 24, 2004, to "extend the scope of its suspension of enrichment-related and reprocessing activities . . ." and noted "with serious concern that the declarations made by Iran in October 2003 did not amount to the complete and final picture of Iran's past and present nuclear programme . . . in that the Agency has since uncovered a number of omissions . . . which require further

investigation, not least as they may point to nuclear activities not so far acknowledged . . ." The resolution also noted many other concerns, including Iran's development of enrichment technology, sources of HEU contamination in Iran, Iran's advanced centrifuge design, its planned heavy-water reactor, the purpose of its polonium-210 experiments, and the fact that Iran and Libya's conversion and centrifuge programs shared "several common elements, including technology largely obtained from the same foreign sources." Finally, the Board requested the Director General to submit a report to the Board before the end of May and decided to defer until its June 2004 meeting, after receipt of the Director General's report, consideration of progress in verifying Iran's declarations and how to respond to Iran's omissions. At the March 13 meeting, U.S. Ambassador Kenneth C. Brill delivered a statement on the implementation of safeguards in the Islamic Republic of Iran to the IAEA Board of Governors. The full text of Ambassador Brill's statement, excerpted below, is available at *www.iaea.org/NewsCenter/Statements/Misc/2004/brill13032004.html.*

* * * *

Three days ago the Board addressed the implementation of safeguards in Libya and discharged its responsibilities under the Statute. Today we are considering another critically important nuclear nonproliferation case, that of Iran. Although the Director General has rightly referred to some "common elements" in the Libyan and Iranian programs, the two cases are in fact far more remarkable for their present differences than for their past similarities.

In Libya, we saw an IAEA member state that in December made a far-sighted and courageous decision to turn voluntarily away from the pursuit of weapons of mass destruction. Libya's government recognized that the pursuit of—and even the possession of—such weapons eroded the security of its people, and would have been a crippling drain on its economic development and its prospects for integration into the international community. The

December decision and the many constructive steps Libya has made since then to implement it have moved the issue quickly towards resolution, increased the security of its region and the world, and set a constructive precedent for others to follow.

Iran, in contrast, is continuing to pursue a policy of denial, deception, and delay. Time after time, when IAEA inspectors have confronted the Iranian government with verified facts it could no longer contest, Iran has revised its story and blamed others for its duplicity. But from the beginning the responsibility for prolonging this investigation has lain solely with Iran itself.

Regrettably, Mr. Chairman, the months during which IAEA inspectors have been trying to uncover the full facts about Iran's nuclear program are now beginning to turn into years. Let me remind you: in August it will be two full years since the public revelations were made that gave the Agency the initial leads it needed to start peeling away the layers of concealment Iran had put in place.

Last October 21, finding itself under increasing pressure from the Secretariat's inspections and the Board's strong September resolution, Iran reached a political agreement with France, Germany and the United Kingdom. In that agreement it committed itself to "full cooperation with the IAEA" and "full transparency" to resolve all outstanding issues. Two days later, the IAEA received a declaration that Iran itself characterized at that time as "the full scope of Iranian nuclear activities."

At the November meeting of the Board, the Iranian Ambassador gave an explicit assurance that his country had gone "to unprecedented lengths in trying to secure the trust and winning the confidence of the international community by disclosing all our past peaceful nuclear activities . . ." Mr. Chairman, that explicit assurance was not qualified by any reference to what Iran was legally required to disclose under either its comprehensive safeguards agreement or the Additional Protocol. Its point of reference was the trust and confidence of the international community, which Iran claimed to have earned by having finally "come clean" about "all" its past and present nuclear activities.

Most of us now in this room were present when Iran made that assurance. Some of us were skeptical then; others were ready

to take Iran at its word. We found common ground in a resolution that strongly deplored Iran's past failures and breaches of its obligation to comply with its safeguards agreement, that noted with the gravest concern Iran's pattern of concealment and the contradictions in its varying explanations of its activities, that requested the Director General to confirm that the information Iran had provided in October was in fact correct and complete, and that decided that if further serious Iranian failures came to light, the Board would meet to consider "all options at its disposal."

Four months later, the Director General's fourth report on Iran now provides a basis on which we can assess the value of the assurance Iran gave us in November. The report sets out facts that, by any measure, are remarkable. In brief, it makes clear beyond question that Iran's assurance to the November Board that it had revealed "all" its nuclear activities was just another active measure in its on-going policy of deception. . . .

The DG's report also detailed numerous cases in which information that Iran provided in explanation of its nuclear activities turned out, once again, to be either not complete or not persuasive. . . . Paragraph 75 of the DG's report indeed indicates that the enrichment issue remains "the major outstanding issue" the Secretariat is facing, despite all the intensive work it has done on that subject since last summer. It is therefore all the more extraordinary, Mr. Chairman, that the report had to note that "the Agency is still waiting for Iran to provide requested information" not only on the origin of the centrifuge equipment and components, but even on "the locations in Iran to which such equipment and components were moved and the associated details of timescales, and the names of individuals involved."

As the months pass, the Board must once again ask whether it can really be so difficult for Iran to provide the information the Agency needs to finish its investigation. . . .

I call to your attention, Mr. Chairman, the facts that the DG's report revealed about the manufacturing of centrifuge components in military-industrial workshops. We commend the Agency for its conscientious pursuit of the truth about Iran's nuclear program, including the extent to which that program involves the Iranian military. In a country like Iran, with a sophisticated and well-

capitalized energy sector, it is more than curious that a nuclear program—said to be purely civilian in nature and purely for power generation purposes—seems to have much closer ties to the Iranian military than it does to the rest of the civilian energy sector. We look forward to learning whether Iran's forthcoming declarations under the Additional Protocol clarify the nature and extent of military involvement in the Iranian nuclear program. The Agency should also follow up on any indications A. Q. Khan could have provided nuclear weapons design information to Iran.

I might note that the Iranian delegation's willingness to support only those things in the Director General's report that it agrees with and to question or denigrate the many Iranian shortcomings and problems the report details speaks volumes about Iran's true attitude to the Agency's work.

The United States hopes that a robust implementation of the Additional Protocol in Iran will help throw much-needed light on those and other issues. In that connection, however, I am sure all Board members were troubled by the recently reported public statement by a high Iranian government official that in addition to the P-2 advanced centrifuge program, Iranian experts are engaged in other types of research that Iran has not reported to the IAEA and does not intend to report. Such statements hardly increase the confidence of the international community in the strength of Iran's commitment to its safeguards agreement and to the Additional Protocol.

Mr. Chairman, the U.S. supported the efforts of France, Germany and the United Kingdom announced last October to reach an accord with Iran on an internationally verifiable suspension and then cessation of Iran's enrichment-related and reprocessing activities. We said at the time that such actions by Iran, combined with full, verifiable transparency, would be the best way for it to build international confidence regarding the nature of its nuclear program. However, we have witnessed Iran, through its actions and its repeated public statements, making a mockery of that agreement. Far from suspending all enrichment-related activities on the path to cessation, Iran continued until January to manufacture, assemble and test centrifuges, and continued construction at the massive Natanz site.

In addition, we are concerned that Iran's February announcement—that it will suspend centrifuge assembly and testing, as well as component manufacture "to the furthest extent possible"—may represent another tactical diversion, and that Iran may intend to continue its programs in defiance of the Board's resolutions. . . . One must ask whether Iran sees suspension and cessation as a route to better relations with the world community, or merely as a short-term maneuver intended to avoid a Board report to the UN Security Council or other criticism by the Agency. The fact that, after months of resistance, Iran's latest partial step on suspension came only at the last possible minute before the Director General's February 24 report, speaks volumes.

Whatever Iran's motivation may be, the Board must adopt at this meeting a resolution that makes clear, as did our resolutions in September and November, that only a prompt and comprehensive suspension of all enrichment-related and reprocessing activities can begin to build international confidence in Iran's intentions after the breaches, failures an deception that have come to light over the past year. We again urge Iran to respond positively and fully to the Board's concerns on the suspension issue.

The resolution the Board adopted today makes no definitive judgments, but it makes clear Iran has yet to discharge the obligation of full cooperation, compliance and transparency essential to the fulfillment of its legal commitments, not to mention its more recent political commitments. That clear statement of the facts is common ground on which we all stand. As our resolution says, the Board will consider in June how to respond to Iran's omissions of important information, as well as other relevant issues. But although Iran continues to press in Vienna and in many capitals for its "file" to be closed in June, there is no indication the work of the Secretariat, of the Board, will have been completed by that time. No member of the Board should lend any support to efforts to impose artificial restrictions on the authority and responsibility of the Board and the Secretariat to perform their duties under the Statute and safeguards agreements. Surely doing so would be inconsistent with our responsibilities as members of this Board.

Libya has now demonstrated, Mr. Chairman, that a country genuinely committed to reversing course can move swiftly and

pro-actively to eliminate weapons of mass destruction programs. In Iran's case, in contrast, we regret that once again, as at every Board meeting over the past year, Board members find it necessary to call on Tehran to intensify its cooperation with the Agency, as the Director General urged in his latest—but not last—report. The "Iran file" at the IAEA cannot and will not be closed until all the facts are known and an appropriate finding of the Board is made upon them.

Mr. Chairman, that concludes the statement I had intended to deliver today. But in light of the very troubling news reports over the past 24 hours about Iran's sudden decision to halt inspections for at least a number of weeks—and the Iranian delegation's less than subtle hints today that Iran's cooperation with the Agency has conditions attached to it—I think Board members would benefit from information from the Secretariat about what impact that decision may have on the inspectors' work. Can the Secretariat tell us whether the inspections that were postponed were essentially routine inspections, or were inspectors planning to visit new sites or facilities? Has Iran said how long the postponement will last? How will the delay affect inspection plans and schedules? Especially in light of Iran's past record of carrying out sanitizing "modifications" to sites before allowing inspectors to carry out environmental sampling, could such a postponement potentially provide time for work that would affect the inspectors' ability to address all relevant outstanding issues and draw closer to conclusions about the Iranian nuclear program?

* * * *

On May 21, 2004 the Islamic Republic of Iran submitted its initial declaration under the Additional Protocol to its NPT Safeguards Agreement to the IAEA. Subsequent reports to the Board were issued by the Director General on June 1, *see* GOV/2004/34, September 1, 2004 (GOV/2004/60) and November 15, 2004 (GOV/2004/83). In the November report, the Director General concluded that Iran had taken "a number of steps intended to conceal the origin, source, and extent of Iran's enrichment program," and the Agency was "not yet in a position to conclude that there are no undeclared nuclear materials or activities in Iran." GOV/2004/83, at 7, 24. The IAEA Board of Governors also issued additional resolutions

on Iran during 2004: on June 18 (GOV/2004/49), September 18 (GOV/2004/79), November 26 (GOV/2003/81), and November 29 (GOV/2004/90). In its resolution of November 26, the Board deplored "Iran's past failures and breaches of its obligation to comply with the provisions of its Safeguards Agreement." GOV/2003/81, at 3. Finally, the "E3/EU" (Governments of France, Germany and the United Kingdom) and the Islamic Republic of Iran signed and submitted to the IAEA a November 15, 2004, agreement (referred to as the "Paris Agreement") concerning Iran's nuclear program, in which Iran committed to suspend all enrichment related and reprocessing activities while negotiations proceed with respect to longer-term arrangements; *see* INFCIRC/637, available at *www.iaea.org/Publications/Documents/Infcircs/2004/infcirc637.pdf*.

9. Democratic People's Republic of Korea

During 2004 the United States made several overtures to the Democratic People's Republic of Korea ("DPRK" or "North Korea") in the context of multilateral talks regarding North Korea's nuclear programs that included the Republic of Korea ("ROK" or "South Korea"), China, Japan, and Russia ("Six-Party talks"). Excerpts below from testimony by James A. Kelly, Assistant Secretary of State for East Asian and Pacific Affairs, delivered on July 15, 2004, to the Senate Foreign Relations Committee, describe the efforts of the United States during the first half of 2004 to engage the North Koreans on this issue. The statement also details the comprehensive and substantive proposal the United States tabled at the third round of Six-Party talks to resolve the nuclear issue. Despite the commitment of all six parties at that June 2004 meeting to resume negotiations by the end of September, the DPRK refused to rejoin the talks for the rest of 2004. The full text of Mr. Kelly's statement is available at *www.state.gov/p/eap/rls/rm/2004/34395.htm*.

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North Korea's nuclear programs are a longstanding threat. The D.P.R.K. leadership decades ago set out on a path that would allow it to acquire nuclear weapons. . . .

In 1985, while construction was going on at Yongbyon, international pressure convinced North Korea to sign the Nuclear Non-Proliferation Treaty. However, it was not until 1992 that it finally signed a comprehensive safeguards agreement and within months the IAEA found evidence of inconsistencies in North Korea's declarations. I should add that throughout the 1990s the IAEA continued to find the D.P.R.K. in noncompliance of its safeguards agreement.

Also in 1992, the D.P.R.K. reached an agreement with the Republic of Korea for a Korean Peninsula free of nuclear weapons, but the North never moved to implement it.

By 1993, IAEA pressure for additional inspections led North Korea to announce its intention to withdraw from the NPT. As tensions mounted, the U.S. and North Korea began high-level talks that culminated in the Agreed Framework of 1994. That agreement obligated the D.P.R.K. not to produce fissile material at its declared nuclear facilities at Yongbyon and its preface stated that its purpose was "an overall resolution of the nuclear issue on the Korean Peninsula."

The Agreed Framework left resolution of pre-1993 discrepancies, especially quantities of plutonium that the D.P.R.K. might have recovered, for the distant future, linked to construction progress on the light water reactors provided under the Agreed Framework. The Agreed Framework did not, as we learned later, end the North Korean nuclear arms programs. By the fall of 2002, our intelligence community assessed that North Korea was pursuing a covert program to produce enriched uranium—in violation of the Agreed Framework, the North-South Joint Declaration on the Denuclearization of the Korean Peninsula, the Nuclear Non-Proliferation Treaty, and the D.P.R.K.'s Safeguards Agreement with the International Atomic Energy Agency. In fact, we determined that North Korea had been pursuing the program for a number of years, even as it was negotiating with senior American officials to improve relations.

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Instead of taking the opportunity we had afforded them to begin walking back their covert uranium enrichment program, the North Koreans escalated the situation. In December 2002, they expelled IAEA inspectors and began to reactivate the 5-megawatt reactor at Yongbyon. In January, the D.P.R.K. announced its withdrawal from the NPT. And on several occasions in 2003, it declared it had finished reprocessing its 8,000-plus existing spent fuel rods. If that is indeed the case, it could have produced enough fissile material for several additional nuclear weapons. Since then, the D.P.R.K. has stated it is strengthening what it calls its nuclear deterrent capability.

Multilateral Solution to a Multilateral Problem

The United States has adhered to two basic principles to resolve this threat from the D.P.R.K. First, we seek the complete, verifiable and irreversible dismantlement of the D.P.R.K.'s nuclear programs—nothing less. . . . Second, because the North's nuclear programs threaten its neighbors and the integrity of the global nuclear non-proliferation regime, the threat can best be dealt with through multilateral diplomacy.

* * * *

The second round of Six-Party talks was in February 2004 [and] . . . ROK offered fuel aid to the D.P.R.K., if there were a comprehensive and verifiable halt of its nuclear programs as a first step toward complete nuclear dismantlement.

The third round of talks . . . were useful and constructive. . . .

In addition to the United States' proposal, the ROK put forward a concrete, detailed proposal to achieve a denuclearized Korean Peninsula. The ROK proposal was consistent with the U.S. approach . . . North Korea, too, participated actively in the plenary, offering a proposal for what it describes as the first step toward full denuclearization—a freeze of its nuclear-weapons related programs in exchange for compensation from the other parties. The Japanese also had constructive ideas, strongly supporting proposals that would lead to the timely and comprehensive denuclearization of the Peninsula subject to international verification, and expressing a willingness to provide energy assistance to the D.P.R.K. when it

is verified that the D.P.R.K. is actually on the road to denuclearization. . . . [A]ll of the parties, including, in my view, the D.P.R.K., went to Beijing prepared for substantive discussions.

. . . . That said, proposals offered by the parties differ very considerably in substance, as I will detail now.

The U.S. Proposal

The proposal the U.S. presented was developed in close coordination with the Republic of Korea and Japan. Under the U.S. proposal, the D.P.R.K. would, as a first step, commit to dismantle all of its nuclear programs. The parties would then reach agreement on a detailed implementation plan requiring, at a minimum, the supervised disabling, dismantlement and elimination of all nuclear-related facilities and materials; the removal of all nuclear weapons and weapons components, centrifuge and other nuclear parts, fissile material and fuel rods; and a long-term monitoring program.

We envisage a short initial preparatory period, of perhaps three months' duration, to prepare for the dismantlement and removal of the D.P.R.K.'s nuclear programs. During that initial period, the D.P.R.K. would:

- provide a complete listing of all its nuclear activities, and cease operations of all of its nuclear activities;
- permit the securing of all fissile material and the monitoring of all fuel rods, and;
- permit the publicly disclosed and observable disablement of all nuclear weapons/weapons components and key centrifuge parts.

These actions by the D.P.R.K. would be monitored subject to international verification.

At this juncture, I'll emphasize that, for the D.P.R.K.'s declaration to be credible and for the process to get underway, the North would need to include its uranium enrichment program and existing weapons, as well as its plutonium program. As of now, the D.P.R.K. is denying that it has a program to enrich uranium, and it speaks of an existing "nuclear deterrent" but has

refrained from stating publicly that it has "nuclear weapons." Under our proposal, as the D.P.R.K. carried out its commitments, the other parties would take some corresponding steps. These would be provisional or temporary in nature and would only yield lasting benefits to the D.P.R.K. after the dismantlement of its nuclear programs had been completed. The steps would include:

- upon agreement of the overall approach, including a D.P.R.K. agreement to dismantle all nuclear programs in a permanent, thorough and transparent manner subject to effective verification, non-U.S. parties would provide heavy fuel oil to the D.P.R.K.
- upon acceptance of the D.P.R.K. declaration, the parties would:
    - provide provisional multilateral security assurances, which would become more enduring as the process proceeded. North Korea's rhetoric on this issue notwithstanding, I would like to point out that it is reasonable to conclude that security assurances given through the multilateral Six-Party process would have considerably more weight than would bilateral assurances;
    - begin a study to determine the energy requirements of the D.P.R.K. and how to meet them by non-nuclear energy programs;
    - begin a discussion of steps necessary to lift remaining economic sanctions on the D.P.R.K., and on the steps necessary for removal of the D.P.R.K. from the List of State Sponsors of Terrorism.

Secretary Powell told the D.P.R.K. Foreign Minister, at the ASEAN Regional Forum in Indonesia on July 2, that the U.S. proposal aimed to move forward on the dismantlement of the D.P.R.K.'s nuclear programs, and that there is an opportunity for concrete progress.

The D.P.R.K. Proposal

The D.P.R.K. proposal restated its goal of a freeze for rewards, including energy assistance, lifting of sanctions, and removal from

the list of countries sponsoring terrorism. We are continuing to study the North's proposal. As I noted, it is clear we are still far from agreement.

Our initial assessment is that the D.P.R.K. proposal lacks detail and is vague on a number of key elements. The scope is narrow in terms of the facilities covered and it ignores pre-2003 plutonium, nuclear weapons, and the uranium enrichment program. North Korea would exclude the IAEA from verification, seeking to create a new verification regime from the Six-Party talks participants. This unprecedented approach would be hard to set up and carry out.

Still, there are some positive elements in positions the D.P.R.K. staked out. The D.P.R.K. claimed that the freeze would be the first step on the path to nuclear dismantlement, not an end to itself, and on that point we agree. The D.P.R.K. also confirmed that whatever would be included in the freeze would also be included in the commitment to dismantlement further down the line.

Specifically, the D.P.R.K. said it would freeze all facilities related to nuclear weapons and the products that resulted from their operation, refrain from producing more nuclear weapons, transferring them, and testing them. The D.P.R.K. delegation clearly identified the 5-MWe reactor as a nuclear weapons facility. While they said they wanted to maintain a civil nuclear program, they also acknowledged that most of their nuclear programs are weapons-related.

We and other parties have questions about the D.P.R.K. proposal, including what the scope of the freeze and dismantlement would be. Again, inclusion of the D.P.R.K.'s uranium enrichment program is critical. We will continue to seek answers through the Six-Party process, though we have made clear all along that we are not talking for the sake of talking and that we expect tangible progress to be made. To that end, the parties agreed to hold the fourth round of talks by the end of September and a working group meeting in the interim as soon as possible to prepare for the fourth round.

North Korea's Choice

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President Bush in his February 11th remarks to the National Defense University called on other governments engaged in covert nuclear arms programs to follow the affirmative example of Libya.

The Libyan case demonstrates, as President Bush has said, that leaders who abandon the pursuit of weapons of mass destruction and their delivery means will find an open path to better relations with the United States and other free nations. When leaders make the wise and responsible choice, they serve the interests of their own people and they add to the security of all nations.

We have discussed Libya's example with our North Korean counterparts, and we hope they understand its significance.

Of course, to achieve full integration into the region and a wholly transformed relationship with the United States, North Korea must take other steps in addition to making the strategic decision to give up its nuclear ambitions. It also needs to change its behavior on human rights, address the issues underlying its appearance on the U.S. list of states sponsoring terrorism, eliminate its illegal weapons of mass destruction programs, put an end to the proliferation of missiles and missile-related technology, and adopt a less provocative conventional force disposition. . . .

I believe that diplomacy is the best way to overcome North Korea's nuclear threat and that the Six-Party process is the most appropriate approach. Our aim is to fully and finally resolve the nuclear problem, not to implement half measures or sweep the problem under the rug for future policy makers to deal with. We are pursuing this course patiently and are committed to its success.

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Regarding the Korean Energy Development Organization ("KEDO"), the KEDO Executive Board (comprised of representatives of the United States, the Republic of Korea, Japan and the European Union) decided in November 2003 to suspend the light-water reactor ("LWR") project of the organization for one year beginning December 1, 2003. On November 25, 2004, KEDO's Board decided to extend the suspension of the LWR project for another year beginning December 1, 2004. KEDO stated in a press release announcing the Board's decision that the future of the LWR project would be assessed and decided by the Executive Board before the expiration of the suspension period. *See www.kedo.org/news_detail.asp?NewsID=29.*

10. Republic of Korea

On August 23, 2004, the ROK informed the Secretariat of the International Atomic Energy Agency (IAEA) of its discovery that certain experiments concluded in 2000 had involved the enrichment of uranium. Specifically, these experiments used the atomic vapor laser isotope separation ("AVLIS") method and produced approximately 200 mg of enriched uranium. The ROK reported that these experiments had been terminated, and the installation where they had been carried out had been dismantled. This information was conveyed along with the ROK's submission of its initial declaration pursuant to the Additional Protocol. In response to this information, the IAEA inspection team visited the ROK from August 30 to September 4, and carried out subsequent verification missions from September 20–24 and November 3–6, 2004. During the verification missions, the ROK also informed the IAEA that its scientists had conducted uranium conversion activities during the 1980s, involving the production of approximately 154 kg of natural uranium metal. Following environmental sampling by the IAEA at a research reactor in Seoul, ROK authorities stated that laboratory experiments during the 1980s had been performed to irradiate 2.5 kg of depleted uranium to study the separation of uranium and plutonium. The ROK also provided information on a chemical exchange process experiment to confirm the feas-ibility of producing 3% U-235.

During the IAEA Board of Governors meeting in September, the Director General stated that he would report to the Board concerning the matter no later than the November 2004 meeting of the Board. On November 11, the Director General issued his report on the Implementation of the NPT Safeguards Agreement in the Republic of Korea. *See* GOV/2004/84 (available on the IAEA website at *www.iaea.org/Publications/Documents/Board/2004/gov2004-84.pdf*). The Director General's report found that between 1982 and 2000, the "ROK conducted experiments and activities involving uranium conversion, uranium enrichment and plutonium

separation, which it failed to report to the Agency in accordance with its obligations under its Safeguards Agreement."

In response to the Director General's report, the Board of Governors Chairman's conclusion, issued November 26, 2004, stated: "The Board shared the Director General's view that given the nature of the nuclear activities described . . . , the failure of the Republic of Korea to report these activities in accordance with its safeguards agreements is of serious concern. At the same time, . . . the quantities of nuclear material involved have not been significant, and . . . to date there is no indication that the undeclared experiments have continued. The Board welcomed the corrective actions taken by the Republic of Korea, and the active cooperation it has provided to the Agency. . . . The Board observed that the Republic of Korea has an Additional Protocol in force and that developments in the Republic of Korea demonstrate the utility of the Additional Protocol. . . ."

Excerpts from the U.S. Statement before the IAEA Board of Governors during its September meeting follow; the full text of the U.S. statement is available at *www.state.gov/s/l/c8183.htm*.

My government welcomes the Republic of Korea's actions in bringing to the attention of the IAEA in the context of its reporting under the Additional Protocol previously undeclared uranium enrichment research. While the activities themselves should never have occurred, the Republic of Korea's transparency in reporting them now is a model that should be followed by others. . . .

My government takes note of the particular value of the Additional Protocol in this instance, where it can be a tool not only of the Agency but of the State itself in ensuring that it meets its obligations and rectifies any problems that may occur.

My government similarly welcomes the ongoing actions by both the Secretariat and the Government of the Republic of Korea in investigating reprocessing experiments that happened over twenty years ago. These too are experiments that should not have happened. We expect the Republic of Korea to maintain its level of cooperation with the IAEA in resolving all remaining questions.

The Republic of Korea has been a staunch supporter of international nonproliferation efforts. It has provided leadership, not only as a member of this Board of Governors but also recently as the Chairman of the Nuclear Suppliers Group as that Group wrestled with a number of difficult issues, including how to respond to the growing threat of terrorism and the illicit activities of the Khan network. . . .

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The IAEA Statute requires that the Board of Governors report non-compliance by a State with its safeguards obligations to the United Nations Security Council, the UN General Assembly and all IAEA Member States. There can be no double standard. Without presuming the outcome, we look forward to receiving the Agency's full, fair and impartial report upon the completion of its investigation of the ROK's nuclear activities.

11. Libya

On September 20, 2004, as discussed in Chapter 16.B.1., President Bush issued Executive Order 13357 terminating the national emergency declared as to Libya and revoking related executive orders, based on the President's finding that the situation that had given rise to the declaration of the national emergency "has been significantly altered by Libya's commitments and actions to eliminate its weapons of mass destruction programs and its Missile Technology Control Regime (MCTR)-class missiles, and by other developments." 69 Fed. Reg. 56, 665 (Sept. 22, 2004). For Libya's announcement on December 19, 2003, that it would rid itself of such weapons, *see* Digest 2003 at 1068–69.

A fact sheet dated September 20 from the Office of the Spokesman, U.S. Department of State, addressed the termination of the national emergency, as excerpted in Chapter 16.B.1. It also enumerated the steps taken by Libya during 2004, as follows.

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Over the last nine months, Libya has worked closely with international organizations including the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons, and has invited the assistance of the United States and United Kingdom, to transparently and verifiably eliminate its WMD and MTCR-class missile programs. It has:

- Facilitated the removal of all critical elements of its previously undeclared nuclear program;
- Signed and implemented the IAEA Additional Protocol;
- Acceded to the Chemical Weapons Convention;
- Acknowledged Rabta's historical use as a chemical weapons production facility and begun a process at the OPCW for approval to convert it to a pharmaceutical plant;
- Destroyed its munitions designed for use with toxic chemicals and secured chemical agents for destruction under international supervision;
- Submitted a declaration of its chemical agents to the Organization for the Prohibition of Chemical Weapons;
- Eliminated its Scud-C missile force and agreed to eliminate its Scud-B missiles;
- Turned over nuclear weapons documentation;
- Begun working with the international community to remove highly enriched uranium and has agreed convert its reactor at Tajura to operate on Low-Enriched Uranium fuel;
- Allowed unimpeded site access by international personnel;
- Engaged in comprehensive discussions over the scope and intent of its WMD and missile programs;
- Pledged to halt all military trade with countries of proliferation concern; and
- Increased the international community's understanding of the global black market in the world's most dangerous technologies.

As a result of this effort, concerns over weapons of mass destruction no longer pose a barrier to the normalization of U.S.-Libyan relations. In responding to Libya's announcement on December 19, 2003 that it would voluntarily give up its WMD and MTCR-class

missile programs, the President committed to respond to concrete Libyan actions in good faith, noting that Libya "can regain a secure and respected place among the nations and, over time, better relations with the United States."

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In testimony before the Subcommittee on International Terrorism, Nonproliferation and Human Rights of the House of Representatives Committee on International Relations on September 22, 2004, Paula A. DeSutter, Assistant Secretary of State for Verification and Compliance, elaborated on cooperative efforts in the accomplishment and verification of Libya's dismantlement efforts. The full text of the testimony, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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. . . [I]t is my pleasure to announce to you today on behalf of the administration that our verification work in Libya is essentially complete. Our final team left Tripoli on Monday, September 20. . . .

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Our goal from the beginning was to assist the Libyans, as partners, in meeting their December 19, 2003, commitments and to verify that they had fulfilled that promise. To accomplish this, we set up three phases for our work. Each of the phases included a group of U.S. and British experts going to Libya, talking to Libyan officials, visiting sites, working together to understand their WMD and missile programs, and determining ways to dismantle these programs. We also kept the international community informed of our progress.

The first phase involved removing some of the key material that was of greatest proliferation risk on a priority basis, identifying the scope of the programs, and assisting the Libyans in their treaty and safeguards-mandated interactions with the IAEA and the OPCW. In January [2004] we removed nuclear weapons design documents, uranium hexafluoride (UF6), and key centrifuges and equipment, including material from the Khan network. On the

missile front, we received a detailed description of a range of Libyan missile research and development activities, and removed parts from Libya's SCUD-C missiles to make them inoperable.

Phase II was focused on removing or eliminating the remaining elements of Libya's programs at Libya's request. Our teams removed a large amount of material and equipment from the nuclear and missile programs. During this phase, the Libyans destroyed over 3,000 chemical munitions and consolidated and secured their stocks of chemical weapons agent and precursors for destruction. The logistics of this effort were daunting, and this would not have been possible without the flexibility and speed of implementation permitted by the Nonproliferation and Disarmament Fund. As part of this effort, we managed to remove over 1,000 metric tons of nuclear equipment, SCUD-C missiles, their launchers, and other equipment by ship. In addition, we arranged the removal of more than 15 kilograms of fresh high-enriched uranium reactor fuel to Russia.

Phase III was primarily a verification phase. In some ways this was the hardest part of the effort. Our goal was to speak with many of the Libyans who were responsible for their WMD and missile programs. We wanted to better understand the extent of those programs, and the procurement network supporting them. Ultimately, we needed to determine whether Libya had truly eliminated its WMD programs. As it had in the previous visits, Libya cooperated in providing full access to people and facilities. Importantly, we also received an assurance from Libya that it would cut off trade in military goods and services with countries of proliferation concern—for example Syria, Iran, and North Korea.

Verification is not a science, and no verification determination can be absolutely certain. But what we can say, and what I am saying with regard to Libya, is that we have verified with reasonable certainty that Libya has eliminated, or has set in place the elimination of all its WMD and MTCR-class missile programs.

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Some work remains. . . . Libya has collected its stockpile of chemical agent and precursors and is preparing to destroy them safely, with our help and with the cooperation of the OPCW. That effort will take some time to complete. Libya has begun

the process at the OPCW to seek approval to convert its former chemical weapons production facility at Rabta to produce pharmaceutical products. We support this effort, and are working with the OPCW to that end. It would be a symbol of the "sea change" that Libya has undergone that Rabta, long a symbol of Libya's dark designs, might someday be producing life-saving drugs for the people of Libya and the African continent.

Libya ended its emerging SCUD-C missile program, and has agreed to destroy its SCUD-B missiles.

To resolve these and any additional issues that arise, Libya, the United Kingdom and the United States have established a Trilateral Steering and Cooperation Committee that will meet to discuss those issues and facilitate Libya's further implementation of its commitments. In practice, this committee has been in place for some time. . . .

In addition, on September 10, 2004, the President issued a memorandum to the Secretary of State, waiving certain remaining restrictions on Libya related to nuclear non-proliferation. Presidential Determination No. 2004–44, 69 Fed. Reg. 56,153 (Sept. 10, 2004), excerpted below.

Pursuant to section 101 of the Arms Export Control Act, I hereby determine that Libya received nuclear enrichment equipment, material, or technology after August 4, 1977. I hereby determine and certify that the continued termination of assistance, as required by this section, would have a serious adverse effect on vital United States interests and that I have received reliable assurances that Libya will not acquire or develop nuclear weapons or assist other nations in doing so.

Pursuant to section 102(b) of the Arms Export Control Act, I hereby determine that Libya, a non-nuclear weapon state, sought and received design information that I determine to be important to, and intended by Libya for use in, the development or manufacture of a nuclear explosive device. I hereby determine and certify that the application of sanctions, as required by this section, would have a serious adverse effect on vital United States interests.

Pursuant to section 2(b)(4) of the Export-Import Bank Act of 1945, as amended, I hereby determine and certify that it is in the national interest for the Export-Import Bank to guarantee, insure, or extend credit, or participate in the extension of credit in support of United States exports to Libya.

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12. Iraq

On July 6, 2004, the U.S. Department of Energy announced that it had conducted a joint operation with the U.S. Department of Defense to secure and remove from Iraq radiological and nuclear materials that could be used in a radiological dispersion device (RDD) or diverted to support a nuclear weapons program. Excerpts from a DOE press release detailing this operation follow; the full text of the release is available at: *www.nnsa.doe.gov/na-20/press.shtml.*

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"This operation was a major achievement for the Bush Administration's goal to keep potentially dangerous nuclear materials out of the hands of terrorists," Secretary Abraham said. "It also puts this material out of reach for countries that may seek to develop their own nuclear weapons."

Twenty experts from DOE's national laboratory complex packaged 1.77 metric tons of low-enriched uranium and roughly 1000 highly radioactive sources from the former Iraq nuclear research facility. The DOD airlifted the material to the United States on June 23 and provided security, coordination, planning, ground transportation, and funding for the mission.

Due to safety and security issues surrounding the removed materials, the U.S., consistent with its authorities and relevant United Nations Security Council Resolutions, took possession of, and removed the materials to ensure the safety and security of the Iraqi people.

DOE also repackaged less sensitive materials that will remain in Iraq. Radiological sources that continue to serve useful medical, agricultural or industrial purposes were not removed from Iraq.

The low enriched uranium will be stored temporarily at a secure DOE facility and the radiological sources will initially be brought to a DOE laboratory for further characterization and disposition.

The International Atomic Energy Agency was advised in advance of the U.S. intentions to remove the nuclear materials. Iraqi officials were briefed about the removal of the materials and sources prior to evacuation.

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On September 30, 2004, the Special Adviser to the Director of Central Intelligence, of the U.S. Central Intelligence Agency, issued a report detailing the Special Advisor's findings on Iraq's Weapons of Mass Destruction. The scope of the report is intended to relay the findings of the Iraq Survey Group "from its creation in June 2003 until September 2004 and provides context and analysis to [the] findings. It also attempts to place the events in their Political-Military context. For the purposes of this report, the term Weapons of Mass Destruction ("WMD") refers to the definition established by the United Nations Security Council in the context of UN Security Council Resolution 687 (1991)." The key findings detail what was found in Iraq during the 2003–2004 timeframe as well as what was determined to be the strategic intent of the Saddam Hussein regime in connection with WMD, including nuclear, chemical and biological weapons and their delivery systems, as well as the regime's financing and procurement of WMD. The report and addenda are available at */www.cia.gov/cia/reports/iraq_wm_2004.*

Cross-references

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Conscientious objection to military service, **Chapter 6.I.5.**

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