INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN V. UNITED STATES OF AMERICA)

ATTACHMENTS AND ANNEXES TO THE MEMORIAL
OF THE ISLAMIC REPUBLIC OF IRAN

VOLUME I

01 February 2017

IN THE NAME OF GOD

INTERNATIONAL COURT OF JUSTICE

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Attachment 1

U.S. Courts Judgments against Iran & Iranian State Entities as of 31 January 2017

U.S. courts Judgments against Iran & Iranian State Entities
As of 31 January 2017

No.	Plaintiff	Defendant	Case No.	Date of Action	Location of Alleged Action	Date of Judgment	Compensation (US$)	Punitive Damage (US$)
1	Flatow	Government of I. R. Iran	1:97-cv-00396	26/02/1997	Israel	11/03/1998	22 500 000	225 000 000
2	Cicipio	Government of I. R. Iran	1:96-cv-01805	31/07/1996	Lebanon	10/09/1998	65 000 000	None
3	Anderson	Government of I. R. Iran	1:99-cv-00698	22/03/1999	Lebanon	24/02/2000	41 200 000	300 000 000
4	Eisenfeld	Government of I. R. Iran	1:98-cv-01945	10/08/1998	Israel	11/07/2000	24 161 000	300 000 000
5	Higgins	Government of I. R. Iran	1:99-cv-00377	17/02/1999	Lebanon	21/09/2000	55 431 937	300 000 000
6	Elahi	Government of I. R. Iran	1:99-cv-02802	22/10/1999	France	20/12/2000	11 740 035	300 000 000
7	Sutherland	Government of I. R. Iran	1:99-cv-03279	13/12/1999	Lebanon	25/06/2001	53 400 000	300 000 000
8	Polhill	Government of I. R. Iran	1:00-cv-01798	27/07/2000	Lebanon	23/08/2001	31 500 000	300 000 000
9	Jenco	Government of I. R. Iran	1:00-cv-00549	15/03/2000	Lebanon	27/08/2001	14 640 000	300 000 000
10	Wagner	Government of I. R. Iran	1:00-cv-01799	27/07/2000	Beirut	06/11/2001	16 280 000	300 000 000
11	Weinstein	Government of I. R. Iran	1:00-cv-02601	27/10/2000	Israel	06/02/2002	33 284 164	150 000 000
12	Hegna	Government of I. R. Iran	1:00-cv-00716	03/04/2000	Greece	07/02/2002	42 000 000	333 000 000
13	Stethem	Government of I. R. Iran	1:00-cv-00159	28/01/2000	Greece	19/04/2002	21 200 000	300 000 000
14	Carlson	Government of I. R. Iran	1:00-cv-01309	06/06/2000	Greece	19/04/2002	7 800 000	300 000 000
15	Turner	Government of I. R. Iran	1:01-cv-01981	18/09/2001	Lebanon	02/10/2002	27 310 000	300 000 000
16	Surette	Government of I. R. Iran	1:01-cv-00570	19/03/2001	Lebanon	01/11/2002	18 961 284	300 000 000
17	Rafii	Government of I. R. Iran	1:01-cv-00850	18/04/2001	France	02/12/2002	5 000 000	300 000 000
18	Cronin	Government of I. R. Iran	1:99-cv-02890	29/10/1999	Lebanon	18/12/2002	1 200 000	300 000 000
19	Kerr	Government of I. R. Iran	1:01-cv-01994	20/09/2001	Lebanon	11/02/2003	33 025 296	None
20	Weir	Government of I. R. Iran	1:01-cv-01303	12/06/2001	Lebanon	02/04/2003	11 450 000	300 000 000
21	Stern	Government of I. R. Iran	1:00-cv-02602	27/10/2000	Israel	17/07/2003	13 000 000	300 000 000
22	Steen	Government of I. R. Iran	1:00-cv-03037	21/12/2000	Lebanon	31/07/2003	42 750 000	300 000 000
23	Tracy	Government of I. R. Iran	1:01-cv-02517	06/12/2001	Lebanon	21/08/2003	18 509 999	None
24	Reiger	Government of I. R. Iran	1:01-cv-01302	12/06/2001	Lebanon	08/09/2003	5 321 520	None
25	Campuzano	Government of I. R. Iran	1:00-cv-02328	29/09/2000	Israel	10/09/2003	40 963 607	112 500 000
26	Rubin	Government of I. R. Iran	1:01-cv-01655	31/07/2001	Israel	10/09/2003	71 500 000	187 500 000
27	Leah S. Mcusa	Government of I. R. Iran	1:00-cv-02096	31/08/2000	Israel	05/11/2003	12 000 000	120 000 000
28	Kapar	Government of I. R. Iran	1:02-cv-00078	16/01/2002	Greece	27/09/2004	13 500 000	None
29	Dodge	Government of I. R. Iran	1:03-cv-00252	14/02/2003	Lebanon	17/03/2005	5 670 000	None
30	Salazar	Government of I. R. Iran	1:02-cv-00558	22/03/2002	Beirut	12/05/2005	18 297 000	None
31	Cicipio Puelo	Government of I. R. Iran	1:01-cv-01496	09/07/2001	Lebanon	10/07/2005	91 000 000	None
32	Dammarell	Government of I. R. Iran	1:01-cv-02224	29/10/2001	Beirut	14/12/2005	316 919 657	None
33	Holland	Government of I. R. Iran	1:01-cv-01924	13/09/2001	Beirut	01/02/2006	25 241 486	None
34	Prevatt	Government of I. R. Iran	1:02-cv-01775	09/09/2002	Beirut	27/03/2006	2 500 000	None
35	Boddof	Government of I. R. Iran	1:02-cv-01991	08/10/2002	Israel	29/03/2006	16 988 300	300 000 000
36	Greenbaum	Government of I. R. Iran	1:02-cv-02148	23/10/2002	Israel	31/08/2006	19 879 023	None
37	Blais	Government of I. R. Iran	1:02-cv-00285	13/02/2002	Saudi Arabia	29/09/2006	28 801 792	None
38	Jacobson	Government of I. R. Iran	1:02-cv-01365	08/04/2002	Lebanon	06/10/2006	6 400 000	None
39	Heiser I	Government of I. R. Iran	1:00-cv-02329	29/09/2000	Saudi Arabia	22/12/2006	254 431 903	None
40	Sisso	Government of I. R. Iran	1:05-cv-00394	24/02/2005	Israel	05/07/2007	5 000 000	None
41	Bennet	Government of I. R. Iran	1:03-cv-01486	02/07/2003	Israel	30/08/2007	12 907 548	None
42	Peterson	Government of I. R. Iran	1:01-cv-02094	03/10/2001	Beirut	07/09/2007	2 656 944 877	None
43	Nikbin	Government of I. R. Iran	1:04-cv-00008	05/01/2004	Iran	28/09/2007	2 600 000	None
44	Welch	Government of I. R. Iran	1:01-cv-00863	19/04/2001	Beirut	15/10/2007	32 698 304	None
45	Bakhtiar	Government of I. R. Iran	1:02-cv-00092	22/01/2002	France	18/12/2007	12 000 000	None
46	Levin	Government of I. R. Iran	1:05-cv-02494	30/12/2005	Lebanon	14/01/2008	28 807 719	None
47	Ben-Rafael	Government of I. R. Iran	1:06-cv-00721	21/04/2006	Argentina	25/02/2008	62 441 839	None
48	Beer I	Government of I. R. Iran	1:08-cv-01807	14/03/2006	Israel	17/07/2008	13 000 000	0
49	Acosta	Government of I. R. Iran	1:06-cv-00745	26/04/2006	United States	06/08/2008	50 172 000	300 000 000
50	Rimkus I	Government of I. R. Iran	1:08-cv-01615	19/06/2006	Saudi Arabia	26/08/2008	5 000 000	0
51	Kirschenbaum	Government of I. R. Iran	1:08-cv-01814	17/10/2008	Israel	26/08/2008	13 750 000	300 000 000
52	Wachsman	Government of I. R. Iran	1:06-cv-00351	28/02/2006	Israel	27/03/2009	25 040 289	None
53	Heiser II	Government of I. R. Iran	1:00-cv-02329	29/09/2000	Saudi Arabia	30/09/2009	36 658 063	300 000 000
54	Belkin	Government of I. R. Iran	1:06-cv-00711	20/04/2006	Israel	30/09/2009	18 525 763	None
55	Brewer	Government of I. R. Iran	1:08-cv-00534	22/03/2008	Beirut	15/10/2009	9 500 000	300 000 000
56	Kilburn	Government of I. R. Iran	1:01-cv-01301	06/12/2001	Lebanon	30/03/2010	11 030 000	None
57	Spencer	Government of I. R. Iran	1:06-cv-00750	24/04/2006	Beirut	31/03/2010	12 565 922	12 500 000
58	Bonk	Government of I. R. Iran	1:08-cv-01237	24/07/2008	Beirut	31/03/2010	158 750 000	170 000 000
59	Murphy	Government of I. R. Iran	1:06-cv-00596	31/03/2006	Beirut	24/09/2010	31 865 570	61 302 671
60	Rimkus II	Government of I. R. Iran	1:08-cv-01615	19/09/2008	Saudi Arabia	16/11/2010	0	5 150 000
61	Valore	Government of I. R. Iran	1:03-cv-01959	16/09/2003	Beirut	31/03/2011	290 291 092	798 000 000
62	Valencia	Government of I. R. Iran	1:08-cv-00533	28/03/2008	Saudi Arabia	31/03/2011	15 500 000	15 965 000
63	Bayani	Government of I. R. Iran	1:04-cv-01712	06/10/2004	Iran	19/05/2011	66 331 500	400 000 000
64	Ben Haim	Government of I. R. Iran	1:08-cv-00520	20/03/2008	Gaza	19/05/2011	16 000 000	300 000 000
65	Beer II	Government of I. R. Iran	1:08-cv-01807	17/10/2008	Israel	19/05/2011	0	300 000 000
66	Arnold	Government of I. R. Iran	1:06-cv-00516	10/03/2006	Beirut	31/05/2011	19 023 602	20 000 000
67	Leibovitch	Government of I. R. Iran	1:08-cv-01939	04/03/2008	Israel	06/09/2011	32 000 000	35 000 000
68	Bland	Government of I. R. Iran	1:05-cv-02124	30/10/2005	Beirut	21/12/2011	227 805 908	1 233 458 232
69	Tarek Reed	Government of I. R. Iran	1:03-cv-02657	30/12/2003	Lebanon	28/02/2012	4 535 000	None
70	Anderson	Government of I. R. Iran	1:08-cv-00535	28/03/2012	Beirut	10/03/2012	7 500 000	25 800 000
71	O'Brien	Government of I. R. Iran	1:06-cv-00690	17/04/2006	Beirut	28/03/2012	10 050 000	34 572 000
72	Davis	Government of I. R. Iran	1:07-cv-01302	07/07/2003	Beirut	30/03/2012	486 918 005	1 674 997 973
73	Wultz	Government of I. R. Iran	1:08-cv-01460	22/08/2008	Israel	14/05/2012	32 068 634	300 000 000

As of 31 January 2017

No.	Plaintiff	Defendant	Case No.	Date of Action	Location of Alleged Action	Date of Judgment	Compensation (US$)	Punitive Damage (US$)
74	Brown	Government of I. R. Iran	1:08-cv-00531	27/03/2008	Beirut	03/07/2012	183 281 294	630 487 651
75	Oveissi	Government of I. R. Iran	1:11-cv-00849	05/05/2011	France	25/07/2012	7 500 000	300 000 000
76	Fain	Government of I. R. Iran	1:10-cv-00628	22/04/2010	Beirut	31/07/2012	15 268 703	52 524 338
77	Taylor	Government of I. R. Iran	1:10-cv-00844	20/05/2010	Beirut	31/07/2012	148 000 000	509 120 000
78	Havlish	Government of I. R. Iran & Iran Airlines, Central Bank of Iran, National Iranian Gas Company, National Iranian Oil Corporation, National Iranian Petrochemical Company, National Iranian Tanker Corporation	1:03-cv-09848	11/12/2003	United States	02/10/2012	1 362 277 884	4 686 235 921
79	John Doe	Government of I. R. Iran	1:08-cv-00540	28/03/2008	Beirut	26/03/2013	8 411 899 095	300 000 000
80	Botvin	Government of I. R. Iran	1:05-cv-00220	31/01/2005	Israel	04/04/2013	1 704 457	None
81	Goldberg-Botvin	Government of I. R. Iran	1:12-cv-01292	03/08/2012	Israel	04/04/2013	10 000 000	30 890 000
82	Spencer	Government of I. R. Iran	1:12-cv-00042	10/01/2012	Beirut	14/01/2014	102 161 376	351 435 133
83	Mwila	Government of I. R. Iran	1:08-cv-01377	07/08/2008	Kenya & Tanzania	28/03/2014	233 757 712	185 994 928
84	Khaliq	Government of I. R. Iran	1:10-cv-00356	05/03/2010	Kenya & Tanzania	28/03/2014	49 761 544	None
85	Wamai	Government of I. R. Iran	1:08-cv-01349	05/08/2008	Kenya &	25/07/2014	1 783 052 244	1 783 052 244
86	Amduso	Government of I. R. Iran	1:08-cv-01361	09/09/2008	Kenya &	25/07/2014	877 939 215	877 939 215
87	Opati	Government of I. R. Iran	1:12-cv-01224	24/07/2012	Kenya & Tanzania	25/07/2014	1 581 716 936	1 581 716 936
88	Onosongo	Government of I. R. Iran	1:08-cv-01380	07/08/2008	Kenya & Tanzania	28/07/2014	99 553 289	99 553 289
89	Owen & Aliganga	Government of I. R. Iran	1:01-cv-02244	28/10/2001	Kenya & Tanzania	15/10/2014	283 809 867	338 491 262
90	Moradi	Government of I. R. Iran	1:13-cv-00599	30/04/2013	Iran	05/01/2015	10 168 000	10 168 000
91	Roth	Government of I. R. Iran	1:11-cv-01377	28/07/2011	Israel	27/01/2015	18 691 019	112 500 000
92	Flanagan	Government of I. R. Iran	1:10-cv-01643	28/09/2010	Yemen	02/04/2015	18 750 000	56 250 000
93	Ashton	Government of I. R. Iran	1:02-cv-06977	04/09/2002	United States	08/03/2016	1 718 000 000	5 841 880 000
94	Federal Insurance Co.	Government of I. R. Iran	1:03-cv-06978	10/09/2003	United States	10/03/2016	3 040 998 426	None
95	Worely	Government of I. R. Iran	1:12-cv-02069	28/12/2012	Beirut	31/03/2016	58 580 424	201 516 659
96	Kaplan	Government of I. R. Iran	1:10-cv-00483	23/03/2010	Israel	30/09/2016	38 161 966	131 277 165
97	Hoglan	Government of I. R. Iran	1:11-cv-07550	22/10/2013	United States	31/10/2016	3 214 215 035	
98	Shmuel Braun	Government of I. R. Iran	1:15-cv-01136	15/07/2015	Israel	09/01/2017	28 000 000	150 000 000
						Total	**29 245 288 124**	**31 345 778 617**
							60 591 066 741	

Attachment 2

Actions filed with U.S. Courts to Enforce Judgments against Assets of I.R. Iran & Iranian State Entities as of 31 January 2017

Actions filed with U.S. courts to Enforce Judgments against Assets of I. R. Iran & Iranian State Entities
As of 31 January 2017

No.	Plaintiff	Defendant	Case No.	Date of Action	US Court	Property	Latest Status
1	Rafii, Rubin	Ministry of Defence and Support for Armed Forces of I. R. Iran (MODSAF)	3:98-cv-01165	25/06/1998	D.C. California	Arbitral award money of $9,462,750	29.4.2016: Court ordered the turnover of $9,462,750 to plaintiffs
2	Heiser	Government of I. R. Iran, Bank Mellat, Bank Melli, Bank Saderat, Iran Air, Iran Marine Industrial Company, Khazar Shiping, National Iranian Oil Company, Telecommunication Infrastructure Company ("ITC")	1:00-cv-02329	29/09/2000	D.C. Columbia	Funds in the amount of $613,587, $59,031.92 & $249,365	10.8.2011: Court ordered turnover of $613,587 belonging to Telecommunications Infrastructure Company to Heiser. 9.6.2016: 9.6.2016: Court ordered turnover of $59,031.92 belonging to Iranian Marine & Industrial, Sediran Drilling Co., Iran Air, and Bank Melli PLC UK plus $249,365 funds of Iranian Navy to the plaintiffs
3	Stern	Government of I. R. Iran	1:00-cv-02602	27/10/2000	D.C. Columbia	IR domain (internet country code)	7.7. 2014: Attachment of IR domain (internet country code). 10.11.2014: Attachment quashed 20.7.2015: Appeal dismissed. 31.8.2016: Request for eb banc filed with Court of Appeals
4	Weinstein	Government of I. R. Iran	1:00-cv-02601	27/10/2000	D.C. Columbia	IR domain (internet country code)	7.7. 2014: Attachment of IR domain (internet country code). 10.11.2014: Attachment quashed. 20.7.2015: Appeal dismissed. 31.8.2016: Request for eb banc filed with Court of Appeals
5	Peterson & Bonk	Government of I. R. Iran, Clearstream, HSBC Bank, Occidental International Corp., Occidental Petroleum Corp., Export-Import Bank of India, State Bank of India, Siemens Corp., World Bank, Asian Development Bank, Mitsubisshi, Bank of Japon, Export-Import Bank of Korea, International Finance Corp., Bank of Tokyo, Caterpillar Inc., Deutsche Bank, Telecommunications Satellite Organization	1:01-cv-02094	03/10/2001	D.C. Columbia	Electronic Funds Tranfers	12.1.2015: Writ of certiorari against quashing attachment of Iranian EFT funds denied
6	Bakhtiar	Government of I. R. Iran	1:02-cv-00092	22/01/2002	D.C. Columbia	None	Writ of Execution served on USB Bank & Bank of New York.
7	Hegna	Government of I. R. Iran	5:02-mc-00042	03/12/2002	D.C. Texas	None	12.10.2014: Judgment on quashing writ of attachment of Iranian property was affirmed by Court of Appeals
8	Bennet	Government of I. R. Iran	4:12-mc-00633	02/07/2003	D.C. Texas	None	17.9.2012: Judgment registered
9	Davis	Government of I. R. Iran	1:07-cv-01302	07/07/2003	D.C. Columbia	None	17.1.2013: Granting execution. 4.12.2014: Motion to require information from OFAC and motion for protective order. 26.10.2015: Sealed motion for attachment
10	Stern	Government of I. R. Iran	8:03-mc-00371	25/07/2003	D.C. Columbia	None	25.7.2003: Judgement registered
11	Havlish	Government of I. R. Iran & Iran Airlines, Central Bank of the Islamic Republic of Iran, National Iranian Gas Company, National Iranian Oil Corporation, National Iranian Petrochemical Company, National Iranian Tanker Corporation, Mellon Bank of New York, JP Morgan Bank	1:03-cv-09848	11/12/2003	D.C. Columbia	None	13.5.2015: Agreed protective order concenring garnishees
12	Rubin	Government of I. R. Iran	1:03-cv-09370	29/12/2003	D.C. Illinois	Perspolis tablets and other Iranian historical objects	29.12.2003: Attachment of Persepolis tablets and other Iranian historical objects. 21.7.2016: Court's quashing the attachment. 20.10.2016: Writ of certiorari filed
13	Goldberg-Botvin	Government of I. R. Iran	1:05-cv-00220	31/01/2005	D.C. Columbia	None	3.7.2012: Execution authorized
14	Rubin	Government of I. R. Iran	2:05-mc-70974	14/03/2005	D.C. Michigan	None	14.3.2005: Judgment registered

As of 31 January 2017

No.	Plaintiff	Defendant	Case No.	Date of Action	US Court	Property	Latest Status
15	Levin	Government of I. R. Iran, Bank of New York Mellon, Morgan Chase, Societe Generale & Citibank New York	1:09-cv-05900	30/12/2005	D.C. New York	Funds in the amount of at least $4000,000 and $4,191,492.25	28.1.2011: Court ordered for turnover of phase 1 blocked assets of Iranian banks and NIOC to Accosta, and Greenbaum. 23.9 &10.10.2013: Court ordered for turnover of over $4000,000 of phase 2 Iranian blocked assets to Levin, Acosta, Greenbaum & Heiser. 31.10.2013: Court order in phase 3 for turnover of $4,191,492.25 of Master Card'sdebt to Bank Melli & Bank Saderat to Levin, Greenbaum & Heiser.
16	Levin	Government of I. R. Iran	1:11-mc-00283	30/12/2005	D.C. New York	Not known	28.8.2012: Service of writ of attachment on Mellon Bank, Citibank & JP Morgan Bank
17	Murphy	Government of I. R. Iran	1:11-mc-00423	31/03/2006	D.C. New York	None	14.4.2014: Writ of execution issued
18	Leibovitch	Government of I. R. Iran, BNP Paribas, Bank of Tokyo, State Bank of India	1:08-cv-01939	04/03/2008	D.C. Illinois	None	19.5.2016: Order quashing motion to compel discovery against banks.
19	Ben Haim	Government of I. R. Iran	1:08-cv-00520	20/03/2008	D.C. Columbia	IR domain (internet country code)	7.7. 2014: Attachment of IR domain (internet country code); 10.11.2014: Attachment quashed. 20.7.2015: Appeal dismissed;14.1.2016: OFAC agreed to provide information on Iranian blocked assets in the US under a Protective Order. 31.8.2016: Request for eb banc rehearing filed with Court of Appeals
20	Boddof	Government of I. R. Iran	1:08-cv-00547	28/03/2008	D.C. Columbia	None	12.6.2012: Service of the new judgment
21	Peterson	Government of I. R. Iran	4:08-mc-00016	21/04/2008	D.C. Oklahoma	None	21.4.2008: Judgment registered
22	Ben-Rafael	Government of I. R. Iran	1:08-cv-00716	25/04/2008	D.C. Columbia	None	2.7.2012: Execution authorized, judgment in 1:06-cv-00721 reinstated.
23	Peterson	Government of I. R. Iran	2:08-mc-00098	28/07/2008	D.C. California	None	28.7.2008: Judgment registered
24	Wamai	Government of I. R. Iran	1:08-cv-01349	05/08/2008	D.C. Columbia	None	2.5.2016: Authorization to OFAC to disclose property information to plaintiffs
25	Heiser	Government of I. R. Iran	2:08-mc-00109	27/08/2008	D.C. California	None	27.8.2008: Judgment registered
26	Heiser	Government of I. R. Iran	1:08-mc-00212	27/08/2008	D.C. Maryland	None	27.8.2008: Judgment registered
27	Heiser	Government of I. R. Iran	3:08-mc-00491	11/09/2008	D.C. California	None	26.4.2012: Judgment registered. 26.4.2012: Order referring Heiser writ of execution to case no. 3:98-cv-01165 (Rafii/Rubin v. MODSAF/Cubic) for execution against ICC arbitral award. 11.5.2012: Voluntary withdrawal of motion for attachment
28	Heiser	Government of I. R. Iran	3:08-mc-00323	17/09/2008	D.C. Connecticut	None	17.9.2008: Judgment registered
29	Peterson	Government of I. R. Iran	0:08-mc-00062	13/11/2008	D.C. Minnesota	None	14.11.2008: Judgment registered
30	Peterson	Government of I. R. Iran	3:08-mc-09256	13/11/2008	D.C. Oregon	None	13.11.2008: Judgment regsitered
31	Acosta	Government of I. R. Iran	2:09-mc-00101	17/11/2009	D.C. California	None	17.11.2009: Judgment registered
32	Greenbaum	Government of I. R. Iran	2:09-mc-00104	19/11/2009	D.C. California	None	19.11.2009: Judgment registered
33	Heiser	Government of I. R. Iran, Bank Melli	4:09-mc-00559	19/11/2009	D.C. Texas	None	19.11.2009: Notice of lis pendens
34	Heiser	Government of I. R. Iran, Bank Melli	8:09-mc-00373	19/11/2009	D.C. Maryland	None	19.11.2009: Notice of lis pendens
35	Heiser	Government of I. R. Iran, Bank Melli	3:09-mc-00941	19/11/2009	D.C. California	None	19.11.2009: Notice of lis pendens
36	Heiser	Government of I. R. Iran, Bank Melli	2:09-mc-00105	19/11/2009	D.C. California	None	19.11.2009: Notice of lis pendens
37	Khaliq	Government of I. R. Iran,	1:11-mc-00036	05/03/2010	D.C. New York	None	15.2.2011: Notice of lis pendens
38	Peterson, Greenbaum, Heiser, Acosta, Rubin, Levin, Valore, Bonk, Silvia, Brown, Bland & Beer	Governement of I. R. Iran & Central Bank of Iran	1:10-cv-04518	06/08/2010	D.C. New York	Funds in the amount of $1,895600,513 plus interest	6.6.2016: Court authorized payment of $1,895600,513 plus interest (amount unknown) to plaintiffs
39	Heiser	Government of I. R. Iran	1:10-mc-00005	07/12/2010	D.C. New York	None	29.5.2013: Writ of execution issued

As of 31 January 2017

No.	Plaintiff	Defendant	Case No.	Date of Action	US Court	Property	Latest Status
40	Heiser	Government of I. R. Iran	1:11-cv-00137	18/01/2011	D.C. Maryland	Unknown	Writ of garnishment of Iranian blocked assets held by Bank of America and Wells Fargo Bank. 27.11.2012: Case closed until further notice. 7.11.2013: Docs & papers filed under seal
41	Heiser	Government of I. R. Iran	1:11-cv-00998	14/02/2011	D.C. New York	Unknown	14.2.2011: Petition for turnover of the funds by Mellon Bank; 29.11.2011: Stayed pending outcome of Levin (1:09-cv-5900)
42	Owen, Aliganga	Government of I. R. Iran	1:11-mc-00037	15/02/2011	D.C. New York	None	15.2.2011: Notice of lis pendens
43	Bennet	Government of I. R. Iran	1:11-mc-00035	15/02/2011	D.C. New York	None	31.5.2012: Writ of execution issued
44	Heiser, Campbell	Baroda Bank, New York Branch	1:11-cv-01602	08/03/2011	D.C. New York	Funds in the amount of $ 2180, $11160, $12647.68, $13000, $13020, $ 19000, $49000, Appx. $9000	15.2.2013: Court ordered turnover to plaintiffs of the folwoing funds: Bank Saderat: $ 2180 Bank Saderat & Behran Oil Company: $11160 Export Development Bank of Iran (EDBI): $12647.68 & $13000 & $13020 Bank Melli: $ 19000 Sebia Bank Melli: $49000 17.7.2013: Appx. $9000 balance of the blocked funds paid to Heiser.
45	Heiser, Mitsubishi Bank	Government of I. R. Iran	1:11-cv-01601	08/03/2011	D.C. New York	Funds in the amount of $92058.08, $4,740.00, $62216.80, $100,365.63 $98,127.36 & $2,181.88	13.2.2013: Judgment for turnover to Plaintiffs the following funds: Bank Sepah International PLC: $92058.08; Azores Shipping Company LL FZE and Iranohind Shipping Company: $4,740.00 Islamic Republic of Iran Shipping Line (IRISL Benelux NV): $62216.80 IRISL Benelux NV: $100,365.63 Export Development Bank of Iran (EDBI): $98,127.36 Bank Melli Iran: $2,181.88
46	Heiser	Government of I. R. Iran	1:11-cv-01609	08/03/2011	D.C. New York	Funds in the amount of $123,202.32	4.5.2012: Court order for turnover of about $123,202.32 of Iranian funds to Heiser
47	Valore	Government of I. R. Iran	1:11-mc-00217	07/06/2011	D.C. New York	None	5.7.2011: Judgment registered.
48	Heiser	Government of I. R. Iran	1:11-mc-00295	24/06/2011	D.C. New York	None	1.9.2011: Execution authorized.
49	Heiser	Government of I. R. Iran	3:11-mc-00116	25/07/2011	D.C. Carolina	None	25.7.2011: Judgment registered.
50	Greenbaum	Government of I. R. Iran	3:11-mc-80283	09/11/2011	D.C. San Francisco	Funds (see no. 54)	19.12.2011: Case is related to Bennett for garnishment of Visa debts to Bank Melli.
51	Rimkus	Government of I. R. Iran	1:11-mc-00413	21/11/2011	D.C. New York	None	21.11.2011: Judgment registered
52	Rimkus	Government of I. R. Iran	1:11-mc-00412	21/11/2011	D.C. New York	None	21.11.2011: Judgment registered
53	Heiser	Government of I. R. Iran	1:11-cv-08446	28/11/2011	D.C. New York	None	1.6. 2012: Action stayed until San Francisco court's decision in Bennett
54	Bennet, Greenbaum, Acosta, Heiser	Government of I. R. Iran	3:11-cv-05807	02/12/2011	D.C. California	Funds in the amount of $17.6 milions	22.2.2016: Court of Appeals affirms turnover of $17.6 milions of Visa's debts to Bank Melli to plaintiffs. 12.9.2016 Writ of Certiorari fild by Bank Melli
55	Bennet	Government of I. R. Iran	0:12-mc-00004	20/01/2012	D.C. Minnesota	None	24.1.2012: Judgment registered
56	Rafii	Government of I. R. Iran	3:12-mc-00093	24/01/2012	D.C. California	Arbitral award money of $9,462,750 (see no. 1)	29.4.2016: Arbitral award money confirmed in favor of MODSAF was turned over to plaintiffs (See 3:98-cv-01165)
57	Heiser	Government of I. R. Iran	3:12-mc-00003	02/02/2012	D.C. Wisconsin	None	2.2.2012: Judgment registered. 24.4.2012: Execution and attachment authorized
58	Boddof	Government of I. R. Iran	1:12-mc-00154	10/05/2012	D.C. New York	None	10.5.2012: Judgment registered
59	Rubin	Government of I. R. Iran	1:12-mc-00153	10/05/2012	D.C. New York	None	10.5.2012: Judgment registered. 2.9.2012: Attachment of assets of Mr. Ahmadinejad at hotel Warwick denied. 11.3.2016: Execution authorized
60	Stern	Government of I. R. Iran	1:12-mc-00151	10/05/2012	D.C. Columbia	None	10.5.2012: Judgment registered
61	Ben Haim	Government of I. R. Iran	1:12-mc-00152	10/05/2012	D.C. New York	None	10.5.2012: Judgment registered
62	Stethem	Government of I. R. Iran	1:12-mc-00203	12/06/2012	D.C. New York	None	12.6.2012: Judgment registered

As of 31 January 2017

No.	Plaintiff	Defendant	Case No.	Date of Action	US Court	Property	Latest Status
63	Weinstein, Heiser	Government of I. R. Iran & HSBC Bank	2:12-cv-03445	12/07/2012	D.C. Columbia	Sale proceeds of $333,776 and $1,021,736	20.12.2012: Heiser & Weinstein received $333,776 and $1,021,736 out of sale proceeds of Bank Melli's building. 17.3.2015: China Construction Bank was served with confidential discovery
64	Owen, Aliganga	Government of I. R. Iran	1:12-mc-00243	20/07/2012	D.C. New York	None	20.7. 2012: Notice of lis pendens
65	Heiser	Government of I. R. Iran	2:12-mc-00391	27/09/2012	D.C. California	None	1.10.2012: Judgment registered
66	Heiser	Government of I. R. Iran	2:12-mc-00392	27/09/2012	D.C. California	None	1.10.2012: Judgment registered
67	Bland	Government of I. R. Iran	1:12-mc-00373	13/11/2012	D.C. New York	None	13.11.2012: Judgment registered. 21.10.2013: Writ of execution issued
68	Bakhtiar	Government of I. R. Iran	1:12-mc-00403	14/12/2012	D.C. Columbia	None	14.12.2012: Judgment registered. 9.1.2013: Writ of execution issued
69	Holland	Government of I. R. Iran	1:13-mc-00149	26/01/2013	D.C. New York	None	26.4.2013: Judgment registered
70	Davis	Government of I. R. Iran & J.P Morgan Bank	1:13-mc-00046	14/02/2013	D.C. New York	None	10.4.2014: Writ of execution issued. 1.7.2014: Writ served on JP Morgan
71	Brown	Government of I. R. Iran & J.P Morgan Bank	1:13-mc-00113	31/03/2013	D.C. New York	None	28.3.2013: Judgment registered. 10.4.2014: Writ of execution issued. 1.7.2014: Writ of execution served on JP Morgan
72	Havlish	Islamic Republic of Iran & Royal Dutch Shell Co.	1:13-cv-07074	10/04/2013	D.C. New York	Funds in the amount of $ 2.3	2.10.2014: Request for attachment of $ 2.3 billions of Royal Dutch Shell Co., dues to National Iranian Oil Company was dismissed. 4.8.2015: Discovery filed against Wells Fargo Bank
73	Brewer	Government of I. R. Iran	1:13-mc-00148	26/04/2013	D.C. New York	None	26.4.2013: Judgment registered
74	Blais	Government of I. R. Iran	1:13-mc-00145	26/04/2013	D.C. New York	None	26.4.2013: Judgment registered
75	Valencia	Government of I. R. Iran	1:13-mc-00150	26/04/2013	D.C. New York	None	26.4.2013: Judgment registered
76	Goldberg-Botvin	Government of I. R. Iran	1:13-mc-00322	13/09/2013	D.C. New York	None	12.9.2013: Judgment registered
77	Goldberg-Botvin	Government of I. R. Iran	1:13-mc-00323	17/09/2013	D.C. New York	None	12.9.2013: Judgment registered
78	Wultz	Government of I. R. Iran	1:13-mc-00055	17/09/2013	D.C. New York	None	15.2.2013: Judgment registered. 13.5.2013: Service on Clearstream & Central Bank of Iran
79	Peterson, Greenbaum, Heiser, Acosta, Rubin, Levin, Valore, Bonk, Silvia, Brown, Bland & Beer	Government of I. R. of Iran, Central Bank of Iran, JP Morgan Bank, Clearstream, UBAE Bank	1:13-cv-09195	30/12/2013	D.C. New York	Funds in the amount $1.683840765.44	19.2.2015: Attachment of $1.683840765.44 of XS bonds in Europe was dismissed. 6.3.2015: Appeal filed
80	Goldberg-Botvin	Government of I. R. Iran & J.P Morgan Bank, Mellon Bank, Wells Fargo Bank	1:14-cv-03002	25/04/2014	D.C. Columbia	Unknown	8.7.2014: OFAC information on Iranian assets filed under seal. 16&17.2.2016: Citation against garnishee banks to discover Iranian assets
81	Goldberg-Botvin	Government of I. R. Iran	1:14-cv-03010	25/04/2014	D.C. Columbia	Unknown	8.7.2014: OFAC information on Iranian assets filed under seal. 16&17.2.2016: Citation against garnishee banks to discover Iranian assets
82	Levin	Government of I. R. Iran & J.P Morgan Bank	1:14-mc-00041	18/06/2014	D.C. New York	None	13.3.2014, 18.6.2014, 3.9.2014: Writs of execution issued
83	Relvas	Government of I. R. Iran	1:14-mc-00359	20/11/2014	D.C. New York	None	29.10.2014: Notice of pending action
84	Oveissi	Government of I. R. Iran	3:15-mc-00005	23/02/2015	Alaska	None	23.2.2015: Judgment registered
85	Oveissi	Government of I. R. Iran	2:15-mc-00050	23/02/2015	D.C. California	None	23.2.2015: Judgment registered
86	Bakhtiar	Government of I. R. Iran	3:15-mc-00099	08/06/2015	D.C. Columbia	None	8.6.2015: Judgment registered
87	Havlish	Government of I. R. Iran & National Iranian Gas Company, National Iranian Oil Corporation, National Iranian Petrochemical Company, National Iranian Tanker Corporation	1:15-cv-04055	05/07/2015	D.C. Illinois	Unknown	8.4.2015: Discovery against Wells Fargo Bank to discover Iranian assets
88	Ben Haim	Government of I. R. Iran	1:16-mc-00094	08/03/2016	D.C. New York	None	8.3.2016: Judgment registered
89	Leibovitch	Government of I. R. Iran	1:16-mc-00097	09/03/2016	D.C. New York	None	9.3.2016: Judgment registered. 9.3.2016: Writ of execution issued

As of 31 January 2017

No.	Plaintiff	Defendant	Case No.	Date of Action	US Court	Property	Latest Status
90	Havlish	Government of I. R. of Iran, Central Bank of Iran, JP Morgan Bank, Clearstream, UBAE Bank	1:16-cv-08075	14/10/2016	D.C. New York	Funds in the amount $1.683840765.44 (see no. 79)	24.10.2016: Plaintiffs' request from the court to accept the relatedness of the case to Peterson (1:13-cv-09195)

Attachment 3

Actions filed in other Jurisdictions for Recognition & Enforcement of U.S. judgments against Assets of Iran & Iranian State Entities as of 31 January 2017

Actions filed in other Jurisdictions for Recognition & Enforcement of U.S. judgments against Assets of Iran & Iranian State Entities
As of 31 January 2017

No.	Plaintiff	Defendant	Case No.	Date of Action	Place of Enfocement	Property	Latest Status
1	Jacobson & Steen	Government of I. R. Iran	cv-10-405814	28/06/2010	D.C. Ontario, Canada	See item 2 below	Plaintiffs agreed with Higgins et al to stay their litigation and receive portions of the attached assets
2	Bennet	Government of I. R. Iran	cv-12-463434	13/09/2012	D.C. Ontario, Canada	Funds in the amount of $1,651942 & $333,4445.23 & two real properties	Attachment of two real properties in Toronto and Ottawa and two Iranian Embassy bank accounts in the amount of $1,651942 & $333,4445.23. Court denied Iran's motion on 9-06-2016; Iran's appeal is pending.
3	Tarek Reed	Government of I. R. Iran	HFX407310	26/09/2012	D.C. Ontario, Canada	See item 2 above	The plaintiffs agreed with Higgins et al to stay their litigation and receive portions of the attached assets
4	Heiser	Government of I. R. Iran	HQ12 X03803	02/10/2012	High Court London	None	Default judgment issued and Iran's objection is pending.
5	Marthaler	Government of I. R. Iran	cv-13-493290	07/05/2013	D.C. Ontario, Canada	See item 2 above	Attachment of two real properties in Torento and Ottawa and two bank accounts in the amount of 1,651942 & $ 333,4445.23. Ontario judgement issued on 9-06-2016 the Case is now pending before the Court of Appeals
6	Tracy	Government of I. R. Iran	cv-1410403	23/01/2014	D.C. Ontario, Canada	See item 2 above	Attachment of two real properties in Toronto and Ottawa and two Iranian Embassy bank accounts in the amount of $1,651942 & $333,4445.23. Court denied Iran's motion on 9-06-2016; Iran's appeal is pending.
7	Holland	Government of I. R. Iran	cv-14-497414	29/01/2014	D.C. Ontario, Canada	See item 2 above	Attachment of two real properties in Toronto and Ottawa and two Iranian Embassy bank accounts in the amount of $1,651942 & $333,4445.23. Court denied Iran's motion on 9-06-2016; Iran's appeal is pending.
8	Higgins	Government of I. R. Iran	cv-14-499468	14/03/2014	D.C. Ontario, Canada	See item 2 above	Attachment of two real properties in Toronto and Ottawa and two Iranian Embassy bank accounts in the amount of $1,651942 & $333,4445.23. Court denied Iran's motion on 9-06-2016; Iran's appeal is pending.
9	Havlish	Government of I. R. Iran & Iran Airlines, Central Bank of Iran, National Iranian Gas Company, National Iranian Oil Corporation, National Iranian Petrochemical Company, National Iranian Tanker Corporation,	177266	21/01/2016	Luxembourg Court	See item 2 above	Attachment of $1.683840765.44 of XS bonds funds belonging to Central Bank of Iran. The pleadings on plaintiffs' request for recignition of US judgment is being exchanged between the parties.

Attachment 4

Claims Pending before the U.S. Courts against Iran & Iranian State Entities as of 31 January 2017

Claims Pending before U.S. courts against Iran & Iranian State Entities
As of 31 January 2017

No.	Plaintiff	Defendant	Case No.	Date of Action	U.S. court	Location of Alleged Act	Relief Sought	
							Compensation (US$)	Punitive Damage (US$)
1	Boulos	Government of I. R. Iran	1:01-cv-02684	28/12/2001	D.C. Columbia	Beirut	200 000 000	125 000 000
2	Salvo	Government of I. R. Iran	1:03-cv-05071	08/07/2003	D.C. New York	United States	90 000 000	300 000 000
3	Barrera	Government of I. R. Iran	1:03-cv-07036	10/09/2003	D.C. Columbia	United States	290 000 000	300 000 000
4	In Re September 11	Government of I. R. Iran & Iran Airlines, Central Bank of the Islamic Republic of Iran, National Iranian Gas Company, National Iranian Oil Corporation, National Iranian Petrochemical Company, National Iranian Tanker Corporation	1:03-md-01570	10/12/2003	D.C. New York	United States	Not Assessed ("NA")	NA
5	O'Neill	Government of I. R. Iran	1:04-cv-01076	10/02/2004	D.C. New York	United States	1 100 000 000	1 000 000 000
6	New York M.	Government of I. R. Iran	1:04-cv-06105	06/08/2004	D.C. New York	United States	NA	NA
7	Continental	Government of I. R. Iran	1:04-cv-05970	01/09/2004	D.C. New York	United States	424 000 000	NA
8	Baxter	Government of I. R. Iran	1:11-cv-02133	30/11/2011	D.C. Columbia	Israel	738 000 000	1 000 000 000
9	Shoham	Government of I. R. Iran	1:12-cv-00508	02/04/2012	D.C. Columbia	Israel	150 000 000	300 000 000
10	Cohen	Government of I. R. Iran	1:12-cv-01496	10/09/2012	D.C. Columbia	Israel	590 000 000	5 550 000 000
11	Bluth	Government of I. R. Iran	1:12-cv-00250	07/11/2012	D.C. Columbia	Gaza	90 000 000	500 000 000
12	Vaughn	Government of I. R. Iran	1:13-cv-00974	06/06/2013	D.C. Columbia	Afghanistan	1 800 000 000	200 000 000
13	Strange	Government of I. R. Iran	1:14-cv-00435	18/03/2014	D.C. Columbia	Beirut	200 000 000	NA
14	Relvas	Government of I. R. Iran	1:14-cv-01752	20/10/2014	D.C. Columbia	Beirut	1 720 000 000	9 000 000 000
15	Freeman	Government of I. R. Iran	1:14-cv-06601	10/12/2014	D.C. Columbia	Iraq	NA	NA
16	Sheikh	Government of I. R. Iran	1:14-cv-02090	11/12/2014	D.C. Columbia	Kenya & Tanzania	300 000 000	NA
17	Kinyua	Government of I. R. Iran	1:14-cv-02118	15/12/2014	D.C. Columbia	Kenya & Tanzania	375 000 000	NA
18	Fritz	Government of I. R. Iran	1:15-cv-00456	30/03/2015	D.C. Columbia	Iraq	NA	NA
19	Ndeda Chogo	Government of I. R. Iran	1:15-cv-00951	19/06/2015	D.C. Columbia	Kenya & Tanzania	1 000 000 000	NA
20	Steven Bova	Government of I. R. Iran	1:15-cv-01074	08/07/2015	D.C. Columbia	Beirut	1 000 000 000	2 000 000 000
21	Fraenkel	Government of I. R. Iran	1:15-cv-01080	09/07/2015	D.C. Columbia	Israel	NA	NA
22	Hirshfeld	Government of I. R. Iran	1:15-cv-01082	10/07/2015	D.C. Columbia	Israel	100 000 000	NA
23	Saleh Alshaar	Government of I. R. Iran	1:15-cv-23438	11/09/2015	D.C. Columbia	Iraq	5 000 000	5 000 000
24	Soto	Government of I. R. Iran	1:15-cv-08410	24/09/2015	D.C. Columbia	Iraq	NA	NA
25	Lelchook	Government of I. R. Iran	1:15-cv-13715	02/11/2015	D.C. Massachauset	Israel	NA	NA
26	Burnett	Government of I. R. Iran & Iran Airlines, Central Bank of the Islamic Republic of Iran, National Iranian Gas Company, National Iranian Oil Corporation, National Iranian Petrochemical Company, National Iranian Tanker Corporation	1:15-cv-09903	18/12/2015	D.C. New York	United States	1 000 000 000	NA
27	Mati Gill	Government of I. R. Iran	1:15-cv-02272	31/12/2015	D.C. Columbia	Gaza	10 000 000	30 000 000
28	Karcher	Government of I. R. Iran	1:16-cv-00232	12/02/2016	D.C. Columbia	Iraq	NA	NA
29	Maalouf	Government of I. R. Iran	1:16-cv-00280	17/02/2016	D.C. Columbia	Beirut	17 930 824	NA
30	Hekmati	Government of I. R. Iran	1:16-cv-00875	09/05/2016	D.C. Columbia	Iran	NA	NA
31	Burks	Government of I. R. Iran	1:16-cv-01102	13/06/2016	D.C. Columbia	Iraq	NA	NA
32	Hamen	Government of I. R. Iran	1:16-cv-01394	01/07/2016	D.C. Columbia	Yemen	133 063 019	600 350 000
33	Spaulding	Government of I. R. Iran	5:16-cv-01748	08/07/2016	D.C. Columbia	Beirut	120 000 000	NA
34	Mayonot	Government of I. R. Iran	1:16-cv-01436	12/07/2016	D.C. Columbia	Israel	410 000	NA
35	Force	Government of I. R. Iran	1:16-cv-01468	15/07/2016	D.C. Columbia	Israel	NA	NA
36	Salazar	Government of I. R. Iran	1:16-cv-01507	22/07/2016	D.C. Columbia	Beirut	10 000 000	NA
37	Bathiard	Government of I. R. Iran	1:16-cv-01549	01/08/2016	D.C. Columbia	Beirut	150 000 000	750 000 000
38	Barry	Government of I. R. Iran	1:16-cv-01625	10/08/2016	D.C. Columbia	Beirut	86 000 000	NA
39	Rezaian	Government of I. R. Iran	1:16-cv-01960	03/10/2016	D.C. Columbia	Iran	NA	NA
40	Martinez	Government of I. R. Iran	1:16-cv-02193	02/11/2016	D.C. Columbia	Iraq	NA	NA
41	Dibenedetto	Government of I. R. Iran	1:16-cv-02429	10/12/2016	D.C. Columbia	Beirut	120 000 000	NA
42	Goldstein	Government of I. R. Iran	1:16-cv-02507	23/12/2016	D.C. Columbia	Israel	NA	NA
43	Parhamovich	Government of I. R. Iran	1:17-cv-00061	11/01/2017	D.C. Columbia	Iraq	50 000 000	NA
						Total	**11 869 403 843**	**21 660 350 000**
							33 529 753 843	

Annex 1

Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States of America and Iran, 284 U.N.T.S. 93

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VOLUME 284

Recueil des Traités

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No. 4132. TREATY[1] OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS BETWEEN THE UNITED STATES OF AMERICA AND IRAN. SIGNED AT TEHRAN, ON 15 AUGUST 1955

The United States of America and Iran, desirous of emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations, have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights, and have appointed as their Plenipotentiaries :

The President of the United States of America :

Mr. Selden Chapin, Ambassador Extraordinary and Plenipotentiary of the United States of America at Tehran; and

His Imperial Majesty, the Shah of Iran :

His Excellency Mr. Mostafa Samiy, Under Secretary of the Ministry of Foreign Affairs;

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles :

Article I

There shall be firm and enduring peace and sincere friendship between the United States of America and Iran.

Article II

1. Nationals of either High Contracting Party shall be permitted, upon terms no less favorable than those accorded to nationals of any third country, to enter and remain in the territories of the other High Contracting Party for the purpose of carrying on trade between their own country and the territories of such other High Contracting Party and engaging in related commercial activities, and for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital.

[1] Came into force on 16 June 1957, one month after the day of exchange of the instruments of ratification at Tehran on 16 May 1957, in accordance with article XXIII.

[TRADUCTION — TRANSLATION]

N° 4132. TRAITÉ[1] D'AMITIÉ, DE COMMERCE ET DE DROITS CONSULAIRES ENTRE LES ÉTATS-UNIS D'AMÉRIQUE ET L'IRAN. SIGNÉ À TÉHÉRAN, LE 15 AOÛT 1955

Les États-Unis d'Amérique et l'Iran, animés du désir de développer les relations amicales qui unissent depuis longtemps leurs deux peuples, de réaffirmer dans la direction des affaires humaines les principes supérieurs auxquels ils sont attachés, d'encourager les échanges et les investissements mutuellement profitables et l'établissement de relations économiques plus étroites entre leurs peuples et de régler leurs relations consulaires, ont décidé de conclure, sur la base de l'égalité réciproque de traitement, un Traité d'amitié, de commerce et de droits consulaires et ont, à cet effet, désigné pour leurs plénipotentiaires :

Le Président des États-Unis d'Amérique :

Monsieur Selden Chapin, Ambassadeur extraordinaire et plénipotentiaire des États-Unis d'Amérique à Téhéran;

Sa Majesté impériale le Shah d'Iran :

Son Excellence Monsieur Mostapha Samiy, Sous-Secrétaire d'État aux affaires étrangères;

Lesquels, après s'être communiqué leurs pleins pouvoirs respectifs, trouvés en bonne et due forme, sont convenus des articles suivants :

Article premier

Il y aura paix stable et durable et amitié sincère entre les États-Unis d'Amérique et l'Iran.

Article II

1. Les ressortissants de chacune des Hautes Parties contractantes seront admis dans les territoires de l'autre Haute Partie contractante et autorisés à y demeurer, dans des conditions non moins favorables que celles dont bénéficient les ressortissants de tout pays tiers, en vue de se livrer au commerce entre les territoires des deux Hautes Parties contractantes ou de se consacrer à des activités commerciales connexes, ou en vue de développer et de diriger les opérations d'une entreprise dans laquelle ils ont investi ou sont sur le point d'investir des capitaux importants.

[1] Entré en vigueur le 16 juin 1957, conformément à l'article XXIII, un mois après l'échange des instruments de ratification qui a eu lieu à Téhéran le 16 mai 1957.

2. Nationals of either High Contracting Party within the territories of the other High Contracting Party shall, either individually or through associations, and so long as their activities are not contrary to public order, safety or morals : (*a*) be permitted to travel therein freely and reside at places of their choice ; (*b*) enjoy freedom of conscience and the right to hold religious services; (*c*) be permitted to engage in philanthropic, educational and scientific activities; and (*d*) have the right to gather and transmit information for dissemination to the public abroad, and otherwise to communicate with other persons inside and outside such territories. They shall also be permitted to engage in the practice of professions for which they have qualified under the applicable legal provisions governing admission to professions.

3. The provisions of paragraphs 1 and 2 of the present Article shall be subject to the right of either High Contracting Party to apply measures which are necessary to maintain public order, and to protect public health, morals and safety, including the right to expel, to exclude or to limit the movement of aliens on the said grounds.

4. Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. When any such national is in custody, he shall in every respect receive reasonable and humane treatment; and, on his demand, the diplomatic or consular representative of his country shall without unnecessary delay be notified and accorded full opportunity to safeguard his interests. He shall be promptly informed of the accusations against him, allowed all facilities reasonably necessary to his defense and given a prompt and impartial disposition of his case.

Article III

1. Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized. As used in the present Treaty, " companies " means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.

2. Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no

2. Les ressortissants de chacune des Hautes Parties contractantes pourront, dans les territoires de l'autre Haute Partie contractante, à titre individuel ou par l'intermédiaire d'associations et aussi longtemps que leurs activités ne sont pas contraires à l'ordre, à la sécurité ou à la moralité publics : *a*) circuler librement et résider en tout lieu de leur choix; *b*) jouir de la liberté de conscience et célébrer des services religieux; *c*) se consacrer à une activité philanthropique, éducative ou scientifique; *d*) recueillir et communiquer des informations destinées à être diffusées à l'étranger et communiquer de toute autre façon avec d'autres personnes se trouvant à l'intérieur ou à l'extérieur desdits territoires. Ils seront aussi admis à pratiquer toutes professions pour lesquelles ils auront satisfait aux conditions légales d'accès.

3. L'application des dispositions des paragraphes 1 et 2 du présent article est subordonnée au droit pour chacune des Hautes Parties contractantes de prendre les mesures nécessaires au maintien de l'ordre public et à la protection de la santé, de la moralité et de la sécurité publiques, y compris le droit d'expulser les étrangers, de leur interdire l'accès du territoire ou de limiter leurs déplacements aux fins susmentionnées.

4. Les ressortissants de chacune des Hautes Parties contractantes bénéficieront de la manière la plus constante de la protection et de la sécurité dans les territoires de l'autre Haute Partie contractante. Si un ressortissant de l'une des deux Parties est mis en état d'arrestation, il devra être traité, à tous égards, d'une manière équitable et humaine et, dès lors qu'il en fera la demande, le représentant diplomatique ou consulaire de son pays devra être avisé sans retard injustifié; toute latitude sera laissée à ce représentant pour sauvegarder les intérêts dudit ressortissant. Celui-ci devra être informé sans délai des accusations portées contre lui, bénéficier dans la mesure du raisonnable de toutes facilités pour assurer sa défense et son affaire sera réglée avec célérité et impartialité.

Article III

1. Le statut juridique des sociétés constituées sous le régime des lois et règlements de l'une des Hautes Parties contractantes applicables en la matière sera reconnu dans les territoires de l'autre Haute Partie contractante. Il est entendu toutefois qu'en elle-même la reconnaissance de ce statut juridique ne donnera pas aux sociétés le droit de se livrer à l'activité en vue de laquelle elles sont organisées. Au sens du présent Traité, le terme « sociétés » doit s'entendre des sociétés de capitaux ou de personnes, des compagnies et de toutes associations, qu'elles soient ou non à responsabilité limitée et à but lucratif.

2. En vue d'assurer une administration rapide et impartiale de la justice, chacune des Hautes Parties contractantes accordera, dans ses territoires, aux ressortissants et aux sociétés de l'autre Haute Partie contractante, libre accès aux tribunaux judiciaires et aux organismes administratifs, à tous les degrés de la juridiction, tant pour faire valoir que pour défendre leurs droits. En toute

less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication.

3. The private settlement of disputes of a civil nature, involving nationals and companies of either High Contracting Party, shall not be discouraged within the territories of the other High Contracting Party; and, in cases of such settlement by arbitration, neither the alienage of the arbitrators nor the foreign situs of the arbitration proceedings shall of themselves be a bar to the enforceability of awards duly resulting therefrom.

Article IV

1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

3. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall not be subject to entry or molestation without just cause. Official searches and examinations of such premises and their contents, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

4. Enterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other

circonstance, elle leur assurera cet accès dans des conditions non moins favorables que celles qui sont applicables à ses propres ressortissants et sociétés ou à ceux de tout pays tiers. Il est entendu que la même latitude sera donnée aux sociétés n'exerçant aucune activité dans le pays, sans qu'elles aient à se faire immatriculer ou à accomplir des formalités ayant pour objet de les assimiler aux sociétés nationales.

3. Rien ne sera fait pour décourager dans les territoires de l'une des Hautes Parties contractantes le règlement privé des litiges de caractère civil auxquels seront parties des ressortissants ou des sociétés de l'autre Haute Partie contractante; dans le cas de règlement du litige par voie d'arbitrage, ni la nationalité étrangère des arbitres ni le fait que la procédure d'arbitrage se déroule à l'étranger ne seront en soi un empêchement à l'exécution d'une sentence arbitrale régulière.

Article IV

1. Chacune des Hautes Parties contractantes accordera en tout temps un traitement juste et équitable aux ressortissants et aux sociétés de l'autre Haute Partie contractante, ainsi qu'à leurs biens et à leurs entreprises; elle ne prendra aucune mesure arbitraire ou discriminatoire pouvant porter atteinte à leurs droits ou à leurs intérêts légalement acquis et, en conformité des lois applicables en la matière, elle assurera des voies d'exécution efficaces à leurs droits contractuels légitimement nés.

2. La protection et la sécurité des biens appartenant aux ressortissants et aux sociétés de l'une des Hautes Parties contractantes, y compris les participations dans des biens, seront assurées de la manière la plus constante dans les territoires de l'autre Haute Partie contractante, et ne seront inférieures en aucun cas aux normes fixées par le droit international. Lesdits biens ne pourront être expropriés que pour cause d'utilité publique et moyennant le paiement rapide d'une juste indemnité. Cette indemnité devra être fournie sous une forme aisément convertible en espèces et correspondre à la valeur intégrale des biens expropriés. Des dispositions adéquates devront être prises, au moment de la dépossession ou avant cette date, en vue de la fixation et du règlement de l'indemnité.

3. Les habitations, bureaux, entrepôts, usines et autres locaux utilisés par des ressortissants ou des sociétés de l'une des Hautes Parties contractantes et situés dans les territoires de l'autre Haute Partie contractante seront à l'abri de toute violation ou trouble de jouissance sans motif valable. Lesdits locaux et leur contenu ne pourront faire l'objet, le cas échéant, de perquisitions et d'inspections officielles que dans les conditions prévues par la loi, compte dûment tenu de la convenance des occupants et avec le souci de ne pas gêner la marche normale des affaires.

4. Les entreprises que les ressortissants ou les sociétés de l'une des Hautes Parties contractantes sont autorisés à créer ou à acquérir dans les territoires de

High Contracting Party, shall be permitted freely to conduct their activities therein, upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities. Such nationals and companies shall enjoy the right to continued control and management of such enterprises; to engage attorneys, agents, accountants and other technical experts, executive personnel, interpreters and other specialized employees of their choice; and to do all other things necessary or incidental to the effective conduct of their affairs.

Article V

1. Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: (*a*) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (*b*) to purchase or otherwise acquire personal property of all kinds; and (*c*) to dispose of property of all kinds by sale, testament or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded nationals and companies of any third country.

2. Upon compliance with the applicable laws and regulations respecting registration and other formalities, nationals and companies of either High Contracting Party shall be accorded within the territories of the other High Contracting Party effective protection in the exclusive use of inventions, trade marks and trade names.

Article VI

1. Nationals and companies of either High Contracting Party shall not be subject to the payment of taxes, fees or charges within the territories of the other High Contracting Party, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country. In the case of nationals of either High Contracting Party residing within the territories of the other High Contracting Party, and of nationals and companies of either High Contracting Party engaged in trade or other gainful pursuit or in non-profit activities therein, such payments and requirements shall not be more hurdensome than those borne by nationals and companies of such other High Contracting Party.

2. Each High Contracting Party, however, reserves the right to: (*a*) extend specific tax advantages only on the basis of reciprocity, or pursuant to agreements for the avoidance of double taxation or the mutual protection of revenue; and (*b*) apply special requirements as to the exemptions of a personal

l'autre Haute Partie contractante pourront y exercer leur activité dans des conditions non moins favorables que les autres entreprises, de n'importe quelle nationalité, qui se livrent à une activité du même genre. Les ressortissants ou sociétés qui auront créé lesdites entreprises auront le droit d'en conserver le contrôle ou la gestion; ils pourront engager des hommes de loi, des agents, des comptables et d'autres techniciens, du personnel de direction, des interprètes et d'autres spécialistes de leur choix; et d'une manière générale, ils pourront faire tout ce qui est nécessaire ou utile à la bonne marche de leurs affaires.

Article V

1. Les ressortissants et les sociétés de l'une des Hautes Parties contractantes pourront, dans les territoires de l'autre Haute Partie contractante : *a*) prendre à bail, pour des durées appropriées, les biens immeubles dont ils ont besoin à des fins de résidence ou qui sont nécessaires à la bonne marche des activités prévues par le présent Traité; *b*) acquérir, par voie d'achat ou par tout autre moyen, des biens mobiliers de toute nature et *c*) aliéner des biens de toute nature par voie de vente, de testament ou par tout autre moyen. Le traitement dont ils bénéficient en ces matières ne sera, en aucun cas, moins favorable que celui qui est accordé aux ressortissants et aux sociétés de tout pays tiers.

2. Les ressortissants et les sociétés de l'une des Hautes Parties contractantes bénéficieront, dans les territoires de l'autre Haute Partie contractante, d'une protection efficace en ce qui concerne l'usage exclusif de brevets d'invention, de marques de fabrique et de noms commerciaux, à condition de se conformer aux lois et règlements applicables à l'enregistrement et aux autres formalités.

Article VI

1. Les ressortissants et les sociétés de l'une des Hautes Parties contractantes ne seront, dans les territoires de l'autre Haute Partie contractante, ni astreints au paiement d'impôts, de taxes ou de droits, ni assujettis à des obligations relatives à leur application ou à leur recouvrement, qui seraient plus onéreux que les charges et obligations imposées aux ressortissants, résidents et sociétés d'un pays tiers. Dans le cas de ressortissants de l'une des Hautes Parties contractantes qui résident dans les territoires de l'autre Haute Partie contractante et dans le cas de ressortissants ou de sociétés de l'une des Hautes Parties contractantes qui se livrent, dans lesdits territoires, au commerce ou à toute autre activité à but lucratif ou non lucratif, lesdites charges et obligations ne seront pas plus onéreuses que celles qui sont imposées aux ressortissants et aux sociétés de cette autre Haute Partie contractante.

2. Chacune des Hautes Parties contractantes se réserve toutefois le droit : *a*) d'octroyer des avantages fiscaux déterminés, soit sur la base de la réciprocité, soit en vertu d'accords visant à éviter la double imposition ou à assurer la protection mutuelle des recettes fiscales; et *b*) d'imposer des conditions particulières,

nature allowed to non-residents in connection with income and inheritance taxes.

3. Companies of either High Contracting Party shall not be subject, within the territories of the other High Contracting Party, to taxes upon any income, transactions or capital not attributable to the operations and investment thereof within such territories.

Article VII

1. Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (*a*) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (*b*) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.

2. If either High Contracting Party applies exchange restrictions, it shall promptly make reasonable provision for the withdrawal, in foreign exchange in the currency of the other High Contracting Party, of : (*a*) the compensation referred to in Article IV, paragraph 2, of the present Treaty, (*b*) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (*c*) amounts for amortization of loans, depreciation of direct investments and capital transfers, giving consideration to special needs for other transactions. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

3. Either High Contracting Party applying exchange restrictions shall in general administer them in a manner not to influence disadvantageously the competitive position of the commerce, transport or investment of capital of the other High Contracting Party in comparison with the commerce, transport or investment of capital of any third country; and shall afford such other High Contracting Party adequate opportunity for consultation at any time regarding the application of the present Article.

Article VIII

1. Each High Contracting Party shall accord to products of the other High Contracting Party, from whatever place and by whatever type of carrier

en ce qui concerne les exonérations, à titre personnel, accordées en matière d'impôt sur le revenu et sur les successions, aux personnes qui n'ont pas leur résidence dans ses territoires.

3. Les sociétés de l'une des Hautes Parties contractantes ne seront pas soumises, dans les territoires de l'autre Haute Partie contractante, à des impôts sur les revenus, les opérations ou les capitaux, lorsque lesdits revenus, opérations ou capitaux n'interviennent pas dans le fonctionnement et les investissements desdites sociétés dans ces territoires.

Article VII

1. Aucune des Hautes Parties contractantes n'imposera de restrictions en matière de paiements, remises et transferts de fonds à destination ou en provenance des territoires de l'autre Haute Partie contractante sauf : *a*) dans la mesure nécessaire afin que les ressources en devises étrangères soient suffisantes pour régler le prix des marchandises et des services indispensables à la santé et au bien-être de sa population; et *b*) dans le cas d'un membre du Fonds monétaire international, s'il s'agit de restrictions expressément approuvées par le Fonds.

2. Si l'une ou l'autre des Hautes Parties contractantes impose des restrictions en matière de change, elle devra réserver sans délai des sommes suffisantes pour faire face aux retraits normalement prévisibles, dans la monnaie de l'autre Haute Partie contractante : *a*) des indemnités dont il est question au paragraphe 2 de l'article IV du présent Traité; *b*) des gains, qu'ils prennent la forme de traitements, d'intérêts, de dividendes, de commissions, de redevances, de rétributions de services ou toute autre forme; et *c*) des sommes afférentes à l'amortissement d'emprunts, à la dépréciation d'investissements directs et au transfert de capitaux, compte tenu des besoins particuliers en vue d'autres opérations. Si plus d'un taux de change est en vigueur, le taux applicable à ces retraits sera celui qui aura été expressément approuvé par le Fonds monétaire international pour les opérations de cette nature ou, à défaut d'un taux ainsi approuvé, un taux effectif qui, compte tenu de toute taxe ou surtaxe imposée sur les transferts de devises, sera juste et raisonnable.

3. En règle générale, la Haute Partie contractante qui imposera des restrictions en matière de change devra les appliquer de manière à ne pas porter préjudice au commerce, aux transports et aux investissements de l'autre Haute Partie contractante sur le marché par rapport au commerce, aux transports ou aux investissements d'un pays tiers; elle devra donner à l'autre Haute Partie contractante la possibilité de discuter avec elle, à tout moment, l'application des dispositions du présent article.

Article VIII

1. Chacune des Hautes Parties contractantes accordera aux produits de l'autre Haute Partie contractante, quelle qu'en soit la provenance et indépen-

arriving, and to products destined for exportation to the territories of such other High Contracting Party, by whatever route and by whatever type of carrier, treatment no less favorable than that accorded like products of or destined for exportation to any third country, in all matters relating to : (*a*) duties, other charges, regulations and formalities, on or in connection with importation and exportation; and (*b*) internal taxation, sale, distribution, storage and use. The same rule shall apply with respect to the international transfer of payments for imports and exports.

2. Neither High Contracting Party shall impose restrictions or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the territories of the other High Contracting Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited.

3. If either High Contracting Party imposes quantitative restrictions on the importation or exportation of any product in which the other High Contracting Party has an important interest :

(*a*) It shall as a general rule give prior public notice of the total amount of the product, by quantity or value, that may be imported or exported during a specified period, and of any change in such amount or period; and

(*b*) If it makes allotments to any third country, it shall afford such other High Contracting Party a share proportionate to the amount of the product, by quantity or value, supplied by or to it during a previous representative period, due consideration being given to any special factors affecting the trade in such product.

4. Either High Contracting Party may impose prohibitions or restrictions on sanitary or other customary grounds of a non-commercial nature, or in the interest of preventing deceptive or unfair practices, provided such prohibitions or restrictions do not arbitrarily discriminate against the commerce of the other High Contracting Party.

5. Either High Contracting Party may adopt measures necessary to assure the utilization of accumulated inconvertible currencies or to deal with a stringency of foreign exchange. However, such measures shall deviate no more than necessary from a policy designed to promote the maximum development of non-discriminatory multilateral trade and to expedite the attainment of a balance-of-payments position which will obviate the necessity of such measures.

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damment du mode de transport utilisé, ainsi qu'aux produits destinés à l'exportation vers les territoires de cette autre Haute Partie contractante, quels que soient l'itinéraire et le mode de transport utilisés, un traitement non moins favorable que celui qui est accordé aux produits similaires provenant de tout pays tiers ou destinés à l'exportation vers tout pays tiers, pour toutes les questions qui ont trait : *a*) aux droits de douane et autres taxes ainsi qu'aux règles et formalités applicables en matière d'importation et d'exportation; et *b*) à la fiscalité, la vente, la distribution, l'entreposage et l'utilisation desdits produits sur le plan national. La même règle s'appliquera au transfert international des sommes versées en paiement des importations ou des exportations.

2. Aucune des Hautes Parties contractantes ne restreindra ou n'interdira l'importation d'un produit de l'autre Haute Partie contractante ou l'exportation d'un produit destiné aux territoires de l'autre Haute Partie contractante, à moins que l'importation d'un produit similaire provenant de tout pays tiers, ou l'exportation d'un produit similaire à destination de tous les pays tiers ne soient, de la même manière, interdites ou restreintes.

3. Si l'une des Hautes Parties contractantes impose des restrictions quantitatives à l'importation ou à l'exportation d'un produit qui présente un intérêt important pour l'autre Haute Partie contractante :

a) Elle devra, en règle générale, faire connaître publiquement à l'avance le contingent de ce produit, en quantité ou en valeur, dont l'importation ou l'exportation sera autorisée pendant une période déterminée, ainsi que toute modification de ce contingent ou de cette période;

b) Elle devra, si elle attribue des contingents à un pays tiers, réserver à l'autre Haute Partie contractante une quote-part proportionnelle au contingent de ce produit, en quantité ou en valeur, fourni par cette Haute Partie contractante ou à cette Haute Partie contractante pendant une période représentative, compte dûment tenu de facteurs spéciaux qui peuvent influer sur le commerce du produit en question.

4. Chacune des Hautes Parties contractantes pourra imposer des interdictions ou des restrictions pour des motifs d'ordre sanitaire ou pour d'autres raisons de caractère non commercial généralement admises, ou en vue d'empêcher des pratiques dolosives ou déloyales, à condition que ces interdictions ou restrictions ne constituent pas des mesures discriminatoires arbitraires envers le commerce de l'autre Haute Partie contractante.

5. Chacune des Hautes Parties contractantes pourra prendre les mesures nécessaires pour assurer l'utilisation des devises inconvertibles accumulées ou pour faire face à une pénurie de devises étrangères. Toutefois, lesdites mesures ne pourront déroger que dans les limites requises à une politique générale visant à favoriser le développement maximum des échanges multilatéraux sur la base de la non-discrimination et à créer le plus rapidement possible une situation telle, en ce qui concerne la balance des paiements, qu'il ne soit plus nécessaire de recourir à de telles mesures.

6. Each High Contracting Party reserves the right to accord special advantages : (*a*) to products of its national fisheries, (*b*) to adjacent countries in order to facilitate frontier traffic, or (*c*) by virtue of a customs union or free trade area of which either High Contracting Party, after consultation with the other High Contracting Party, may become a member. Each High Contracting Party, moreover, reserves rights and obligations it may have under the General Agreement on Tariffs and Trade,[1] and special advantages it may accord pursuant thereto.

Article IX

1. In the administration of its customs regulations and procedures, each High Contracting Party shall : (*a*) promptly publish all requirements of general application affecting importation and exportation; (*b*) apply such requirements in a uniform, impartial and reasonable manner; (*c*) refrain, as a general practice, from enforcing new or more burdensome requirements until after public notice thereof; (*d*) provide an appeals procedure by which prompt and impartial review of administrative action in customs matters can be obtained; and (*e*) not impose greater than nominal penalties for infractions resulting from clerical errors or from mistakes made in good faith.

2. Nationals and companies of either High Contracting Party shall be accorded treatment no less favorable than that accorded nationals and companies of the other High Contracting Party, or of any third country, with respect to all matters relating to importation and exportation.

3. Neither High Contracting Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either High Contracting Party.

Article X

1. Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either High Contracting Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both on the high seas and within the ports, places and waters of the other High Contracting Party.

[1] See footnote 2, p. 76 of this volume.

6. Chacune des Hautes Parties contractantes se réserve le droit d'accorder des avantages particuliers : *a*) aux produits de ses pêcheries nationales; *b*) aux pays voisins en vue de faciliter le trafic frontalier, ou *c*) en vertu d'une union douanière ou d'une zone de libre-échange dont l'une des Hautes Parties contractantes serait devenue membre après avoir consulté l'autre Haute Partie contractante. En outre, chacune des Hautes Parties contractantes se réserve le droit d'exercer les prérogatives et de remplir les obligations qui pourraient lui être conférées par l'Accord général sur les tarifs douaniers et le commerce[1] et de consentir des avantages particuliers en application dudit Accord.

Article IX

1. Dans le cadre de l'application de ses règlements douaniers et de ses procédures douanières, chacune des Hautes Parties contractantes : *a*) publiera rapidement toutes les dispositions d'application générale concernant les importations ou les exportations; *b*) appliquera lesdites dispositions d'une manière uniforme, impartiale et raisonnable; *c*) s'abstiendra, en règle générale, de mettre en vigueur des dispositions nouvelles ou plus rigoureuses avant de les avoir fait connaître publiquement à l'avance *d*) établira une procédure d'appel permettant d'obtenir la revision rapide et impartiale des mesures administratives ayant trait à des questions douanières; et *e*) n'infligera pas de sanctions supérieures à des amendes purement nominales lorsque l'infraction résulte d'une erreur matérielle ou d'une faute commise de bonne foi.

2. Les ressortissants et les sociétés de l'une des Hautes Parties contractantes bénéficieront, pour toutes les questions qui ont trait aux importations et aux exportations, d'un traitement non moins favorable que celui qui est accordé aux ressortissants et aux sociétés de l'autre Haute Partie contractante ou de tout pays tiers.

3. Aucune des Hautes Parties contractantes n'imposera de mesures de caractère discriminatoire ayant pour effet d'empêcher, directement ou indirectement, les importateurs ou les exportateurs de produits originaires de l'un ou l'autre pays, d'assurer lesdits produits contre les risques maritimes auprès de compagnies de l'une ou l'autre des Hautes Parties contractantes.

Article X

1. Il y aura liberté de commerce et de navigation entre les territoires des deux Hautes Parties contractantes.

2. Les navires battant pavillon de l'une des Hautes Parties contractantes et munis des documents que leur législation exige comme preuve de leur nationalité, seront considérés comme étant des navires de cette Haute Partie contractante, en haute mer aussi bien que dans les ports, les mouillages et les eaux de l'autre Haute Partie contractante.

[1] Voir note 2, p. 77 de ce volume.

3. Vessels of either High Contracting Party shall have liberty, on equal terms with vessels of the other High Contracting Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other High Contracting Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other High Contracting Party; but each High Contracting Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

4. Vessels of either High Contracting Party shall be accorded national treatment and most-favored-nation treatment by the other High Contracting Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other High Contracting Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other High Contracting Party, with respect to : (*a*) duties and charges of all kinds, (*b*) the administration of the customs, and (*c*) bounties, drawbacks and other privileges of this nature.

5. Vessels of either High Contracting Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other High Contracting Party, and shall receive friendly treatment and assistance.

6. The term " vessels ", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war.

Article XI

1. Each High Contracting Party undertakes (*a*) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other High Contracting Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (*b*) that the nationals, companies and commerce of such other High Contracting Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

3. Les navires de l'une des deux Hautes Parties contractantes pourront librement, dans les mêmes conditions que les navires de l'autre Haute Partie contractante et les navires de tout pays tiers, se rendre avec leur cargaison dans tous les ports, mouillages et eaux de cette autre Haute Partie contractante, qui sont ouverts au commerce international et à la navigation internationale. Lesdits navires, ainsi que leur cargaison bénéficieront à tous égards, dans les ports, les mouillages et les eaux de cette autre Haute Partie contractante, du traitement national et du traitement de la nation la plus favorisée; mais chacune des Hautes Parties contractantes pourra réserver à ses propres navires des droits et des privilèges exclusifs en ce qui concerne le cabotage, la navigation fluviale et les pêcheries nationales.

4. Chacune des Hautes Parties contractantes accordera aux navires de l'autre Haute Partie contractante le traitement national et le traitement de la nation la plus favorisée en ce qui concerne le droit de transporter, à destination ou en provenance de ses territoires, tous les produits qui peuvent être acheminés par bateau; lesdits produits bénéficieront d'un traitement non moins favorable que celui qui est accordé aux produits similaires transportés à bord de navires de la première Haute Partie contractante en ce qui concerne : *a*) les droits et taxes de toutes natures, *b*) les formalités douanières; et *c*) les primes, drawbacks et autres avantages de même ordre.

5. Les navires en détresse de l'une des Hautes Parties contractantes pourront chercher refuge dans le port ou havre le plus proche de l'autre Haute Partie contractante; ils y bénéficieront d'un traitement amical et recevront assistance.

6. Au sens du présent Traité, le terme « navires » doit s'entendre des navires de tous genres, qu'ils soient propriété privée ou publique ou que leur exploitation soit privée ou publique; ce terme ne vise cependant pas, sauf en ce qui concerne l'application des paragraphes 2 et 5 du présent article, les bateaux de pêche ou les bâtiments de guerre.

Article XI

1. Chacune des Hautes Parties contractantes garantit : *a*) que les entreprises appartenant à l'État ou contrôlées par lui, ainsi que les monopoles ou organismes auxquels des privilèges exclusifs ou particuliers ont été concédés dans ses territoires, ne prendront en considération, lorsqu'ils effectueront des achats ou des ventes donnant lieu à des importations ou à des exportations intéressant le commerce de l'autre Haute Partie contractante, que des facteurs commerciaux, tels que le prix, la qualité, la situation de l'offre, les possibilités d'écoulement, le transport et d'autres conditions d'achat ou de vente; et *b*) que les ressortissants et les sociétés de cette autre Haute Partie contractante, ainsi que son commerce, auront des possibilités adéquates, conformément aux pratiques commerciales ordinaires, pour faire, sur la base de la concurrence, des offres d'achat ou de vente,

2. Each High Contracting Party shall accord to the nationals, companies and commerce of the other High Contracting Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to : (*a*) the governmental purchase of supplies, (*b*) the awarding of government contracts, and (*c*) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

3. The High Contracting Parties recognize that conditions of competitive equality should be maintained in situations in which publicly owned or controlled trading or manufacturing enterprises of either High Contracting Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other High Contracting Party. Accordingly, such private enterprises shall, in such situations, be entitled to the benefit of any special advantages of an economic nature accorded such public enterprises, whether in the nature of subsidies, tax exemptions or otherwise. The foregoing rule shall not apply, however, to special advantages given in connection with : (*a*) manufacturing goods for government use, or supplying goods and services to the Government for government use; or (*b*) supplying at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise practically obtainable by such groups.

4. No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Article XII

Each High Contracting Party shall have the right to send to the other High Contracting Party consular representatives, who, having presented their credentials and having been recognized in a consular capacity, shall be provided, free of charge, with exequaturs or other authorization.

Article XIII

1. Consular representatives of each High Contracting Party shall be permitted to reside in the territory of the other High Contracting Party at the places where consular officers of any third country are permitted to reside and

2. Chacune des Hautes Parties contractantes accordera aux ressortissants et aux sociétés de l'autre Haute Partie contractante, ainsi qu'à son commerce, un traitement juste et équitable par rapport au traitement qui est accordé aux ressortissants, aux sociétés et au commerce de tout pays tiers en ce qui concerne : *a*) l'achat de fournitures pour l'État; *b*) la passation de marchés publics; et *c*) la vente de tout service assuré par l'État ou par un monopole ou un organisme doté de privilèges exclusifs ou particuliers.

3. Les Hautes Parties contractantes reconnaissent qu'il faut dans les territoires de chacune d'elles maintenir des conditions égales de concurrence entre les entreprises commerciales ou les manufactures d'État qui sont possédées ou exploitées par l'une d'elles et les entreprises possédées ou exploitées par des ressortissants ou des sociétés de l'autre Haute Partie contractante qui leur font concurrence. En conséquence, ces entreprises privées auront droit à tout avantage particulier de nature économique qui serait accordé auxdites entreprises d'État, que ces avantages aient le caractère de subventions ou d'exemptions fiscales ou qu'ils prennent toute autre forme. Toutefois, la règle précédente ne s'applique pas aux avantages particuliers accordés en ce qui concerne : *a*) la fabrication d'articles destinés à être utilisés par l'État; ou *b*) la fourniture à des prix notablement inférieurs aux prix de marché, d'articles et de services destinés à satisfaire les besoins de certains éléments de la population, lorsqu'il s'agit de biens et de services essentiels que ces éléments ne pourraient pas obtenir pratiquement par d'autres moyens.

4. Aucune entreprise de l'une ou l'autre des Hautes Parties contractantes, qu'il s'agisse de sociétés, d'associations, d'administrations et d'agences publiques qui est propriété publique ou sous contrôle public, ne pourra, si elle exerce dans les territoires de l'autre Haute Partie contractante une activité commerciale ou industrielle de quelque nature que ce soit, y compris le transport des marchandises, bénéficier ni prétendre bénéficier, dans lesdits territoires, pour elle-même ou pour ses biens, d'une exemption en matière d'impôts, de poursuites judiciaires, d'exécution des jugements ou d'obligations d'un autre ordre applicables aux entreprises qui sont propriété privée ou sous contrôle privé.

Article XII

Chacune des Hautes Parties contractantes aura le droit d'envoyer auprès de l'autre Haute Partie contractante des représentants consulaires qui, après avoir présenté leurs lettres de provision et avoir fait connaître leur qualité, devront être gratuitement munis d'exequaturs ou de toute autre autorisation qui serait nécessaire.

Article XIII

1. Les représentants consulaires de chacune des Hautes Parties contractantes pourront résider dans le territoire de l'autre Haute Partie contractante en tout lieu où les fonctionnaires consulaires de tout pays tiers sont autorisés

at other places by consent of the other High Contracting Party. Consular officers and employees shall enjoy the privileges and immunities accorded to officers and employees of their rank or status by general international usage and shall be permitted to exercise all functions which are in accordance with such usage; in any event they shall be treated, subject to reciprocity, in a manner no less favorable than similar officers and employees of any third country.

2. The consular offices shall not be entered by the police or other local authorities without the consent of the consular officer, except that in the case of fire or other disaster, or if the local authorities have probable cause to believe that a crime of violence has been or is about to be committed in the consular office, consent to entry shall be presumed. In no case shall they examine or seize the papers there deposited.

Article XIV

1. All furniture, equipment and supplies consigned to or withdrawn from customs custody for a consular or diplomatic office of either High Contracting Party for official use shall be exempt within the territories of the other High Contracting Party from all customs duties and internal revenue or other taxes imposed upon or by reason of importation.

2. The baggage, effects and other articles imported exclusively for the personal use of consular officers and diplomatic and consular employees and members of their families residing with them, who are nationals of the sending state and are not engaged in any private occupation for gain in the territories of the receiving state, shall be exempt from all customs duties and internal revenue or other taxes imposed upon or by reason of importation. Such exemptions shall be granted with respect to the property accompanying the person entitled thereto on first arrival and on subsequent arrivals, and to that consigned to such officers and employees during the period in which they continue in status.

3. It is understood, however, that : (*a*) paragraph 2 of the present Article shall apply as to consular officers and diplomatic and consular employees only when their names have been communicated to the appropriate authorities of the receiving state and they have been duly recognized in their official capacity; (*b*) in the case of consignments, either High Contracting Party may, as a condition to the granting of exemption, require that a notification of any such consignment be given, in a prescribed manner; and (*c*) nothing herein authorizes importations specifically prohibited by law.

à résider ainsi qu'en tout autre lieu qui aura l'agrément de l'autre Haute Partie contractante. Les fonctionnaires et employés consulaires jouiront des privilèges et immunités qui sont accordés aux fonctionnaires et employés de même rang ou de même statut conformément à la pratique générale internationale et seront autorisés à exercer toutes les fonctions admises par ladite pratique; ils bénéficieront, en toute circonstance, sur la base de la réciprocité, d'un traitement non moins favorable que celui qui est appliqué aux fonctionnaires et employés de même catégorie de tout pays tiers.

2. La police ou les autres autorités locales ne pourront pénétrer dans les bureaux consulaires qu'avec la permission du fonctionnaire consulaire; toutefois, ce dernier sera présumé avoir donné ladite permission en cas d'incendie ou d'autres sinistres, ou lorsque les autorités locales auront des raisons sérieuses de croire qu'un délit avec violence a été ou est sur le point d'être commis dans les bureaux consulaires. Lesdites autorités ne pourront en aucun cas examiner ou saisir les documents qui s'y trouvent déposés.

Article XIV

1. Le mobilier, le matériel et les fournitures destinés aux besoins officiels d'un bureau consulaire ou d'une mission diplomatique de l'une des Hautes Parties contractantes seront exonérés, dans les territoires de l'autre Haute Partie contractante, qu'ils se trouvent dans les entrepôts douaniers ou qu'ils en soient déjà sortis, de tout droit de douane et de tous impôts ou taxes intérieurs perçus en raison ou à l'occasion de l'importation.

2. Les bagages, les effets et tous autres articles importés exclusivement pour l'usage personnel des fonctionnaires consulaires et des employés diplomatiques ou consulaires et des membres de leurs familles qui résident avec eux, qui sont ressortissants de l'État d'origine et qui ne se livrent à aucune activité lucrative dans le territoire de l'État d'admission, seront exempts de tous droits de douane et de tous impôts ou taxes intérieurs perçus en raison ou à l'occasion de l'importation. Lesdites exemptions seront accordées aussi bien dans le cas où les biens accompagnent l'intéressé lors de sa première entrée dans le pays ou de toute entrée subséquente, que dans le cas où les biens seront expédiés auxdits fonctionnaires ou employés au cours de la période pendant laquelle ils demeureront affectés à leurs postes.

3. Il est entendu toutefois : *a*) que les dispositions du paragraphe 2 du présent article ne s'appliqueront aux fonctionnaires consulaires et aux employés diplomatiques ou consulaires que quand leurs noms auront été communiqués aux autorités compétentes de l'État d'admission et que leur qualité officielle aura été dûment reconnue; *b*) que, dans le cas d'articles expédiés, chacune des Hautes Parties contractantes pourra subordonner l'octroi de l'exemption à une notification de l'expédition qui devra être donnée sous la forme qu'elle prescrira; *c*) qu'aucune des présentes dispositions n'autorise l'entrée dans le territoire d'articles dont l'importation est expressément interdite par la loi.

Article XV

1. The Government of either High Contracting Party may, in the territory of the other, acquire, own, lease for any period of time, or otherwise hold and occupy, such lands, buildings, and appurtenances as may be necessary and appropriate for governmental, other than military, purposes. If under the local law the permission of the local authorities must be obtained as a prerequisite to any such acquiring or holding, such permission shall be given on request.

2. Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, national, state, provincial and municipal, other than assessments levied for services or local public improvements by which the premises are benefited.

Article XVI

1. No tax or other similar charge of any kind, whether of a national, state, provincial, or municipal nature, shall be levied or collected within the territories of the receiving state in respect of the official emoluments, salaries, wages or allowances received (*a*) by a consular officer of the sending state as compensation for his consular services, or (*b*) by a consular employee thereof as compensation for his services at a consulate. Likewise, consular officers and employees, who are permanent employees of the sending state and are not engaged in private occupation for gain within the territories of the receiving state, shall be exempt from all taxes or other similar charges, the legal incidence of which would otherwise fall upon such officers or employees.

2. The preceding paragraph shall not apply in respect of taxes and other similar charges upon : (*a*) the ownership or occupation of immovable property situated within the territories of the receiving state; (*b*) income derived from sources within such territories (except the compensation mentioned in the preceding paragraph); or (*c*) the passing of property at death.

3. The provisions of the present Article shall have like application to diplomatic officers and employees, who shall in addition be accorded all exemptions allowed them under general international usage.

Article XVII

The exemptions provided for in Articles XIV and XVI shall not apply to nationals of the sending state who are also nationals of the receiving state, or to any other person who is a national of the receiving state, nor to persons having immigrant status who have been lawfully admitted for permanent residence in the receiving state.

Article XV

1. Les pouvoirs publics de l'une des Hautes Parties contractantes pourront dans le territoire de l'autre acquérir, posséder, louer pour une durée quelconque ou détenir et occuper à toute autre titre les terrains, bâtiments et dépendances qui pourront leur être nécessaires ou utiles à toute fin officielle autre que militaire. Si le droit local subordonne l'acquisition ou la possession susvisée à l'autorisation préalable des autorités locales, cette autorisation devra être accordée sur demande.

2. Les terrains et bâtiments situés sur le territoire de l'une des Hautes Parties contractantes et appartenant en droit ou en équité à l'autre Haute Partie contractante et utilisés exclusivement à des fins officielles seront exempts de tous impôts nationaux, d'état, provinciaux et municipaux à l'exception des taxes perçues pour des prestations de service ou à l'occasion de travaux publics locaux dont bénéficient les biens dont il s'agit.

Article XVI

1. Aucun impôt ou contribution similaire d'aucune sorte, qu'il soit national, d'état, provincial ou municipal ne sera levé ou perçu dans les territoires de l'État d'admission, sur les émoluments, traitements, salaires ou indemnités touchés : *a*) par un fonctionnaire consulaire de l'État d'origine en rétribution de ses services consulaires ou *b*) par un employé de consulat en rétribution de ses services dans un consulat dudit État. De même, les fonctionnaires consulaires et les employés de consulat qui sont fonctionnaires publics de l'État d'origine et qui n'exercent pas une activité privée de caractère lucratif dans les territoires de l'État d'admission, seront exonérés de tous impôts ou contributions similaires dont le paiement, en l'absence de l'exemption prévue par le présent article, incomberait légalement auxdits fonctionnaires consulaires ou employés de consulat.

2. Les dispositions du paragraphe précédent ne s'appliqueront pas aux impôts et contributions similaires perçus : *a*) du fait de la propriété ou de l'occupation de biens immeubles situés dans les territoires de l'État d'admission; *b*) sur les revenus provenant de sources dans lesdits territoires (à l'exception de la rétribution mentionnée au paragraphe précédent); ou *c*) à l'occasion d'une mutation de propriété pour cause de décès.

3. Les dispositions du présent article s'appliqueront dans les mêmes conditions aux fonctionnaires et employés diplomatiques qui bénéficieront en outre de toutes les exemptions qui leur sont accordées en vertu de la pratique générale internationale.

Article XVII

Les exemptions prévues aux articles XIV et XVI ne s'appliqueront pas aux ressortissants du pays d'origine qui sont en même temps ressortissants du pays d'admission, ni à toute autre personne qui est ressortissant du pays d'admission ni aux personnes ayant le statut d'immigrants qui ont été légalement reçues dans le pays d'admission pour y résider de façon permanente.

Article XVIII

Consular officers and employees are not subject to local jurisdiction for acts done in their official character and within the scope of their authority. No consular officer or employee shall be required to present his official files before the courts or to make declaration with respect to their contents.

Article XIX

A consular officer shall have the right within his district to : (*a*) interview, communicate with, assist and advise any national of the sending state; (*b*) inquire into any incidents which have occurred affecting the interests of any such national; and (*c*) assist any such national in proceedings before or in relations with the authorities of the receiving state and, where necessary, arrange for legal assistance to which he is entitled. A national of the sending state shall have the right at all times to communicate with a consular officer of his country and, unless subject to lawful detention, to visit him at the consular office.

Article XX

1. The present Treaty shall not preclude the application of measures :

(*a*) regulating the importation or exportation of gold or silver;
(*b*) relating to fissionable materials, the radio-active by-products thereof, or the sources thereof;
(*c*) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; and
(*d*) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

2. The present Treaty does not accord any rights to engage in political activities.

3. The stipulations of the present Treaty shall not extend to advantages accorded by the United States of America or its Territories and possessions, irrespective of any future change in their political status, to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands or to the Panama Canal Zone.

4. The provisions of Article II, Paragraph 1, shall be construed as extending to nationals of either High Contracting Party seeking to enter the territories of

Article XVIII

Les fonctionnaires consulaires et employés de consulat ne sont pas soumis à la juridiction locale pour les actes qu'ils ont accomplis en qualité et dans la limite de leur compétence. Aucun fonctionnaire consulaire ou employé de consulat ne sera requis de présenter ses dossiers officiels devant les tribunaux ou de faire une déclaration au sujet de leur contenu.

Article XIX

Un fonctionnaire consulaire aura le droit dans le ressort qui lui est imparti : *a*) de conférer et communiquer avec tout ressortissant du pays d'origine, de l'assister et de le conseiller; *b*) d'enquêter sur les incidents qui pourraient porter atteinte aux intérêts dudit ressortissant; *c*) d'assister ledit ressortissant dans toute action intentée devant les autorités du pays d'admission ou dans ses rapports avec lesdites autorités et, en cas de besoin, de prendre toutes dispositions pour lui procurer l'assistance judiciaire à laquelle il a droit. Tout ressortissant du pays d'origine aura le droit de communiquer à tout moment avec un fonctionnaire consulaire de son pays et, sauf s'il se trouve légalement en état de détention, d'aller le voir au consulat.

Article XX

1. Le présent Traité ne fera pas obstacle à l'application de mesures :

a) Réglementant l'importation ou l'exportation de l'or ou de l'argent;
b) Concernant les substances fissiles, les sous-produits radioactifs desdites substances et les matières qui sont la source de substances fissiles;
c) Réglementant la production ou le commerce des armes, des munitions et du matériel de guerre, ou le commerce d'autres produits lorsqu'il a pour but direct ou indirect d'approvisionner des unités militaires;
d) Ou nécessaires à l'exécution des obligations de l'une ou l'autre des Hautes Parties contractantes relatives au maintien ou au rétablissement de la paix et de la sécurité internationales ou à la protection des intérêts vitaux de cette Haute Partie contractante sur le plan de la sécurité.

2. Le présent Traité n'accorde aucun droit en vue de l'exercice d'une activité politique.

3. Les dispositions du présent Traité ne s'appliqueront pas aux avantages que s'accordent mutuellement les États-Unis d'Amérique, leurs territoires et leurs possessions, indépendamment de toute modification qui pourrait être apportée à leur statut politique, ou qui sont accordés par eux à la République de Cuba, à la République des Philippines, au Territoire sous tutelle des Iles du Pacifique ou à la zone du canal de Panama.

4. Les dispositions du paragraphe 1 de l'article II s'appliqueront au ressortissant de l'une ou l'autre des Hautes Parties contractantes cherchant à

the other High Contracting Party solely for the purpose of developing and directing the operations of an enterprise in the territories of such other High Contracting Party in which their employer has invested or is actively in the process of investing a substantial amount of capital : provided that such employer is a national or company of the same nationality as the applicant and that the applicant is employed by such national or company in a responsible capacity.

Article XXI

1. Each High Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

Article XXII

1. The present Treaty shall replace the following agreements between the United States of America and Iran :

(*a*) the provisional agreement relating to commercial and other relations, concluded at Tehran May 14, 1928,[1] and

(*b*) the provisional agreement relating to personal status and family law, concluded at Tehran July 11, 1928.[2]

2. Nothing in the present Treaty shall be construed to supersede any provision of the trade agreement and the supplementary exchange of notes between the United States of America and Iran, concluded at Washington April 8, 1943.[3]

Article XXIII

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Tehran as soon as possible.

2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.

[1] De Martens, *Nouveau Recueil général de Traités*, troisième série, tome XXX, p. 885.
[2] De Martens, *Nouveau Recueil général de Traités*, troisième série, tome XXV, p. 58.
[3] United Nations, *Treaty Series*, Vol. 106, p. 155.

entrer sur le territoire de l'autre Haute Partie contractante à seule fin de diriger et de développer les opérations d'une entreprise située sur le territoire de cette autre Haute Partie contractante dans laquelle son employeur a investi ou est sur le point d'investir des capitaux importants : à condition que ledit employeur soit un ressortissant ou une société de la même nationalité que le postulant et qu'il emploie ledit postulant dans un poste où il assumera des responsabilités.

Article XXI

1. Chacune des deux Hautes Parties contractantes examinera avec bienveillance les représentations que pourra faire l'autre Haute Partie contractante au sujet de toute question concernant l'application du présent Traité et prendra des mesures adéquates pour permettre des consultations à ce propos.

2. Tout différend qui pourrait s'élever entre les Hautes Parties contractantes quant à l'interprétation ou à l'application du présent Traité et qui ne pourrait pas être réglé d'une manière satisfaisante par la voie diplomatique sera porté devant la Cour internationale de Justice, à moins que les Hautes Parties contractantes ne conviennent de le régler par d'autres moyens pacifiques.

Article XXII

1. Le présent Traité remplace les accords suivants conclus entre les États-Unis d'Amérique et l'Iran :

a) L'Accord provisoire relatif aux relations commerciales et autres conclu à Téhéran, le 14 mai 1928[1],

b) L'Accord provisoire relatif au statut personnel et au droit de la famille, conclu à Téhéran, le 11 juillet 1928[2].

2. Aucune disposition du présent Traité ne sera interprétée comme se substituant à une disposition de l'Accord de commerce et de l'échange de notes y relatif conclu le 8 avril 1943[3] à Washington entre les États-Unis d'Amérique et l'Iran.

Article XXIII

1. Le présent Traité sera ratifié et les instruments de ratification seront échangés à Téhéran, dès que faire se pourra.

2. Le présent Traité entrera en vigueur un mois après la date de l'échange des instruments de ratification. Il demeurera en vigueur pendant dix ans et le restera par la suite jusqu'à ce qu'il soit abrogé conformément à la procédure prévue par ses dispositions.

[1] De Martens, *Nouveau Recueil général de Traités*, troisième série, tome XXX, p. 885.
[2] De Martens, *Nouveau Recueil général de Traités*, troisième série, tome XXV, p. 58.
[3] Nations Unies, *Recueil des Traités*, vol. 106, p. 155.

3. Either High Contracting Party may, by giving one year's written notice to the other High Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Persian languages, both equally authentic, at Tehran this fifteenth day of August one thousand nine hundred fifty-five, corresponding with the twenty-third day of Mordad one thousand three hundred and thirty-four.

Selden CHAPIN
[SEAL]

MOSTAFA SAMIY
[SEAL]

No. 4132

3. Chacune des Hautes Parties contractantes pourra mettre fin au présent Traité à la fin de la période initiale de dix ans ou à tout moment après l'expiration de cette période, en donnant par écrit à l'autre Haute Partie contractante un préavis d'un an.

EN FOI DE QUOI les plénipotentiaires respectifs ont signé le présent Traité et y ont apposé leur sceau.

FAIT en double exemplaire, dans les langues anglaise et persane, les deux textes faisant également foi, à Téhéran, le quinze août mil neuf cent cinquante-cinq, correspondant au vingt-troisième jour du mois de Mordad mil trois cent trente-quatre.

Selden CHAPIN
[SCEAU]

MOSTAFA SAMIY
[SCEAU]

N° 4132

Annex 2

Letter of the U.S. Embassy in Tehran to the U.S. Department of State, dated 16 October 1954

Air Pouch
PRIORITY

CONFIDENTIAL
(Security Classification)

DO NOT TYPE IN THIS SPACE
611.884/10-1654
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EXHIBIT A

FOREIGN SERVICE DESPATCH

FROM : AMEMBASSY, Tehran

REC'D OCT 22 1954

DESP. NO. 212

TO : THE DEPARTMENT OF STATE, WASHINGTON.

DATE October 16, 1954

REF : Department Instruction No. 23, 1954.

	ACTION	DEPT.							
4 For Dept. Use Only	E-4 AFE-4	INFO	OCIR-2	REF-2	OCI-6	L-2	VO-2	ARMY-4	NAVY-3 AIR-3
	REC'D 10-25		OTHER CIA-5	COM-8	FOA-10	TR-3	TAR-2	RMB	OSD

SUBJECT: Draft Treaty of Amity and Economic Relations

On October 13, 1954, Messrs Rountree and Bray of the Embassy conferred with Iranian officials regarding the results of the work of the Inter-ministerial Committee which had been established under the chairmanship of Dr. Abdoh, Director General of Political Affairs, Ministry of Foreign Affairs, to consider the draft Treaty of Amity and Economic Relations between the United States and Iranian Governments. In addition to Dr. Abdoh, the following Iranian officials were present: Mr. Kia, Chief of the American Division; Dr. Faruher, also of the Ministry of Foreign Affairs, and Mohamed Nemazee, who is serving as Adviser to the Ministry of National Economy on the proposed treaty. With one or two exceptions the Iranian officials explained fully and frankly the issues and problems which had arisen in the course of the review of the draft treaty by the Inter-ministerial Committee. The items considered at the meeting are set forth below according to their order of appearance in the text of the draft Treaty.

1. Preamble

Dr. Abdoh stated that the Government of Iran would like to have a statement in the draft treaty that the agreement was to be applied on a basis of reciprocity, and explained that this was for its effect upon third countries. The Government of Iran wanted, if possible, to avoid the extension of the terms of this treaty to third countries, notably to the Soviet Union, with which the Government of Iran had or might enter into treaties containing most-favored-nation clauses. (The Iranian representatives explained that many of the suggested changes in the draft treaty were motivated by the concern of the Iranian Government over the most-favored-nation clause in treaties which Iran had with other countries.) Dr. Abdoh indicated that the Government of Iran would be satisfied on this point if a phrase were inserted in line 6 of the preamble, so that clause would read: "The United States and Iran, . . . have resolved to conclude on the basis of the principle of reciprocity a Treaty of Amity and Economic Relations, . . .".

The Embassy perceives no objection to this addition and recommends that the Department accept the suggestion of the Iranian representatives.

2. Article II, Paragraph 1

Dr. Abdoh suggested that the provisions of the last sentence of paragraph 1 which concern the right of either party to exclude or expel aliens on grounds

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relating to public order, morals, health and safety, should be applicable to the rights conferred in paragraph 3 as well as to those in paragraph 1 of Article II. He suggested that the present paragraph 3 be renumbered as paragraph 2. The present paragraph 2 should be renumbered as paragraph 4, and a new paragraph 3 added with language along the following lines, which he said had been inspired by a similar text in the treaty between the United States and Japan:

"The provisions of paragraphs 1 and 2 of the present Article shall be subject to the right of either High Contracting Party to apply measures which are necessary to maintain public order, and to protect public health, morals and safety, including the right of either High Contracting Party to expel, to exclude or to limit the movement of aliens on the said grounds."

Dr. Abdoh explained that the Government of Iran had in mind the need to control the movements and the activities of Soviet and Satellite nationals in Iran, and that it was necessary for the Government to maintain adequate legal authority to do so.

The Embassy recommends that the Department accept the suggestions of Dr. Abdoh on these points.

3. Article II, Paragraph 2, renumbered as paragraph 4 (page 2, lines 7, 10, 11 and 12 of the Department's draft)

a. It was suggested that the text which reads that the "diplomatic or consular representative shall be immediately notified" should be revised to read the "diplomatic or consular representative shall be notified within a reasonable period of time." Regarding this point, Dr. Abdoh stated that communications in Iran in many instances were not efficient enough to enable the Government to notify "immediately" the diplomatic or consular representative. He preferred language which would be more in keeping with the Government's capabilities of making the required notification.

b. With regard to line 10 of this paragraph, which stated that "He shall be . . . allowed ample facilities to defend himself . . .", it was suggested that the text be amended to read that "He shall be . . . allowed the usual facilities to defend himself . . .", or, alternatively, that the word "ample" simply be omitted. On this point Dr. Abdoh stated the Iranian Government was prepared to agree that the facilities to be allowed by Iran for defense would be the same as those allowed to Iranians, but that the definition of what might be considered "ample" presented a difficulty. He asked whether the intent of the Article did not mean that the same facilities would be granted to a national of one contracting party when such a national was taken into custody by the other contracting party on charges of committing a penal offense, as those granted under similar conditions to the nationals of the contracting party taking custody.

The Embassy representatives agreed to seek the Department's advice on this question.

c. Dr. Abdoh suggested that the last phrase in this paragraph (lines 11 and 12), reading ". . .., in accord with modern standards of justice" be revised to

read ". . . in accord with principles of justice." He stated that the Iranians were "touchy" on any matter that suggested that their system of justice was not "in accord with modern standards of justice," but recognized also that it was not universally considered to be so. He said that this kind of language would open the possibility of misunderstanding and difficulty.

The Embassy sees no compelling reason why the Iranian suggestion on these three points should not be accepted.

4. Article III, Paragraph 1

The Iranian officials were particularly concerned with the definition of "companies" which would be eligible to enjoy the benefits of Article III. Again, they were concerned primarily with the effects of this Article on Iran's relations with the U.S.S.R. arising from the principle of most-favored-nation treatment. The Government of Iran desired to avoid extending privileges to Soviet companies operating in Iran similar to those which Iran would like to give to American companies which might invest in Iran. Dr. Abdoh suggested that the words "privately owned" be inserted before "corporation, partnerships," etc., in the second sentence of this paragraph. In addition he proposed that letters be exchanged between the two governments in which it would be stated that, for purposes of interpreting this paragraph, it would be understood that all Iranian companies operating in the United States would enjoy the benefits of Article III, including those Iranian companies which might be financed in whole or in part by the Government of Iran. He believed that reciprocal rights need not be conferred on United States companies operating in Iran financed in whole or in part by funds from the United States Government, since any such companies or corporations operating here would in all probability be doing so on the basis of special agreements.

If the Department does not perceive objections to an exchange of letters interpreting certain articles of the treaty, the Embassy believes that an exchange along the lines suggested by Dr. Abdoh would be helpful in solving this problem, which is a serious one for the Iranian Government.

5. Article III, Paragraph 3

It was indicated that the Ministry of Justice regarded Article III, paragraph 3, as a form of "capitulation". Article 633 of the Iranian Code provides that an Iranian national is not bound by the results of an arbitration proceeding conducted either by alien arbitrators or on a foreign situs. The Embassy representatives explained that the private settlement of disputes, particularly by arbitration, was highly necessary in many commercial and business transactions. Complex technical problems involving the interpretation of commercial contracts, the grading of products entering international trade, the survey of losses covered by insurance, and matters relating to industrial property rights, were frequently settled by private arbitration proceedings of an international character. Dr. Abdoh and Mr. Nemazee agreed that these were important considerations and that the Government of Iran would reconsider its position on this paragraph.

It is likely that the Iranian objection will be withdrawn. However, the

Embassy would appreciate any additional comments which the Department might have bearing on the interpretation of paragraph 3 and the advantages of such a provision to Iran.

6. Article IV, Paragraph 1 (page 4, line 1 of the Department's draft)

The Iranian officials suggested that the sentence reading "Each High Contracting Party . . . shall refrain from applying unreasonable or discriminatory measures . . ." be amended to read "Each High Contracting Party . . . shall refrain from applying unlawful or discriminatory measures . . .". The Iranian officials did not explain the reasons for this change. It appears clear, however, that the Government of Iran wishes to maintain its right to impair legally acquired rights and interests by lawful measures. On the other hand, the Embassy notes that the concluding clause in paragraph 1 binds the High Contracting Parties to " . . . assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

The Embassy would appreciate receiving the Department's advice on this suggestion of the Iranian Government.

7. Article IV, Paragraph 2 (page 4, line 12 of the Department's draft)

Dr. Abdoh suggested that the first two sentences of this paragraph be revised more in line with the United States treaty with Ireland, to read:

> "Property of nationals and companies of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just and effective compensation, nor without compliance with the requirements of international law."

It appears that the original intention of the Iranian representatives was to suggest that the wording quoted above should constitute the entire paragraph. They indicated that the revised wording was based upon the text of Article VIII, Paragraph 2, of the United States treaty with Ireland. A copy of this treaty, however, was not available during the discussion. It later developed that, contrary to the implication given by the Iranian officials, the entire paragraph in the Irish Treaty had not been utilized. This matter was discussed with Dr. Abdoh in a subsequent meeting, and the important omissions in the Iranian suggested text were pointed out. Also, in response to Dr. Abdoh's comments, the Embassy representatives explained why the Iranian text, taken with Article VII of the draft treaty, would not entirely meet the situation. Dr. Abdoh expressed personal agreement with the position outlined and suggested that the last sentence of the Department's draft paragraph be retained, along with the first part of the paragraph as revised by the Iranian representatives. He could not guarantee that this would be accepted by the Iranian Cabinet members, but said he would endeavor to obtain their agreement.

The two sentences quoted above and taken from Article VIII, Paragraph 2, of the United States Treaty with Ireland, limit the application of the paragraph on the taking of property to "property of nationals and companies of either Party." The Iranian representatives indicated that one reason they preferred the language in the United States treaty with Ireland was that it omitted any reference to "interests in property" which was included in the Department's draft.

Since the participation of the United States oil companies in the International Oil Consortium and its subordinate companies will be through companies registered in countries other than the United States and Iran, it would appear that neither the investment of the United States oil companies in the oil consortium, nor their right to earnings potentially realizable under terms of the oil agreement between the Government of Iran and the National Iranian Oil Company, on the one hand, and the member companies of the oil consortium, on the other hand, would be covered by the terms of the Iranian draft proposal. These deficiencies might be remedied by including, either in the proposed treaty or in an exchange of notes or letters, a definition of "property of nationals and companies of either Party" which, without specific mention of the U.S. oil operation, would meet the special circumstances of the United States oil companies which are or may become members of the International Oil Consortium.

The Department's comments upon the acceptability of the paragraph as revised (including the last sentence of the Department's draft) is requested. We would appreciate the Department's advice concerning the position which should be taken if the Iranian Government should later insist upon the deletion of the last sentence. Also, if the Department agrees that omission of the phrase "including interests in property" renders the provision of the paragraph inadequate, we would appreciate advice as to whether the problem can be met by an exchange of letters or whether the Iranians should be urged in light of the realities of the situation to agree to the inclusion of the phrase in question.

8. Article V

Two changes were recommended in this article; both appear designed to improve the sentence structure and do not affect the substance of the Article:

a. Under paragraph 1 (a), place the phrase "for the conduct of activities pursuant to the present Treaty" at the head of the paragraph so that this condition will apply to the entire paragraph.

b. Similarly, in paragraph 2, place the phrase "upon compliance with the applicable laws and regulations [, if any,] respecting registration and other formalities" at the head of the paragraph.

Dr. Abdoh explained that the Ministry of Justice preferred the revised arrangement of the latter paragraph also because it would more fully reflect the substance of Iranian regulations on the registration of inventions, trade marks and trade names.

The Embassy perceives no objection to either of the above suggestions.

9. Article VII, Paragraphs 1, 2 and 3

It was apparent that the scope, intent and standards of execution of Article VII in its entirety had given rise to much concern on the part of the Iranian representatives (see Embtel 787, October 2, 1954). The difficulties which the Iranian officials made explicit included: (a) the conditions which would have to be met before either party could apply restrictions on foreign exchange; (b) the question of who would be the judge as to the extent to which restrictions on foreign exchange transactions could be applied; and (c) in the event restrictions on foreign exchange were applied, the order of priority that would be given to various requirements for the foreign exchange which was being rationed by either contracting party.

With regard to the conditions which would have to be met before either contracting party could apply restrictions on foreign exchange, Mr. Mohamed Nemazee, in particular, stressed his understanding that either party could impose restrictions on foreign exchange whenever it felt that it did not have sufficient exchange to cover the financing of essential imports and to cover the other requirements such as servicing of foreign obligations and transfers relating to foreign investment. Mr. Nemazee stated that his interpretation of paragraph 1 which would govern the interpretation of paragraphs 2 and 3 of Article VII, was that/country should be enabled to cover its requirements for the financing of essential imports and thereafter, to the extent that exchange was available, make reasonable provision for the servicing of loans and other obligations.

In subsequent discussions with Dr. Abdoh regarding Article IV on the taking of property, he indicated that the transfer of payment for compensation would be governed by Article VII. He said that under Article IV the parties would be obligated on the taking of property to make prompt payment in local currency for the full equivalent of the property taken; the extent to which the local currency payment could be converted into acceptable exchange would be determined by the amount of exchange which the party taking the property had available after giving consideration to its special needs for other transactions, including payments for goods and services essential to the health and welfare of its people. The Embassy representatives pointed out that Article IV required that compensation for the taking of property belonging to a national of the other contracting party should be paid in an effectively realizable form and that adequate provision should have been made at or prior to the time of taking for the determination and payment thereof. If, at the time the taking of property was contemplated by one of the parties, it had exchange restrictions in effect which would prevent the payment of compensation from being converted into acceptable exchange, one of the essential conditions in Article IV would not have been met and the party contemplating the taking of property which belonged to a national of the other contracting party should not carry out the contemplated action. Dr. Abdoh said he recognized the merit of this explanation. He added that this was another issue which would have to be resolved.

The question of who was to be the judge as to the need for imposing exchange restrictions and the compatibility of those restrictions with the requirements of

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Article VII, seemed to be uppermost in the minds of the Iranian officials. Dr. Abdoh stated that the Government of Iran felt strongly that each government should be its own judge on these questions. He suggested that language be inserted in Article VII, paragraph 1 (a) to make this point clear, so that the clause would read: "(a) to the extent necessary in its own judgment to assure the availability of foreign exchange for . . .". The Embassy representatives commented that since Iran is a member of the International Monetary Fund sub-paragraph (a) would be subordinate to sub-paragraph (b). The addition of the language suggested would be unnecessary in view of the fact that Iran is a member of the Fund.

The Iranians had given considerable thought to the order of priority among the various requirements for foreign exchange in the event such exchange had to be restricted. As indicated above, they made it clear that the essential import requirements of each country would have overriding priority on available foreign exchange. Dr. Abdoh sought to make this point clearer by placing the phrase in paragraph 2 (c), reading "giving consideration to special needs for other transactions" at the head of the paragraph, so that the first sentence of para-graph 2 would read as follows: "If either High Contracting Party applies exchange restrictions, it shall, after giving consideration to special needs for other transactions, promptly make reasonable provision . . .". In this way it would be clear that either contracting party would have freedom to give consideration to its special requirements for foreign exchange before foreign exchange need be made available to meet the servicing requirements of foreign loans, foreign investment and other foreign obligations.

Similarly, the Iranian officials wanted to remove any suggestion that "commissions" (page 7, line 1) would be eligible for special consideration in the event foreign exchange restrictions were imposed. They also wanted to elim-inate any other special priority claims on foreign exchange by deleting the words "or otherwise" appearing later in the same sentence. It appeared that the sugg-estion regarding the deletion of "commissions" was occasioned by a misunderstand-ing on the part of most of the Iranian representatives regarding the true meaning of the word, which had to them a connotation that it was an unnecessary payment in connection with a purchase and sale transaction. However, Mr. Nemazee joined with the Embassy representatives in explaining that the term is properly used to identify payments for legitimate and necessary services. The Iranians agreed to reexamine their position on this point.

Dr. Abdoh stated that Mr. A. H. Ebtehaj, head of the Plan Organization and former Governor of Bank Melli, had raised the question whether either government under the terms of paragraph 2 (c) was required by the definition of the term "capital transfers" (page 7, line 3) to make scarce foreign exchange available to facilitate "hot money" (speculative) transfers. He had also raised the question of the eligibility of any foreign capital for special consideration under the terms of Article VII in the event foreign exchange restrictions were applied, if that capital had not entered the country by an authorized bank. On these points the Embassy representatives stated that it was generally understood that capital transfers involving the speculative movement of funds would not enjoy the benefits of Article VII, which was designed primarily to encourage

foreign investment. Even if speculative movements of foreign capital were to benefit from this article, it was likely that such benefits would be of more importance to Iran than to the United States. With regard to the movement of foreign investment capital through authorized banks, specifically through the Bank Melli, when United States capital moved to Iran, the Embassy representatives said that, to the extent international transfers of investment funds were involved in foreign investment activities, this condition probably could be met. They stated that the suggestions offered by the Government of Iran substantially altered the meaning of Article VII, and that the suggestions would have to be submitted to the Department for its consideration.

The Department's advice on the foregoing issues would be appreciated.

10. Article VIII, Paragraph 6

a. The Iranian officials asked clarification regarding the right of each contracting party to accord special advantages to products of its national fisheries. It was clear that the Iranian officials wanted information on United States policy in this regard which might be helpful in guiding the Government of Iran's policy regarding fishery resources in the Persian Gulf.

b. Mr. Nemazee requested that an additional clause be added to paragraph 6, whereby each contracting party reserved the right to accord special advantages "to barter and clearing agreements." He explained that Iran had important private and governmental barter agreements with several countries. In addition, the Government of Iran had clearing agreements with a number of important countries, including Germany, France and Italy. He said that these clearing agreements conferred important benefits on Iran; for example, the French purchased certain Iranian goods which did not have a good market elsewhere in return for Iran's permission to allow the import of canned goods into Iran, although the import of canned goods from other countries was prohibited. Mr. Nemazee stated that Iran wanted to retain the net advantages which it felt it was obtaining under these bilateral barter and clearing arrangements and that Iran was not in a position to generalize these concessions to other countries with which Iran had entered into treaties containing the most-favored-nation provision.

An unspoken consideration throughout this discussion may have been the latitude which certain Government of Iran officials wanted to have in negotiations involving the sale of "royalty" oil in competition with the marketings of Iranian oil by the proposed international oil consortium. As the Department is aware, the Government of Iran already has entered into special arrangements regarding the barter of Iranian oil for certain products of Italy and Japan. More of these barter arrangements involving Iranian oil may be under consideration.

The Embassy representatives pointed out that if each contracting party reserved the right to accord special advantages to barter and to clearing arrangements it could be inferred that it was the intention of each party to grant more favorable treatment to these arrangements than to normal commercial transactions. Dr. Abioh

stated that he recognized the logic of this position. He said that he was primarily concerned with Iran's need to impose special rules and regulations governing Iran's barter trade with the U.S.S.R. so as to minimize the possibilities of subversive activities being conducted in Iran by Soviet trade representatives. He felt that Iran's need to make special arrangements for barter agreements, primarily with the U.S.S.R., could be met by inserting appropriate language elsewhere in the draft. Mr. Nemazee, however, insisted that the special treatment which Iran wanted to continue to accord to clearing agreements would have to be included in paragraph 6.

The Embassy believes that the issue of special treatment which Iran wants to accord to clearing arrangements will be difficult to overcome. The Embassy would welcome the Department's advice on this problem and suggestions regarding the way Iran's need to regulate barter trade with the U.S.S.R. can be met.

11. Article IX, paragraph 1 (d)

Dr. Abdoh stated that, under Iranian procedure, appeals can be taken from the rulings of lower echelon customs officials to higher competent authorities within the Customs Administration. There is no appeal from the rulings of the Customs Administration to the Iranian courts. In view of the Iranian legal procedure regarding the administration of customs rulings, Dr. Abdoh suggested that paragraph 1 (d) be amended to read as follows: "allow appeals to be taken from rulings of the customs agents to higher competent authorities;".

The Embassy perceives no objection to the Iranian suggestion given above, unless the Department attaches such importance to an independent appeals system going beyond the Customs Administration that it would urge a change in the pertinent Iranian laws.

12. Article X, Paragraphs 2 and 3

The Iranian officials indicated that the Government of Iran did not desire to accord national treatment to the merchant vessels of the United States or of third countries. Mr. Nemazee stated that while Iran did not have a merchant fleet of its own, it had hopes of acquiring one in the future, to which the Government of Iran wished to preserve its right to accord special privileges. Dr. Abdoh said that another and more important consideration was that Iran did not want to accord national treatment to the merchant vessels of the Soviet Union and of Soviet Bloc countries, and that this would be impossible to avoid under the most-favored-nation principle unless the suggested revision were made.

As the Department is aware, Mr. Nemazee has certain plans to register merchant vessels under the Iranian flag. The matter is further complicated by the desire of the Iranian Government that a portion of Iran's oil exports be transported in the future in Iranian flag vessels.

The Embassy would appreciate receiving the Department's views on this problem.

13. Article XI, Paragraph 1 (a)

Dr. Abdoh recommended that on page 11, line 5, under Article XI, the word "solely" be deleted, and that in line 6, after the word "commercial", the words "and economic" be inserted. The balance of that clause after the word "consideration" would be deleted. That portion of the sentence in paragraph 1 would then read "Each High Contracting Party undertakes (a) that enterprises . . . shall make their purchases and sales involving either imports or exports affecting the commerce of the other High Contracting Party in accordance with commercial and economic considerations; and (b) that . . ." Mr. Nemazee said that this revision was aimed solely at providing an escape for the Government of Iran from accepting possible offers by Soviet and Soviet Bloc trading companies. He stated that it was within the realm of possibility that Soviet trading companies might make especially attractive offers to enterprises owned or controlled by the Government of Iran, and that if only commercial considerations were to prevail the Iranian companies would be required under the language of paragraph 1 of Article XI (which would be generalized to the U.S.S.R.) to accept the offerings of the Soviet trading companies.

The Embassy recommends that the Department accept the suggestion of the Iranian representatives.

14. Article XI, Paragraph 2 (b)

Dr. Abdoh suggested that the language referring to "concessions" be deleted so that sub-paragraph (b) would read "the awarding of Government contracts". He said that this was another instance of a word which had unfavorable connotations in Iran.

The Embassy perceives no objection to Dr. Abdoh's suggestion in this regard.

15. Article XI, Paragraph 4

In the interest of economy in the use of words, Dr. Abdoh suggested that paragraph 4 be revised to read "No enterprise of any kind of either High Contracting Party shall, if it engages in commercial, industrial, shipping of other business activities within the territories of the other High Contracting Party, . . .".

Dr. Abdoh assured the Embassy that no change in substance was intended by this revision.

The Embassy perceives no objection to this suggestion.

16. Article XIII, Paragraph 2

In line 2 of paragraph 2, Dr. Abdoh suggested the words "or application" be deleted. He stated that under Article 36, Paragraph 2, of the Statute of the International Court of Justice, the Court had authority only to interpret treaties. The Government of Iran did not want to confer, by means of a bilateral treaty, competence to the International Court of Justice to rule on or otherwise

to express a judgment on the application of the terms of a bilateral treaty to which Iran was a party. He would prefer to limit this paragraph of the draft treaty to Article 36, Paragraph 2, of the Court Statute by deletion of the words indicated.

The Embassy requests the views of the Department on this matter, particularly in light of the importance of Article XIII in relation to Article IV (Department's Instruction A-18, July 23, 1954).

17. Additional Items

(a) Dr. Abdoh noted that the present draft treaty did not contain provisions on certain matters which the Iranian representatives thought might usefully be included. He said that the Iranians would suggest the addition of a provision relating to the obligation of citizens of one country in the territory of the other to perform compulsory military service. The draft treaty submitted to the Government of Iran by the Embassy in 1943 contained such a provision. He proposed that the provision in the earlier draft be included in the present draft.

The Embassy agreed to submit this matter to the Department for its consideration. It is noted that a similar provision is included in other treaties negotiated by the United States, notably Article III of the treaty with Ireland. We preceive no objection to accepting the Iranian suggestion.

(b) Dr. Abdoh referred to the Provisional Agreement Between the United States and Iran, of July 11, 1928, concerning personal status and family law jurisdiction of American nationals in Iran and of Iranian nationals in the United States. He said that the Iranian Government would like to include in the new draft treaty provisions incorporating on a reciprocal basis some of the terms of the 1928 Agreement. Dr. Abdoh's specific suggestion was that an article be added which, essentially, would provide that citizens of either party in the territory of the other would be covered by their national law in regard to "marriage, divorce, legal separation, dowry, affiance, capacity, successism and testamentary power." He said that, in line with his suggestions regarding Article II of the draft treaty, an escape clause might be included so that either party might be relieved of its obligation to carry out its treaty responsibilities regarding the personal status of citizens of the other party resident in its territory, whenever this should be required for reasons relating to public order or morals.

In line with pertinent instructions from the Department, the Embassy representatives explained that this matter had been given serious consideration by the United States Government on previous occasions, and set forth in some detail the reasons why a reciprocal agreement of this kind would not be possible in view of the nature of the judicial system in the United States.

This subject was subsequently raised during the course of a brief conversation on October 17 between Ambassador Henderson, Dr. Abdoh, and Mr. Rountree. Ambassador Henderson again pointed out that the United States court system was such that we could not undertake an agreement on reciprocal terms along the lines

suggested by Dr. Abdoh. He said that we recognized the difficulties arising from the fact that the agreement of 1928 was on a non-reciprocal basis and indicated the possibility that the 1928 agreement might be considered as replaced by the new proposed treaty when it is concluded. (For tactical reasons the proposed new Article XIV set forth inthe Department's telegram 667, October 5, has not yet been presented to the Iranian representatives.)

Existing Departmental instruction on this subject, notably the Department's telegram No. 667 and Instruction No. A-26, of August 4, 1954, are believed to be adequate for the Embassy's purposes in discussing this matter with the Iranian representatives.

* * * *

The proposed consular provisions of the draft treaty were not included in the discussions reported herein, and Dr. Abdoh suggested that a separate meeting be arranged to take up this subject since most of the Iranian representatives present were not directly concerned with this aspect of the treaty.

It would be appreciated if the Department would consider the matters set forth above at its earliest convenience and provide the Embassy with additional information and instructions. In this connection, it is suggested that telegrams be despatched as rapidly as decisions are made upon the several items. The Iranian Government at the present time appears to be greatly interested in the conclusion of the treaty, and the officials of various ministries dealing with the matter on behalf of the Government have apparently undertaken their responsibilities with unusual enthusiasm. We hope during the course of the next several days to be in a position to resume discussions with the Iranian representatives on at least some of the issues involved, and to be prepared to provide answers to all of their points as soon as possible.

William M. Rountree,
Charge d'Affaires ad interim.

Annex 3

Aide Memoire of the U.S. Embassy in Tehran, dated 20 November 1954

20 NOV 1954

وزارت امور خارجه

AIDE-MEMOIRE

On November 16 representatives of the American Embassy met with His Excellency Dr. Jalal Abdoh of the Imperial Ministry of Foreign Affairs to pursue discussions on the proposed Treaty of Amity and Economic Relations betwwn the United States and Iran. In the course of this meeting Dr. Abdoh was fiven information concerning comments from the Department of State upon several matters discussed in a previous meeting on October 13 between representatives of the Government of Iran and of the American Embassy. The following summarizes the substance of the information conveyed by the Embassy representatives to Dr. Abdoh on November 16, and supplements the Embassy's Aide-Memoire of November 8, 1954, on the subject of the proposed treaty:

A. Article III, Paragraph 1.

In the meeting ofOctober 13 , the Iranian representative suggested that the words "privately owned" be inserted before "corporations, partnerships", etc., in the second sentence of this paragraph. The suggestion was made that letters might be exchanged between the two Governments in which it would be stated that for the purpose of interpreting the paragraph as revised it would be understood that all Iranian companies operating in the United States would enjoy the benefits ofArticleIII, indluding those Iranian companies which might be financed in whole or in part by the Government of Iran. The thought was expressed that reciprocal rights need not be conferred upon United States companies financed in whole or in part by funds from the United States Government, since any such companies or

corporations

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corporations operating in Iran would in all probability be doint so on the basis of special agreements. It was understood that this suggestion was motivated by considerations relating to problems which might arise from the most-favored-nation provision included in Iranian treaties with third countries, if alien Government-owned corporations were permitted by virtue of the treaty with the United States to operate in Iran.

In commenting upon this matter the Department of State expressed the belief that there might have been some misunderstanding of the purpose of the paragraph. The provision is intended to confer no right upon corporations to operate in Iran, but merely to provide their recognition as corporate entities, principally in orde that they may prosecute or defend their rights in courts as corporate entities. In this sense, paragraph 1 is related to paragraph 2 of the Article. Under the draft treaty no United States corporation may engage in business in Iran except as permitted by Iran. The corporate status should be recognized to assure the right of foreign corporate entities - those which sell goods or furnish other services to Iran, as well as those permitted to operate in Iran - to free access to courts in order to collect debts, protect patent rights, enforce contracts, etc. The Department has enquired as to whether the Iranian representatives might reconsider their suggestion in light of this explanation.

B. Article III, Paragraph 3.

In the meeting of October 13, the Iranian representatives questioned the provision of this paragraph relating to arbitration proceedings conducted either by alien arbitrators or at a foreign situs. At that time representatives of the Embassy explained that the private settlement of disputes, particularly by arbitration, was highly necessary in many commercial and business transactions.

Complex

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Complex technical problems involving the interpretation of commercial contracts, the grading of products entering international trade, the survey of losses covered by insurance, and matters relating to industrial property rights, are ordinarily settled by private arbitration proceedings of an interna onal character. In addition to those consideration, the Department of State has commented upon the long history of private arbitration in commercial communities. One of the main advantages of private arbitration, which is a purely voluntary arrangement of the two parties to contracts, is to expedite settlement of disputes without corwding public courts. The purpose of the provision is not to require Iran (or the United States) to enforce awards if there are substantive objections, but merely provides against discrimination of account of alien arbitrators or the foreign situs of the arbitration. Comparable provisions are included in United States treaties with other countries. It is hoped that the Iranian Government will find this provision acceptable in light of the foregoing explanation.

C. Article IV,Paragraph 1.

In the meeting of October 13 Iranian representatives suggested that the sentence reading "Each High Contracting Party.... shall refrain from applying unreasonable or discriminatory measures..." should be amended to read "Each High Contracting Party .... shall refrain from applying unlawful or discriminatory measures...".In commenting upon this suggestion the Department feels that the substitution of the word "unlawful" for "unreasonable" might destroy the effect of the provision. The original clause was intended to express a general requirement of careful regard, in accordance with the general purpose of the treaty, for legitimate interests of foreign investors without interference with the country's right of proper regulation. The change suggested might be interpreted

to mean that

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وزارت امور خارجه

to mean that any related measure might be taken so long as it was consistent with the law, regardless of whether or not it was "reasonable". It was understood during the course of the discussion of November 16 that the Iranian suggestion would be reconsidered in light of these comments.

D. Article IV, Paragraph 2.

During the course of the meeting of October 13 and in subsequent conversation with Iranian representatives, the suggestion was made that this paragraph be revised to read as follows (the first two sentences being based upon the United States treaty with Ireland):

"Property of nationals and companies of either High Cont Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just and effective compensation, nor without compliance with the requirements of international law. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

The principal discussion relating to the suggested revision applied to the deletion of the words "including interests in property", appearing in the first sentence of the original paragraph as drafted by the Department of State. The Iranian representatives noted that these words were omitted from the Irish treaty with the United States.

In commenting upon this matter, the Department of State pointed out that the Irish treaty version is not used in more recent United States treaties; nevertheless, even in that document interests in property within thecontext of the related Article are covered in

Protocol (7) of the treaty. The Department considere that coverage of indirect interests is essential and in the mutual interest of Iran and the United States, since it is important to encourage foreign development through participation in Iranian corporations as well as directly. United States investment through third country corporations also would contribute to Iran's economic development. The Department therefore considers that indirect investments are of equal importance to direct investments, and should not be omitted from the provisions of the treaty. If the Irnian Government upon reconsideration should agree, but should prefer to include interests in investments by a separate document (such as an exchange of letters), the Department would be pleased to consider this suggestion, although it would prefer, if the Iranian Government perceives no objection, to inclde the words within the Article itself.

E. Article XIII, Paragraph 2.

In the October 13 meeting, the Iranian representatives suggested tha the words "or application" be deleted from paragraph 2. with regard to this suggestion there was discussion of the circumstances under which Iran would find reference of disputes to the International Court of Justice to be acceptable.

In commenting upon this suggestion the Department expressed the view that deletion of the words"or applicatin" might serously curtailmeans of settlement of any disputes which might arise under the treaty, in view of the established practice of many nations of using the term "interpretation or application" in clauses providing for adjudication by the International Court. The Department noted that Iran has subscribed to the following agreements which contain both terms: Swedish-Iranian Commercial Air Service Agreement signed in Tehran, October 31, 1949; International Civil Aviation Convention, 1944; Constitution of the World Health Organization, 1946; Convention

on Privileges

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وزارت امور خارجه

on Privileges and Immunities of the United Nations, 1946; Treaty of Peace with Japan, 1951; Protocol Limiting Cultivation of the Poppy Plant, etc., 1953. The use of both terms has been standard in United States bilateral and multilateral treaty provisions relating to the International Court.

The Department points out that adjudication of cases under the proposed treaty would fall under paragraph 1, Article 36, of the statute (matters specifically provided for in treaties) rather than paragraph 2 (compulsory jurisdiction) of that Article. The Department expressed the hope that in light of this explanation the Iranian representatives might see fit to accept the provisions as drafted.

American Embassy,

Tehran, November 20, 1954.

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Annex 4

Telegram of the U.S. Embassy in Tehran to the U.S. Department of State, dated 27 November 1954

INCOMING TELEGRAM *Department of State*

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FOA/S

Control: 11890
Rec'd: November 27, 1954
12:36 pm

1954 NOV 29 AM 7 40

FROM: Tehran

TO: Secretary of State

NO: 1176, November 27, 5 p.m. (SECTION ONE OF TWO)

RECD
File
NOV 29 1954
Economic Section
Office of Greek, Turkish and Iranian Affairs
11/30/54

PRIORITY

Embassy officers have again reviewed with Iranian representatives Department's position on certain articles draft treaty amity and economic relations. Following articles discussed on basis aides-memoire which Embassy submitted setting forth Department's views as contained several recent telegrams:

1. Referring to Article II, paragraph 3 of FCN Treaty between US and Greece, Iranian representatives asked whether similar phrase covering MFN principle could be inserted Article II, paragraph 1 of Department's draft.

2. Re Article III, paragraph 1, Iranian officials understand Department's explanation as to scope article. They pointed out however definition of "companies" given therein applied to entire treaty and that other rights and privileges conferred on "companies" as defined Article III are significant, e.g., those specified in Article V. They asked that Department reconsider Iranian request to limit treaty definition to "privately-owned and managed" companies. Treaty definition would be supplemented by exchange letters in which US Government would agree that all Iranian corporations including those owned or controlled by Government Iran established in US would enjoy benefits of treaty. They reiterated justifications given Embassy Despatch 212, October 16, 1954 and stated they open to suggestions regarding manner in which their request might be recognized in treaty.

3. Article IV, paragraph 2, Iranians said they still preferred first two sentences only of Article VIII, paragraph 2, of Irish Treaty. Following detailed discussion this article they said Ministry Foreign Affairs was prepared accept Department draft in its entirety except for one modification; add phrase "in no (repeat no) case less than that required by international law" to end first sentence Department's draft. They said they saw advantages in including minimum standard of protection and security of property and addition this phrase would bring Department's text into closer conformity with Article VIII, paragraph 2 and Protocol 7 of Irish Treaty.

4. Re Article

611.884/11-2754

Confidential File

DEC 16 1954

HQ

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4. Re Article VI, paragraph 2, Iranian representatives requested additional information from Department about exemptions of personal nature which might be allowed to non-residents in connection with income and inheritance taxes. They suggested exchange letters which would express intent US and Iran to conclude treaty for avoidance double taxation.

HENDERSON

TT/15

INCOMING TELEGRAM *Department of State* ACTION COPY

16 CONFIDENTIAL

MESSAGE CENTER NEA

Action NEA

1954 NOV 29 AM 7 42

Control: 11849
Rec'd: November 27, 1954 10:37 a.m.

FROM: Tehran

Info SS G SP C EUR L SMSA E R P OCLO FCAS

TO: Secretary of State

NO: 1176, November 27, 5 p.m. (SECTION TWO OF TWO)

REC'D File NOV 29 1954 Economic Section Office of Greek, Turkish and Iranian Affairs

PRIORITY

5. Re Article VII paragraph 2 Iranians stated that in their consultations with group leading Iranian businessmen (who were generally in accord with Department's draft), questions of interest rate and of commissions had been raised. Iranian suggested use of term "banking interest" on ground foreign funds might be transferred Iran for short term lending in Bazaar at prevailing rate of 24 percent a year. They thought 24 percent would be rather high in context of treaty right foreign lender to convert such earnings into foreign exchange. Although Embassy representatives pointed out (A) effect of using foreign funds for such purposes would tend force Bazaar rate interest in line with banking rate and (B) Iranian laws could control use foreign funds if it were thought necessary Iranian representatives requested views Department be ascertained re their suggestion. Similarly with regard to "commissions" Iranians requested definition this term as well as assurances payments for commissions would be reasonable particularly those on sale of goods to Iran.

6. Re Article IX paragraph 3, Minister Finance informed Foreign Minister that present insurance regulations (Embassy forwarding translation to Department) required Marine Insurance be obtained from company registered in Iran on exports and on those imports for which purchase agreements had been made or documentary credits opened in Iran. All insurance companies registered Iran required to reinsure 25 percent their insurance transactions (presumably attributable to their operations in Iran) with Iran Insurance Company a government monopoly. Minister Finance was particularly concerned that loss re-insurance business might force government insurance company into bankruptcy. Iranian representatives suggested this problem be studied further by both governments.

7. Re Article XIII paragraph 2, Iranian officers appeared be impressed with Department's explanation although they observed that treaties cited by Department in which Iran had agreed to phrase "interpretation or application" were either international conventions

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conventions or bilateral treaty text was based thereon; e.g. Iran-Sweden agreement* They said Minister Foreign Affairs was giving careful consideration to Department's view and decision would be reached at early date. We obtained impression Foreign Minister likely recommend acceptance Department's wording.

8. Iranian officials requested views of Department on foregoing suggestions be expedited as well as their proposals Article XI and provisions re compulsory military service (Embassy despatch 212 October 16). They hoped prepare at early date revised annotated treaty text for consideration by Council Ministers.

HENDERSON

MDG-5

* Sentence as received.

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Annex 5

Telegram of the U.S. Department of State to the U.S. Embassy in Tehran, dated 13 December 1954

VERBATIM TEXT

L/T

DC/T

SENT TO: Amembassy, TEHRAN 1174

Treaty Article III-one To define companies for all treaty purposes as private companies establishes precedent of questionable effect on interests both countries view trend many countries toward state enterprises. Iran appears recognize this in proposing separate agreement assuring rights their public corporations in US. Latter device advertises intent discriminate against third country public corporations and unacceptable here for obvious lack mutuality.

DEPT has considered most carefully various aspects matter in effort find acceptable means accommodate Iran in purpose their proposal. Following possibly helpful. Insert new sentence after first sentence paragraph one: QUOTE It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized UNQUOTE.

Iran's proposal amend Article V-one URDES 212 and reference that Article EMBTEL 1176 suggests possible concern V-one(b) would permit foreign state enterprises acquire control Iranian corporations by purchase stock. This effect not intended but to clarify, add QUOTE, subject to the right of a Party to limit the acquisition of interests in its corporations by aliens or alien corporations UNQUOTE, which QUOTE funds UNQUOTE.

DEPARTMENT OF STATE L/T DEC 1 4 1954 TREATY BRANCH OFFICE OF THE LEGAL ADVISER

EMB

EDT:CP:VGSetser:hc 12/13/54 V. G. Setser

E/E L/T OFD GTI COMMERCE

CONFIDENTIAL

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[redacted]

CONFIDENTIAL

EMB may present aide memoire to effect not intent US proposals require either party admit enterprises of other, including public corporations, but that purpose establish reasonable standards treatment those enterprises a party may admit by own decision. Refer first two lines Article IV-4 as emphasizing this, to amended III-one as assuring against recognition juridical status being construed as right do business, to limitation right lease realty to treaty purposes in V-one(a), to protection in V-one(b) against alien acquisition control by purchase stock, and to right protect security interests in III-one(d).

DULLES

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Annex 6

U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2

U.S. FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

An Act

To define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Sovereign Immunities Act of 1976".

SEC. 2. (a) That chapter 85 of title 28, United States Code, is amended by inserting immediately before section 1331 the following new section:

"§ 1330. Actions against foreign states

"(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

"(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

"(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.".

(b) By inserting in the chapter analysis of that chapter before—

"1331. Federal question; amount in controversy; costs."

the following new item:

"1330. Action against foreign states.".

SEC. 3. That section 1332 of title 28, United States Code, is amended by striking subsections (a)(2) and (3) and substituting in their place the following:

"(2) citizens of a State and citizens or subjects of a foreign state;

"(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

"(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.".

SEC. 4. (a) That title 28, United States Code, is amended by inserting after chapter 95 the following new chapter:

"Chapter 97.—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

"Sec.

"1602. Findings and declaration of purpose.

"1603. Definitions.

"1604. Immunity of a foreign state from jurisdiction.

"1605. General exceptions to the jurisdictional immunity of a foreign state.

"1606. Extent of liability.

"1607. Counterclaims.

"1608. Service; time to answer default.

"1609. Immunity from attachment and execution of property of a foreign state.

"1610. Exceptions to the immunity from attachment or execution.

"1611. Certain types of property immune from execution.

"§ 1602. Findings and declaration of purpose

"The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. 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.

"§ 1603. Definitions

"For purposes of this chapter—

"(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

"(b) An 'agency or instrumentality of a foreign state' means any entity—

"(1) which is a separate legal person, corporate or otherwise, and

"(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other owner-

ship interest is owned by a foreign state or political subdivision thereof, and

"(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

"(c) The 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

"(d) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

"(e) A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States.

"§ 1604. Immunity of a foreign state from jurisdiction

"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.

"§ 1605. General exceptions to the jurisdictional immunity of a foreign state

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

"(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

"(2) 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;

"(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

"(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

"(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

"(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

"(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided,* That—

"(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

"(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided,* That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

"§ 1606. Extent of liability

"As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

"§ 1607. Counterclaims

"In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

"(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

"(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

"(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

"§ 1608. Service; time to answer; default

"(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

"(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

"(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

"(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

"(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official

language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a 'notice of suit' shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

"(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

"(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

"(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

"(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

"(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

"(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

"(C) as directed by order of the court consistent with the law of the place where service is to be made.

"(c) Service shall be deemed to have been made—

"(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

"(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

"(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other

responsive pleading to the complaint within sixty days after service has been made under this section.

"(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

"§ 1609. Immunity from attachment and execution of property of a foreign state

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

"§ 1610. Exceptions to the immunity from attachment or execution

"(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

"(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

"(2) the property is or was used for the commercial activity upon which the claim is based, or

"(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

"(4) the execution relates to a judgment establishing rights in property—

"(A) which is acquired by succession or gift, or

"(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

"(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of

automobile or other liability or casualty insurance covering the claim which merged into the judgment.

"(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

"(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

"(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

"(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

"(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

"(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

"(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

"§ 1611. Certain types of property immune from execution

"(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

"(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

"(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

"(2) the property is, or is intended to be, used in connection with a military activity and

"(A) is of a military character, or

"(B) is under the control of a military authority or defense agency."

Annex 7

S. Rep. No. 94-1310 U.S. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2, at 9 (1976)

Calendar No. 1243

94TH CONGRESS 2d Session | SENATE | REPORT No. 94-1310

BEST COPY AVAILABLE

DEFINE JURISDICTION OF U.S. COURTS IN SUITS AGAINST FOREIGN STATES

SEPTEMBER 27 (legislative day, SEPTEMBER 24), 1976.—Ordered to be printed

Mr. SCOTT, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 3553]

The Committee on the Judiciary, to which was referred the bill (S. 3553) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

AMENDMENTS

The amendments proposed by the Committee are as follows:

Page 2, lines 11 and 12: Strike "of process."

Page 3, following line 11: Strike "1606. Claims involving the public debt." and insert "1606. Extent of liability.", and strike "1608. Service of process; time to answer; default." and insert "1608. Service; time to answer; default."

Page 4, line 13: Strike "and" and insert "or."

Page 4, lines 9 and 10: Strike "sections 1606 and" and insert "section".

Page 5, line 14: Strike "and future."

Page 5, line 15: After "party" insert "at the time of enactment of this Act".

Page 7, line 23: Strike "service" and insert "delivery."

Page 8, line 2: Strike "served," and insert "delivered,".

Page 8, line 3: Strike "served" and insert "delivered."

Page 8, line 8: Strike "service" and insert "delivery."

Page 8, line 11: After "days" insert "either."

Page 8, line 11: Strike "service of process" and insert "delivery of notice."

Page 8, line 12: After "section" insert "or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest."

Page 8, line 13: Strike "served" and insert "delivered."

Page 8, after line 21: Insert "§ 1606. Extent of Liability."

Page 8, line 22: Strike "(c)".

Page 8, lines 23 and 24. Strike "this section or under section 1606" and insert "section 1605".

Page 9, lines 2 and 3: Strike "itself, as distinguished from a political subdivision thereof or from" and insert "except for."

Page 9, line 3: After "instrumentality" insert "thereof."

Page 9, lines 3, 4, and 5: Strike "of a foreign state shall not be liable in tort for interest prior to judgment or" and insert "shall not be liable."

Page 9, lines 13 through 25 and page 10 lines 1 through 5: Strike:

"§ 1606. Claims involving the public debt

"(a) For purposes of this section, a 'foreign state' shall not include a political subdivision of a foreign state or an agency or instrumentality of a foreign state.

"(b) Notwithstanding the provisions of section 1605 of this chapter, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States in any case relating to debt obligations incurred for general governmental purposes unless—

"(1) the foreign state has waived its immunity explicitly, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; or

"(2) the case arises under provisions codified as section 77a through 80b–21 of title 15, United States Code, as amended, or any other statute which may hereafter be administered by the United States Securities and Exchange Commission.

Page 10, line 12: Strike "sections 1605 and 1606" and insert "section 1605".

Page 10, line 21.: Strike "of process".

Page 10, lines 22 through 25; page 12, lines 1 through 25; page 12, lines 1 through 25; page 13, lines 1 through 25; page 14 lines 1 through 25; page 15, lines 1 through 25; strike:

"Subject to existing and future international agreements to which the United States is a party—

"(a) service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

"(1) by delivering a copy of the summons and of the complaint in accordance with nay special arrangement for service between the plaintiff and the foreign state or political subdivision; or

"(2) if no special arrangement exists, and if service is reasonably calculated to give actual notice—

"(A) by service of a copy of the summons and of the complaint, together with a translation into the official language of the foreign state, as directed by an authority

of the foreign state or of the political subdivision in response to a letter rogatory or request, or

"(B) by sending a copy of the summons and of the complaint, together with a translation into the official language of the foreign state, by any form of mail requiring a signed receipt to be addressed and dispatched by the clerk of the court to the official in charge of the foreign affairs of the foreign state which is, or whose political subdivision is, named in the complaint; or

"(3) if proof of service is not made within sixty days after service has been initiated under paragraph (1) or (2) of this subsection, and if—

"(A) the claim for relief arises out of an activity or act in the United States of a diplomatic or consular representative of the foreign state for which the foreign state is not immune from jurisdiction under section 1605 of this title, or

"(B) the foreign state uses diplomatic channels for service upon the United States or any other foreign state, or

"(C) the foreign state has not notified the Secretary of State prior to the institution of the proceeding in question that it prefers that service not be made through diplomatic channels,

by sending two copies of the summons and of the complaint, together with a translation into the official language of the foreign state, by any form of mail requiring a signed receipt to be addressed and dispatched by the clerk of the court, to the Secretary of State at Washington, District of Columbia, to the attention of the Director of Special Consular Services, and the Secretary shall send one copy through diplomatic channels to the foreign state and shall send a certified copy of the diplomatic note to the clerk of the court in which the action is pending. The Secretary shall maintain and publish in the Federal Register a list of foreign states upon which service may be made under subparagraphs (B) and (C) of this paragraph, and such list shall be conclusive for purposes of subparagraphs (B) and (C);

"(b) service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

"(1) by delivering a copy of the summons and of the complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

"(2) if no special arrangements exists, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent or to any other agent authorized by appointment or by law to receive service of process in the United States; or

"(3) if service cannot be made under paragraph (1) or (2) of this subsection, and if service is reasonably calculated to give actual notice—

"(A) by service of a copy of the summons and of the complaint, together with a translation into the official language of the foreign state, as directed by an authority of the foreign state or of a political subdivision in response to a letter or request, or

"(B) by sending a copy of the summons and of the complaint, together with a translation into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

"(C) as directed by order of the court consistent with the law of the place where service is to be made;

"(c) for the purposes of this section, service of process shall be deemed to have been made—

"(1) in the case of subsections (a)(1) and (b)(1), when delivered in accordance with the terms of the special arrangement;

"(2) in the case of subsections (a)(2)(A) and (b)(3)(A), when delivered as directed by an authority of the foreign state or political subdivision;

"(3) in the case of subsections (a)(2)(B) and (b)(3)(B), when received abroad by mail, as evidenced by the returned, signed receipt;

"(4) in the case of subsection (b)(2), when delivered to an officer, managing or general agent or appointed agent in the United States;

"(5) in the case of subsection (a)(3), when sent through diplomatic channels, as evidenced by a certified copy of the diplomatic note of transmittal;

"(6) in the case of subsection (b)(3)(C), when served as directed by order of the court;

"(d) in any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint or to a cross-claim, or a reply to a counterclaim, within sixty days after the service of the pleading in which a claim is asserted; and

"(e) no judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service of process in this section."

and insert:

"(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for

service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Page 16, line 3: Strike "and future".

Page 16, line 4: After "party" insert "at the time of enactment of this Act".

Page 16, line 6: Strike "and from" and insert "arrest and".

Purpose of Amendments

1. In sections 1604 and 1609 of the bill, the committee has preserved the reference to "existing international agreements" but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement. Moreover, it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement. However, the reference to existing international agreements is essential to make it clear that this bill would not supersede the special procedures provided in existing international agreements, such as the North Atlantic Treaty—Status of Forces Agreement.

2. Section 1606, relating to public debt obligations, has been deleted and the former section 1605(c) has been renumbered as section 1606.

The public debt provision was, at best, very limited. It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific government projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would be subject to U.S. regulation, such as that provided by the securities laws. Thus, on reconsideration of all of the factors, the committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.

3. Former section 1605(c), renumbered as section 1606, has also been revised in two other respects. First, it makes clear that the exception for punitive damages applies to political subdivisions of foreign states, as well as to the foreign state itself. This accords with current international practice. Second, it would eliminate the exception for interest prior to judgment. Such an exception is not supported by international practice. If a foreign state is not immune from suit, it should be liable for interest to the same extent as a private party.

4. Section 1608 has been substantially revised, with the principal revisions being in subsection (a). A number of bar association studies which otherwise expressed full support for the bill, pointed out that subsection (a), as previously drafted, created a significant gap in its provisions concerning service upon a foreign state through diplomatic channels. The Departments of Justice and State have reconsidered this provision and have indicated their preference for the revised language in the committee amendment. The committee has revised subsection (a) to fill the prior gap, and, at the same time, to minimize potential irritants to relations with foreign states. Subsection (a), as revised, would provide that service of a summons and complaint also be accompanied by a new document, called a notice of suit. The notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.

The revised paragraphs (a)(2) and (b)(2) of section 1608 give emphasis to service under an "applicable international convention on service of judicial documents." At present, there is such an applicable international convention—the Hague Convention on Service Abroad of Judicial and Extrajudical Documents, TIAS 6638, 20 UST 361—to which the Senate gave its advice and consent to ratification, and which entered into force for the United States in 1969. At present 18 nations are parties to this convention. In the committee's view, if a country has entered into such an international convention, priority should be given to this method for service.

Subsection (d) has been revised to delete the references to cross-claims and counterclaims. The existence of a counterclaim against a foreign state indicates that the foreign state has already entered an appearance in the lawsuit; thus, there is no necessity for affording

the foreign state with a special time period in which to respond to a counterclaim. When a cross-claim is filed against a foreign state, rules 19 and 20, of the Federal Rules of Civil Procedure, require that original service be made. Under rules the bill, this would mean service under section 1608 (a) or (b).

5. Finally, the committee has made a few perfecting amendments in the bill's provisions involving maritime jurisdiction. These include changes in section 1605(b) to make it clear that the delivery of notice to a master of a vessel under paragraph (1) does not itself constitute "service"; and to make clear, in cases where the plaintiff is unaware that he has arrested a foreign state-owned vessel, that the 10-day period in paragraph (2) does not begin to run until the plaintiff has determined that a foreign state owns the vessel. Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

Purpose of the Bill

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.

Statement

It is noted that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity; and, in the event a plaintiff should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the plaintiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

In a modern world where foreign state enterprises are every day participants in commercial activities, S.3553 is urgently needed legislation. The bill, which has been drafted over many years and which has involved extensive consultations within the administration, among bar associations and in the academic community, would accomplish four objectives:

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatitc influences to bear upon the State Department's determiination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment S. 3553 seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

Background

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). S. 3553 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943) and *Mexico* v. *Hoffman*, 324 U.S. 30 (1945).

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952. 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

The United States in Foreign Courts

Since World War II, the United States has increasingly become involved in litigation in foreign courts. This litigation has involved such diverse activities as the purchase of goods and services by our embassies, employment of local personnel by our military bases, the construction or lease of buildings for our foreign missions, and traffic accidents involving U.S. Government-owned vehicles.

In the mid-1950's, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the Department of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contracts with the forum were present. Thus, in the 1960's, it became the practice of the Department of Justice to avoid claiming

immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the Department would not recognize a foreign state's immunity in this country.

In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts. The United States cannot take recourse to a foreign affairs agency abroad as other states have done in this country when they seek a suggestion of immunity from the Department of State.

History of the Bill

S. 3553 is the product of many years of work by the Departments of State and Justice, in consultation with members of the bar and the academic community. Study of possible legislation began in the mid-1960's. In the early 1970's, a number of draft bills were prepared and submitted for comment to many authorities and practitioners in the international law field. On January 31, 1973, a bill (S. 566) was introduced in the 93d Congress, and referred to the Committee on the Judiciary. Although extensive advice had already been obtained from the private sector, in the course of the committee's consideration it became apparent that a few segments of the private bar had not been fully consulted. It was pointed out that the 93d Congress bill contained some technical deficiencies which could be remedied—particularly with respect to maritime cases and the jurisdictional provisions. The American Bar Association at the August 1976 meeting of its House of Delegates adopted a resolution urging approval of S. 3553.

The current bill, S. 3553, contains revised language. It is essentially the same bill as was introduced in 1973, except for the technical improvements that have been made in the interim.

Section-by-Section Analysis

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. Practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588–589 (1943).)

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state

has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

Aside from setting forth comprehensive rules governing sovereign immunity, the bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.

Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. I, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested * * * in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof and foreign States * * *." (art. I, sec. 8, cl. 18; art. III, sec. 2, cl. 1). See *National Bank* v. *Republic of China*, 348 U.S. 356, 370-71 (1955) (Reed J., dissenting); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964).

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) *Subject Matter Jurisdiction.*—Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605–1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only

where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a) (2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91–358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605–1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605–1607 are all carefully interconnected.

(c) *Effect of an Appearance.*—Section 1330(c) states that a mere appearance by a foreign state in an action does not confer personal jurisdiction with respect to claims which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term "transaction or occurrence" includes each basis set forth in sections 1605–1607 for not granting immunity, including waivers.

SEC. 3. DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section

1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). See analysis to section 1603(b).

SEC. 4. NEW CHAPTER 97: SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

Section 1602. Findings and declaration of purpose

Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform. This restrictive theory has been adhered to by the Department of State since the "Tate Letter" of May 19, 1952. (26 Dept. of State Bull. 984 (1952).)

Section 1603. Definitions

Section 1603 defines five terms that are used in the bill:

(a) *Foreign state.*—Subsection (a) defines the term foreign state as used in all provisions of chapter 97, except section 1608. In section 1608, the term "foreign state" refers only to the sovereign state itself.

As the definition indicates, the term "foreign state" as used in every other section of chapter 97 includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term "political subdivisions" includes all governmental units beneath the central government, including local governments.

(b) *Agency or instrumentality of a foreign state.*—Subsection (b) defines an "agency or instrumentality of a foreign state" as an entity (1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 1332(c) and (d) nor created under the laws of any third country.

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

The second criterion requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

The third criterion excludes entities which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d)—for example a corporation organized and incorporated under the laws of the State of New York but owned by a foreign state. (See *Amtorg Trading Corp.* v. *United States*, 71 F. 2d 524 (C.C.P.A. 1934).) Also excluded are entities which are created under the laws of third countries. The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature.

An entity which does not fall within the definitions of sections 1603 (a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court. On the other hand, the fact that an entity is an "agency or instrumentality of a foreign state" does not in itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions contained in the bill (see sections 1605–1607 and 1610–1611) was applicable.

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

(c) *United States.*—Paragraph (c) of section 1603 defines "United States" as including all territory and waters subject to the jurisdiction of the United States.

(d) *Commercial activity.*—Paragraph (e) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government

to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity. By the same token, a foreign state's activities in and "contacts" with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction (see sec. 1330) or to assets which could be subjected to attachment or execution with respect to unrelated commercial transactions (see sec. 1610(b)). However, a transaction to obtain goods or services from private parties would not lose its otherwise commerical character because it was entered into in connection with an AID program. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

(c) *Commercial activity carried on in the United States by a foreign state.*—Are paragraph (d) of section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States—for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Section 1604. Immunity of foreign states from jurisdiction

New chapter 97 of title 28, United States Code, starts from a premise of immunity and then creates exceptions to the general principle. The

chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605–1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

The immunity from jurisdiction provided in section 1604 applies to proceedings in both Federal and State courts. Section 1604 would be the only basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State court in the United States.

All immunity provisions in sections 1604 through 1607 are made subject to "existing" treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes.

Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.

(a)(1) *Waivers.*—Section 1605(a)(1) treats explicit and implied waivers by foreign states of sovereign immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a foreign state may waive its immunity in a contract with a private party. Since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities.

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

The language, "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver," is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver. In other words, if the foreign state agrees to a waiver of sovereign immunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

(a)(2) *Commercial activities having a nexus with the United States.*—Section 1605(a)(2) treats what is probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity. The definition of a "commercial activity" is set forth in section 1603(d) of the bill, and is discussed in the analysis to that section.

Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the "commercial activity [is] carried on in the United States by the foreign state." This phrase is defined in section 1603(e) of the bill. See the analysis to that section.

The second situation, and "act performed in the United States in connection with a commercial activity of the foreign state elsewhere," looks to conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere. Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; and act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country.

Although some or all of these acts might also be considered to be a "commercial activity carried on in the United States," as broadly defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specifc act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

The third situation—"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"—would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

Neither the term "direct effect" nor the concept of "substantial contacts" embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913), or *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F. 2d 803 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969)

(a)(3) *Expropriation claims.*—Section 1605(a)(3) would, in two categories of cases, deny immunity where "rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).[1]

[1] The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be improperly asserted in an effort to block litigation. Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts committed and effective within their own territory. For example, in the Supreme Court's recent decision in *Dunhill* v. *Republic of Cuba*, 44 U.S.L.W. 4665, No. 73-1288 (May 24, 1976, the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted to assert that a refusal to pay a commercial obligation was not reviewable because it was an "act of state".

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country. The conclusions of the committee are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

"[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." (Amicus Brief of United States, p. 41.)

(a)(4) *Immovable, inherited, and gift property.*—Section 1605(a)(4) denies immunity in litigation relating to rights in real estate and in inherited or gift property located in the United States. It is established that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted, 26 Department of State Bulletin 984 (1952). It does not matter whether a particular piece of property is used for commercial or public purposes.

It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus, the Vienna Convention on Diplomatic Relations, concluded in 1961, 23 UST. 3227, TIAS 7502 (1972), provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permited under the Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

(a)(5) *Noncommercial torts.*—Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

As used in section 1605(a)(5), the phrase "tortious act or omission" is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h).

Like other provisions in the bill, section 1605 is subject to existing international agreements (see section 1604), including Status of Forces Agreements; if a remedy is available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).

Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section 1605(a)(5)

would not govern suits against diplomatic or consular representatives but only suits against the foreign state. It is noteworthy in this regard that while article 43 of the Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS 6820 (1970), expressly abolishes the immunity of consular officers with respect to civil actions brought by a third party for "damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft," there is no such provision in the Vienna Convention on Diplomatic Relations of 1961, *supra*. Consequently, no case relating to a traffic accident can be brought against a member of a diplomatic mission.

The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law. See, however, section 1605(c).

(b) *Maritime liens.*—Section 1605(b) denies immunity to a foreign state in cases where (i) a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign state, (ii) the maritime lien is based upon a commercial activity of the foreign state, and (iii) the conditions in paragraphs (1) and (2) of section 1605(b) have been complied with.

The purpose of this subsection is to permit a plaintiff to bring suit in a U.S. district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an in personam action against the foreign state in a manner analogous to bringing such a suit against the United States. Cf. 46 U.S.C. 741, *et seq.* In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit. Instead, as provided in paragraph (1), a copy of the summons and complaint must be delivered to the master or other person having possession of the vessel or cargo (such as the second in command of the ship).

If, however, the vessel or its cargo is arrested or attached, the plaintiff will lose his in personam remedy and the foreign state will be entitled to immunity—except in the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. By contrast, evidence that a party had relied on a standard registry of ships, which did not reveal a foreign state's interest in a vessel, would be prima facie evidence of the party's unawareness that a vessel of a foreign state was involved. More generally, a party could seek to establish its lack of awareness of the foreign state's ownership by submitting affidavits from itself and from its counsel. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, is right to immunity from arrest.

Under paragraph (2), the plaintiff must also be able to prove that the procedures for service under section 1608 (a) or (b) have commenced—for example, that the clerk of the court has mailed the requisite copies of the summons and complaint. The plaintiff need

not show that service has actually been made under section 1608(c). The reason for this second requirement is to help make certain that the foreign state concerned receives prompt and actual notice of the institution of a suit in admiralty in the United States, even if the copies served on the master of the vessel should fail to reach the foreign state.

Section 1605(b) would not preclude a suit in accordance with other provisions of the bill—e.g., section 1605(a)(2). Nor would it preclude a second action, otherwise permissible, to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.

Section 1606. Extent of liability

Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages. Under current international practice, punitive damages are usually not assessed against foreign states. See 5 Hackwork, Digest of International Law, 723–26 (1943); Garcia-Amador, State Responsibility, 94 Hague Recueil des Cours 365, 476–81 (1958). Interest prior to judgment and costs may be assessed against a foreign state just as against a private party. Cf. 46 U.S.C. 743, 745.

Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609–1610.

The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply.[2] Or, if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discoverey.

Section 1607. Counterclaims

Section 1607 applies to counterclaims against a foreign state which brings an action or intervenes in an action in a Federal or State court. It would deny immunity in three situations. First, immunity would be denied as to any counterclaim for which the foreign state would not be entitled to immunity under section 1605, if the counterclaim had been brought as a direct claim in a separate action against the foreign state. This provision is based upon article I of the European Convention on State Immunity 11 Int'l Legal Materials 470 (1972).

Second, even if a foreign state would otherwise be entitled to immunity under sections 1604–1606, it would not be immune from a

[2] e.g. 5 U.S.C. 552 concerning public information.

counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." This is the same terminology as that used in rule 13(a) of the Federal Rules of Civil Procedure and is consistent with section 70(2)(b), Restatement of the Law, Second, Foreign Relations Law of the United States (1965). Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from the same transaction or occurrence. See, *Alfred Dunhill of London, Inc.*, v. *Cuba*, —— U.S. —— No. 73–1288, decided May 24, 1976).

Third, notwithstanding that the foreign state may be immune under subsections (a) and (b), the foreign state nevertheless would not be immune from a setoff. Subsection (c) codifies the rule enunciated in *National Bank* v. *Republic of China*, 348 U.S. 356 (1965).

Section 1608. Service; time to answer; default

Section 1608 sets forth the exclusive procedures with respect to service on, the filing of an answer or other responsive pleading by, and obtaining a default judgment against a foreign state or its political subdivisions, agencies or instrumentalities. These procedural provisions are intended to fill a void in existing Federal and State law, and to insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts.

Provisions in section 1608 are closely interconnected with other parts of the bill—particularly the proposed section 1330 and sections 1605–1607. If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605–1607 are satisfied, personal jurisdiction over a foreign state would exist under section 1330(b). In addition to its integral role in the bill, section 1608 follows on the precedents of other statutory service provisions in areas of unusual Federal interest. See, for example, 8 U.S.C. 1105a(3) and 16 U.S.C. 21(f) and 77v.

(a) *Service on Foreign States and Political Subdivisions.*—Subsection (a) of section 1608 sets forth the exclusive procedures for service on a foreign state, or political subdivision thereof, but not on an agency or instrumentality of a foreign state which is covered in subsection (b). There is a hierarchy in the methods of service. Paragraph (1) provides for service in accordance with any special arrangement which may have been agreed upon between a plaintiff and the foreign state or political subdivision. If such an arrangement exists, service must be made under this method. The purpose of subsection (a)(1) is to encourage potential plaintiffs and foreign states to agree to a procedure on service.

If no special arrangement exists, paragraph (2) would permit service in accordance with an applicable international convention on service of judicial documents. The only such convention to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS 6638 (1969). In order for an international convention to be "applicable", both the United States and the foreign state concerned must be a party to the convention.

If neither an applicable international convention nor a special arrangement exists, paragraph (3) would provide for service by mail.

The clerk of the court would send a copy of a "notice of suit" as prescribed by the Secretary of State by regulation, together with a copy of the summons and complaint, by mail to the head of the foreign state's ministry of foreign affairs or its equivalent. This procedure is based on rule 4(i)(1)(D), F.R. Civ. P.

Finally, as a method of last resort, paragraph (4) would provide for service through diplomatic channels if service could not be made by mail within 30 days. The clerk of the court would send two copies of the notice of suit, summons and complaint to the Secretary of State for transmittal through diplomatic channels. Transmittal through diplomatic channels would mean that the Office of Special Consular Services in the Department of State will pouch a copy of these papers to the U.S. Embassy in the foreign state in question. The U.S. Embassy, in turn, would prepare a diplomatic note of transmittal and deliver the diplomatic note with the other papers to the appropriate official in the ministry of foreign affairs of the foreign state. Use of diplomatic channels could also include transmittal of the papers by the Department of State to the foreign state's embassy in Washington, D.C. "Transmittal" of the notice of suit, summons and complaint does not require that the foreign state formally accept these papers. It only requires that these papers be transmitted in such a way that the foreign state has actual notice of the suit. All papers to be served would be accompanied by translations into an official language of the foreign state. Finally, the Secretary of State would be required to send back to the court the diplomatic note used in transmitting the papers to the foreign state.

A "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures.

Service through diplomatic channels is widely used in international practice. It is provided for in the European Convention on State Immunity, *supra*, which was negotiated by 18 European nations. It is accepted and indeed preferred by the United States in suits brought against the United States Government in foreign courts. See Department of State's circular instruction No. CA–10922, June 16, 1961, 56 Am. J. Int'l L. 523–33 (1962).

(b) *Service on Agencies or Instrumentalities*—Subsection (b) of section 1608 provides the methods under which service shall be made upon an agency or instrumentality of a foreign state, as defined in section 1603(b). Again, service must always be made in accordance with any special arrangement for service between a plaintiff and the agency or instrumentality. If no such arrangement exists, then service must be made under subsection (b)(2) which provides for service upon officers, or managing, general or appointed agents in the United States of the agency or instrumentality—or in the alternative, in accordance with an applicable international convention such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, *supra*.

If there is no special arrangement and if the agency or instrumentality has no representative in the United States, service may be made

under one of the three methods provided in subsection (b)(3). The first two methods provide for service by letter rogatory or request or by mail. The third method, subparagraph (C), authorizes a court to fashion a method of service, for example under rule 83, F.R. Civ. P., provided the method is "consistent with the law of the place where service is to be made." This latter language takes into account the fact that the laws of foreign countries may prohibit the service in their country of judicial documents by process servers from the United States. It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted. It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd.* v. *Moore*, 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).

(c) *When Service Is Made.*—Subsection (c) of section 1608 establishes the time when service shall be deemed to have been made under each of the methods provided in subsections (a) and (b).

(d) *Time To Answer or Reply.*—Subsection (d) of section 1608 gives each foreign state, political subdivision thereof or agency or instrumentality of a foreign state or political subdivision up to 60 days from the time service is deemed to have been made in which to answer or file a responsive pleading. This corresponds to similar provisions applicable in suits against the United States or its officers or agencies. Rule 12(a), F.R. Civ. P.

(e) *Default Judgments.*—Subdivision (e) of section 1608 provides that no default judgement may be entered against a foreign state, or its political subdivisions, agencies or instrumentalities, "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This is the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R. Civ. P. In determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign state.[3] Once the default judgment is entered, notice of such judgment must be sent in the manner prescribed for service in sections 1608(a) or (b).

Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state. First, the current practice of attempting to commence a suit by attachment of a foreign state's property would be prohibited under section 1609 in the bill, because of foreign relations considerations and because such attachments are rendered unnecessary by the liberal service and jurisdictional provisions of the bill. See the analysis to section 1609.

A second means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Con-

[3] Cf. Statement in the analysis of section 1606 noting that appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

vention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458–59 (1974).

Section 1609. Immunity From Attachment and Execution of Property of a Foreign State

As in the case of section 1604 of the bill with respect to jurisdiction, section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(a), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611. Here, it should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit.

Attachment of foreign government property for jurisdictional purposes has been recognized "where under international law a foreign government is not immune from suit", and where the property in the United States is commercial in nature. *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct. N.Y. 1959). Even in such cases, however, it has been recognized that property attached for jurisdictional purposes cannot be retained to satisfy a judgment because, under current practice, the property of a foreign sovereign is immune from execution.

Attachments for jurisdictional purposes have been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the jurisdiction. Such cases frequently require the application of foreign law to events which occur entirely abroad.

Such attachments can also give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

At the same time, one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States. Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim for which the foreign state is not entitled to immunity. The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department.

Section 1610. Exceptions to Immunity from Attachment or Execution

Section 1610 sets forth circumstances under which the property of a foreign state is not immune from attachment or execution to satisfy a judgment. Though the enforcement or judgments against foreign state property remains a somewhat controversial subject in interna-

tional law, there is a marked trend toward limiting the immunity from execution.

A number of treaties of friendship, commerce and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2, 1953, art. 18(2), 4 UST 2063, TIAS 2863). The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 196 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial services in the same way as against privately owned vessels. Although not a party to this treaty, the United States follows a policy of not claiming immunity for its publicly-owned merchant vessels, both domestically, 46 U.S.C. 742, 781, and abroad, 46 U.S.C. 747; 2 Hackworth, Digest of International Law, 438–39 (1941). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS 5639, to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used in commercial service.

However, the traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. *Dexter and Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930). Even after the "Tate Letter" of 1952, this continued to be the position of the Department of State and of the courts. See, *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469, 743 (Sup. Ct. N.Y. 1959). Sections 1610(a) and (b) are intended to modify this rule by partially lowering the barrier of immunity from execution, so as to make immunity conform more closely with the provisions on jurisdictional immunity in the bill.

(a) *Execution Against Property of Foreign States.* Section 1610(a) relates to execution against property of a foreign state, including a political subdivision, agency, or instrumentality of a foreign state. The term "attachment in aid of execution" is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. See rule 69, F.R. Civ. P. The property in question must be used for a commercial activity in the United States. If so, attachment in aid of execution, and execution, upon judgments entered by Federal or State courts against the foreign state would be permitted in any of the circumstances set forth in paragraphs (1)–(5) of section 1610(a).

Paragraph (1) relates to explicit and implied waivers, and is governed by the same principles that apply to waivers of immunity from jurisdiction under section 1605(a)(1) of the bill. A foreign state may have waived its immunity from execution, *inter alia*, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution. As in section 1605(a)(1), a waiver on behalf of an agency or instrumentality of a foreign state may be made either by the agency or instrumentality or by the foreign state itself.

Paragraph (2) of section 1610(a) denies immunity from execution against property used by a foreign state for a commercial activity

in the United States, provided that the commercial activity gave rise to the claim upon which the judgment is based. Included would be commercial activities encompassed by section 1605(a)(2). The provision also includes a commercial activity giving rise to a claim with respect to which the foreign state has waived immunity under section 1605(a)(1). In addition, it includes a commercial activity which gave rise to a maritime lien with respect to which an admiralty suit was brought under section 1605(b). One could, of course, execute against commercial property other than a vessel or cargo which is the subject of a suit under section 1605(b), provided that the property was used in the same commercial activity upon which the maritime lien was based.

The language "is or was used" in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. See *Prelude Corp.* v. *Owners of m/V Atlantic*, 1971, A.M.C. 2651 (N.D. Calif.); *American Hawaiian Ventures* v. *M.V.J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

Paragraph (3) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and which has been taken in violation of international law or has been exchanged for property taken in violation of international law. See the analysis to section 1605(a)(3).

Paragraph (4) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residences of the chiefs of such missions. This exemption applies to all of the situations encompassed by sections 1610 (a) and (b): embassies and related buildings could not be deemed to be property used for a "commercial" activity as required by section 1610(a); also, since such buildings are those of the foreign state itself, they could not be property of an agency or instrumentality engaged in a commercial activity in the United States within the meaning of section 1610(b).

Paragraph (5) of section 1610(a) would deny immunity with respect to obligations owed to a foreign state under a policy of liability insurance. Such obligations would after judgment be treated as property of the foreign state subject to a garnishment or related remedies in aid or in place of execution. The availability of such remedies would, of course, be governed by applicable State or Federal law. Paragraph (5) is intended to facilitate recovery by individuals who may be injured in accidents, including those involving vehicles operated by a foreign state or by its officials, or employees acting within the scope of their authority.

(b) *Additional Execution Against Agencies and Instrumentalities Engaged in Commercial Activity in the United States.*—Section 1610 (b) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in section 1610(a). However, the agency or instrumentality must be engaged in a commercial activity in the United States. If so, the plaintiff may obtain an attachment in aid of execution or execution against *any* property, commercial and noncommercial, of the agency or instrumentality, but only in the circumstances set forth in paragraphs (1) and (2).

Paragraph (1) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States, where the agency or instrumentality has waived its immunity from execution. See the analysis to paragraph (1) of section 1610(a).

Paragraph (2) of section 1610(b) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States in order to satisfy a judgment relating to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3) or (5), or 1605(b). Property will be subject to execution irrespective of whether the property was used for the same commercial or other activity upon which the claim giving rise to the judgment was based.

Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971, A.M.C. 2651 (N.D. Calif.). There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. See the analysis to section 1610(a)(2).

(c) *Necessity of court order following reasonable notice.*—Section 1610(c) prohibits attachment or execution under sections 1610 (a) and (b) unless the court has issued an order for such attachment and execution. In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(e). In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.

(d) *Attachments upon explicit waiver to secure satisfaction of a judgment.*—Section 1610(d) relates to attachment against the property of a foreign state, or of a political subdivision, agency or instrumentality of a foreign state, prior to the entry of judgment or prior to the lapse of the "reasonable period of time" required under section 1610(c). Immunity from attachment will be denied only if the foreign state, political subdivision, agency or instrumentality has explicitly waived its immunity from attachment prior to judgment, and only if the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to secure jurisdiction. This subsection provides, in cases where there has been an explicit waiver, a provisional remedy, for example to prevent assets from being dissipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment.

Section 1611. Certain types of property immune from execution

Section 1611 exempts certain types of property from the immunity provisions of section 1610 relating to attachment and execution.

(a) *Property held by international organizations.*—Section 1611 (a) precludes attachment and execution against funds and other property of certain international organizations. The purpose of this subsection is to permit international organizations designated by the President pursuant to the International Organizations Immunities Act, 22 U.S.C. 288, *et seq.*, to carry out their functions from their offices located in the United States without hindrance by private claimants seeking to attach the payment of funds to a foreign state; such attachments would also violate the immunities accorded to such international institutions. See also article 9, section 3 of the Articles of Agreement of the International Monetary Fund, TIAS 1501, 60 Stat. 1401. International organizations covered by this provision would include, *inter alia*, the International Monetary Fund and the World Bank. The reference to "international organizations" in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.

(b) *Central bank funds and military property.*—Section 1611(b)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

Section 1611(b)(2) provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of two conditions: the property is either (A) of a military character or (B) under the control of a military authority or defense agency. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, warships, tanks, communications equipment. Both the character and the function of the property must be military. The purpose of this

condition is to avoid frustration of United States foreign policy in connection with purchase of military equipment and supplies in the United States by foreign governments.

The second condition is intended to protect other military property, such as food, clothing, fuel and office equipment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control, and a "defense agency" is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military (e.g., surplus military equipment withdrawn from military use would not be immune). Both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act.

SEC. 5. VENUE

This section amends 28 U.S.C. § 1391, which deals with venue generally. Under the new subsection (f), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred." This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(b) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(b)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. § 1391(c).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (f) would, of course, not apply to entities that

are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(b).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(h), F.R. Civ. P.)

SEC. 6. REMOVAL OF CASES FROM STATE COURTS

The bill adds a new provision to 28 U.S.C. 1441 to provide for removal to a Federal district court of civil actions brought in the courts of the States against a foreign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446.) However, in view of the 60-day period provided in section 1608(c) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition of removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (*Cf.* 28 U.S.C. 2402, precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court. (*Cf.* rule 81(c), F.R. Civ. P.) Because the judicial power of the United States specifically encompasses actions "between a State, or the Citizens thereof, and foreign States" (U.S. Constitution, art. III, sec. 2, cl. 1), this preemption of State court procedures in cases involving foreign sovereigns is clearly constitutional.

This section, again, would not apply to entities owned by a foreign state which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d), or created under the laws of a third country.

SEC. 7. SEVERABILITY OF PROVISIONS

This action provides that if a portion of the act or any application of the act should be found invalid for any reason, such invalidity would not affect any other provision or application of the act.

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.

Cost

This Committee is informed by the Congressional Budget Office that enactment of this legislation would have no budgetary impact.

Changes in Existing Law

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law is shown in roman, matter repealed enclosed in black brackets, and new matter is printed in italic):

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

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Part IV—Jurisdiction and Venue

Chap.		Sec.
81.	Supreme Court	1251
83.	Courts of Appeals	1291
85.	District Courts; Jurisdiction	1331
87.	District Courts; Venue	1391
89.	District Courts; Removal of Cases from State Courts	1441
91.	Court of Claims	1491
93.	Court of Customs and Patent Appeals	1541
95.	Customs Court	1581
97.	*Jurisdictional Immunities of Foreign States*	1602

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CHAPTER 85.—DISTRICT COURTS: JURISDICTION

Sec.

1330. Actions against foreign states.
1331. Federal question; amount in controversy; costs.
1332. Diversity of citizenship; amount in controversy; costs.
1333. Admiralty, maritime and prize cases.
1334. Bankruptcy matters and proceedings.
1335. Interpleader.
1336. Interstate Commerce Commission's orders.
1337. Commerce and anti-trust regulations.
1338. Patents, copyrights, trade-marks and unfair competition.[1]
1339. Postal matters.
1340. Internal revenue; customs duties.
1341. Taxes by States.
1342. Rate orders of State agencies.
1343. Civil rights [and elective franchise.][1]
1344. Election disputes.
1345. United States as plaintiff.
1346 United States as defendant.
1347. Partition action where United States is joint tenant.
1348. Banking association as party.
1349. Corporation organized under federal law as party.
1350. Alien's action for tort.
1351. Consuls and vice consuls as defendants.
1352. Bonds executed under federal law.
1353. Indian allotments.
1354. Land grants from different states.
1355. Fine, penalty or forfeiture.
1356. Seizures not within admiralty and maritime jurisdiction.
1357. Injuries under Federal laws.
1358. Eminent domain.

[1] Section catchline amended without amending analysis.

CHAPTER 85.—DISTRICT COURTS: JURISDICTION—CONTINUED

Sec.
1359. Parties collusively joined or made.
1360. State civil jurisdiction in actions to which Indians are parties.
1361. Action to compel an officer of the United States to perform his duty.
1362. Indian tribes.
1363. Construction of references to laws of the United States or Acts of Congress.

* * * * * * *

§ 1330. Action against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

* * * * * * *

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

[(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.]

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State

of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. (June 25, 1948, ch. 646, 62 Stat. 930; July 26, 1956, ch. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85–554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88–439, § 1, 78 Stat. 445.)

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§ 1391. Venue generally.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought. (June 25,

1948, ch. 646, 62 Stat. 935; Oct. 5, 1962, Pub. L. 87–748, § 2, 76 Stat. 744; Dec. 23, 1963, Pub. L. 88–234, 77 Stat. 473; Nov. 2, 1966, Pub. L. 89–714, §§ 1, 2, 80 Stat. 1111.)

* * * * * * *

§ 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * * * * * *

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

1602. Findings and declaration of purpose.
1603. Definitions.
1604. Immunity of a foreign state from jurisdiction.
1605. General exceptions to the jurisdictional immunity of a foreign state.
1606. Extent of liability.
1607. Counterclaims.
1608. Service; time to answer; default.
1609. Immunity from attachment and execution of property of a foreign state.
1610. Exceptions to the immunity from attachment or execution.
1611. Certain types of property immune from execution.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction

of judgments rendered against them in connection with their commercial activities. 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.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing of international agreements of 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.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) 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;

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(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act of omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section, or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: Provided, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned; or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state

and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other cast under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunitu from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attach-

ment, arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachments in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry

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of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603 (a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachments prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if 1—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

"§ 1611. Certain types of property immune from execution

"(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 (of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, not withstanding any withdrawal of the waiver which the bank authority or government may purport to effect except in accordance with the terms of the waivers; or

(3) the property is, or is intended to be, used in connection with a military activity and

(A) is a military character, or

(B) is under the control of a military authority or defense agency.

* * * * * * *

Recommendation

The Committee believes that S. 3553, as amended, is meritorious and recommends that it do pass.

○

Annex 8

Section 6 of the U.S. Export Administration Act of 1979, Pub. L. 96-72, Sept. 29, 1979, 93 Stat. 503

Public Law 96-72
96th Congress

An Act

To provide authority to regulate exports, to improve the efficiency of export regulation, and to minimize interference with the ability to engage in commerce.

Sept. 29, 1979
[S. 737]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Export Administration Act of 1979.

SHORT TITLE

SECTION 1. This Act may be cited as the "Export Administration Act of 1979".

50 USC app. 2401 note.

FINDINGS

SEC. 2. The Congress makes the following findings:

50 USC app. 2401.

(1) The ability of United States citizens to engage in international commerce is a fundamental concern of United States policy.

(2) Exports contribute significantly to the economic well-being of the United States and the stability of the world economy by increasing employment and production in the United States, and by strengthening the trade balance and the value of the United States dollar, thereby reducing inflation. The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment, particularly when restrictions applied by the United States are more extensive than those imposed by other countries.

(3) It is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, which would strengthen the Nation's economy.

(4) The availability of certain materials at home and abroad varies so that the quantity and composition of United States exports and their distribution among importing countries may affect the welfare of the domestic economy and may have an important bearing upon fulfillment of the foreign policy of the United States.

(5) Exports of goods or technology without regard to whether they make a significant contribution to the military potential of individual countries or combinations of countries may adversely affect the national security of the United States.

(6) Uncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States.

(7) Unreasonable restrictions on access to world supplies can cause worldwide political and economic instability, interfere with free international trade, and retard the growth and development of nations.

(8) It is important that the administration of export controls imposed for national security purposes give special emphasis to the need to control exports of technology (and goods which

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security controls under this section which contribute to that particular military use, regardless of whether such goods or technology are available to that country from sources outside the United States; and

(B) may take such additional steps under this Act with respect to the party referred to in subparagraph (A) as are feasible to deter the further military use of the previously exported goods or technology.

"Diversion to significant military use" and "significant military use".

(2) As used in this subsection, the terms "diversion to significant military use" and "significant military use" means the use of United States goods or technology to design or produce any item on the United States Munitions List.

FOREIGN POLICY CONTROLS

50 USC app. 2405.

SEC. 6. (a) AUTHORITY.—(1) In order to carry out the policy set forth in paragraph (2)(B), (7), or (8) of section 3 of this Act, the President may prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States, to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations. The authority granted by this subsection shall be exercised by the Secretary, in consultation with the Secretary of State and such other departments and agencies as the Secretary considers appropriate, and shall be implemented by means of export licenses issued by the Secretary.

Expiration date.

(2) Export controls maintained for foreign policy purposes shall expire on December 31, 1979, or one year after imposition, whichever is later, unless extended by the President in accordance with subsections (b) and (e). Any such extension and any subsequent extension shall not be for a period of more than one year.

Export license denial.

(3) Whenever the Secretary denies any export license under this subsection, the Secretary shall specify in the notice to the applicant of the denial of such license that the license was denied under the authority contained in this subsection, and the reasons for such denial, with reference to the criteria set forth in subsection (b) of this section. The Secretary shall also include in such notice what, if any, modifications in or restrictions on the goods or technology for which the license was sought would allow such export to be compatible with controls implemented under this section, or the Secretary shall indicate in such notice which officers and employees of the Department of Commerce who are familiar with the application will be made reasonably available to the applicant for consultation with regard to such modifications or restrictions, if appropriate.

Export license application, review.

(4) In accordance with the provisions of section 10 of this Act, the Secretary of State shall have the right to review any export license application under this section which the Secretary of State requests to review.

(b) CRITERIA.—When imposing, expanding, or extending export controls under this section, the President shall consider—

(1) the probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls;

(2) the compatibility of the proposed controls with the foreign policy objectives of the United States, including the effort to counter international terrorism, and with overall United States

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policy toward the country which is the proposed target of the controls;

(3) the reaction of other countries to the imposition or expansion of such export controls by the United States;

(4) the likely effects of the proposed controls on the export performance of the United States, on the competitive position of the United States in the international economy, on the international reputation of the United States as a supplier of goods and technology, and on individual United States companies and their employees and communities, including the effects of the controls on existing contracts;

(5) the ability of the United States to enforce the proposed controls effectively; and

(6) the foreign policy consequences of not imposing controls.

(c) CONSULTATION WITH INDUSTRY.—The Secretary, before imposing export controls under this section, shall consult with such affected United States industries as the Secretary considers appropriate, with respect to the criteria set forth in paragraphs (1) and (4) of subsection (b) and such other matters as the Secretary considers appropriate.

(d) ALTERNATIVE MEANS.—Before resorting to the imposition of export controls under this section, the President shall determine that reasonable efforts have been made to achieve the purposes of the controls through negotiations or other alternative means.

(e) NOTIFICATION TO CONGRESS.—The President in every possible instance shall consult with the Congress before imposing any export control under this section. Except as provided in section 7(g)(3) of this Act, whenever the President imposes, expands, or extends export controls under this section, the President shall immediately notify the Congress of such action and shall submit with such notification a report specifying—

Contents of report.

(1) the conclusions of the President with respect to each of the criteria set forth in subsection (b); and

(2) the nature and results of any alternative means attempted under subsection (d), or the reasons for imposing, extending, or expanding the control without attempting any such alternative means.

Such report shall also indicate how such controls will further significantly the foreign policy of the United States or will further its declared international obligations. To the extent necessary to further the effectiveness of such export control, portions of such report may be submitted on a classified basis, and shall be subject to the provisions of section 12(c) of this Act.

(f) EXCLUSION FOR MEDICINE AND MEDICAL SUPPLIES.—This section does not authorize export controls on medicine or medical supplies. It is the intent of Congress that the President not impose export controls under this section on any goods or technology if he determines that the principal effect of the export of such goods or technology would be to help meet basic human needs. This subsection shall not be construed to prohibit the President from imposing restrictions on the export of medicine or medical supplies, under the International Emergency Economic Powers Act. This subsection shall not apply to any export control on medicine or medical supplies which is in effect on the effective date of this Act.

50 USC 1701 note.

(g) FOREIGN AVAILABILITY.—In applying export controls under this section, the President shall take all feasible steps to initiate and conclude negotiations with appropriate foreign governments for the purpose of securing the cooperation of such foreign governments in controlling the export to countries and consignees to which the

United States export controls apply of any goods or technology comparable to goods or technology controlled under this section.

(h) INTERNATIONAL OBLIGATIONS.—The provisions of subsections (b), (c), (d), (f), and (g) shall not apply in any case in which the President exercises the authority contained in this section to impose export controls, or to approve or deny export license applications, in order to fulfill obligations of the United States pursuant to treaties to which the United States is a party or pursuant to other international agreements.

(i) COUNTRIES SUPPORTING INTERNATIONAL TERRORISM.—The Secretary and the Secretary of State shall notify the Committee on Foreign Affairs of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate before any license is approved for the export of goods or technology valued at more than $7,000,000 to any country concerning which the Secretary of State has made the following determinations: Notification to congressional committees.

(1) Such country has repeatedly provided support for acts of international terrorism.

(2) Such exports would make a significant contribution to the military potential of such country, including its military logistics capability, or would enhance the ability of such country to support acts of international terrorism.

(j) CRIME CONTROL INSTRUMENTS.—(1) Crime control and detection instruments and equipment shall be approved for export by the Secretary only pursuant to a validated export license.

(2) The provisions of this subsection shall not apply with respect to exports to countries which are members of the North Atlantic Treaty Organization or to Japan, Australia, or New Zealand, or to such other countries as the President shall designate consistent with the purposes of this subsection and section 502B of the Foreign Assistance Act of 1961. 22 USC 2304.

(k) CONTROL LIST.—The Secretary shall establish and maintain, as part of the commodity control list, a list of any goods or technology subject to export controls under this section, and the countries to which such controls apply. Such goods or technology shall be clearly identified as subject to controls under this section. Such list shall consist of goods and technology identified by the Secretary of State, with the concurrence of the Secretary. If the Secretary and the Secretary of State are unable to agree on the list, the matter shall be referred to the President. Such list shall be reviewed not less frequently than every three years in the case of controls maintained cooperatively with other countries, and annually in the case of all other controls, for the purpose of making such revisions as are necessary in order to carry out this section. During the course of such review, an assessment shall be made periodically of the availability from sources outside the United States, or any of its territories or possessions, of goods and technology comparable to those controlled for export from the United States under this section. Periodical review.

SHORT SUPPLY CONTROLS

SEC. 7. (a) AUTHORITY.—(1) In order to carry out the policy set forth in section 3(2)(C) of this Act, the President may prohibit or curtail the export of any goods subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States. In curtailing exports to carry out the policy set forth in section 3(2)(C) of this Act, the President shall allocate a portion of export licenses on the basis of factors other than a prior history of exportation. Such factors shall include the extent to which a country engages 50 USC app. 2406. Export licenses, allocation.

Annex 9

Hearings on Section 825 before the Subcommittee on Courts and the Administrative Practice of the Senate Committee on the Judiciary, 103d Cong., 2nd Sess 10 (1994)

Excerpts: p. 1, p. 90 and p. 91

S. HRG. 103–1077

THE FOREIGN SOVEREIGN IMMUNITIES ACT

Y 4. J 89/2: S. HRG. 103-1077

The Foreign Sovereign Immunities Ac...

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 825

A BILL TO AMEND TITLE 28 OF THE UNITED STATES CODE TO PERMIT A FOREIGN STATE TO BE SUBJECT TO THE JURISDICTION OF FEDERAL OR STATE COURTS IN ANY CASE INVOLVING AN ACT OF INTERNATIONAL TERRORISM

JUNE 21, 1994

Serial No. J–103–62

Printed for the use of the Committee on the Judiciary

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Department cannot be trusted to the same degree. The State Department is under constant pressure from foreign states and may be reluctant to risk causing any offense by making a determination that it would be futile to pursue local remedies in their courts. It was because of the State Department's inability to make sovereign immunity determinations "on purely legal grounds and under procedures that insure due process" that Congress transferred the immunity determination to the courts when it adopted the FSIA in 1976.

Question 2. Mr. Sofaer, in your view is "torture" likely to be a broader category than "international terrorism.

Answer 2. "Torture" is a much narrower category than "international terrorism"; it is also much more easily defined and widely accepted than the latter phrase. The term "torture" is defined in the Torture Victim Protection Act of 1991 as follows:

> [T]orture" means 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 for any reason based on discrimination of any kind * * *.

This definition of torture derives from the United Nations Torture Convention, which has received the endorsement of a wide segment of the international community. Moreover, the experience of courts both in the United States and abroad has demonstrated that this definition is manageable and confined.

In contrast, the term "international terrorism" is politically charged and its definition is subject to intense debate and little agreement among states. Admittedly, the definition of "international terrorism" in S. 825 is reasonably narrow. Nevertheless, in view of the absence of consensus in this area, if that phrase is inserted in the legislation being considered, the United States could find itself subject to suit in foreign courts for conduct that it considers to be wholly lawful in character.

Question 3. Mr. Sofaer, how effective do you think S. 825 would be, if it became law, in providing actual recoveries to injured American plaintiffs?

Answer 3. For the reasons specified in my June 21, 1994 testimony, it is essential that any legislation that seeks to amend the FSIA provide a remedy to American victims of state sponsored torture and other egregious abuses of human rights incorporate adequate safeguards. A carefully drawn amendment would lead to actual recoveries in a number of cases for several reasons. First, in most cases foreign states will agree to international arbitration or to a settlement rather than litigating meritorious human rights claims in U.S. courts. Second, experience demonstrates that, when foreign states do litigate in U.S. courts, they generally pay the judgments rendered against them. Recovery will, of course, be most difficult in those cases in which a foreign state defaults. In some such cases, however, the foreign state may have non-diplomatic assets in the United States against which a plaintiff can execute. In all cases, the default judgment will be a thorn in the side of the foreign state that will increase pressure to resolve the matter.

QUESTIONS FROM SENATOR THURMOND TO THE U.S. DEPARTMENT OF JUSTICE

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, September 30, 1994.

Hon. HOWELL HEFLIN,
Chairman, Subcommittee on Courts and Administrative Practice,
Committee on the Judiciary, U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of July 20, 1994, regarding the testimony of Stuart Schiffer before the Senate Judiciary Subcommittee on Courts and Administrative Practice regarding S. 825, as introduced, a bill to amend the Foreign Sovereign Immunities Act. Your letter also requests a response to some additional questions submitted by Senator Thurmond. We appreciate this opportunity to present the views of the Department of Justice on S. 825, as introduced, both at the Subcommittee hearing and in response to Senator Thurmond's questions.

The Department of Justice is totally committed to the fight against international terrorism by all effective means. Senator Thurmond's questions go directly to the core issue of the effectiveness of S. 825 as a remedy to victims of state-sponsored

terrorism. In our view, S. 825, by extending the jurisdiction of U.S. courts over suits alleging deliberate wrongdoing by foreign states, and by authorizing prejudgment attachment of foreign state property in such suits, would not be an effective remedy for state-sponsored terrorism because it goes well beyond the current international consensus regarding jurisdiction over foreign states in tort suits. In response to suits proceeding under S. 825, foreign states are likely not to appear in U.S. court, and not to honor judgments rendered against them. Foreign states which sponsor international terrorism also are unlikely to have significant assets in the United States which might be attached. Conversely, we may be exposed to reciprocal treatment by foreign states for our deliberate policies which may be unpalatable abroad.

We wish to respond to Senator Thurmond's questions as follows:

Question 1. Could you please discuss your views on whether private litigation as permitted by S. 825 would provide any deterrence to international terrorism? Would this legislation send a helpful signal to foreign countries which are involved in international terrorism?

Answer 1. We believe there are more effective deterrents to international terrorism than private litigation. These include criminal prosecution of individuals who commit acts of terrorism and economic sanctions against countries designated as state sponsors of terrorism. Moreover, because of the sensitivity of such suits, we believe that foreign states will be reluctant to appear to defend themselves in this context.

Question 2. Could you please discuss your views on how effective S. 825 would be if it became law, in providing actual recoveries to injured American plaintiffs?

Answer 2. We do not believe that S. 825 would be effective in providing actual recoveries to American plaintiffs. As noted above, foreign states are reluctant to enter the courts of other countries to defend themselves against charges of violations of law stemming from conduct within their own borders. This makes the tort area one with particularly high potential for default judgments, and the problems associated with them. In addition, states which sponsor terrorism are unlikely to have assets in the United States to satisfy judgments pursuant to S. 825. Furthermore, because S. 825 departs from the current international consensus, it is unlikely that judgments based on it will be recognized and enforced in foreign jurisdictions, or that terrorist states would have significant assets in any jurisdiction which might honor our judgments under S. 825. Thus, we view S. 825 as providing little chance of realistic relief to U.S. plaintiffs while it exposes the United States to adverse-consequences overseas.

Question 3. You raise a concern in your written testimony about exercising prejudgment attachment on foreign governments' commercial property, because of the reciprocal exposure of the United States. What alternative provision, if any, would you suggest?

Answer 3. We do not see any practicable alternatives which fulfill the same functions as prejudgment attachment. As outlined in our testimony, enlarging the prejudgment attachment limitations in the Act poses foreign relations concerns and invites reciprocal treatment by foreign states where United States assets are located abroad. The United States, which has more overseas assets than any other country, is most exposed in this regard. We are wary that, while well-intentioned, S. 825 will lead to the entanglement in judicial proceedings of United States property overseas, while creating little real benefit to U.S. plaintiffs because state sponsors of terrorism will have little or no property which might be subject to attachment in this country.

I hope this letter is responsive to Senator Thurmond's questions. I am happy to respond further to any additional questions or thoughts that you, or other members of the Subcommittee, may have on this subject.

Sincerely,

SHEILA F. ANTHONY,
Assistant Attorney General.

Annex 10

Section 221 of the U.S. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214

Public Law 104–132
104th Congress

An Act

Apr. 24, 1996
[S. 735]

To deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Antiterrorism and Effective Death Penalty Act of 1996.
18 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Antiterrorism and Effective Death Penalty Act of 1996".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.

TITLE I—HABEAS CORPUS REFORM

Sec. 101. Filing deadlines.
Sec. 102. Appeal.
Sec. 103. Amendment of Federal Rules of Appellate Procedure.
Sec. 104. Section 2254 amendments.
Sec. 105. Section 2255 amendments.
Sec. 106. Limits on second or successive applications.
Sec. 107. Death penalty litigation procedures.
Sec. 108. Technical amendment.

TITLE II—JUSTICE FOR VICTIMS

Subtitle A—Mandatory Victim Restitution

Sec. 201. Short title.
Sec. 202. Order of restitution.
Sec. 203. Conditions of probation.
Sec. 204. Mandatory restitution.
Sec. 205. Order of restitution to victims of other crimes.
Sec. 206. Procedure for issuance of restitution order.
Sec. 207. Procedure for enforcement of fine or restitution order.
Sec. 208. Instruction to Sentencing Commission.
Sec. 209. Justice Department regulations.
Sec. 210. Special assessments on convicted persons.
Sec. 211. Effective date.

Subtitle B—Jurisdiction for Lawsuits Against Terrorist States

Sec. 221. Jurisdiction for lawsuits against terrorist states.

Subtitle C—Assistance to Victims of Terrorism

Sec. 231. Short title.
Sec. 232. Victims of Terrorism Act.
Sec. 233. Compensation of victims of terrorism.
Sec. 234. Crime victims fund.
Sec. 235. Closed circuit televised court proceedings for victims of crime.
Sec. 236. Technical correction.

TITLE III—INTERNATIONAL TERRORISM PROHIBITIONS

Subtitle A—Prohibition on International Terrorist Fundraising

Sec. 301. Findings and purpose.

SEC. 211. EFFECTIVE DATE.

18 USC 2248 note.

The amendments made by this subtitle shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act.

Subtitle B—Jurisdiction for Lawsuits Against Terrorist States

SEC. 221. JURISDICTION FOR LAWSUITS AGAINST TERRORIST STATES.

(a) EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY FOR CERTAIN CASES.—Section 1605 of title 28, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "or" at the end of paragraph (5);

(B) by striking the period at the end of paragraph (6) and inserting "; or"; and

(C) by adding at the end the following new paragraph:

"(7) not otherwise covered by paragraph (2), 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, except that the court shall decline to hear a claim under this paragraph—

"(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

"(B) even if the foreign state is or was so designated, if—

"(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

"(ii) the claimant or victim was not a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred."; and

(2) by adding at the end the following:

"(e) For purposes of paragraph (7) of subsection (a)—

"(1) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

"(3) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

"(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

"(g) LIMITATION ON DISCOVERY.—

"(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

"(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

"(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

"(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

"(i) create a serious threat of death or serious bodily injury to any person;

"(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

"(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

"(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

"(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

"(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.".

(b) EXCEPTION TO IMMUNITY FROM ATTACHMENT.—

(1) FOREIGN STATE.—Section 1610(a) of title 28, United States Code, is amended—

(A) by striking the period at the end of paragraph (6) and inserting ", or"; and

(B) by adding at the end the following new paragraph:

"(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.".

(2) AGENCY OR INSTRUMENTALITY.—Section 1610(b)(2) of title 28, United States Code, is amended—

(A) by striking "or (5)" and inserting "(5), or (7)"; and

(B) by striking "used for the activity" and inserting "involved in the act".

(c) APPLICABILITY.—The amendments made by this subtitle shall apply to any cause of action arising before, on, or after the date of the enactment of this Act. 28 USC 1605 note.

Subtitle C—Assistance to Victims of Terrorism

Justice for Victims of Terrorism Act of 1996.

SEC. 231. SHORT TITLE. 42 USC 10601 note.

This subtitle may be cited as the "Justice for Victims of Terrorism Act of 1996".

SEC. 232. VICTIMS OF TERRORISM ACT.

(a) AUTHORITY TO PROVIDE ASSISTANCE AND COMPENSATION TO VICTIMS OF TERRORISM.—The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404A the following new section:

"SEC. 1404B. COMPENSATION AND ASSISTANCE TO VICTIMS OF TERRORISM OR MASS VIOLENCE. 42 USC 10603b.

"(a) VICTIMS OF ACTS OF TERRORISM OUTSIDE THE UNITED STATES.—The Director may make supplemental grants as provided in section 1404(a) to States to provide compensation and assistance to the residents of such States who, while outside of the territorial boundaries of the United States, are victims of a terrorist act or mass violence and are not persons eligible for compensation under title VIII of the Omnibus Diplomatic Security and Antiterrorism Act of 1986.

"(b) VICTIMS OF TERRORISM WITHIN THE UNITED STATES.—The Director may make supplemental grants as provided in section 1404(d)(4)(B) to States for eligible crime victim compensation and assistance programs to provide emergency relief, including crisis response efforts, assistance, training, and technical assistance, for the benefit of victims of terrorist acts or mass violence occurring within the United States and may provide funding to United States Attorney's Offices for use in coordination with State victim compensation and assistance efforts in providing emergency relief.".

(b) FUNDING OF COMPENSATION AND ASSISTANCE TO VICTIMS OF TERRORISM, MASS VIOLENCE, AND CRIME.—Section 1402(d)(4) of the Victims of Crime Act of 1984 (42 U.S.C. 10601(d)(4)) is amended to read as follows:

"(4)(A) If the sums available in the Fund are sufficient to fully provide grants to the States pursuant to section 1403(a)(1), the Director may retain any portion of the Fund that was deposited during a fiscal year that was in excess

Annex 11

Section 589 of the U.S. Omnibus Consolidated Appropriations Act for 1997, a.k.a the "Flatow Amendment", 30 September 1996, Pub. L. No. 104-208, 110 Stat. 3009-172

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*Public Law 104–208
104th Congress

An Act

Making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes.

Sept. 30, 1996
[H.R. 3610]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Omnibus Consolidated Appropriations Act, 1997.

DIVISION A

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 1997, and for other purposes, namely:

TITLE I—OMNIBUS APPROPRIATIONS

Sec. 101. (a) For programs, projects or activities in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, provided as follows, to be effective as if it had been enacted into law as the regular appropriations Act:

AN ACT

Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1997, and for other purposes.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997.

TITLE I—DEPARTMENT OF JUSTICE

Department of Justice Appropriations Act, 1997.

GENERAL ADMINISTRATION

SALARIES AND EXPENSES

For expenses necessary for the administration of the Department of Justice, $75,773,000 of which not to exceed $3,317,000 is for the Facilities Program 2000, to remain available until expended: *Provided*, That not to exceed 43 permanent positions and 44 full-time equivalent workyears and $7,477,000 shall be expended for the Department Leadership Program exclusive of augmentation that occurred in these offices in fiscal year 1996: *Provided further*, That not to exceed 41 permanent positions and 48 full-time equivalent workyears and $4,660,000 shall be expended for the Offices of Legislative Affairs and Public Affairs:

*Note: This is a typeset print of the original hand enrollment as signed by the President on September 30, 1996. The text is printed without corrections. Missing text in the original is indicated by a footnote.

supporting the development or deployment of a ballistic missile capability.

LIMITATION ON ASSISTANCE TO MEXICO

SEC. 587. Not less than $2,500,000 of the funds appropriated or otherwise made available by this Act for the Government of Mexico shall be withheld from obligation until the President has determined and reported to Congress that—

(1) the Government of Mexico is taking actions to reduce the amount of illegal drugs entering the United States from Mexico; and

(2) the Government of Mexico—

(A) is taking effective actions to apply vigorously all law enforcement resources to investigate, track, capture, incarcerate, and prosecute individuals controlling, supervising, or managing international narcotics cartels or other similar entities and the accomplices of such individuals, individuals responsible for, or otherwise involved in, corruption, and individuals involved in money-laundering;

(B) is pursuing international anti-drug trafficking initiatives;

(C) is cooperating fully with international efforts at narcotics interdiction; and

(D) is cooperating fully with requests by the United States for assistance in investigations of money-laundering violations and is making progress toward implementation of effective laws to prohibit money-laundering.

LIMITATION OF ASSISTANCE TO TURKEY

SEC. 588. Not more than $22,000,000 of the funds appropriated in this Act under the heading "Economic Support Fund" may be made available to the Government of Turkey.

CIVIL LIABILITY FOR ACTS OF STATE SPONSORED TERRORISM

SEC. 589. (a) an official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7). 28 USC 1605 note.

(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section. No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

Titles I through V of this Act may be cited as the "Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997". Short title.

Annex 12

U.S. House of Representatives, Report on the Justice for Victims of Terrorism Act, 13 July 2000, H. R. Rep. No. 106-733

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106TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
106–733

JUSTICE FOR VICTIMS OF TERRORISM ACT

JULY 13, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HYDE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 3485]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3485) modifying the enforcement of certain anti-terrorism judgments, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

79–006

SECTION 1. ENFORCEMENT OF CERTAIN ANTI-TERRORISM JUDGMENTS.

(a) SHORT TITLE.—This Act may be cited as the "Justice for Victims of Terrorism Act".

(b) DEFINITION.—

(1) IN GENERAL.—Section 1603(b) of title 28, United States Code, is amended—

(A) in paragraph (3) by striking the period and inserting a semicolon and "and";

(B) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively;

(C) by striking "(b)" through "entity—" and inserting the following:

"(b) An 'agency or instrumentality of a foreign state' means—

"(1) any entity—"; and

(D) by adding at the end the following:

"(2) for purposes of sections 1605(a)(7) and 1610 (a)(7) and (f), any entity as defined under subparagraphs (A) and (B) of paragraph (1), and subparagraph (C) of paragraph (1) shall not apply.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—Section 1391(f)(3) of title 28, United States Code, is amended by striking "1603(b)" and inserting "1603(b)(1)".

(c) ENFORCEMENT OF JUDGMENTS.—Section 1610(f) of title 28, United States Code, is amended—

(1) in paragraph (1)—

(A) in subparagraph (A) by striking "(including any agency or instrumentality or such state)" and inserting "(including any agency or instrumentality of such state)"; and

(B) by adding at the end the following:

"(C) Notwithstanding any other provision of law, moneys due from or payable by the United States (including any agency, subdivision or instrumentality thereof) to any state against which a judgment is pending under section 1605(a)(7) shall be subject to attachment and execution, in like manner and to the same extent as if the United States were a private person."; and

(2) by adding at the end the following:

"(3)(A) Subject to subparagraph (B), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive this subsection in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

"(B) A waiver under this paragraph shall not apply to—

"(i) if property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations has been used for any nondiplomatic purpose (including use as rental property), the proceeds of such use; or

"(ii) if any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations is sold or otherwise transferred for value to a third party, the proceeds of such sale or transfer.

"(C) In this paragraph, the term 'property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' and the term 'asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

"(4) For purposes of this subsection, all assets of any agency or instrumentality of a foreign state shall be treated as assets of that foreign state.".

(d) TECHNICAL AND CONFORMING AMENDMENT.—Section 117(d) of the Treasury Department Appropriations Act, 1999 (Public Law 105–277; 112 Stat. 2681–492) is repealed.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to any claim for which a foreign state is not immune under section 1605(a)(7) of title 28, United States Code, arising before, on, or after the date of enactment of this Act.

SEC. 2. PAYGO ADJUSTMENT.

The Director of the Office of Management and Budget shall not make any estimates of changes in direct spending outlays and receipts under section 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 902(d)) for any fiscal year resulting from enactment of this Act.

SEC. 3. TECHNICAL AMENDMENTS TO IMPROVE LITIGATION PROCEDURES AND REMOVE LIMITATIONS ON LIABILITY.

(a) GENERAL EXCEPTIONS TO JURISDICTIONAL IMMUNITY OF FOREIGN STATE.—Section 1605 of title 28, United States Code, is amended by adding at the end the following:

"(h) If a foreign state, or its agency or instrumentality, is a party to an action pursuant to subsection (a)(7) and fails to furnish any testimony, document, or other thing upon a duly issued discovery order by the court in the action, such failure shall be deemed an admission of any fact with respect to which the discovery order relates. Nothing in this subsection shall supersede the limitations set forth in subsection (g).".

(b) EXTENT OF LIABILITY.—Section 1606 of title 28, United States Code, is amended by adding at the end the following: "No Federal or State statutory limits shall apply to the amount of compensatory, actual, or punitive damages permitted to be awarded to persons under section 1605(a)(7) and this section.".

PURPOSE AND SUMMARY

H.R. 3485 would allow victims of terrorism to satisfy judgments against foreign states by allowing assets frozen by the U.S. to be subject to attachment and execution. While providing for the protection of embassies and assets necessary for their actual operating expenses from attachment and execution if the President deems it necessary in the interest of national security, H.R. 3485 provides that protection is specifically denied under the bill for proceeds from any property which has been used for any non-diplomatic purpose (including rental property) or for proceeds from any asset which is sold or transferred for value to a third party.

BACKGROUND AND NEED FOR THE LEGISLATION

In March 1985, Terry Anderson, an American journalist working in Beirut, was kidnapped by agents of the Islamic Republic of Iran. He was held captive by his kidnappers in deplorable conditions until early December 1991.

During the 1980's, three other individuals working in Lebanon, David Jacobsen, an administrator of the American University hospital in Beirut, Joseph Ciccippio, a comptroller of the America University school and hospital and Frank Reed, a principal of a private secondary school in Beirut, were also held captive by agents of the Islamic Republic of Iran.

In April 1995, Alisa Flatow, a 20-year-old college student from New Jersey, was on a bus on the Gaza strip going to a Passover holiday celebration. A terrorist from the Iranian backed Islamic Jihad rammed his car loaded with explosives into the bus, killing Ms. Flatow and seven others.

Two Americans studying in Israel, Matthew Eisenfeld and Sara Duker were killed in a suicide bombing of a bus in Jerusalem in February 1996. Those responsible were provided training, money, and resources by Iran.

Also in February 1996, Cuban MiG aircraft shot down two aircraft flown by the "Brothers to the Rescue" organization in international airspace over the Florida Straits. Three American citizens were killed in the attack.

After the Brothers to the Rescue incident, at a February 26, 1996, White House press briefing President Clinton stated "I am asking that Congress pass legislation that will provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the

United States. If Congress passes this legislation, we can provide the compensation immediately."

The Brothers to the Rescue families did receive $300,000 each ($1.2 million total) out of Cuban blocked assets as, in the President's words, a "humanitarian gesture" with assurances from the Department of State that those payments would not affect receiving their full judgment.

In 1996, the Antiterrorism and Effective Death Penalty Act became law. That law allowed American citizens injured in an act of terrorism or their survivors to bring a private lawsuit against the terrorist state responsible for that act.

Upon enactment of the Antiterrorism and Effective Death Penalty Act, several victims of terrorism or their families filed suit against terrorist states. There are several cases pending in U.S. courts by the families of victims of terrorism. To date, judgments have been awarded to families of victims in ten cases.

The three Brothers to the Rescue victims' families went to court and on December 17, 1997, in separate but related judgments were awarded $48 million in compensatory damages and $132 million in punitive damages, plus nearly $20 million in post-judgment interest and costs. The administration fought to block the attempted attachment of any Cuban assets to satisfy that award.

In March 1998, Alisa Flatow's family went to court and was awarded $22.5 million in compensatory damages and $225 million in punitive damages. The administration fought to block the attachment of any Iranian assets to satisfy the award.

In August 1998, David Jacobsen, Joseph Ciccippio and his wife, and Frank Reed and his wife, were awarded a total of $65 million in compensatory damages. They were not awarded any punitive damages. The administration fought to block the attachment of any Iranian assets to satisfy the award.

In 1999, the Congress passed Section 117 of the Fiscal Year 1999 Treasury Department Appropriations Act, mandating that the Executive Branch must allow Americans to attach the assets of terrorist states in the U.S. in order to collect judgments won in Federal court. That legislation included a provision for a Presidential waiver to block the attachment of assets if it was in the interest of national security.

In Presidential Determination No. 99–1, the President determined that the authority granted by Section 117 for the attachment of assets of terrorist states in general would impede foreign policy and therefore would not be in the interest of national security. This determination effectively applied the Presidential waiver in Section 117 to all judgments attempting to attach to terrorist state assets.

On August 11, 1999, in *Alejandre* v. *Republic of Cuba*, 183 F.3d. 1277 (11th Cir. Aug. 11, 1999), the U.S. Court of Appeals ruled that congressional intent in passing Section 117 was unclear as to whether all blocked assets of an agency or instrumentality of a terrorist state could be executed upon to satisfy an Anti-Terrorism Act judgment. The Court cited the 1983 Supreme Court ruling in *First National City Bank* v. *Banco Para El Comercio de Cuba*, 462 U.S. 611 (1983), when coming to the conclusion that without an indication of more explicit intent by the Congress, the court was compelled to determine that the Foreign Sovereign Immunities Act

does not intend that there is cross-liability between parent and subsidiary entities without the presence of fraud or a determination that the subsidiary is an alter ego of the parent entity.

On November 15, 1999, in *Stephen M. Flatow* v. *The Islamic Republic of Iran*, C.A. No. 97–396 (RCL), the U.S. District Court of the District of Columbia ruled in favor of the United States' motion to quash Mr. Flatow's attempt to attach certain assets and monies held by the U.S. to satisfy his judgment. In that ruling the court stated "Because this Court finds that Congress has not clearly and unequivocally waived the United States' sovereign immunity, the Court grants the United States Motion to Quash the Writ of Attachment."

In March 2000, Terry Anderson and his family were awarded $41.2 million in compensatory damages and $300 million in punitive damages by the U.S. District Court for the District of Columbia. It is expected that the Presidential waiver will be used to the block the attachment of any Iranian assets to satisfy their judgement as well.

On July 11, 2000, the families of Matthew Eisenfeld and Sara Duker were awarded $327 million in compensatory and punitive damages by the U.S. District Court for the District of Columbia. The administration will certainly assert the Presidential waiver to block the attachment of any Iranian assets to satisfy their judgement as well.

The President's continued use of his waiver power has frustrated the legitimate rights of victims of terrorism, and thus this legislation is required. While still allowing the President to block the attachment of embassies and necessary operating assets, H.R. 3485 would amend the law to specifically deny blockage of attachment of proceeds from any property which has been used for any non-diplomatic purpose or of proceeds from any asset which is sold or transferred for value to a third party.

Two amendments were adopted during committee consideration. One amendment was offerred by Congressman Bill McCollum and the other by Congressman John Conyers.

The amendment offered by Mr. McCollum and accepted by the committee clarifies that property properly characterized as diplomatic under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations is not subject to attachment in aid of execution or execution. The administration had concerns that the bill could be construed to allow execution against diplomatic property under the Vienna Convention in a way that would create a liability on behalf of the United States. The McCollum amendment is intended to prevent such liability.

It is important to note that for assets which could be deemed diplomatic property and which the administration fears execution against would violate international agreements, the administration has not provided any evidence that the execution of such blocked assets is inconsistent with any international agreement. Yet, in light of concerns expressed by the administration that execution, unlike blocking, would cause liability, the McCollum amendment assures that the definition of diplomatic property which is protected from execution in H.R. 3485 is the same definition of diplomatic property in the Vienna Convention.

The amendment offered by Mr. Conyers and accepted by the committee would (1) provide that when a country which sponsors terrorism and is a party in a trial brought under the Anti-Terrorism Act does not provide the necessary evidence required under any discovery order, the Court can impose any type of sanction available by law on that country; and (2) provide that no Federal or State statutory limits will apply to the amount of compensatory, actual, or punitive damages that can be awarded to individuals by the courts in these victim of terrorism cases.

The committee would note that although the Congressional Budget Office estimates the cost of H.R. 3485 at $405 million, they admit that:

> Enactment of H.R. 3485 could result in savings in later years if future disbursements that would otherwise have to be made under current law were reduced because of the payments made in 2001. CBO has no basis for estimating these effects—if any—because they would depend on future decisions of the international Iran-U.S. Claims Tribunal and the responses of the United States and Iran to these decisions.

The CBO scoring of this bill is based on all sources of money held by the U.S. that will potentially be available to pay out to claimants rather than actual known outlays. The committee believes that any attempt at a definitive cost analysis at this time on H.R. 3485 is futile due to the uncertainty of the many factors, some of which are mentioned in the above portion of the CBO estimate.

HEARINGS

The committee's Subcommittee on Immigration and Claims held a hearing on H.R. 3485 on April 13, 2000. Testimony was received from Terry A. Anderson; Stephen M. Flatow; Maggie A. Khuly; and Ronald W. Kleinman, Esquire, with additional material submitted by Robin L. Higgins; Joseph & Elham Cicippio; Frank & Fifi Reed; David P. Jacobsen; Stewart Eizenstat, Deputy Secretary of the Treasury; and the Honorable Lincoln Diaz-Balart.

COMMITTEE CONSIDERATION

On June 21, 2000, the committee met in open session and ordered favorably reported the bill H.R. 3485 with amendment by voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 3485, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 7, 2000.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3485, the Justice for Victims of Terrorism Act.

If you wish further details on this estimate, we will be pleased to provide them. The principal CBO staff contact is Lanette J. Keith.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure.

H.R. 3485—Justice for Victims of Terrorism Act.

H.R. 3485 would enable victims of Iranian terrorism who have won judgments against Iran in U.S. courts to collect monetary damages from that country—primarily by obtaining certain funds currently held by the U.S. government. As shown in the following table, CBO estimates that enacting this bill would increase direct spending by about $405 million in 2001; therefore, pay-as-you-go procedures would apply.

Although the bill would pertain to victims of other nations that sponsor terrorism, CBO does not expect that any budgetary effects would result from judgments against other nations. As shown in the following table, CBO estimates that enacting this bill would increase direct spending by about $420 million in 2001; therefore, pay-as-you-go procedures would apply. Enactment of H.R. 3485 could result in savings in later years if future disbursements that would otherwise have to be made under current law were reduced because of the payments made in 2001. CBO has no basis for estimating these effects—if any—because they would depend on future decisions of the international Iran-U.S. Claims Tribunal and the responses of the United States and Iran to these decisions.

[By fiscal year, in millions of dollars]

	2001	2002	2003	2004	2005
CHANGES IN DIRECT SPENDING					
Estimated Budget Authority	405	a	a	a	a
Estimated Outlays	405	a	a	a	a

a. H.R. 3485 could result in savings after 2001, but CBO has no basis for estimating such savings—if any—because they would depend on future decisions made by the Iran-U.S. Claims Tribunal, the United States, and Iran.

The legislation contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Iran is one of seven countries that is designated by the federal government as a sponsor of terrorism. (The provisions of H.R. 3485 would apply to the other six nations as well; however, according to information from the Department of State, the only budgetary effect of S. 1796 the bill would involve primarily affect assets of Iran.) Under current law, victims of state-sponsored terrorism may pursue claims against that state's government in U.S. courts. Information from the Department of State indicates that victims of Iranian terrorism have won punitive and compensatory damages in U.S. courts that exceed $650 million.

The U.S. government currently holds, in the Foreign Military Sales (FMS) Trust Fund, about $400 million on behalf of Iran previously paid by Iran for the purchase of military equipment that was not delivered. The disposition of those funds is currently before the Iran-U.S. Claims Tribunal, an international body established to settle disputes between the two nations. Under current law, victims of terrorist acts may attach, by judicial order, property of the Iranian government held by the United States. Victims, however, have been unable to obtain payment in satisfaction of those judgments because the funds they have attached are protected by the federal government's sovereign immunity. As a result, those judgments remain unpaid.

By explicitly waiving the federal government's sovereign immunity, H.R. 3485 would remove a barrier to the execution of the victims' judgments., resulting That action would likely result in the payment of these the judgment claims from the FMS Trust Fund. As a result, CBO estimates that enacting this provision would increase direct spending by $400 million in fiscal year 2001. CBO cannot determine whether the payment of these claims to terrorist victims would reduce, eliminate, or leave unaltered the any liability of the United States to Iran, which is yet to be determined by before the Iran-U.S. Claims Tribunal. Thus, it is possible that some or all of the funds we estimate will be paid to victims of terrorism under this bill could be offset by a reduction in payments that would be made from the FMS Trust Fund to Iran under current law. CBO, however, has no basis for predicting the future decisions of the Iran-U.S. Claims Tribunal, nor the response of the federal governments to such decisions.

The bill would also make possible the attachment of rental proceeds from leasing Iranian diplomatic property in the United States. Under current law, the President has authority to preclude such assets from attachment and execution to satisfy judgments against states that sponsor terrorism. H.R. 3485 would limit that authority for rental proceeds. Based on information from the Treas-

ury Department, CBO estimates the value of such rental proceeds in this country that could be seized under this provision to be about $5 million.

The United States has a custodial responsibility under international agreements to maintain diplomatic assets belonging to Iran; therefore, the federal government would likely be liable to Iran for the loss of this $5 million from rental proceeds. If those amounts are seized, CBO anticipates that the United States would have to promptly reimburse Iran for their value.

On May 3, 2000, CBO transmitted a cost estimate for S. 1796, the Justice for Victims of Terrorism Act, as reported by the Senate Committee on the Judiciary on March 9, 2000. S. 1796 would have limited the President's authority to preclude most Iranian diplomatic property in the United States from attachment and execution to satisfy judgements against Iran. H.R. 3485 would limit the President's ability to preclude only the rental proceeds of such property. Because of that limitation, CBO estimates that H.R. 3485 would result in about $15 million less in direct spending than S. 1796.

The CBO staff contacts for this estimate are Lanette J. Keith and John R. Righter, and Joseph C. Whitehill. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article 1, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1(a). Short Title

This subsection provides that the short title of the legislation is the "Justice for Victims of Terrorism Act".

Section 1(b). Definition

This subsection indicates that only part of the statutory definition of "agency or instrumentality of a foreign state" shall apply to any case concerning the attachment and execution of property in the United States of a foreign state based on a judgement against that 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 for such acts by an official, employee, or agent of a foreign state.

The new definition provides that an entity can be deemed an agency or instrumentality of the foreign state which sponsored the terrorist act regardless of where that entity is incorporated.

This subsection also includes a technical and conforming amendment to 28 U.S.C. 1391(f)(3) to change "1603(b)" to "1603(b)(1)".

Section 1(c). Enforcement of Judgments

This subsection states that moneys due from or payable by the U.S. to any foreign state which sponsors terrorism and has a judgment pending against it for a terrorist act shall be subject to attachment and execution as if the U.S. were a private entity.

The subsection also provides that, when it is determined that a waiver is necessary in the interest of national security, the President may waive this subsection and protect any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations from attachment and execution to satisfy a judgment as well as any funds necessary for actual operating expenses of those properties. If these properties have been used for any nondiplomatic purpose (including use as rental property), the proceeds of that use are not subject to such a waiver of this subsection. Additionally, this waiver does not apply to any proceeds from the sale or transfer to a third party of these properties.

Finally, this subsection provides that there is cross liability between any agency or instrumentality of a foreign state and the foreign state itself. This provision specifically provides that a judgment against a foreign state that sponsors terrorism can be executed against assets of an agency or instrumentality of that foreign state even if there is no proof of fraud or any proof that the agency or instrumentality is an alter ego of the foreign state. This is intended to allow collection on judgments even in light of *First National City Bank* v. *Banco Para El Comercio de Cuba*, 462 U.S. 611 (1983).

Section 1(d). Technical and Conforming Amendment

This subsection repeals Section 117(d) of the Treasury Department Appropriations Act of 1999.

Section 1(e). Effective Date

This subsection provides that all amendments made in Section 1 of the bill will apply to any claim involving a foreign state that sponsors terrorism which arose before, on, or after the date of enactment of this legislation.

Section 2. Technical Amendments to Improve Litigation Procedures and Remove Limitations on Liability

Subsection (a) would amend 28 U.S.C. 1605 to provide that when a country which sponsors terrorism is a party in a trial brought under the Anti-Terrorism Act and does not provide the necessary evidence required under any discovery order, the Court can impose any type of sanction available by law on that country. Subsection (b) would amend 28 U.S.C. 1606 to provide that no Federal or State statutory limits will apply to the amount of compensatory, actual, or punitive damages that can be awarded to individuals by the courts in these victims of terrorism cases.

AGENCY VIEWS

TREASURY DEPUTY SECRETARY STUART E. EIZENSTAT, DEFENSE DEPARTMENT; UNDER SECRETARY FOR POLICY WALTER SLOCOMBE; AND STATE DEPARTMENT UNDER SECRETARY FOR POLICY THOMAS PICKERING TESTIMONY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON IMMIGRATION AND CLAIMS

Mr. Chairman and Members of the Committee:

We are submitting this joint testimony as envisaged by the letters of Deputy Secretary Eizenstat of April 12 to Committee Chairman Hyde and Subcommittee Chairman Smith in response to let-

ters to Secretary Summers and Secretary Albright from Chairman Hyde, inviting them or their designees to testify before this subcommittee on April 13 concerning H.R. 3485, the "Justice for Victims of Terrorism Act." Deputy Secretary Eizenstat has worked extensively on this issue for the Administration over the past 18 months, and we, on behalf of our Departments, join him in presenting our views on this proposed legislation. We share your goal that U.S. victims of terrorism and their families receive justice and compensation for their suffering. We are actively engaged with the Congress in ongoing discussions to resolve the complex issues identified and to address the needs of victims of terrorism. We also appreciate the opportunity to submit this statement into the record.

Let us begin by expressing the Administration's and our own genuine and personal sympathy to victims of international terrorism—an evil that this administration has led the world in combating. It is the responsibility of the United States Government to do everything possible to protect American lives from international terrorism and other heinous acts. People like Mr. Flatow, Mr. Anderson, Mr. Cicippio, Mr. Jacobsen, and Mr. Reed and their families, and the families of the Brothers to the Rescue pilots, deserve support in their goal of finding fair and just compensation for their grievous losses and unimaginable experiences. Those of us who have met with them have been touched by their suffering and impressed with their strength and determination to seek justice. We understand their frustrations and the frustrations that have led the sponsors of this legislation to introduce it. We are dedicated to working with the Congress to achieve the goal of obtaining compensation for the victims and their families. But we feel strongly that this must be done in a way that is consistent with the broad national interests and international obligations of the United States.

It is obvious that the states involved here—states that we have publicly branded as sponsors of terrorism—do not view the United States as a friendly environment in which to conduct financial transactions. As part of our efforts to combat terrorism, we impose a wide range of economic sanctions against state sponsors of terrorism in order to deprive them of the resources to fund acts of terrorism and to affect their conduct. Because of these measures, terrorism-list states engage in minimal economic activity in the United States. In many cases, the only assets that states which sponsor terrorism have in the United States are either blocked or diplomatic property. Such property should not be available for attachment and execution of judgments, for very good reasons involving the interests of the entire nation, which are described in detail below. As much as we join the sponsors of this bill in desiring to have victims of international terrorism and the heinous acts of the Cuban Air Force compensated, it would be unwise to ignore these reasons and prejudice the interests of all our citizens for this purpose.

This question is complex and fraught with difficulties. For this reason, last year, we proposed, among other things, that a commission be established to review all aspects of the problems presented by acts of international terrorism. Such a commission would have specifically studied the issue of compensation with the goal of recommending proposals to the President and to the Congress to help

the victims and their families receive compensation in a manner that would not impinge upon important U.S. national interests. While this proposal was not taken up, we believe this approach still has merit.

H.R. 3485, though born of good intentions, is fundamentally flawed. The legislation would have five principal negative effects, all of which would be seriously damaging to important U.S. interests, and would, at the end of the day, result in substantial U.S. taxpayer liability.

First, blocking of assets of terrorist states is one of the most significant economic sanctions tools available to the President. The proposed legislation would undermine the President's ability to combat international terrorism and other threats to national security by permitting the wholesale attachment of blocked property, thereby depleting the pool of blocked assets and depriving the U.S. of a source of leverage in ongoing and future sanctions programs, such as was used to gain the release of our citizens held hostage in Iran in 1981 or in gaining information about POW's and MIA's as part of the normalization process with Vietnam.

Second, it would cause the U.S. to violate its international treaty obligations to protect and respect the immunity of diplomatic and consular property of other nations, and would put our own diplomatic and consular property around the world at risk of copycat attachment, with all that such implies for the ability of the United States to conduct diplomatic and consular relations and protect personnel and facilities.

Third, it would create a race to the courthouse benefiting one small, though deserving, group of Americans over a far larger group of deserving Americans. For example, in the case of Cuba, many Americans have waited decades to be compensated for both the loss of property and the loss of the lives of their loved ones. This would leave no assets for their claims and others that may follow. Even with regard to current judgment holders, it would result in their competing for the same limited pool of assets, which would be exhausted very quickly and might not be sufficient to satisfy all judgments.

Fourth, it would breach the long-standing principle that the United States Government has sovereign immunity from attachment, thereby preventing the U.S. Government from making good on its debts and international obligations and potentially causing the U.S. taxpayer to incur substantial financial liability, rather than achieving the stated goal of forcing Iran to bear the burden of paying these judgments. The Congressional Budget Office ("CBO") has recognized this by scoring the legislation at $420 million, the bulk of which is associated with the Foreign Military Sales ("FMS") Trust Fund. Such a waiver of sovereign immunity would expose the Trust Fund to writs of attachment, which would inject an unprecedented and major element of uncertainty and unreliability into the FMS program by creating an exception to the processes and principles under which the program operates.

Fifth, it would direct courts to ignore the separate legal status of states and their agencies and instrumentalities, overturning Supreme Court precedent and basic principles of corporate law and international practice by making state majority-owned corporations liable for the debts of the state and establishing a dangerous prece-

dent for government owned enterprises like the U.S. Overseas Private Investment Corporation ("OPIC").

As the *Washington Post* observed in a fall 1999 editorial, "Victims of terrorism certainly should be compensated, but a mechanism that permits individual recovery to take precedence over significant foreign policy interests is flawed." The proposed legislation would indeed seriously compromise important national security, foreign policy, and other clear national interests, and discriminate among and between past and future U.S. claimants.

For all these reasons, explained in more detail below, the Administration strongly opposes the proposed legislation.

(1) Attachment of Blocked and Diplomatic Property and the Elimination of the Effectiveness of Our Blocking Programs

The Administration has grave concerns with the provisions of the proposed legislation that seek to nullify the President's waiver of the 1998 FSIA amendments and thereby permit attachment of blocked and diplomatic property.

The ability to block assets represents one of the primary tools available to the United States to deter aggression and discourage or end hostile actions against U.S. citizens abroad. Our efforts to combat threats to our national security posed by terrorism-list countries such as Iraq, Libya, Cuba, and Sudan rely in significant part upon our ability to block the assets of those countries.

Blocking assets permits the United States to deprive those countries of resources that they could use to harm our interests, and to disrupt their ability to carry out international financial transactions. By placing the assets of such countries in the sole control of the President, blocking programs permit the President at any time to withhold substantial benefits from countries whose conduct we abhor, and to offer a potential incentive to such countries to reform their conduct. Our blocking programs thus provide the United States with a unique and flexible form of leverage over countries that engage in threatening conduct.

The Congress has recognized the need for the President to be able to regulate the assets of foreign states to meet threats to the U.S. national security, foreign policy, and economy. In both the International Emergency Economic Powers Act and the Trading with the Enemy Act, the Congress has provided the President with statutory authority for regulating foreign assets. On the basis of this authority and foreign policy powers under the Constitution, Presidents have blocked property and interests in property of foreign states and foreign nationals that today amount to over $3.5 billion.

The Supreme Court has also recognized the importance of the President's blocking authority, stating that such blocking orders "permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a 'bargaining chip' to be used by the President when dealing with a hostile country." *Dames & Moore* v. *Regan*, 453 U.S. 654, 673 (1981).

The leverage provided by blocked assets has proved central to our ability to protect important U.S. national security and foreign policy interests. The most striking example is the Iran Hostage Crisis. The critical bargaining chip the United States had to bring to

the table in an effort to resolve the crisis was the almost $10 billion in Iranian Government assets that the President had blocked shortly after the taking of our embassy. Because the return of the blocked assets was one of Iran's principal conditions for the release of the hostages, we would not have been able to secure the safe release of the hostages and to settle thousands of claims of U.S. nationals if those blocked assets had not been available. This settlement with Iran also resulted in the eventual payment of $7.5 billion in claims to or for the benefit of U.S. nationals against Iran.

In the case of Vietnam, the leverage provided by approximately $350 million in blocked assets, combined with Vietnam's inability to gain access to U.S. technology and trade, played an important role in persuading Vietnam's leadership to address important U.S. concerns in the normalization process. These concerns included assistance in accounting for POWs and MIAs from the Vietnam War, accepting responsibility for over $200 million in U.S. claims which had been adjudicated by the Foreign Claims Settlement Commission, and moderating Vietnamese actions in Cambodia.

In addition, blocked assets have helped us to secure equitable settlements of claims of U.S. nationals against such countries as Romania, Bulgaria, and Cambodia in the context of normalization of relations. These results could not have been achieved without effective blocking programs.

However, our blocking programs simply cannot function, and cannot serve to protect these important interests, if blocked assets are subject to attachment and execution by private parties, as the proposed legislation would permit. The need to deal with the increasing demands for information on assets, blocked and unblocked, of these terrorism-list governments as monetary judgments are awarded would seriously disrupt the operations of the Treasury Department in administering the blocking programs. These demands would greatly impair Treasury's investigative functions through the release of deliberative process and enforcement-related materials thereby divulging sensitive operational details and raising important issues of confidentiality with U.S. banks and others who provide information on assets. Additionally, the ability to use blocked assets as leverage against foreign states that threaten U.S. interests is essentially eliminated if the President is unable to preserve and control the disposition of such assets. Private rights of execution against blocked assets would permanently rob the President of the leverage blocking provides by depleting the pool of blocked assets.

In the Cuban and Iranian contexts, for example, the value of judgments (including both compensatory and punitive damages) won by the Brothers to the Rescue families exceeds the total known value of the blocked assets of Cuba in the United States, and the value of the judgment won by the Flatow family, or the former Beirut Hostages, exceeds the total known value of the blocked assets of the Government of Iran in the United States. Attachment of these blocked assets to satisfy private judgments in these and similar cases would leave no remaining assets of terrorism-list governments in the President's control, denying the President an important source of leverage and seriously weakening his hand in dealing with threats to our national security.

In addition, the prospect of future attachments by private parties would place a perpetual cloud over the President's ongoing control of all blocked assets programs. This would further undermine the President's ability to use such assets as leverage in negotiations, even where attachments had not yet occurred.

Put simply, permitting attachment of blocked assets would likely seriously undermine the use of our blocking programs as a key tool for combating threats against our national security and, in the Iranian context, would not even achieve the goal of full payment of the compensatory damages of all existing judgments against Iran.

(2) Our Obligation and Interest in Protecting Diplomatic Property

The proposed legislation also could cause the United States to violate our obligations under international law to protect diplomatic and consular property, and would undermine the legal protections for such property on which we rely every day to protect the safety of our diplomatic and consular property and personnel abroad. Even though the current legislation arguably provides protection for a slightly broader range of diplomatic property than previous legislative proposals, it is still fundamentally flawed in its failure to permit the President to protect properties, including consular properties, some diplomatic bank accounts, diplomatic residences, and properties of foreign missions to international organizations, which international law obligates us to protect.

The United States' legal obligation to prevent the attachment of diplomatic and consular property could not be clearer. Protection of diplomatic property is required by the Vienna Convention on Diplomatic Relations, to which the United States and all of the states against which suits presently may be brought under the 1996 amendments to the FSIA are parties. Under Article 45 of the Vienna Convention on Diplomatic Relations we are obligated to protect the premises of diplomatic missions, together with their real and personal property and archives, of countries with which we have severed diplomatic relations or are in armed conflict. This would include diplomatic residences owned by the foreign state.

Likewise, under Article 27 of the Vienna Convention on Consular Relations, the same protection is required for consular premises, property, and archives. Attachment of any of the types of property covered by the Vienna Conventions on Diplomatic and Consular Relations could place the United States in violation of our obligations under international law.

The proposed legislation would only permit the President to ensure the protection of a narrow portion of the property covered by the Vienna Conventions, and would thereby place the United States in violation of our legal obligations. In addition, the proposed legislation as drafted could cause us to breach our obligations to ensure the inviolability of missions to the United Nations, pursuant to the UN Headquarters Agreement and the General Convention on Privileges and Immunities.

Our national interest in the protection of diplomatic property could not be clearer or more important. [Italic for emphasis] The United States owns over 3,000 buildings and other structures abroad that it uses as embassies, consulates, missions to international organizations, and residences for our diplomats. The total value of this property is between $12 and $15 billion.

Because we have more diplomatic property and personnel abroad than any other country, we are more at risk than any other country if the protections for diplomatic and consular property are eroded. [Italic for emphasis] If we flout our obligations to protect the diplomatic and consular property of other countries, then we can expect other countries to target our diplomatic property when they disagree strongly with our policies or actions. Defending our national interests abroad at times makes the United States unpopular with some foreign governments. We should not give those states who wish the United States ill an easy means to strike at us by declaring diplomatic property fair game.

In the specific case of Iran, attachment of Iran's diplomatic and consular properties could also result in substantial U.S. taxpayer liability. Iran's diplomatic and consular properties in the United States are the subject of a claim brought by Iran against the United States before the Iran-U.S. Claims Tribunal. The Iran-U.S. Claims Tribunal is an arbitration court located at The Hague in the Netherlands. It was established as part of the agreement between Iran and the United States that freed the U.S. hostages in Iran and resolved outstanding claims that were then pending between the United States and Iran. Pursuant to this agreement and awards of the Tribunal, Iran has paid $7.5 billion in compensation to or for the benefit of U.S. nationals. The Tribunal also has jurisdiction over certain claims between the two governments.

Although we are contesting Iran's claim vigorously, the Tribunal could find that the United States should have transferred Iran's diplomatic and consular property to it in 1981. If it does so and the properties are not available because they have been liquidated to pay private judgments, the U.S. taxpayer would have to bear the cost of compensating Iran for the value of the properties. Under the Algiers Accords, Tribunal awards against the governments are enforceable in the courts of any country, under the laws of that country.

(3) Equity Among Claimants

We are also deeply concerned that the proposed legislation would frustrate equity among U.S. nationals with claims against terrorism-list states. It would create a winner-take-all race to the courthouse, arbitrarily permitting recovery for the first, or first few, claimants from limited available assets, leaving other similarly-situated claimants with no recovery at all. In fact, it would take away assets potentially available to them.

However, the Alejandre, Flatow, and Anderson cases do not represent the only claims of U.S. nationals against Cuba and Iran. No other claimants would benefit at all from the proposed legislation; indeed this legislation would seriously prejudice their interests.

In the case of Cuba, the U.S. Foreign Claims Settlement Commission ("FCSC") has certified 5,911 claims of U.S. nationals against the Government of Cuba, totaling approximately $6 billion with interest, dating back to the early 1960s. Contrary to statements made at the April 13 hearing, these include not just expropriation claims, but also the wrongful death claims of family members of two individuals whom the Cuban Government executed after summary trial for alleged crimes against the Cuban state. Other claims relate to the Castro Government's seizure of homes

and businesses from U.S. nationals. These claimants have waited over 35 years without receiving compensation for their losses. This bill will not help them at all.

The same situation applies with respect to Iran. In addition to the Flatow and Anderson plaintiffs, who have judgments for compensatory and punitive damages totaling $589 million, former hostages who were held captive in Lebanon—David Jacobsen, Joseph Cicippio, Frank Reed, and their families—collectively have won a judgment against Iran totaling $65 million. Additional suits against Iran are currently pending in the Federal District courts.

Moreover, given the nature of these regimes, it remains possible that in spite of our substantial efforts to combat terrorism, foreign terrorist states will commit future acts in violation of the rights of U.S. nationals, which may give rise to claims against them. If such incidents occur, these claimants will also have an interest in being compensated.

Against this background, in which outstanding judgments for compensatory and substantial punitive damages far exceed available funds, the proposed legislation would permit the first claimants to reach the courthouse to deplete all the available assets of terrorism-list governments, leaving nothing for other similarly situated claimants to satisfy even compensatory damages they are awarded. Satisfaction of the judgments in the Alejandre, Flatow, and Anderson cases would come at the expense of all other claimants against Cuba and Iran, both past and future.

In sum, permitting the attachment of blocked and diplomatic properties in individual cases, as the proposed legislation would do, would undermine our ability to combat threats to our national security, violate our obligations under international law, place our diplomatic and consular properties and personnel abroad at risk, and lead to arbitrary inequities in the treatment of similarly-situated U.S. nationals with claims against foreign governments.

(4) Breaching the Sovereign Immunity of the United States

We are equally concerned about the provision of the proposed legislation that would permit garnishment of debts of the United States. Not only would this provision breach the long-established principle that the United States Government has sovereign immunity from garnishment actions, it would seriously undermine our Foreign Military Sales program, which is an important tool supporting U.S. national security policy and strategy, by creating an exception to the processes and principles under which the program operates that has not existed in the program's 40-year history.

By allowing plaintiffs to attempt to tap the FMS Trust Fund to satisfy their judgments, the entire FMS program would be jeopardized as foreign customers question whether funds they are required to pay under the FMS program might be at risk of diversion or attachment. H.R. 3485 would therefore inject a major element of uncertainty and unreliability into the FMS program.

Additionally, foreign governments make pre-payments into the FMS Trust Fund to ensure payment of U.S. suppliers for products and services provided to foreign governments in USG-approved sales of defense products and services. Under section 37 of the Arms Export Control Act, these funds are available solely for payments to U.S. suppliers, and for refunds to foreign purchasers in

connection with such sales. If the FMS Trust Fund can be exposed to attachment through an act of Congress for purposes other than ensuring payment for arms sales, not only may foreign governments simply question the wisdom of engaging in such transactions with the United States, but payments to U.S. suppliers would be threatened.

The proposed legislation also will negatively affect our defense industrial base. If passed as currently written, not only will U.S. defense firms be uncertain about whether and when they will be paid, but our ability to maintain open production lines needed to support the U.S. military, which the FMS program greatly facilitates, also would be disrupted.

We have heard that the intent of the proposed legislation is to "make terrorist states pay." However, exposing the Iranian FMS Trust Fund account ("Iran FMS account") to attachment will not cause Iran to pay. Here too, at the end of the day, the U.S. taxpayer will bear this burden if this fund is tapped. The United States will have to pay Iran whatever amount in the Iran FMS account is held by the Iran-U.S. Claims Tribunal to be owed to Iran. The current balance of the Iran FMS account, which is approximately $400 million, is the subject of Iran's multi-billion dollar claim against the United States before the Tribunal, arising out of the Iran FMS program. Depleting Iran's FMS account through attachment by the plaintiffs in no way discharges any obligation to Iran the U.S. Government may ultimately be determined to have by the Tribunal. And if Iran prevails on its claims, it can seek to enforce its award against U.S. property anywhere in the world, since the awards of the Iran-U.S. Claims Tribunal are enforceable in the courts of any country. Any Tribunal award that cannot be satisfied from the Iranian FMS account will have to be satisfied with U.S. government funds. Thus American taxpayers, rather than Iran, would actually pay under H.R. 3485. CBO's cost estimate for the bill has been confirmed that the legislation would cost the Treasury, and hence the taxpayer, $420 million, most of which is associated with the FMS Trust Fund.

This provision is also of particular concern because it would prevent the United States from meeting its obligations to make payments in satisfaction of awards the Tribunal renders against the United States. Instead, the proposed legislation would permit private parties to garnish the funds of the U.S. Government in order to collect such payments before they reach Iran. Even without this change in the law, there have been efforts in the Flatow case to garnish the payment of a $6 million Tribunal award in Iran's favor.

It is important to understand that allowing private litigants to garnish amounts we owe Iran under Tribunal awards would not discharge the U.S. Government's liability to Iran to pay such money. For example, if the efforts in the Flatow case had succeeded, the Flatow family would have received $6 million, but the United States still would have owed Iran $6 million under the unpaid award. *And again because the awards of the Iran-U.S. Claims Tribunal are enforceable in the courts of any country, Iran can seek to enforce awards against U.S. property in other countries if we do not pay them voluntarily*. [Italic for emphasis]

Permitting garnishment of the payment of such awards could thus result in the U.S. taxpayer paying twice: once when a private

claimant garnishes the payment, and a second time upon Iran's successful enforcement of the still unsatisfied award against us abroad. Because the judgments against Iran received by these plaintiffs total in the hundreds of millions of dollars, permitting garnishment of debts owed by the United States to Iran as a means of satisfying these judgments could cost the U.S. taxpayer hundreds of millions of dollars.

Finally, while we are vigorously contesting all of Iran's claims at the Tribunal, if we are unable to pay even the smallest awards against us, our position before the Tribunal in all other claims will clearly be undermined.

(5) Eliminating Legal Separateness of Agencies and Instrumentalities

There are also significant problems with the provision of the proposed legislation that would change the way the FSIA defines a foreign state's agencies and majority-owned or controlled instrumentalities for terrorism-list countries where there is a terrorism-related judgment against it. This provision would overturn the Congress's own considered judgment when it passed the FSIA in 1976, as well as existing Supreme Court case law and basic principles of corporate and international law. In addition, it would prejudice the interests of U.S. citizens and corporations who invest abroad.

This provision would make corporations that are majority-owned or controlled by a terrorism-list foreign government liable for terrorism-related judgments awarded against that government. The Congress recognized the danger of this position when it passed the FSIA in 1976. The Conference Report to that bill observed that "[i]f U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary."

We are concerned that this proposal to disregard separate legal personality, although limited in the bill to terrorism-list states and their majority owned entities, could create the perception that the United States is unreliable as a location for banking or investment. Especially for companies with linkages to foreign governments, such a provision could be viewed as an expansion of U.S. economic sanctions. It could raise concerns about the United States as a safe financial center and about the likelihood of possible legal actions against their assets in the United States. This perception could undermine the competitive ability of U.S. financial firms to lead privatizations abroad and to attract banking business and investments to the United States.

In addition, if the United States were to "pierce the corporate veil" in this manner, there could well be similar actions in foreign countries. Foreign countries may enact similar changes to their law or foreign courts might disregard the separate status of private, U.S. owned companies in cases where a litigant had a judgment against the U.S. Government.

Compared to the billions of dollars the United States Government and private U.S. interests have invested abroad, the blocked assets of terrorism-list state entities, agencies, and instrumental-

ities located in the United States are small. In the case of Iran, we do not have a comprehensive picture of Iranian assets in the United States that might be affected by this proposed legislation. There is currently no blocking of Iranian assets in the United States (other than the residual of property blocked during the Hostage Crisis), and thus no obligation on the part of U.S. persons to report specific information on them.

U.S. citizens, corporations, the United States Government, and taxpayers have far more money invested abroad than those of any other country, and thus have more to lose if investment protections such as those provided by the presumption of separate status is eroded. [Italic for emphasis] If we saddle the investors of other countries with the debts of foreign governments with which they are co-investors, as the proposed legislation would do, then we can expect U.S. investors and taxpayers to pay a considerably higher price when other governments follow our example.

Finally, disregarding separate legal personality as provided for in this proposal could possibly lead to substantial U.S. taxpayer liability for takings claims in U.S. courts and possibly before international fora.

We are grateful for this opportunity to address a very important subject involving the fight against terrorism, compensation for victims, and critical national interests. Unfortunately, however, the concerns raised here indicate that the 1996 amendment waiving sovereign immunity and creating a judicial cause of action for damages arising from acts of terrorism has not met its goals of providing compensation to victims and deterring terrorism. In fact, if blocked assets were exhausted to compensate the families, which would be the result of this bill, the leverage to affect the conduct of the terrorism-list states would be lost along with the blocked assets. We are not happy that these suits have not led to recovery for families who have brought cases under the 1996 amendment. A system that has to date left no recovery option other than one that conflicts with U.S. national interests and would result in substantial U.S. taxpayer liability is not an acceptable system.

We have been giving this a very hard look and have been working with several members of Congress to address this difficult problem. We are anxious to continue doing so. Together, we hope to formulate immediate and longer-term approaches that will address the concerns—of compensation for terrorist acts and the U.S. national interests and international obligations—that we all share in a much more satisfactory way. Most importantly, we believe that, for a workable and effective solution, we need a careful and deliberative review of the issues, informed by our experience since the 1996 amendment.

As mentioned earlier, we suggested last year that the Administration and Congress commit to a joint commission to review all aspects of the problem, and to recommend to the President and the Congress proposals to find ways to help these families receive compensation, in a way consistent with our overall national interests and international obligations. We believe that this is the best way to deal with these issues and that it therefore merits further consideration. We believe that such a commission should be one of stature and with the right expertise to confront all the hard issues we have discussed today—including the lack of effective remedies

in these cases because of sanctions against terrorism-list countries under U.S. law, which are absolutely necessary to maintain.

A fundamental principle for this joint commission—by definition—would be the need to inventory outstanding claims and develop an effective and fair mechanism for compensation of victims of terrorism. The commission should be encouraged to think broadly, including consideration of avenues other than the judicial one created by the 1996 amendment.

We hope discussions on the Commission and the broader issue of compensation for victims of terrorism will yield a solution that best addresses all parties' respective interests. Again, we are committed to working together with you, members of this Subcommittee, and others to find non-legislative and legislative means to achieve our shared goal of fair and just compensation for victims of terrorism.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * * * *

PART IV—JURISDICTION AND VENUE

* * * * * * *

CHAPTER 87—DISTRICT COURTS; VENUE

* * * * * * *

§ 1391. Venue generally

(a) * * *

* * * * * * *

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) * * *

* * * * * * *

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b)*(1)* of this title; or

* * * * * * *

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

* * * * * * *

§ 1603. Definitions

For purposes of this chapter—

(a) * * *

[(b) An "agency or instrumentality of a foreign state" means any entity—] *(b) An "agency or instrumentality of a foreign state" means—*

(1) any entity—

[(1)] *(A)* which is a separate legal person, corporate or otherwise, and

[(2)] *(B)* which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

[(3)] *(C)* which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country[.]*; and*

(2) for purposes of sections 1605(a)(7) and 1610 (a)(7) and (f), any entity as defined under subparagraphs (A) and (B) of paragraph (1), and subparagraph (C) of paragraph (1) shall not apply.

* * * * * * *

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) * * *

* * * * * * *

(h) If a foreign state, or its agency or instrumentality, is a party to an action pursuant to subsection (a)(7) and fails to furnish any testimony, document, or other thing upon a duly issued discovery order by the court in the action, such failure shall be deemed an admission of any fact with respect to which the discovery order relates. Nothing in this subsection shall supersede the limitations set forth in subsection (g).

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages, except any action under section 1605(a)(7) or 1610(f); if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought. *No Federal or State statutory limits shall apply to the amount of compensatory, actual, or punitive damages permitted to be awarded to persons under section 1605(a)(7) and this section.*

* * * * * * *

§ 1610. Exceptions to the immunity from attachment or execution

(a) * * *

* * * * * * *

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state **[**(including any agency or instrumentality or such state)**]** *(including any agency or instrumentality of such state)* claiming such property is not immune under section 1605(a)(7).

* * * * * * *

(C) Notwithstanding any other provision of law, moneys due from or payable by the United States (including any agency, subdivision or instrumentality thereof) to any state against which a judgment is pending under section 1605(a)(7) shall be subject to attachment and execution, in like manner and to the same extent as if the United States were a private person.

* * * * * * *

(3)(A) Subject to subparagraph (B), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive this subsection in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against the premises of a foreign diplomatic mission to the United States, or any funds held by or in the name of such foreign diplomatic mission determined by the President to be necessary to satisfy actual operating expenses of such foreign diplomatic mission.

(B) A waiver under this paragraph shall not apply to—

(i) if the premises of a foreign diplomatic mission has been used for any nondiplomatic purpose (including use as rental property), the proceeds of such use; or

(ii) if any asset of a foreign diplomatic mission is sold or otherwise transferred for value to a third party, the proceeds of such sale or transfer.

(4) For purposes of this subsection, all assets of any agency or instrumentality of a foreign state shall be treated as assets of that foreign state.

* * * * * * *

SECTION 117 OF THE TREASURY DEPARTMENT APPROPRIATIONS ACT, 1999

EXCEPTION TO IMMUNITY FROM ATTACHMENT OR EXECUTION

SEC. 117. (a) * * *

* * * * * * *

[(d) WAIVER.—The President may waive the requirements of this section in the interest of national security.**]**

* * * * * * *

ADDITIONAL VIEWS

I take this opportunity to express my perspective on the committee's consideration of the *Justice for Victims of Terrorism Act*, H.R. 3485 and to describe several amendments I made to the bill. I continue to support Congress's efforts to ensure that victims of terrorism and their families are compensated by the foreign states that have committed such atrocious crimes. Monetary damages can never truly compensate the victims and their families. What Congress can do is ensure that judicial judgements against these terrorist nations are enforced so that monetary awards actually hurt these terrorist states rather than being merely a slap on the wrist.

In considering H.R. 3485, I raised two concerns with provisions under current law that potentially restrict victims ability to obtain compensation for terrorist attacks against them or their family members. Both of these concerns were incorporated in an amendment I offered that was accepted by the Majority. In particular, I was concerned that road blocks put up by foreign states in the course of discovery can severely burden the litigation process to the victims' detriment. Moreover, it is important to ensure that the continuing efforts of Congress and numerous States to implement Federal and State statutory caps on damage awards do not apply to U.S. victims of terrorist attacks. A description of the history of the current law waiving sovereign immunity for certain foreign states that commit terrorist acts and H.R. 3485, as well as the amendment, are detailed herein.

HISTORY OF CURRENT LAW

Until the beginning of the 1900s, the United States afforded foreign states absolute immunity from suit in U.S. courts as a matter of common law. With the rise of Communism and the growth of state owned trading and shipping companies, the United States began to recognize the restrictive theory of foreign sovereign immunity, which permitted suits arising from a foreign states' commercial activities. In 1952, the "Tate Letter" announced that the United States would follow the restrictive theory in making foreign sovereign immunity determinations.[1] In 1976, in order to promote uniform and apolitical determinations, Congress transferred immunity determinations from the State Department to the judiciary and codified the restrictive theory in the Foreign Sovereign Immunities Act ("FSIA").[2]

Since enactment of the FSIA, U.S. courts consistently have refused to extend the scope of the FSIA, and thus, did not find within the FSIA the right to sue foreign states, beyond commercial activi-

[1] *Letter from Jack B. Tate, Acting Legal Advisor, to the Attorney General* (May 19, 1952).
[2] 28 U.S.C.A. §§ 1602–1611. See *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1 (D.C.D.C. 1998).

ties, to reach public acts committed by such foreign states outside the United States. As a result, foreign states used the FSIA as a shield against civil liability for violations of the laws of nations committed against U.S. nationals overseas.[3]

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted in response to a number of terrorist attacks against U.S. citizens abroad.[4] AEDPA amended the FSIA to lift the immunity of foreign states for a certain category of sovereign acts which are repugnant to the United States and the international community—namely acts of terrorism.[5] AEDPA created an exception to sovereign immunity in the case of foreign states officially designated by the State Department as terrorist states when the foreign state commits a terrorist act, or provides material support and resources to an individual or entity which commits such an act, resulting in the death or personal injury of a U.S. citizen.

In the 1997 Omnibus Consolidated Appropriations Act, the "Flatow Amendment" revised the FSIA to expressly provide that punitive damages were available in actions brought under the state sponsored terrorism exception to immunity.[6] This was done to ensure that the state sponsored terrorism exception had a deterrent effect—the potential for substantial civil liability. To further make the immunity exception have a real impact on state sponsored terrorism, in 1998 Congress amended the FSIA to allow plaintiffs holding judgements for acts of terrorism against those states on the terrorism list to bring enforcement actions against any blocked assets of those states. The legislation included a waiver provision which, according to the legislative history, was to be exercised by the President on a limited basis and only when in the national security interest of the United States.[7] President Clinton in 1998 issued a Presidential Proclamation, which was a finding that it is in the national security interest of the United States to waive the eligibility of plaintiffs to attach "blocked" assets in the United States in connection with all judgements against all terrorist states.[8]

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[3] See *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993).

[4] There are several notable cases involving U.S. citizens in the 1980s and 1990s, which spurred Congress' efforts to expand the FSIA to eliminate sovereign immunity for foreign states engaged in state-sponsored terrorism. First, in March 1985, Terry Anderson, an American journalist working in Beirut, was kidnaped by agents of the Islamic Republic of Iran ("Iran"). He was held captive by his kidnappers in deplorable conditions until early December 1991. Second, during the 1980s, three other individuals working in Lebanon, David Jacobsen, an administrator of the American University hospital in Beirut, Joseph Ciccipio, a comptroller of the American University school and hospital, and Frank Reed, the principal of a private secondary school in Beirut, were also held captive by agents of Iran. Third, in April 1995, Alisa Flatow, a 20 year old college student from New Jersey, was on a bus on the Gaza strip going to a Passover holiday celebration. A terrorist from the Iranian-backed Islamic Jihad rammed his car loaded with explosives into the bus, killing Ms. Flatow and seven others. Finally, in February 1996, Cuban MiG aircraft shot down two aircraft flown by the "Brothers to the Rescue" organization in international airspace over the Florida Straits. Three American citizens were killed in the attack.

[5] Pub. L. 104–132, Title II, § 221(a) (Apr. 24, 1996), 110 Stat. 1241 *codified in* 28 U.S.C.A. § 1605 (West 2000 Supp.).

[6] Pub. L. 104–208, Div. A., Title I, § 101(c) [Title V § 589] (Sept. 30, 1996), 110 Stat. 3009–172 *codified in* 28 U.S.C.A. § 1605 note (West 2000 Supp.).

[7] Treasury Department Appropriations Act of 1999, Pub. L. 105–277, Title I, § 117(d) *codified in* 28 U.S.C.A. § 1610 note (West 2000 Supp.).

[8] *Determination to Waive Requests Relating to Blocked Property of Terrorist-List States*, Presidential Determination No. 99–1, 63 Fed. Reg. 59201 (Oct. 21, 1998) *codified in* 28 U.S.C.A. § 1610 note (West 2000 Supp.).

There are several cases pending in U.S. courts by the families of victims of terrorism.[9] The plaintiffs in these actions have been unable to collect on the judgements they received due to impediments in attaching the assets of foreign states. It is argued that the President's national security waiver prevents plaintiffs from attaching certain assets blocked, and thus held by the United States, to prevent such assets from being returned to the foreign state. Further, there are certain "unblocked" assets which are essentially immunized from attachment because they are independent juridical entities (*e.g.*, an Iranian bank that does not have a direct nexus to the terrorist act). As described below, H.R. 3485 amends the FSIA to remove the asserted impediments to plaintiffs attaching the assets of foreign states located in the United States.

SUMMARY OF THE JUSTICE FOR VICTIMS OF TERRORISM ACT, H.R. 3485

H.R. 3485 amends the applicability of the FSIA's definition of an "agency or instrumentality of a foreign state" to make clear that the U.S. located assets of corporations majority-owned by terrorism sponsoring governments would be liable for execution of judgement issued by U.S. courts against that government.

H.R. 3485 directs that moneys due from, or payable by the United States to any foreign state against which a judgment is pending will be subject to attachment and execution in a like manner and to the same extent as if the United States were a private person. This provision waives the U.S. Government's immunity from suit on funds held or collected by the U.S. Government in connection with the activities of a foreign state (*e.g.*, the U.S. Government holds the revenue of certain Iranian properties sold in the United States and are due to be paid to Iran. Such revenue cannot be attached because the United States is immunized from suit).

H.R. 3485 authorizes the President, upon determining on an asset-by-asset basis that a waiver is necessary and in the national security interest, to prevent plaintiffs from attaching the premises of any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations. The presidential waiver would not apply to the proceeds of: (1) any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used for any non-diplomatic purpose (including use as rental property); or (2) a sale or transfer of an asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations. This provision prevents the President from issuing a blanket waiver and prevents the applicability of such a waiver to proceeds from non-diplomatic activities.

H.R. 3485 treats all assets of any agency or instrumentality of a foreign state as assets of that foreign state. This change in the law eliminates the "Bancec" rule which limits the attachment of a

[9] To date, judgements currently have been awarded to families of victims in the following cases: (1) in March 1998, Alisa Flatow's family was awarded $22.5 million in compensatory damages and $225 million in punitive damages; (2) the three Brothers to the Rescue victims' families were awarded in separate, but related judgements, $48 million in compensatory damages and $132 million in punitive damages, plus nearly $20 million in post-judgement interest and costs; (3) in March 2000, Terry Anderson and his family were awarded $41.2 million in compensatory damages and $300 million in punitive damages; and (4) David Jacobsen, Joseph Ciccipio and Frank Reed were awarded a total of approximately $20 million compensatory damages.

foreign states' assets in the United States (e.g., a bank) only to those assets that are connected in a significant fashion with the terrorist act. This provision also would allow the attachment of the assets of certain private non-profit organizations in the United States that are allied with a foreign state and that are known to be involved in terrorist activities.

Thus, H.R. 3485 eliminates many of the remaining barriers to victims and their families seeking to attach the assets of, and executing the judicial judgements against, foreign terrorist states.[10]

CONYERS AMENDMENT TO H.R. 3485

In order to further assist current and future victims of terrorism who file suits under the FSIA, I offered an amendment approved by voice vote that reduces litigation difficulties presented by unresponsive foreign states during the discovery stages of litigation as well as precludes any cap on damages awarded to victims and their families.

In cases involving foreign terrorist states, obtaining discovery from such litigants can be difficult, if not impossible. American citizens are subject to a very burdensome discovery process under the FSIA and Hague Evidence Convention, which requires the involvement of foreign courts and diplomatic offices and are subject to foreign "blocking statutes" designed to thwart our discovery process. Moreover, foreign states have substantial incentives not to respond to discovery requests seeking information about their involvement in terrorist activities. My amendment therefore requires that when a foreign state fails to respond to a discovery order, the foreign state will be deemed to have admitted the facts to which the discovery order pertains.

The amendment also precludes the application of Federal and Statute caps on compensatory, actual and punitive damages awarded to victims of terrorism under the FSIA. Many States and Congress are continually revising the law to cap or preclude damage awards to plaintiffs, regardless of the egregiousness of the offense. It is nearly impossible to keep track of all the cases where this Congress and States have enacted caps on damages, and it is now to the point where we cannot be sure that caps on damage awards do not currently, or will not some day in the future, apply to these

[10] According to Treasury Deputy Secretary Stuart E. Eizenstat, the Administration has several concerns with H.R. 3485: First, the ability to block assets represents one of the primary tools available to the United States to deter aggressions and discourage or end hostile actions against U.S. citizens abroad. The bill therefore would interfere with the President's power to block foreign assets by subjecting the assets to attachment and execution by private parties. Second, H.R. 3485 may result in the United States violating its obligations under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations to prevent the attachment of diplomatic and consular property. Without protecting the diplomatic and consular property of these terrorist-list countries, the Administration argues that we should expect such countries, and possibly others, to target our diplomatic property when they disagree strongly with our polices or actions. Third, the first claimants who reach the courthouse may be able to deplete the available assets of terrorism-list governments, leaving nothing for other similarly situated claimants. Fourth, the Administration argues that permitting the garnishment of debts of the United States would breach the principle that the United States government has sovereign immunity from garnishment actions. Finally, the bill would make corporations that are majority-owned or controlled by a terrorism-list foreign government liable for all of the individual debts of that government. According to the Administration, such an action would saddle the investors of other countries with the debts of foreign governments with which they are co-investors and we should expect U.S. investors to face the same consequences abroad. Letter from Stuart E. Eizenstat, Deputy Secretary of the U.S. Treasury Department, to the U.S. Senate Committee on the Judiciary (Oct. 27, 1999).

types of cases. Therefore, my amendment ensures that caps on damage awards in these cases are not applicable.

The aforementioned changes are fully consistent with Congressional intent regarding the FSIA. I am pleased that this modest and common sense amendment to further help victims of terrorism was adopted on a bipartisan basis.

JOHN CONYERS, Jr.

○

Annex 13

U.S. Terrorism Risk Insurance Act of 2002, Pub. L. 107–297, 116 Stat. 2322

Public Law 107–297
107th Congress

An Act

Nov. 26, 2002
[H.R. 3210]

To ensure the continued financial capacity of insurers to provide coverage for risks from terrorism.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Terrorism Risk Insurance Act of 2002.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

15 USC 6701 note.

(a) SHORT TITLE.—This Act may be cited as the "Terrorism Risk Insurance Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—TERRORISM INSURANCE PROGRAM

Sec. 101. Congressional findings and purpose.
Sec. 102. Definitions.
Sec. 103. Terrorism Insurance Program.
Sec. 104. General authority and administration of claims.
Sec. 105. Preemption and nullification of pre-existing terrorism exclusions.
Sec. 106. Preservation provisions.
Sec. 107. Litigation management.
Sec. 108. Termination of Program.

TITLE II—TREATMENT OF TERRORIST ASSETS

Sec. 201. Satisfaction of judgments from blocked assets of terrorists, terrorist organizations, and State sponsors of terrorism.

TITLE III—FEDERAL RESERVE BOARD PROVISIONS

Sec. 301. Certain authority of the Board of Governors of the Federal Reserve System.

15 USC 6701 note.

TITLE I—TERRORISM INSURANCE PROGRAM

SEC. 101. CONGRESSIONAL FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) the ability of businesses and individuals to obtain property and casualty insurance at reasonable and predictable prices, in order to spread the risk of both routine and catastrophic loss, is critical to economic growth, urban development, and the construction and maintenance of public and private housing, as well as to the promotion of United States exports and foreign trade in an increasingly interconnected world;

(2) property and casualty insurance firms are important financial institutions, the products of which allow mutualization of risk and the efficient use of financial resources and enhance

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TITLE II—TREATMENT OF TERRORIST ASSETS

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

28 USC 1610 note.

(a) IN GENERAL.—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 USC 1610 note.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(c) SPECIAL RULE FOR CASES AGAINST IRAN.—Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106–386; 114 Stat. 1542), as amended by section 686 of Public Law 107–228, is further amended—

Ante, p. 1411.

(1) in subsection (a)(2)(A)(ii), by striking "July 27, 2000, or January 16, 2002" and inserting "July 27, 2000, any other date before October 28, 2000, or January 16, 2002";

(2) in subsection (b)(2)(B), by inserting after "the date of enactment of this Act" the following: "(less amounts therein as to which the United States has an interest in subrogation pursuant to subsection (c) arising prior to the date of entry of the judgment or judgments to be satisfied in whole or in part hereunder)";

28 USC 1606, 1610 and note.

(3) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively; and

(4) by inserting after subsection (c) the following new subsection (d):

"(d) DISTRIBUTION OF ACCOUNT BALANCES AND PROCEEDS INADEQUATE TO SATISFY FULL AMOUNT OF COMPENSATORY AWARDS AGAINST IRAN.—

"(1) PRIOR JUDGMENTS.—

"(A) IN GENERAL.—In the event that the Secretary determines that 90 percent of the amounts available to be paid under subsection (b)(2) are inadequate to pay the total amount of compensatory damages awarded in judgments issued as of the date of the enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran, the Secretary shall, not later than 60 days after such date, make payment from such amounts available to be paid under subsection (b)(2) to each party to which such a judgment has been issued in an amount equal to a share, calculated under subparagraph (B), of 90 percent of the amounts available to be paid under subsection (b)(2) that have not been subrogated to the United States under this Act as of the date of enactment of this subsection.

"(B) CALCULATION OF PAYMENTS.—The share that is payable to a person under subparagraph (A), including any person issued a final judgment as of the date of enactment of this subsection in a suit filed on a date added by the amendment made by section 686 of Public Law 107–228, shall be equal to the proportion that the amount of unpaid compensatory damages awarded in a final judgment issued to that person bears to the total amount of all unpaid compensatory damages awarded to all persons to whom such judgments have been issued as of the date of enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran.

"(2) SUBSEQUENT JUDGMENT.—

"(A) IN GENERAL.—The Secretary shall pay to any person awarded a final judgment after the date of enactment of this subsection, in the case filed on January 16, 2002, and identified in subsection (a)(2)(A) with respect to Iran, an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraph (1). The Secretary shall make such payment not later than 30 days after such judgment is awarded.

"(B) CALCULATION OF PAYMENTS.—To the extent that funds are available, the amount paid under subparagraph (A) to such person shall be the amount the person would have been paid under paragraph (1) if the person had been awarded the judgment prior to the date of enactment of this subsection.

"(3) ADDITIONAL PAYMENTS.—

Deadline.

"(A) IN GENERAL.—Not later than 30 days after the disbursement of all payments under paragraphs (1) and (2), the Secretary shall make an additional payment to each person who received a payment under paragraph (1) or (2) in an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraphs (1) and (2).

"(B) CALCULATION OF PAYMENTS.—The share payable under subparagraph (A) to each such person shall be equal

to the proportion that the amount of compensatory damages awarded that person bears to the total amount of all compensatory damages awarded to all persons who received a payment under paragraph (1) or (2).

"(4) STATUTORY CONSTRUCTION.—Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure or against assets otherwise available under this section or under any other provision of law.

"(5) CERTAIN RIGHTS AND CLAIMS NOT RELINQUISHED.—Any person receiving less than the full amount of compensatory damages awarded to that party in a judgment to which this subsection applies shall not be required to make the election set forth in subsection (a)(2)(B) or, with respect to subsection (a)(2)(D), the election relating to relinquishment of any right to execute or attach property that is subject to section 1610(f)(1)(A) of title 28, United States Code, except that such person shall be required to relinquish rights set forth—

"(A) in subsection (a)(2)(C); and

"(B) in subsection (a)(2)(D) with respect to enforcement against 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.

"(6) GUIDELINES FOR ESTABLISHING CLAIMS OF A RIGHT TO PAYMENT.—The Secretary may promulgate reasonable guidelines through which any person claiming a right to payment under this section may inform the Secretary of the basis for such claim, including by submitting a certified copy of the final judgment under which such right is claimed and by providing commercially reasonable payment instructions. The Secretary shall take all reasonable steps necessary to ensure, to the maximum extent practicable, that such guidelines shall not operate to delay or interfere with payment under this section.".

(d) DEFINITIONS.—In this section, the following definitions shall apply: 28 USC 1610 note.

(1) ACT OF TERRORISM.—The term "act of terrorism" means—

(A) any act or event certified under section 102(1); or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term "blocked asset" means—

(A) 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); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International

Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.—The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

TITLE III—FEDERAL RESERVE BOARD PROVISIONS

SEC. 301. CERTAIN AUTHORITY OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM.

Section 11 of the Federal Reserve Act (12 U.S.C. 248) is amended by adding at the end the following new subsection:

"(r)(1) Any action that this Act provides may be taken only upon the affirmative vote of 5 members of the Board may be taken upon the unanimous vote of all members then in office if there are fewer than 5 members in office at the time of the action.

"(2)(A) Any action that the Board is otherwise authorized to take under section 13(3) may be taken upon the unanimous vote of all available members then in office, if—

"(i) at least 2 members are available and all available members participate in the action;

"(ii) the available members unanimously determine that—

"(I) unusual and exigent circumstances exist and the borrower is unable to secure adequate credit accommodations from other sources;

"(II) action on the matter is necessary to prevent, correct, or mitigate serious harm to the economy or the stability of the financial system of the United States;

"(III) despite the use of all means available (including all available telephonic, telegraphic, and other electronic means), the other members of the Board have not been able to be contacted on the matter; and

Annex 14

**U.S. Senator Harkin statement to the Senate, 19 November 2002,
148 Cong. Rec. S11524, at S11528 (2002)**

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PROCEEDINGS AND DEBATES OF THE 107th CONGRESS, SECOND SESSION

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Senate

HOMELAND SECURITY ACT OF 2002—Continued

THE SAFETY ACT

Mr. CHAFEE. Madam President, I would like to thank the Republican Leader for his willingness to address concerns raised by me and our colleagues from Maine regarding certain provisions in H.R. 5005, the Homeland Security Act of 2002.

In the interests of clarity, I wanted to discuss one aspect of the Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act of 2002, which is included in H.R. 5005. The SAFETY Act provides that the ''government contractor defense'' will be available to certain sellers of anti-terrorism technology. In *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988), the U.S. Supreme Court recognized that the government contractor defense offers relief to certain defendants from liability for design defects. It is my understanding that the drafters of the SAFETY Act were aware of the Boyle decision and intended for the government contractor defense to apply solely to design defect claims, rather than offering blanket relief to any and all causes of action.

Mr. LOTT. I concur with the Senator from Rhode Island. It is clear that the government contractor defense contained in the SAFETY Act could be raised only in response to design defect claims.

Mr. CHAFEE. I thank the Republican Leader, and look forward to the opportunity to correct three other provisions of the Homeland Security Act when the 108th Congress convenes in January.

FIRST RESPONDERS

Mr. DAYTON. Madam President, I would like to speak about a very important first responder matter which, I hope, the Senate will include in the Homeland Security Act of 2002.

By definition, emergency management usually occurs in crisis. The incident managers must assess the emergency, organize the staff, and direct their responses under very difficult conditions. Currently, however, many first responders are not fully prepared for attacks like September 11, 2001.

NOTICE

If the 107th Congress, 2d Session, adjourns sine die on or before November 22, 2002, a final issue of the Congressional Record for the 107th Congress, 2d Session, will be published on Monday, December 16, 2002, in order to permit Members to revise and extend their remarks.

All material for insertion must be signed by the Member and delivered to the respective offices of the Official Reporters of Debates (Room HT–60 or S–123 of the Capitol), Monday through Friday, between the hours of 10:00 a.m. and 3:00 p.m. through Friday, December 13. The final issue will be dated Monday, December 16, 2002, and will be delivered on Tuesday, December 17, 2002.

None of the material printed in the final issue of the Congressional Record may contain subject matter, or relate to any event that occurred after the sine die date.

Senators' statements should also be submitted electronically, either on a disk to accompany the signed statement, or by e-mail to the Official Reporters of Debates at ''Record@Sec.Senate.gov''.

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By order of the Joint Committee on Printing.

MARK DAYTON, *Chairman.*

● This ''bullet'' symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3210) to ensure the continued financial capacity of insurers to provide coverage for risks from terrorism, having met, have agreed that the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment, signed by a majority of the conferees on the part of both Houses.

The PRESIDING OFFICER. The Senate will proceed to the consideration of the conference report.

(The report is printed in the House proceedings of the RECORD of November 13, 2002.)

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, pursuant to rule XXII the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate on the conference report to accompany H.R. 3210, the Terrorism Risk Protection Act.

Christopher Dodd, Zell Miller, Joseph Lieberman, Harry Reid, Jack Reed, Jon Corzine, Debbie Stabenow, Hillary Rodham Clinton, Charles Schumer, Maria Cantwell, Paul Sarbanes, Byron L. Dorgan, Tom Carper, Jeff Bingaman, Tom Daschle, Barbara Boxer.

The PRESIDING OFFICER. There are 2 minutes of debate evenly divided before the vote. Who yields time?

Mr. SARBANES. Mr. President, I urge Members to vote in favor of invoking cloture. I am not quite sure why we are doing the cloture vote, but in any event, so we can get to the legislation and pass it—this is worthy legislation—I hope the Senate will first impose cloture, and then, under the unanimous consent agreement, we would go to a final vote on the legislation.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. GRAMM. Mr. President, much good work has gone into this bill. I am going to vote against cloture. I don't think the industry retention figures are high enough. I think the taxpayer is too exposed. I am afraid the secondary market will not develop under these circumstances, and, despite all our efforts, the bill still retains the provision that will produce punitive damage judgments against victims of terrorism. In my mind, that is licensing piracy on hospital ships and should not be allowed.

The PRESIDING OFFICER. Is all time yielded back?

All time is yielded back.

By unanimous consent, the mandatory quorum call under the rule is waived.

The question is, Is it the sense of the Senate that debate on the conference report accompanying H.R. 3210, the Terrorism Risk Protection Act, shall be brought to a close?

The yeas and nays are required under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from North Carolina (Mr. HELMS), the Senator from Alaska (Mr. MURKOWSKI), and the Senator from Arkansas (Mr. HUTCHINSON) are necessarily absent.

The yeas and nays resulted—yeas 85, nays 12, as follows:

[Rollcall Vote No. 251 Leg.]

YEAS—85

Akaka	Dayton	Lott
Allard	DeWine	Lugar
Allen	Dodd	McCain
Barkley	Domenici	McConnell
Baucus	Dorgan	Mikulski
Bayh	Durbin	Miller
Bennett	Edwards	Murray
Biden	Feingold	Nelson (FL)
Bingaman	Feinstein	Nelson (NE)
Bond	Fitzgerald	Reed
Boxer	Frist	Reid
Breaux	Graham	Roberts
Brownback	Gregg	Rockefeller
Bunning	Hagel	Sarbanes
Burns	Harkin	Schumer
Byrd	Hatch	Smith (NH)
Campbell	Hollings	Smith (OR)
Cantwell	Inhofe	Snowe
Carnahan	Inouye	Specter
Carper	Jeffords	Stabenow
Chafee	Johnson	Stevens
Cleland	Kennedy	Thompson
Clinton	Kerry	Thurmond
Cochran	Kohl	Torricelli
Collins	Landrieu	Voinovich
Conrad	Leahy	Warner
Corzine	Levin	Wyden
Crapo	Lieberman	
Daschle	Lincoln	

NAYS—12

Craig	Grassley	Santorum
Ensign	Hutchison	Sessions
Enzi	Kyl	Shelby
Gramm	Nickles	Thomas

NOT VOTING—3

Helms	Hutchinson	Murkowski

The PRESIDING OFFICER. On this vote, the ayes are 85, the nays are 12. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

Mr. HATCH. Mr. President, today I rise to speak on final passage of H.R. 3210, the conference report to the Terrorism Risk Insurance Act of 2002. Most of us agree that something needs to be done in this area. This legislation is important to our economy and the many jobs and construction projects that have been in limbo due to the uncertainty following the tragic events of September 11th. My constituents have come to me on multiple occasions, imploring that the Senate act on this issue. They are genuinely concerned about the negative impact lack of coverage has had on their businesses and their employees. Without insurance, our economic growth is in jeopardy, businesses will fail and jobs will be lost. For that reason, I will support final passage.

However, I am concerned that we have not addressed the issue in a prudent and responsible manner that provides the appropriate stability to our economy without exposing our taxpayers to an unreasonable financial burden. In this legislation, we have failed to provide elements that are necessary to the businesses that are themselves the victims of the terrorist attacks, those very same businesses that provide the thousands of jobs in this country that we are seeking to preserve. Moreover, I have concerns about implementing a program such as this without ensuring that the hardworking taxpayers in this county are not forced to pick up the tab for the overzealous and unrestrained trial bar. With the type of litigation that would likely result from massive losses, even just from one attack, it defies common sense that some would oppose implementing principles of litigation management to ensure that all victims get treated fairly and jury awards, based more on emotion rather than actual legal culpability, do not dry up the resources of defendant businesses, which in turn hurts victims, employees and taxpayers.

In a letter dated June 10, 2000, from the Treasury Department and signed by not only the Secretary of the Treasury, but the Director of the Office of Management and Budget, the Director of the National Economic Council and the Director of Economic Advisers really underscores the serious ramifications to our economy that have resulted from a lack of coverage for terrorist acts and supports Congressional action in this area. But it also emphasizes that we must do so in a responsible manner.

One important issue for the availability of terrorism insurance is the risk of unfair or excessive litigation against American companies following an attack. Many for-profit and charitable companies have been unable to obtain affordable and adequate insurance, in part because of the risk that they will be unfairly sued for the acts of international terrorists . . . It makes *little economic sense* to pass a terrorism insurance bill that leaves our economy exposed to such *inappropriate and needless legal uncertainty*. [emphasis added]

In seeking to provide stability to our economy we must not act irresponsibly. The conference report on H.R. 3210, while providing a necessary backstop to our economy, includes some weaknesses that concern me. While I believe this measure is necessary and should be enacted as soon as possible, I sincerely hope this body will address my concerns in the next Congress.

Mr. GRASSLEY. Mr. President, I rise to express my concern about the conference report to H.R. 3210, the Terrorism Risk Insurance Act. When the Senate first considered this bill in June, I expressed the hope that Congress would send the President a bill that was fair and balanced with respect to basic liability protections for all victims of terrorism. However, I believe that the conference report before us fails to provide reasonable restrictions on lawsuit liability, and instead exposes the American taxpayer to potentially excessive costs of unmitigated litigation as a result of terrorist attacks beyond anyone's control. Consequently, I am reluctant to vote for final passage of this conference report.

I am glad that the final version of the terrorism reinsurance legislation is only a temporary fix. As a general matter, the Government should not be in the business of writing claims.

Some have implied that we wrongly predicted an insurance crisis following the events of September 11, 2001, which was the reason for this temporary backstop. The insurance companies have survived without government support thus far, and banks are still lending where there is uncovered risks. According to the Wall Street Journal, ''the economy has continued to grow, albeit slowly, and some companies have started offering insurance again, albeit at very high premiums.'' The article states that a short-term solution would be nice, but the bill is ''a bonanza for the trial lawyers, an entitlement for insurers.''

Again, I do not believe that this legislation contains adequate liability protections. While some restrictions were negotiated in conference, I don't believe that they go far enough. Basically, American companies that are themselves victims of terrorists acts should not be subject to predatory lawsuits or unfair and excessive punitive damages. If that happens, not only will Americans be the victims of another attack, but the taxpayers will be the victims of trial lawyers who will seek the deepest pocket and rush to the courthouse to sue anyone regardless of fault. There needs to be careful restrictions on lawsuit liability to protect taxpayer funds from being exposed to opportunistic, predatory assaults on the United States Treasury.

In fact, I agree with an editorial in the Washington Post: the other side of the aisle should be ''embarrassed by their efforts to defend trial lawyers at the expense of the American economy.'' Rather, we should be working to enforce the long-standing Federal policies behind the Federal Tort Claims Act: namely, that lawyers should not be making handsome profits when they are paid from the U.S. Treasury. I agree with a statement made by House Judiciary Chairman SENSENBRENNER, that ''especially today, in a time of war, excessive lawyer fees drawn from the U.S. Treasury should not be allowed to result in egregious war profiteering at the expense of victims, jobs and businesses.''

Many say we can come back and revisit these provisions later. I say we get it right the first time we sign it into law.

I ask unanimous consent to print the Wall Street Journal article to which I referred in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Wall Street Journal, Nov. 6, 2002]

A TERRIFYING INSURANCE DEAL

A BONANZA FOR THE TRIAL LAWYERS, AN ENTITLEMENT FOR INSURERS

After the elections the 107th Congress is threatening to return to pass some unfinished business, including a compromise on terrorism insurance. Having looked at the details of the insurance deal, we can only hope they'll all stay home.

The two parties have been battling for a year over this bill, especially the extent to which trial lawyers could profit from acts of terror. Republicans and some Democrats want to ban punitive damages against property owners. But Tom Daschle, carrying his usual two oceans of water for the plaintiff's bar, resisted any erosion in the right to sue the owner should a plane crash into his or her building.

And it looks like Mr. Daschle has prevailed. The compromise permits such suits, albeit before a single federal court as opposed to the more accommodating state courts. In other words, the White House appears to have caved, and after months of arguing the opposite now says terror insurance is about ''jobs, not tort reform.''

Well, we're not sure it's still about jobs either. The bill makes insurance companies liable for claims amounting to a certain percentage of their premiums, puts the government on the hook for 90% of losses over that deductible, and allows the government to recover some portion of its payment by levying a surcharge on all policy owners. The best news is that government help sunsets in 2005, or at least that's the promise.

Unfortunately, the bill ignores the crucial problem of risk. Risk-based premiums—which reward the careful and punish the careless—are a superb tool for reducing risk. Consider: There are lots of things property owners can do to reduce the damage from terrorism—retrofitting air-filtration systems to guard against biological agents, redesigning underground parking garages to prevent bomb attacks, fireproofing steel girders to minimize fire damage. And insurance companies can discipline them to take these measures by charging risk-based premiums.

If insurers were required to pay premiums to the government based on the premiums they receive, market incentives to reduce risk would improve markedly. If, on the other hand, terror insurance is essentially free, as it would be under the current bill, insurers have less incentive to charge the full cost of risk; instead they have every incentive to underprice it.

An alternative has been suggested by David Moss, an economist at Harvard Business School: Let the federal government pay 80% of losses from a terrorist attack, as long as insurers also pass along 80% of the premiums they collect. This way, says Mr. Moss, insurers would price risk near or at its full cost, exerting discipline against the careless, and prices would be set in the private market.

We mention Mr. Moss's idea because, despite heavy breathing by the insurance industry, it isn't at all clear that there's an immediate economic need for this legislation. It's true that right after 9/11 the property insurance market seized up. Insurers didn't know how to price for the risk of another attack, and so rent their garments that the economy would collapse without government reinsurance. We were also open to the idea, but it turns out they were wrong. The economy has continued to grow, albeit slowly, and some companies have started offering insurance again, albeit at very high premiums.

We aren't arguing that a federal backstop might not perk up business in the short term, or that some sort of insurance wouldn't be nice to have in place before another attack. But the assertion that billions of dollars of projects have been shelved and 300,000 jobs lost is bogus. Despite efforts to quantify a slowdown, including a survey by the Fed, evidence of suffering is scattered and anecdotal—and mostly confined to trophy properties.

The bigger point here is that any legislation is likely to be permanent, since no entitlement of this size has ever been allowed to ride quietly into the sunset. That argues for doing it right, and waiting until the next Congress if need be. Many Republicans are privately unhappy with the deal the White House has cut with Mr. Daschle. We hope they'll urge President Bush to insist on something better.

Mr. HARKIN. Mr. President, I am very pleased that this conference report includes bipartisan legislation that I authored with my colleague, Senator ALLEN of Virginia, which will make state sponsors of terrorism and their agents literally pay for the dastardly attacks they perpetrate on innocent Americans.

Last June, the Senate approved our amendment to the terrorism insurance bill on an 81 to 3 vote to mandate that at least $3.7 billion in blocked assets of foreign state sponsors of terrorism and their agents, at the current disposal of the U.S. Treasury Department, be used—first and foremost—to compensate American victims of their terrorist attacks. That lop-sided vote made it very clear that most Americans and their elected representatives understand the importance of making the rogue governments who sponsor international terrorism pay literally, instead of blithely dunning the American taxpayer to compensate the victims of their outrageous attacks or doing nothing.

Our global struggle against terrorism must be fought and won on multiple fronts. In so doing, we cannot forget that terrorist attacks are ultimately stories of human tragedy. The young woman from Waverly, IA—Kathryn Koob—seeking to build cross-cultural ties between the Iranian people and the American people only to be held captive for 444 days in the U.S. Embassy in Tehran. The teenage boy from LeClaire, Iowa—Taleb Subh—who was visiting family in Kuwait in 1990, and who was terrorized by Saddam Hussein and Iraqi troops in the early stages of the invasion of Kuwait. The U.S. aid worker from Virginia—Charles Hegna—who was tortured and killed in 1984 by Iranian-backed hijackers in order ''to punish'' the United States. These are only a few of the American families victimized by terrorist attacks abroad I have come to know. There is not a Senator in this body who cannot count additional American victims of state-sponsored terrorism among his or her constituents.

What do we say to these families, the wives, mothers and fathers, sons and daughters? More importantly, what can we do, as legislators and policymakers, to mitigate their suffering and to answer their cries for justice?

Those who sponsor as well as those who commit these inhumane acts must pay a price. That is why I sponsored the Terrorism Victim's Access to Compensation Act, whose key provisions are included in this conference agreement.

In 1996, the Congress passed an important law—the Anti-Terrorism and Effective Death Penalty Act—with bipartisan support and with the support of the U.S. State Department. That statute allows American victims of state-sponsored terrorism to seek redress and pursue justice in our Federal courts. A central purpose of that law is to make the international terrorists and their sponsors pay an immediate price for their attacks on innocent Americans abroad. For the first time starting in 1996, the money of foreign sponsors of terrorism and their agents that is frozen bank accounts in the United States and under the direct control of the U.S. Treasury was to have become available to compensate American victims of state-sponsored terrorism who bring lawsuits in federal court and win judgments on the merits against the perpetrators of such attacks.

The law enacted in 1996 only applies to seven foreign governments officially designated by the U.S. State Department as state sponsors of international terrorism. They are the governments of Iran, Iraq, Libya, Syria, Sudan, North Korea, and Cuba. It is these state sponsors of international terrorism, not the American taxpayer, who must be compelled first and foremost to compensate the American victims of their inhumane attacks.

The U.S. Treasury Department currently and lawfully controls at least $3.7 billion in blocked or frozen assets of these seven state sponsors of terrorism. But some officials of the U.S. Treasury and State Departments who think they know better, until now, have been flaunting the law, ignoring the clear intent of the Congress, and opposing the use of these blocked assets of Saddam Hussein, the ruling mullahs in Iran, and other state sponsors of terrorism to compensate American victims of terrorist attacks. In fact, in the on-going case involving the 53 Americans taken hostage in the U.S. Embassy in Iran in 1979 and held in captivity for 444 days and their families, U.S. Justice Department and State Department attorneys have intervened in federal court to have their lawsuit dismissed in its entirety, thus de facto siding with the Government of Iran.

Incredibly, since 1996 American victims of state-sponsored terrorism have been actively encouraged to seek redress and compensation in our federal courts. These long-suffering American families have complied with all requirements of existing U.S. law and many have actually won court-ordered judgments, only to be denied any compensation and what little justice they seek in a court of law. The opponents of this legislation apparently want American taxpayers to foot the bill for what could amount to hundreds of millions of dollars instead of making the terrorists and their sponsors pay.

With the passage of this new legislation, the Congress is requiring that this misguided policy be abandoned. Holding the blocked assets of state sponsors of terrorism in perpetuity might make sense in the pristine world of high diplomacy, but not in the real world after the September 11 terrorist attacks on America.

First, paying American victims of terrorism from the blocked and frozen assets of these rogue governments and their agents will really punish and impose a heavy cost on those aiding and abetting the terrorists. This tougher U.S. policy will provide a new, powerful disincentive for any foreign government to continue sponsoring terrorist attacks on Americans, while also discouraging any regimes tempted to get into the ugly business of sponsoring future terrorist attacks.

Second, making the state sponsors actually lose billions of dollars will more effectively deter future acts of terrorism than keeping their assets blocked or frozen in perpetuity in pursuit of the delusion that long-standing, undemocratic, brutish governments like those in Iran and Iraq can be moderated.

Third, American victims of state-sponsored terrorism and their families will finally be able to secure some measure of justice and compensation. Public condemnation by the U.S. Government of state-sponsored terrorism only goes so far. This new legislation enables American victims to fight back, to hold the terrorists who are responsible accountable to the rule of law, and to make the perpetrators and their sponsors pay a heavy price.

In his last days in office, former President Clinton signed a law endorsing a policy of paying American victims of terrorism from blocked assets, while simultaneously signing a waiver of the means to make this policy work. The Bush administration has not changed this mistaken policy as yet. That is why Senator ALLEN joined me in pushing this bipartisan legislation to establish two new policy cornerstones for our Nation's struggle against international terrorism. First, the U.S. will first require that compensation be paid from the blocked and frozen assets of the state sponsors of terrorism in cases where American victims of terrorism secure a final judgment in our Federal courts and are awarded compensation. Second, the U.S. Government will provide a level playing field for all American victims of state-sponsored terrorism who are pursuing redress by providing equal access to our federal courts.

American victims of state-sponsored terrorism deserve and want to be compensated for their losses from those who perpetrated the attacks upon them, including our former hostages in Iran and their families. The Congress should clear the way for them to get some satisfaction of court-ordered judgments and, in so doing, help deter future acts of state-sponsored terrorism against innocent Americans.

Mr. KYL. Mr. President, I rise today to express my opposition to the conference report on H.R. 3210, the terrorism insurance bill.

I had hoped that Congress would approve legislation that encouraged building construction, gave business owners limited liability protection in the event of a terrorist attack, and protected taxpayers from exorbitant costs. These goals were all enunciated by President Bush when he pressed Congress to act on this issue after months of delay.

Unfortunately, the legislation in its current form fails to meet any of those objectives.

First, the conference report subjects victims of terrorism to potentially unlimited liability by placing no restrictions on court awards of punitive damages or non-economic damages. This has the potential of encouraging a slew of frivolous lawsuits against business owners whose business may be destroyed in terrorist attacks. Certainly no business that was located in the World Trade Center, for example, should be held at fault for the unforeseeable tragedy that took place on September 11.

As several of the President's economic advisors noted in a June 10, 2002 letter to Senate Minority Leader LOTT, ''the victims of terrorism should not have to pay punitive damages. Punitive damages are designed to punish criminal or near-criminal wrongdoing.'' The letter goes on to say ''the availability of punitive damages in terrorism cases would result in inequitable relief for injured parties, threaten bankruptcies for American companies and a loss of jobs for American workers.''

I strongly agree with that position and am troubled that the conferees did not take these concerns into account before bringing this legislation to the Senate floor.

Additionally, I am concerned that this legislation leaves taxpayers open to liability for terrorist attacks. One of the original goals of this bill was to allow the Secretary of the Treasury to sign off on out-of-court settlements to protect the taxpayers from exorbitant costs. Without such a provision, taxpayers, who are liable for as much as 90 percent of property and casualty costs after a terrorist attack, could be gouged by trial attorneys. That is primarily because insurers, with only a ten percent stake in the outcome of litigation, will favor faster, rather than fairer, settlements—at the taxpayers' expense.

Of additional concern, the low per-company deductibles will impede the development of a private reinsurance market and will increase the likelihood that this temporary federal program becomes permanent. Since the Federal Government limits each company's liability, rather than that of the entire industry, insurance companies have less incentive to spread their risk.

I am also troubled by certain provisions in Title II of this legislation covering victim compensation through

seized assets from terrorists and terrorist-sponsoring states. As the conference report stands now, this provision would create a race to the courthouse benefiting a small group of Americans over a far larger group of victims just as deserving of compensation.

Economic sanctions against terrorist states have kept the economic activity of those states to a minimum. Yet this limited pool of frozen assets and diplomatic property would be exhausted quickly as large, and often uncontested, compensatory and punitive damage awards are satisfied, leaving most victims with nothing. For example, the special provisions for terrorism victims of Iran expands the number of judgment holders eligible for payment under the 2000 Act (to approximately eight), but metes out all of the approximately $30 million remaining in the fund to satisfy judgments in only two cases. And there are a number of ongoing lawsuits by terrorism victims and their families against Iran that will be foreclosed under this agreement.

This section would also disproportionately benefit trial lawyers, since plaintiff's lawyers whose fees are contingent upon satisfying their clients' judgments stand to gain the lion's share of the compensation, not the victims.

Overall, this legislation is far from what President Bush wanted. It is a major disappointment that literally benefits trial lawyers at the expense of the taxpayers.

I realize that many of my colleagues want to support this bill, despite its flaws. And I understand that. It is regrettable that special-interest groups exerted so much influence in the drafting of this legislation, leaving the President with a bill that amounts to little more than the best he could get from this Congress.

But as it stands today, I cannot ask Arizona taxpayers to absorb the potential losses they might incur because of the self-serving and unjustified lawsuits that are the all but inevitable outcome of this legislation.

Mr. HARKIN. Mr. President, I rise to address a portion of this conference agreement relating to enforcement of judgments obtained by victims of terrorism against state sponsors of terrorism. These provisions strike an important blow in our global struggle against terrorism.

The purpose of title II is to deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism in any U.S. court by enabling them to satisfy such judgments from the frozen assets of terrorist parties. As the conference committee stated, this title establishes, once and for all, that such judgments are to be enforced against any assets available in the U.S., and that the executive branch has no statutory authority to defeat such enforcement under standard judicial processes, except as expressly provided in this act.

Title II expressly addresses three particular issues which have vexed victims of terrorism in this context. First, there has been a dispute over the availability of ''agency and instrumentality'' assets to satisfy judgments against a terrorist state itself. Let there be no doubt on this point. Title II operates to strip a terrorist state of its immunity from execution or attachment in aid of execution by making the blocked assets of that terrorist state, including the blocked assets of any of its agencies or instrumentalities, available for attachment and/or execution of a judgment issued against that terrorist state. Thus, for purposes of enforcing a judgment against a terrorist state, title II does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities.

Second, title II amends Section 2002 of the Justice for Victims of Terrorism Act of 2000 to address a miscarriage of justice in the drafting and implementation of that act. In that provision, Congress had directed that specified claimants against Iran receive payment in satisfaction of judgments from two specified accounts, namely Iran's Foreign Military Sales, ''FMS'', Trust Account and the proceeds of rental of certain Iranian government properties. Contrary to Congressional intent, the legislative language has been construed by the Departments of State and Treasury to exclude unspecified claimants and to allow the executive branch to bar enforcement of their awards against other blocked assets. As one United States District Court has noted, the result is a gross injustice that demands immediate correction.

To address this injustice, we are adding to the list of those to be compensated, all persons who meet two criteria—either, 1, they had a claim filed when Section 2002 was enacted and have already received a final judgment on that claim as of the date of enactment, or 2 were added to the list by the State Department Reauthorization Bill enacted last month. In accordance with amended Section 2002(b)(2)(B), each of these claimants are to be treated as if they were originally included in Section 2002, and are to be paid an amount determined by the Secretary of the Treasury to have been available for payment of their judgment on the date their judgment was issued. Once these amounts are paid, any remaining amounts in these accounts are to be paid to remaining claimants under the formula specified in amended Section 2002(d).

Moreover, to address this injustice, this amendment will treat all of these victims—those originally included in Section 2002 and those now being added—equally to the maximum extent possible. No priority is given to one group or the other. Those in each group which have filed timely lawsuits and received a final judgment by the enactment of this Act are to be paid within the strict deadlines set in the Act, i.e., within 60 days, without delay. Those not included within this time frame may pursue satisfaction from blocked assets. This will necessarily include some who, for whatever reason, have failed to obtain a judgment in their lawsuit by the date of enactment of this act.

Third, the term ''blocked asset'' has been broadly defined to include any asset of a terrorist party that has been seized or frozen by the United States in accordance with law. This definition includes any asset with respect to which financial transactions are prohibited or regulated by the U.S. Treasury under any blocking order under the Trading With the Enemy Act, the International Emergency Economic Powers Act, or any proclamation, order, regulation, or license. Moreover, by including the phrase ''seized by the United States'' in this section, it is our intent to include within the definition of ''blocked asset'' any asset of a terrorist party that is held by the United States. This is intended as an explicit waiver of any principle of law under which the United States might not be subject to service and enforcement of any judicial order or process relating to execution of judgments, or attachments in aid of such execution, in connection with terrorist party assets that happen to be held by the United States. In this respect, the United States is to be treated the same as any private party or bank which holds assets of a terrorist party, and such terrorist party assets held by the United States are not immunized from court procedures to execute against such assets. However, any assets as to which the United States claims ownership are not included in the definition of ''blocked assets'' and are not subject to execution or attachment under this provision.

Mr. ENZI. Mr. President, first of all, I want to thank all of the conferees for the long hours and late nights they here worked to complete this bill. I know this has been a difficult process and a long year.

Unfortunately, now I kind myself in a very difficult position. I find myself forced to oppose this legislation even though it is a Presidential priority and even though I support the underlying goals.

It was a little over a year ago that Senators SARBANES, GRAMM, DODD, and I announced an agreement for terrorism risk insurance legislation. That agreement outlined the parameters that we thought were a reasonable response to disruptions occurring in the marketplace as a result of the lack of reinsurance. This agreement outlined very limited and specific liability protections that would protect both the taxpayer's pocketbook and businesses which may themselves be victim's of terrorism from frivolous lawsuits after future terrorist attack.

These limited protections were: First, suits filed as a result of a terrorist attack would be consolidated

into a Federal district court; second, punitive damages would not be allowed; and third, the Secretary of the Treasury was given the ability to agree to out-of-court settlements.

Now, in this new conference report, two out of these three protections have been eliminated. The new program in this conference report will allow frivolous lawsuits to be filed against businesses that may be victims of the terrorist act themselves. Think about a business located in the World Trade Center on 9/11. This business was destroyed and likely lost a number of its employees. The next thing that happens is while attempting to rebuild, the business gets slapped with a frivolous lawsuit by a greedy trial lawyer. It is ridiculous to believe that a business could have prevented an attack of this kind. Yet this legislation will subject them to the will of the trial bar.

This conference report keeps America's businesses and the taxpayer subject to punitive damages. I have a Statement of Administration Policy from the executive Office of the President's Office of Management and Budget. In the second paragraph of the letter dated June 13, 2002, it states ''the Administration cannot support enactment of any terrorism insurance bill that leaves the Nation's economy and victims of terrorist acts subject to predatory lawsuits and punitive damages.'''

Also from the administration, I have a letter signed by Treasury Secretary O'Neill, OMB Director Daniels, Director of the National Economic Council Lindsey, and Director of the Council of Economic Advisors Glenn Hubbard dated June 10, 2002. This letter states ''the victims of terrorism should not have to pay punitive damages. Punitive damages are designed to punish criminal or near-criminal worngdoing.'' It goes on the say ''the availability of punitive damages in terrorism cases would in inequitable relief for injured parties, threaten bankruptcies for American companies and a loss of jobs for American workers.'' I could not agree more with the administration's position from just a few months ago that this legislation could lead to the bankruptcies of American companies who were victims of terrorist acts themselves.

In addition, this conference report does not include a provision which allows the Secretary of the treasury to agree to out-of-court settlements. This legislation has the American taxpayer pay potentially 90 percent of property and casualty costs after a terrorist attack. I can think of no other instance where the group liable for paying 90 percent of a lawsuit is unable to agree to an out-of-court settlement. If another catastrophic terrorist attack occurs, every trial lawyer in America will file a lawsuit because they know that the insurance company, which only pays 10 percent of the settlement, will agree immediately. The mansions of the trial lawyers will be built with the dollars of the American taxpayer.

I do not consider the inclusion of these protections to be extreme measures and I do not think that most of the members of this chamber believe them to be unreasonable. They are very simple and reasonable protections that basically say the trial bar should not take advantage of tragedies caused by terrorists.

The President invited Senate Republican conferees to the White House a few weeks ago where concerns were raised regarding the lack of these specific taxpayer protections. Unfortunately, these protections were not reintroduced into the legislation and now this conference report comes to the floor of the Senate without a single Senate Republican conferee's signature.

For these reasons, I am unable to support passage of this legislation. I support the program and understand the possible economic problems by not passing the legislation. I cannot in good faith subject the hard-working taxpayers of Wyoming to the potential losses they might incur because of the self-serving and unjustified lawsuits which may result.

However, even though I cannot support this bill because of the lack of taxpayer protections, I would like to commend those who have worked so diligently on the legislation for over a year now. Senator DODD, in particular, has given more time and effort to this project than probably anyone. He and his staff, Alex Sternhell, have remained committed to seeing the passage of this legislation and have done remarkable work to bring the issues that relate to the structure of the program to a compromise. I have to say that I agree with Senator DODD'S position on the structure of the program and always felt confident in the manner which he negotiated these provisions.

Mr. President, my position on this legislation has not changed since the very beginning. I believe we need a Federal backstop and I believe at one point we had a bill that did just that. I am sorry the trial bar was able to derail the bill for over a year now. I can only hope that the trial lawyers of America will stop to realize that subjecting Americans to lawsuits to line their pockets after the devastation of a terrorist attack is simply the wrong thing to do .

Mr. President, I yield the floor.

Mr. LEAHY. Mr. President, I am pleased to support this conference report to provide a federal backstop for terrorism insurance. I believe this bipartisan bill will boost our economy by providing extra protection against terrorist attacks for buildings and construction projects with resulting new jobs in Vermont and across the nation. I agree with President Bush that this legislation is essential for our future economic growth.

I worked with the distinguished Majority Leader, Senator DODD, Senator SARBANES, Senator SCHUMER and others to craft a balanced compromise in the conference report on legal procedures for civil actions involving acts of terrorism covered by the legislation. The conference report protects the rights of future terrorism victims and their families while providing federal court jurisdiction of civil actions related to acts of terrorism, consolidating of such cases on a pre-trial and trial basis, and excluding punitive damages from government-backed insurance coverage under the bill. These provisions do not limit the accountability of a private party for its actions in any way.

Further, the conference report, identical to the Senate-passed bill, fully protects federal taxpayers from paying for punitive damage awards. Under the conference report only corporate wrongdoers pay punitive damages, not U.S. taxpayers as some incorrectly claimed on the Senate floor during consideration of the Senate-passed bill.

The U.S. Chamber of Commerce has declared that the conference report ''will improve the legal rights of plaintiffs and defendants and, importantly, will help American workers and the economy.'' I agree.

I thank the conferees for rejecting the special legal protections in the House-passed bill. The liability limits for future terrorist attacks in the House-passed bill were irresponsible because they restricted the legal rights of victims and their families and discouraged private industry from taking appropriate precautions to promote public safety. Restricting damages against a wrongdoer in terrorism-related civil actions involving personal injury or death, for example, could discourage corporations from taking the necessary precautions to prevent loss of life or limb in a future terrorist attack. There is no need to enact these special legal protections and take away the legal rights of victims of terrorism and their families.

For example, the House-passed bill would have permitted a security firm to be protected from punitive damages if the private firm hired incompetent employees or deliberately failed to check for weapons and a terrorist act resulted.

The threat of punitive damages is a major deterrent to wrongdoing. Eliminating punitive damages under the House-passed bill would have severely undercut this deterrent and permitted reckless or malicious defendants to find it more cost effective to continue their wanton conduct without the risk of paying punitive damages. Without the threat of punitive damages, callous corporations could have decided it is more cost-effective to cut corners that put American lives at risk. This approach failed to protect public safety, and the conferees rightly rejected it.

In addition, I thank the managers for including language in the conference report to help captive insurance companies participate in the federal backstop program. Many captives deal in

property and casualty lines, but some do not. Senator JEFFORDS and I strongly support language in the conference report to allow those captives in property and casualty the option of participating in the program while not requiring other captives to start offering terrorism risk insurance.

The state of Vermont is the premier U.S. domicile for captive insurance companies. Vermont's captive owners represent a wide range of industries including multinational corporations, associations, banks, municipalities, transportation and airline companies, power producers, public housing authorities, higher education institutions, telecommunications suppliers, shipping companies, insurance companies and manufacturers, among others. Since 1981, Vermont has averaged approximately 25 captives licensed annually, and those numbers are on the rise. Vermont closed 2001 with 38 new captives, 37 pure and I sponsored, for a total of 527 at year-end. The first half of 2002 saw 26 new captives licensed in Vermont setting a record pace, according to the Vermont Department of Banking, Insurance and Health Care Administration.

At a time when the American people are looking for Congress to take measured actions to protect them from acts of terror and jump-start our economy, this conference report is a shining example of bipartisan progress. I applaud Senator DASCHLE, SENATOR DODD, Senator SARBANES, Senator SCHUMER and the other Senate and House conferees on their good work on this bipartisan conference report.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. DASCHLE. Mr. President, I have consulted with the chairman and the ranking member of the Appropriations Committee. As I think our colleagues know, the next order of business is a debate and then a vote on the continuing resolution. I am told they will need no more than 40 minutes. So Senators should be prepared to vote on final passage on the continuing resolution at about 9:10 to 9:15 p.m. Please return to the Chamber if you are not going to stay. That will be the final vote of the evening. We will vote at approximately 9:10 to 9:15 p.m., following this vote.

The PRESIDING OFFICER. Under the previous order, cloture having been invoked, the question is on agreeing to the conference report to accompany H.R. 3210.

Mr. DODD. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from North Carolina (Mr. HELMS), the Senator from Arkansas (Mr. HUTCHINSON), and the Senator from Alaska (Mr. MURKOWSKI) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 86, nays 11, as follows:

[Rollcall Vote No. 252 Leg.]

YEAS—86

Akaka	Dayton	Lincoln
Allard	DeWine	Lott
Allen	Dodd	Lugar
Barkley	Domenici	McCain
Baucus	Dorgan	Mikulski
Bayh	Durbin	Miller
Bennett	Edwards	Murray
Biden	Ensign	Nelson (FL)
Bingaman	Feingold	Nelson (NE)
Bond	Feinstein	Reed
Boxer	Fitzgerald	Reid
Breaux	Frist	Roberts
Brownback	Graham	Rockefeller
Bunning	Gregg	Santorum
Burns	Hagel	Sarbanes
Byrd	Harkin	Schumer
Campbell	Hatch	Smith (NH)
Cantwell	Hollings	Smith (OR)
Carnahan	Inhofe	Snowe
Carper	Inouye	Specter
Chafee	Jeffords	Stabenow
Cleland	Johnson	Stevens
Clinton	Kennedy	Thompson
Cochran	Kerry	Thurmond
Collins	Kohl	Torricelli
Conrad	Landrieu	Voinovich
Corzine	Leahy	Warner
Crapo	Levin	Wyden
Daschle	Lieberman	

NAYS—11

Craig	Hutchison	Sessions
Enzi	Kyl	Shelby
Gramm	McConnell	Thomas
Grassley	Nickles	

NOT VOTING—3

Helms	Hutchinson	Murkowski

The conference report was agreed to.

Mr. REID. Mr. President, I ask unanimous consent that the Senator from Georgia, Mr. CLELAND, be recognized for up to 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

SERVICE IN THE SENATE

Mr. CLELAND. Mr. President, I rise today to reflect on a 6 year term in the Senate which has been simultaneously the most challenging, yet most rewarding, experience of my life. I have had the chance to realize a lifelong dream by following in the footsteps of one of my personal my heroes, Senator Richard Russell of Georgia. I have been able to represent the state I love in an institution I revere. And I have been able to add my voice to the others that have risen before me in this chamber, from William Fulbright to Harry Truman to John Kennedy to Everett Dirksen to so many other outstanding men and women of history.

In my Senate office, I have surrounded myself with small reminders of the men I most admire. I sit at Richard Russell's desk. On my walls, I have photographs of just two people. President Franklin Roosevelt and Prime Minister Winston Churchill. Theirs were no ordinary times, and we can safely say now, neither are ours. After the Pentagon was attacked on September 11th, I looked at FDR's picture and finally understood the gravity of his day of infamy, because this generation now had one of its own. I have used Churchill's and Roosevelt's examples of strength and courage to make it through every day in this town. Some days have been better than others, but every one has been a gift because this has been the life of my dreams.

When I came to the Senate, I came to do the best job I could for the people of Georgia and the people of the United States, particularly our men and women in uniform. I am proud of what we've accomplished since then. Today, over 60% of our service members are married, and their benefits have finally begun to reflect that fact in order to retain those talented professionals. We knew that the decision to stay in the military is made at the dinner table, not the conference table, so we've increased pay for service members by nearly 20% since I came to the Senate. We've modernized the G.I. bill so that service members can transfer their benefits to start a college fund for their children. We set a schedule to eliminate out of pocket housing expenses and we even added a measure to help families take their pets with them when serving in Hawaii. Keeping the family dog may not be the highest priority for some lawmakers, but it's the whole world to a child moving around the globe as their mother or father serves our country. The family matters to the military member, so the family has mattered to me in my time here.

Beyond these individual personnel matters, I became deeply concerned about the shrinking numbers of our U.S. military, and this year was able to raise the ceiling of our force strength. In our new war on what Sam Nunn calls ''catastrophic terrorism,'' we must continue to go on the strategic offensive. Our military may be winning the battle, but we will lose the war if we continue to ignore the fact that our forces are critically over-deployed and being asked to do too much with too little. We are out of balance. Our commitments are far outpacing our troop levels, and the situation is only getting worse.

Since the end of Operation Desert Storm in 1991, the armed forces have downsized by more than half a million personnel, but our commitments have increased by nearly 300%, including new deployments to Afghanistan, Yemen, the Philippines, Georgia, and Pakistan. Today, a Desert Storm-size deployment to Iraq would require 86% of the Army's deployable end strength, including all stateside deployable personnel, all overseas-deployed personnel, and most forward-stationed personnel.

To make the war on terrorism possible, we have activated more than 80,000 guard and reserve troops and instituted stop-loss for certain specialties. This is no way to fight a war when our strategic national interests are at stake. The President has rightly told the country to be prepared for a long commitment. But the Pentagon has not requested an increase in end

Annex 15

Section 1083 of the U.S. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206

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INFORMATION
GPO

H. R. 4986

One Hundred Tenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and eight

An Act

To provide for the enactment of the National Defense Authorization Act for Fiscal Year 2008, as previously enrolled, with certain modifications to address the foreign sovereign immunities provisions of title 28, United States Code, with respect to the attachment of property in certain judgments against Iraq, the lapse of statutory authorities for the payment of bonuses, special pays, and similar benefits for members of the uniformed services, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TREATMENT OF EXPLANATORY STATEMENT.

(a) SHORT TITLE.—This Act may be cited as the "National Defense Authorization Act for Fiscal Year 2008".

(b) EXPLANATORY STATEMENT.—The Joint Explanatory Statement submitted by the Committee of Conference for the conference report to accompany H.R. 1585 of the 110th Congress (Report 110–477) shall be deemed to be part of the legislative history of this Act and shall have the same effect with respect to the implementation of this Act as it would have had with respect to the implementation of H.R. 1585, if such bill had been enacted.

SEC. 2. ORGANIZATION OF ACT INTO DIVISIONS; TABLE OF CONTENTS.

(a) DIVISIONS.—This Act is organized into three divisions as follows:

(1) Division A—Department of Defense Authorizations.

(2) Division B—Military Construction Authorizations.

(3) Division C—Department of Energy National Security Authorizations and Other Authorizations.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; treatment of explanatory statement.
Sec. 2. Organization of Act into divisions; table of contents.
Sec. 3. Congressional defense committees.

DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

TITLE I—PROCUREMENT

Subtitle A—Authorization of Appropriations

Sec. 101. Army.
Sec. 102. Navy and Marine Corps.
Sec. 103. Air Force.
Sec. 104. Defense-wide activities.
Sec. 105. National Guard and Reserve equipment.

Subtitle B—Army Programs

Sec. 111. Multiyear procurement authority for M1A2 Abrams System Enhancement Package upgrades.
Sec. 112. Multiyear procurement authority for M2A3/M3A3 Bradley fighting vehicle upgrades.

(B) what criteria and considerations are appropriate to determine whether additional Civil Support Teams are needed and, if so, where they should be located.

(e) COOPERATION OF OTHER AGENCIES.—

(1) IN GENERAL.—The advisory panel required by subsection (a) may secure directly from the Department of Defense, the Department of Homeland Security, the Department of Energy, the Department of Justice, the Department of Health and Human Services, and any other department or agency of the Federal Government information that the panel considers necessary for the panel to carry out its duties.

(2) COOPERATION.—The Secretary of Defense, the Secretary of Homeland Secretary, the Secretary of Energy, the Attorney General, the Secretary of Health and Human Services, and any other official of the United States shall provide the advisory panel with full and timely cooperation in carrying out its duties under this section.

(f) REPORT.—Not later than 12 months after the date of the initial meeting of the advisory panel required by subsection (a), the advisory panel shall submit to the Secretary of Defense, and to the Committees on Armed Services of the Senate and the House of Representatives, a report on activities under this section. The report shall set forth—

(1) the findings, conclusions, and recommendations of the advisory panel for improving the capabilities of the Department of Defense to provide support to United States civil authorities in the event of a chemical, biological, radiological, nuclear, or high-yield explosive incident; and

(2) such other findings, conclusions, and recommendations for improving the capabilities of the Department for homeland defense as the advisory panel considers appropriate.

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY.—

(1) IN GENERAL.—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL.—

"(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter 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 for such an act if such act or provision of material support or resources 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.

"(2) CLAIM HEARD.—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains

so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) not later than the latter of—

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States

may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS.—

"(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.—

"(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS.—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS.—The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS.—

(1) GENERAL EXCEPTION.—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS.—Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY.—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS.—

"(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT.—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES.—

(1) IN GENERAL.—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS.—

(A) IN GENERAL.—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had

originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED.—The defenses of res judicata, collateral estoppel, and limitation period are waived—

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208), and is refiled under section 1605A(c) of title 28, United States Code,

to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS.—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS.—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS.—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108–11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ.—

(1) APPLICABILITY.—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE.—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS.—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS.—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY.—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

TITLE XI—CIVILIAN PERSONNEL MATTERS

Sec. 1101. Extension of authority to waive annual limitation on total compensation paid to Federal civilian employees working overseas under areas of United States Central Command.
Sec. 1102. Continuation of life insurance coverage for Federal employees called to active duty.
Sec. 1103. Transportation of dependents, household effects, and personal property to former home following death of Federal employee where death resulted from disease or injury incurred in the Central Command area of responsibility.
Sec. 1104. Special benefits for civilian employees assigned on deployment temporary change of station.
Sec. 1105. Death gratuity authorized for Federal employees.
Sec. 1106. Modifications to the National Security Personnel System.
Sec. 1107. Requirement for full implementation of personnel demonstration project.
Sec. 1108. Authority for inclusion of certain Office of Defense Research and Engineering positions in experimental personnel program for scientific and technical personnel.
Sec. 1109. Pilot program for the temporary assignment of information technology personnel to private sector organizations.
Sec. 1110. Compensation for Federal wage system employees for certain travel hours.
Sec. 1111. Travel compensation for wage grade personnel.
Sec. 1112. Accumulation of annual leave by senior level employees.
Sec. 1113. Uniform allowances for civilian employees.

Annex 16

Section 502 of the U.S. Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214

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U.S. GOVERNMENT
INFORMATION
GPO

H. R. 1905

One Hundred Twelfth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, two thousand and twelve

An Act

To strengthen Iran sanctions laws for the purpose of compelling Iran to abandon its pursuit of nuclear weapons and other threatening activities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Iran Threat Reduction and Syria Human Rights Act of 2012".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.

TITLE I—EXPANSION OF MULTILATERAL SANCTIONS REGIME WITH RESPECT TO IRAN

Sec. 101. Sense of Congress on enforcement of multilateral sanctions regime and expansion and implementation of sanctions laws.
Sec. 102. Diplomatic efforts to expand multilateral sanctions regime.

TITLE II—EXPANSION OF SANCTIONS RELATING TO THE ENERGY SECTOR OF IRAN AND PROLIFERATION OF WEAPONS OF MASS DESTRUCTION BY IRAN

Subtitle A—Expansion of the Iran Sanctions Act of 1996

Sec. 201. Expansion of sanctions with respect to the energy sector of Iran.
Sec. 202. Imposition of sanctions with respect to transportation of crude oil from Iran and evasion of sanctions by shipping companies.
Sec. 203. Expansion of sanctions with respect to development by Iran of weapons of mass destruction.
Sec. 204. Expansion of sanctions available under the Iran Sanctions Act of 1996.
Sec. 205. Modification of waiver standard under the Iran Sanctions Act of 1996.
Sec. 206. Briefings on implementation of the Iran Sanctions Act of 1996.
Sec. 207. Expansion of definitions under the Iran Sanctions Act of 1996.
Sec. 208. Sense of Congress on energy sector of Iran.

Subtitle B—Additional Measures Relating to Sanctions Against Iran

Sec. 211. Imposition of sanctions with respect to the provision of vessels or shipping services to transport certain goods related to proliferation or terrorism activities to Iran.
Sec. 212. Imposition of sanctions with respect to provision of underwriting services or insurance or reinsurance for the National Iranian Oil Company or the National Iranian Tanker Company.
Sec. 213. Imposition of sanctions with respect to purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt.
Sec. 214. Imposition of sanctions with respect to subsidiaries and agents of persons sanctioned by United Nations Security Council resolutions.
Sec. 215. Imposition of sanctions with respect to transactions with persons sanctioned for certain activities relating to terrorism or proliferation of weapons of mass destruction.

with appropriate consideration for the national security interests of the United States; and

(4) to publicly call for the release of Iranian dissidents by name and raise awareness with respect to individual cases of Iranian dissidents and prisoners of conscience, as appropriate and if requested by the dissidents or prisoners themselves or their families.

TITLE V—MISCELLANEOUS

SEC. 501. EXCLUSION OF CITIZENS OF IRAN SEEKING EDUCATION RELATING TO THE NUCLEAR AND ENERGY SECTORS OF IRAN.

(a) IN GENERAL.—The Secretary of State shall deny a visa to, and the Secretary of Homeland Security shall exclude from the United States, any alien who is a citizen of Iran that the Secretary of State determines seeks to enter the United States to participate in coursework at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))) to prepare the alien for a career in the energy sector of Iran or in nuclear science or nuclear engineering or a related field in Iran.

(b) APPLICABILITY.—Subsection (a) applies with respect to visa applications filed on or after the date of the enactment of this Act.

SEC. 502. INTERESTS IN CERTAIN FINANCIAL ASSETS OF IRAN.

(a) INTERESTS IN BLOCKED ASSETS.—

(1) IN GENERAL.—Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—

(A) held in the United States for a foreign securities intermediary doing business in the United States;

(B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b); and

(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,

shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act.

(2) COURT DETERMINATION REQUIRED.—In order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction Iran, prior to an award turning over any asset pursuant to execution or attachment in aid of execution with respect to any judgments against Iran described in paragraph (1), the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the

assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—

(A) equitable title to, or a beneficial interest in, the assets described in subsection (b) (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran); or

(B) a constitutionally protected interest in the assets described in subsection (b),

such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

(b) FINANCIAL ASSETS DESCRIBED.—The financial assets described in this section are the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order.

(c) RULES OF CONSTRUCTION.—Nothing in this section shall be construed—

(1) to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b); or

(2) to apply to assets other than the assets described in subsection (b), or to preempt State law, including the Uniform Commercial Code, except as expressly provided in subsection (a)(1).

(d) DEFINITIONS.—In this section:

(1) BLOCKED ASSET.—The term "blocked asset"—

(A) means 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 section 202 or 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701 and 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of the license has been specifically required by a provision of law other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) is property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges

and immunities under the laws of the United States, and is being used exclusively for diplomatic or consular purposes.

(2) FINANCIAL ASSET; SECURITIES INTERMEDIARY.—The terms "financial asset" and "securities intermediary" have the meanings given those terms in the Uniform Commercial Code, but the former includes cash.

(3) IRAN.—The term "Iran" means the Government of Iran, including the central bank or monetary authority of that Government and any agency or instrumentality of that Government.

(4) PERSON.—

(A) IN GENERAL.—The term "person" means an individual or entity.

(B) ENTITY.—The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

(5) TERRORIST PARTY.—The term "terrorist party" has the meaning given that term in section 201(d) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note).

(6) UNITED STATES.—The term "United States" includes all territory and waters, continental, or insular, subject to the jurisdiction of the United States.

(e) TECHNICAL CHANGES TO THE FOREIGN SOVEREIGN IMMUNITIES ACT.—

(1) TITLE 28, UNITED STATES CODE.—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by inserting after "section 1605A" the following: "or section 1605(a)(7) (as such section was in effect on January 27, 2008)"; and

(B) in subsection (b)—

(i) in paragraph (2)—

(I) by striking "(5), 1605(b), or 1605A" and inserting "(5) or 1605(b)"; and

(II) by striking the period at the end and inserting ", or"; and

(ii) by adding after paragraph (2) the following:

"(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.".

(2) TERRORISM RISK INSURANCE ACT OF 2002.—Section 201(a) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note) is amended by striking "section 1605(a)(7)" and inserting "section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008)".

SEC. 503. TECHNICAL CORRECTIONS TO SECTION 1245 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012.

(a) EXCEPTION FOR SALES OF AGRICULTURAL COMMODITIES.—

(1) IN GENERAL.—Section 1245(d)(2) of the National Defense Authorization Act for Fiscal Year 2012 (22 U.S.C. 8513a(d)(2)) is amended—

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Section 1245 of the U.S. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-239, 126 Stat. 2006

defenses that is classified as of, or after, the date of enactment of this Act.

SEC. 1245. IMPOSITION OF SANCTIONS WITH RESPECT TO THE FINANCIAL SECTOR OF IRAN.

(a) FINDINGS.—Congress makes the following findings:

(1) On November 21, 2011, the Secretary of the Treasury issued a finding under section 5318A of title 31, United States Code, that identified Iran as a jurisdiction of primary money laundering concern.

(2) In that finding, the Financial Crimes Enforcement Network of the Department of the Treasury wrote, "The Central Bank of Iran, which regulates Iranian banks, has assisted designated Iranian banks by transferring billions of dollars to these banks in 2011. In mid-2011, the CBI transferred several billion dollars to designated banks, including Saderat, Mellat, EDBI and Melli, through a variety of payment schemes. In making these transfers, the CBI attempted to evade sanctions by minimizing the direct involvement of large international banks with both CBI and designated Iranian banks.".

(3) On November 22, 2011, the Under Secretary of the Treasury for Terrorism and Financial Intelligence, David Cohen, wrote, "Treasury is calling out the entire Iranian banking sector, including the Central Bank of Iran, as posing terrorist financing, proliferation financing, and money laundering risks for the global financial system.".

(b) DESIGNATION OF FINANCIAL SECTOR OF IRAN AS OF PRIMARY MONEY LAUNDERING CONCERN.—The financial sector of Iran, including the Central Bank of Iran, is designated as a primary money laundering concern for purposes of section 5318A of title 31, United States Code, because of the threat to government and financial institutions resulting from the illicit activities of the Government of Iran, including its pursuit of nuclear weapons, support for international terrorism, and efforts to deceive responsible financial institutions and evade sanctions.

(c) FREEZING OF ASSETS OF IRANIAN FINANCIAL INSTITUTIONS.—The President shall, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), block and prohibit all transactions in all property and interests in property of an Iranian financial institution if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person.

(d) IMPOSITION OF SANCTIONS WITH RESPECT TO THE CENTRAL BANK OF IRAN AND OTHER IRANIAN FINANCIAL INSTITUTIONS.—

(1) IN GENERAL.—Except as specifically provided in this subsection, beginning on the date that is 60 days after the date of the enactment of this Act, the President—

(A) shall prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account by a foreign financial institution that the President determines has knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran or another Iranian financial institution designated by the Secretary of the Treasury for the imposition of sanctions

pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.); and

(B) may impose sanctions pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) with respect to the Central Bank of Iran.

(2) EXCEPTION FOR SALES OF FOOD, MEDICINE, AND MEDICAL DEVICES.—The President may not impose sanctions under paragraph (1) with respect to any person for conducting or facilitating a transaction for the sale of food, medicine, or medical devices to Iran.

(3) APPLICABILITY OF SANCTIONS WITH RESPECT TO FOREIGN CENTRAL BANKS.—Except as provided in paragraph (4), sanctions imposed under paragraph (1)(A) shall apply with respect to a foreign financial institution owned or controlled by the government of a foreign country, including a central bank of a foreign country, only insofar as it engages in a financial transaction for the sale or purchase of petroleum or petroleum products to or from Iran conducted or facilitated on or after that date that is 180 days after the date of the enactment of this Act.

(4) APPLICABILITY OF SANCTIONS WITH RESPECT TO PETROLEUM TRANSACTIONS.—

(A) REPORT REQUIRED.—Not later than 60 days after the date of the enactment of this Act, and every 60 days thereafter, the Administrator of the Energy Information Administration, in consultation with the Secretary of the Treasury, the Secretary of State, and the Director of National Intelligence, shall submit to Congress a report on the availability and price of petroleum and petroleum products produced in countries other than Iran in the 60-day period preceding the submission of the report.

(B) DETERMINATION REQUIRED.—Not later than 90 days after the date of the enactment of this Act, and every 180 days thereafter, the President shall make a determination, based on the reports required by subparagraph (A), of whether the price and supply of petroleum and petroleum products produced in countries other than Iran is sufficient to permit purchasers of petroleum and petroleum products from Iran to reduce significantly in volume their purchases from Iran.

(C) APPLICATION OF SANCTIONS.—Except as provided in subparagraph (D), sanctions imposed under paragraph (1)(A) shall apply with respect to a financial transaction conducted or facilitated by a foreign financial institution on or after the date that is 180 days after the date of the enactment of this Act for the purchase of petroleum or petroleum products from Iran if the President determines pursuant to subparagraph (B) that there is a sufficient supply of petroleum and petroleum products from countries other than Iran to permit a significant reduction in the volume of petroleum and petroleum products purchased from Iran by or through foreign financial institutions.

(D) EXCEPTION.—Sanctions imposed pursuant to paragraph (1) shall not apply with respect to a foreign financial institution if the President determines and reports to Congress, not later than 90 days after the date on which

the President makes the determination required by subparagraph (B), and every 180 days thereafter, that the country with primary jurisdiction over the foreign financial institution has significantly reduced its volume of crude oil purchases from Iran during the period beginning on the date on which the President submitted the last report with respect to the country under this subparagraph.

(5) WAIVER.—The President may waive the imposition of sanctions under paragraph (1) for a period of not more than 120 days, and may renew that waiver for additional periods of not more than 120 days, if the President—

(A) determines that such a waiver is in the national security interest of the United States; and

(B) submits to Congress a report—

(i) providing a justification for the waiver; and

(ii) that includes any concrete cooperation the President has received or expects to receive as a result of the waiver.

(e) MULTILATERAL DIPLOMACY INITIATIVE.—

(1) IN GENERAL.—The President shall—

(A) carry out an initiative of multilateral diplomacy to persuade countries purchasing oil from Iran—

(i) to limit the use by Iran of revenue from purchases of oil to purchases of non-luxury consumers goods from the country purchasing the oil; and

(ii) to prohibit purchases by Iran of—

(I) military or dual-use technology, including items—

(aa) in the Annex to the Missile Technology Control Regime Guidelines;

(bb) in the Annex on Chemicals to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris January 13, 1993, and entered into force April 29, 1997 (commonly known as the "Chemical Weapons Convention");

(cc) in Part 1 or 2 of the Nuclear Suppliers Group Guidelines; or

(dd) on a control list of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies; or

(II) any other item that could contribute to Iran's conventional, nuclear, chemical, or biological weapons program; and

(B) conduct outreach to petroleum-producing countries to encourage those countries to increase their output of crude oil to ensure there is a sufficient supply of crude oil from countries other than Iran and to minimize any impact on the price of oil resulting from the imposition of sanctions under this section.

(2) REPORT REQUIRED.—Not later than 180 days after the date of the enactment of this Act, and every 180 days thereafter, the President shall submit to Congress a report on the efforts

of the President to carry out the initiative described in paragraph (1)(A) and conduct the outreach described in paragraph (1)(B) and the results of those efforts.

(f) FORM OF REPORTS.—Each report submitted under this section shall be submitted in unclassified form, but may contain a classified annex.

(g) IMPLEMENTATION; PENALTIES.—

(1) IMPLEMENTATION.—The President may exercise all authorities provided under sections 203 and 205 of the International Emergency Economic Powers Act (50 U.S.C. 1702 and 1704) to carry out this section.

(2) PENALTIES.—The penalties provided for in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) shall apply to a person that violates, attempts to violate, conspires to violate, or causes a violation of this section or regulations prescribed under this section to the same extent that such penalties apply to a person that commits an unlawful act described in section 206(a) of that Act.

(h) DEFINITIONS.—In this section:

(1) ACCOUNT; CORRESPONDENT ACCOUNT; PAYABLE-THROUGH ACCOUNT.—The terms "account", "correspondent account", and "payable-through account" have the meanings given those terms in section 5318A of title 31, United States Code.

(2) FOREIGN FINANCIAL INSTITUTION.—The term "foreign financial institution" has the meaning of that term as determined by the Secretary of the Treasury pursuant to section 104(i) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (22 U.S.C. 8513(i)).

(3) UNITED STATES PERSON.—The term "United States person" means—

(A) a natural person who is a citizen or resident of the United States or a national of the United States (as defined in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a))); and

(B) an entity that is organized under the laws of the United States or a jurisdiction within the United States.

TITLE XIII—COOPERATIVE THREAT REDUCTION

Sec. 1301. Specification of cooperative threat reduction programs and funds.
Sec. 1302. Funding allocations.
Sec. 1303. Limitation on availability of funds for cooperative biological engagement program.
Sec. 1304. Limitation on use of funds for establishment of centers of excellence in countries outside of the former Soviet Union.

SEC. 1301. SPECIFICATION OF COOPERATIVE THREAT REDUCTION PROGRAMS AND FUNDS.

(a) SPECIFICATION OF COOPERATIVE THREAT REDUCTION PROGRAMS.—For purposes of section 301 and other provisions of this Act, Cooperative Threat Reduction programs are the programs specified in section 1501 of the National Defense Authorization Act for Fiscal Year 1997 (50 U.S.C. 2362 note).

Annex 18

U.S. House of Representatives, Report on the Clarifying Amendment to Provide Terrorism Victims Equity Act, 12 July 2016, H. R. Rep. 1114-685

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
114–685

CLARIFYING AMENDMENT TO PROVIDE TERRORISM VICTIMS EQUITY ACT

JULY 12, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 3394]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3394) to amend the Terrorism Risk Insurance Act of 2002 to allow for the use of certain assets of foreign persons and entities to satisfy certain judgments against terrorist parties, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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59–006

The Amendment

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Clarifying Amendment to Provide Terrorism Victims Equity Act" or the "CAPTIVE Act".

SEC. 2. USE OF BLOCKED ASSETS TO SATISFY JUDGMENTS OF U.S. PERSONS AGAINST TERRORIST PARTIES.

Section 201(d) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note) is amended—

(1) in paragraph (2)—

(A) in the matter preceding subparagraph (A), by striking "means";

(B) by amending paragraph (2)(A) to read as follows:

"(A) means 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)), under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702), or under section 805(b) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1904(b)); and";

(2) by redesignating paragraph (4) as paragraph (5); and

(3) by inserting after paragraph (3) the following:

"(4) PERSON.—In subsection (a), the term 'person' means—

"(A) a natural person who, at the time the act of terrorism described in subsection (a) was committed upon which the judgment described in such subsection was obtained by that person, was either—

"(i) 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));

"(ii) a member of the Armed Forces of the United States; or

"(iii) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; or

"(B) if the person described in subparagraph (A) is deceased, the personal representative of the estate of that deceased person.".

SEC. 3. APPLICABILITY.

The amendments made by this Act apply to any judgment described in section 201(a) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note) that is entered before, on, or after the date of the enactment of this Act.

Purpose and Summary

H.R. 3394, the "Clarifying Amendment to Provide Terrorism Victims Equity Act" or "CAPTIVE Act," amends the Terrorism Risk Insurance Act (TRIA) to allow U.S. victims of narco-terrorism to satisfy court-awarded judgments against a terrorist party from the "blocked assets" of that terrorist party that have been frozen by the Federal Government under the Foreign Narcotics Kingpin Designation Act (Kingpin Act). Under TRIA, as currently written, only assets blocked under the International Emergency Economic Powers Act and the Trading with the Enemy Act are considered blocked assets.

Background and Need for the Legislation

A. SECTION 201 OF THE TERRORISM RISK INSURANCE ACT

Under statutes, like the terrorism exception to the Foreign Sovereign Immunities Act (FSIA)[1] and the civil liability provision in the Anti-Terrorism Act (ATA),[2] U.S. terrorism victims have successfully obtained judgments against terrorist parties that have

[1] 28 U.S.C. § 1605A.
[2] 18 U.S.C. § 2333.

caused them harm. However, after being awarded such judgments, terrorism victims have often faced practical and legal difficulties at the enforcement stage. Assets of terrorist parties may not be present in the United States and, to the extent they are present, they are often either well concealed or seized or frozen by the Federal Government.

In 2002, in order to help lessen these enforcement burdens, Congress passed section 201 of the Terrorism Risk Insurance Act,[3] which authorizes execution or attachment in aid of execution in order to satisfy a terrorism judgment against a terrorist party from the blocked assets of that terrorist party. By permitting terrorism victims to attach blocked assets in order to satisfy their terrorism-based judgments, TRIA permits victims to bypass the usual requirement that a litigant first obtain a license from the United States Department of the Treasury Office of Foreign Assets Control (OFAC) in order to attach blocked assets.[4] Section 201(a) of TRIA provides

> Notwithstanding any other provision of law . . . , 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 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, 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.[5]

Accordingly, the elements a terrorism victim is required to establish before executing on a blocked asset under section 201 are quite straightforward. The victim must first establish that he or she has obtained a judgment against a terrorist party that is for either a claim based on an act of terrorism or a claim for which a terrorist party is not immune under the terrorism exception to FSIA. The victim must then show that the assets are blocked as that term is defined in TRIA. And, finally, the total amount of the execution cannot exceed the amount of compensatory damages. If the victim wants to execute against the assets of a terrorist party's agency or instrumentality, he or she must further prove that the purported agency or instrumentality is actually an agency or instrumentality of the terrorist party against whom he or she holds a judgment.

As currently defined in TRIA, a "blocked asset" is any asset seized or frozen by the United States pursuant to section 5(b) of the Trading with the Enemy Act[6] (TWEA) or sections 202 and 203 of the International Emergency Economic Powers Act[7] (IEEPA).[8]

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[3] Terrorism Risk Insurance Act (TRIA), Pub. L. 107–297 201(a), § 201, 116 Stat. 2337 (28 U.S.C. § 1610 note).

[4] *See, e.g.*, 31 C.F.R. §§ 515.201, 515.310 (CACR) (requiring a license for attachment); *id.* §§ 535.201, 535.310 (Iran Assets Control Regulations) (same); *id.* §§ 594.201, 594.312 (GTSR) (same).

[5] TRIA § 201(a).

[6] 50 U.S.C. app. §§ 1–44.

[7] 50 U.S.C. §§ 1701–1708.

[8] TRIA § 201(d)(2)(A).

Both TWEA and IEEPA authorize the President to freeze the assets of foreign enemies and their agencies and instrumentalities so that the President may dispose of these assets in the manner that best furthers the United States' foreign-relations and national-security interests. Assets become blocked under TWEA or IEEPA when OFAC designates the owner of the assets under those Acts.[9]

In addition to TWEA and IEEPA, the President may also block the assets of designated foreign narcotics traffickers under the Kingpin Act. Section 805(b) of the Kingpin Act blocks all property and interests in property within the United States, or within the possession or control of any U.S. person, which are owned or controlled by significant foreign narcotics traffickers, as identified by the President, or foreign persons designated by the Secretary of the Treasury after consultation with the Attorney General, the Director of Central Intelligence, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of Homeland Security, and the Secretary of State, as meeting the criteria in the Kingpin Act.[10]

Although the Kingpin Act has its genesis in a blocking order issued by President Clinton under IEEPA,[11] assets blocked pursuant to the Kingpin Act are not considered "blocked assets" for purposes of TRIA. Accordingly, under current law, assets blocked under the Kingpin Act are not available to satisfy judgments of terrorism victims against terrorist parties that are both terrorist parties and drug kingpins to the extent that their assets are only frozen under the Kingpin Act.[12]

B. THE CAPTIVE ACT

The CAPTIVE Act amends TRIA in two small, but important ways. First, it amends the definition of "blocked asset" under TRIA such that an asset of a terrorist party that is blocked under the Kingpin Act is subject to execution or attachment in aid of execution in order to satisfy a terrorism judgment against that terrorist party to the extent of any compensatory damages for which the terrorist party has been adjudged liable. As is explained above, "blocked asset" is currently defined only to include assets seized or frozen under TWEA and IEEPA.

This presents a problem in cases in which a terrorist party's assets (or the assets of an agency or instrumentality of a terrorist party) are blocked pursuant only to the Kingpin Act. One such case involved the victims of a terrorist attack by the Revolutionary Armed Forces of Colombia (FARC). On February 13, 2003, Keith Stansell, Marc Gonsalves, Thomas Howes, and Thomas Janis were flying over Colombia while performing counter-narcotics reconnaissance. Members of FARC shot their plane down and, after a crash

[9] OFAC specifies the jurisdictional basis (the statute under which an individual or entity is designated) for any designation it makes. Thus, the blocking of an asset by OFAC does not necessarily bring that asset within the coverage of TRIA.

[10] 21 U.S.C. § 1904(b).

[11] Exec. Order No. 12978, 60 Fed. Reg. 54579 (October 24, 1995). In 1999, Congress enacted the Kingpin Act based partially upon the successful application of IEEPA against Colombian narcotics traffickers by Executive Order 12978. H.R. Rep. No. 106–457, at 22, 42–43 (1999) (Conf. Rep.).

[12] Stansell v. Revolutionary Armed Forces of Colombia, 704 F.3d 910, 915–17 (11th Cir. 2013) (holding that "assets frozen pursuant to the Kingpin Act are not 'blocked assets' under the Terrorism Act").

landing, captured the group. FARC immediately executed Janis and took the other survivors hostage, holding them for over 5 years. After they were rescued and returned to the United States, Stansell, Gonsalves, Howes, and Janis's wife and his surviving children successfully brought suit against FARC under the Anti-Terrorism Act.[13] This group of victims though has had difficulty satisfying this judgment against FARC.

FARC has been designated as both a "Specially Designated Global Terrorist," under IEEPA, and a "Significant Foreign Narcotics Trafficker," under the Kingpin Act. However, to the extent any FARC assets exist within the jurisdiction of the United States, such assets are well concealed. Because of the difficulty inherent in the direct execution of the judgment against FARC, these victims have sought to satisfy their award by attaching the assets of agencies or instrumentalities of FARC pursuant to section 201(a) of TRIA. But even this strategy has proved difficult as the only identifiable blocked assets of FARC agencies and instrumentalities are designated under the Kingpin Act, rather than under IEEPA or TWEA, making them outside TRIA's ambit. The CAPTIVE Act, by adding assets blocked pursuant to the Kingpin Act to the definition of "blocked asset" in TRIA, addresses this issue for victims of terrorists' acts carried out by narco-terrorists like FARC.

Second, to make TRIA consistent with the civil liability provision in the ATA[14] and the state-sponsored terrorism exception to FSIA,[15] the CAPTIVE Act defines "person" as it is used in section 201(a) of TRIA to be limited to U.S. nationals, members of the armed forces, and U.S. government employees and contractors. This change will prevent foreign nationals, who Congress has specifically excluded from the ATA and state-sponsored terrorism FSIA cases, from using TRIA to defeat the efforts of U.S. terrorism victims to enforce their compensatory damages judgments from the limited pool of blocked assets.

Hearings

The Committee on the Judiciary held no hearings on H.R. 3394.

Committee Consideration

On April 27, 2016, the Committee met in open session and ordered the bill, H.R. 3394, favorably reported, with an amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 3394.

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[13] *Id.* at 913. (noting that the victims sued FARC in the U.S. District Court for the Middle District of Florida under the civil remedies provisions of the Anti-Terrorism Act, 18 U.S.C. § 2333, and obtained a default judgment against FARC).

[14] 18 U.S.C. § 2333 (only a "national of the United States" may bring a claim under the civil liability provision in the Anti-Terrorism Act).

[15] 28 U.S.C. § 1605A (the private right of action provided for in the terrorism exception to the Foreign Sovereign Immunities Act is limited to U.S. nationals, members of the armed forces, and U.S. government employees and contractors).

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3394, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 24, 2016.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3394, the "Clarifying Amendment to Provide Terrorism Victims Equity Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Rabent, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3394—Clarifying Amendment to Provide Terrorism Victims Equity Act.

As ordered reported by the House Committee on the Judiciary on April 27, 2016.

H.R. 3394 would amend the Terrorism Risk Insurance Program (TRIP). CBO estimates that implementing H.R. 3394 would have no significant effect on the federal budget.

Under current law, TRIP authorizes the use of the blocked assets of groups designated as terrorist parties to settle claims related to acts of terrorism perpetrated by those groups.[1] H.R. 3394 would

[1] Blocked assets are defined in TRIP as certain assets seized or frozen by the United States under the Trading With the Enemy Act or the International Emergency Powers Act.

permit the blocked assets to remain available to satisfy claims arising from judgments against a terrorist group even if the group later loses that designation. H.R. 3394 also would expand the definition of blocked asset to include assets seized or frozen under the Foreign Narcotics Kingpin Designation Act. On the basis of information from the Department of the Treasury, CBO estimates that implementing the bill would have no significant cost to the federal government.

Enacting H.R. 3394 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 3394 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 3394 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Stephen Rabent. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 3394 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 3394 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that, pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3394 amends section 201 of the Terrorism Risk Insurance Act to make assets that are seized or frozen under the Foreign Narcotics Kingpin Designation Act available for execution or attachment in aid of execution to satisfy judgments of U.S. terrorism victims.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3394 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title.

Section 1 provides for the short title of the legislation, the "Clarifying Amendment to Provide Terrorism Victims Equity Act" or the "CAPTIVE Act."

Section 2. Use of Blocked Assets to Satisfy Judgments of U.S. Persons Against Terrorist Parties.

Section 2 amends section 201(d) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. § 1610 note) in order to add assets seized or frozen by the United States under section 805(b) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. § 1904(b)) to the definition of "blocked asset." In addition, section 2 adds a definition of "person" to section 201(d). Under the CAPTIVE Act, "person" is defined as a natural person who, at the time of the act of terrorism upon which the eligible judgment is based, was (1) a national of the United States, (2) a member of the Armed Forces of the United States, (3) otherwise an employee of the Federal Government or an individual performing a Federal Government contract, or (4) the personal representative of the estate of a deceased person described in clauses (1), (2), or (3).

Section 3. Applicability.

Section 3 provides that the amendments made by the CAPTIVE Act shall apply to any judgment described in section 201(a) of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. § 1610 note) entered before, on, or after the date of the enactment of the Act. This protects terrorist victim judgment holders' rights by clarifying that the changes to existing law made by the bill apply retroactively to previously entered judgments on liability for acts of terrorism.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TERRORISM RISK INSURANCE ACT OF 2002

* * * * * * *

TITLE II—TREATMENT OF TERRORIST ASSETS

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) IN GENERAL.—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 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) 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.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(c) [Omitted Amendatory]

(d) DEFINITIONS.—In this section, the following definitions shall apply:

(1) ACT OF TERRORISM.—The term "act of terrorism" means—

(A) any act or event certified under section 102(1); or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term "blocked asset" [means]—

[(A) 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); and]

(A) means 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)), under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702), or under section 805(b) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1904(b)); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et

seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) PERSON.—In subsection (a), the term "person" means—

(A) a natural person who, at the time the act of terrorism described in subsection (a) was committed upon which the judgment described in such subsection was obtained by that person, was either—

(i) 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));

(ii) a member of the Armed Forces of the United States; or

(iii) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; or

(B) if the person described in subparagraph (A) is deceased, the personal representative of the estate of that deceased person.

[(4)**]** *(5)* TERRORIST PARTY.—The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

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Annex 19

Memorandum of the U.S. Department of State Legal Adviser on the Application of the Treaty of Amity to Expropriations in Iran, 13 October 1983

UNITED STATES: MEMORANDUM OF THE DEPARTMENT OF STATE LEGAL ADVISER ON THE APPLICATION OF THE TREATY OF AMITY TO EXPROPRIATIONS IN IRAN*

[October 13, 1983]

CLAIMS AGAINST IRAN

Mr. PERCY. Mr. President, the work of the Iran-United States Claims Tribunal at The Hague in the Netherlands is continuing in an effort to provide compensation to the many American citizens and corporations who lost money and property as a result of actions by the Government and officials of Iran. One of the key issues in the Tribunal's deliberations is the question of appropriate standards for determining the level of compensation required for such losses. Iran has sought to argue that it is no longer bound by the 1955 treaty which established the general standard of prompt, adequate and effective compensation, which has become an important term of art in international law.

In view of the importance of this issue to many American businesses, I asked the Legal Adviser of the Department of State, Davis Robinson, to provide me with a memorandum discussing this issue. I ask that a copy of this memorandum be included in the RECORD at this point.

There being no objection, the memorandum ordered to be printed in the RECORD, as follows:

[Memorandum]

APPLICATION OF THE TREATY OF AMITY TO EXPROPRIATIONS IN IRAN

INTRODUCTION

The Iran-United States Claims Tribunal [1] in The Hague has heard or scheduled for hearing numerous claims seeking compensation for the expropriation of property of U.S. nationals by Iran. In each of these cases, as in numerous others which will follow, the Tribunal must ascertain the applicable standard of compensation for expropriated property. The United States maintains that the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran [2] ("the Treaty of Amity" or "the Treaty") provides the standard of compensation which must be applied to the cases before the Tribunal.[3]

This memorandum discusses the applicability of the Treaty of Amity to the determination of compensation for the expropriation of property of U.S. nationals in Iran. Part I demonstrates that the Treaty is still in force. Part II shows that the Treaty requires the payment of prompt, adequate and effective compensation for the expropriation of such property in Iran. Part III demonstrates that, for purposes of determining the amount of compensation, property must be appraised at its fair market value. Part IV shows that property must be valued as of the date of expropriation, disregarding the effects of any actions attributable to the Government of Iran that were unlawful or taken in anticipation of the expropriation.

I. The Treaty of Amity remains in force

A. The Treaty Remains In Force By Its Own Terms

The Treaty of Amity explicitly provides that it shall continue in effect until terminated by a party. Specifically, Article XXIII (2) states that the Treaty "*shall remain in force* for ten years and shall continue in force thereafter *until terminated as provided herein.*" (Emphasis added.) The sole method of termination under the Treaty is described in Article XXIII, which provides that the Treaty may be terminated only upon one year's written notice by one party to the other.[4]

Neither the United States nor Iran has provided written notice to the other that the Treaty has been terminated.[5] In fact, to the contrary, Iran on numerous occasions as recent as late 1980 has argued before U.S. domestic courts that the treaty remains in full force and effect.[6] Iran, moreover, has continued to enjoy the benefits of the Treaty.[7] Thus, it is abundantly clear that the Treaty of Amity has not been terminated in accordance with its terms and, therefore, remains in effect.

B. The International Court of Justice Has Ruled That the Treaty Is Still in Force

The continued validity of the Treaty of Amity has been confirmed conclusively by a judgment of the International Court of Justice. On November 29, 1979, the United States filed an application with the Court seeking a declaration, *inter alia*, that Iran's November 4, 1979, seizure of the U.S. Embassy in Tehran violated the Treaty. On May 24, 1980, the Court rendered its judgment, in which it held that the Treaty's provisions "*remain part of the corpus of law applicable between the United States and Iran.*"[8] In so holding, the Court explained that the continued applicability of a treaty of this nature is especially important when the parties are in dispute:

"The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. *It is precisely when difficulties arise that the treaty assumes its greatest importance. . . .*[9]

Under the principle of *res judicata*,[10] this decision by the International Court of Justice established conclusively the continued validity of the Treaty of Amity as of May 24, 1980.

The Court's rationale and holding are no less applicable now. Iran has not alleged any event since the issuance of the Court's decision which would affect the continued validity of the Treaty. Moreover, although the hostages have been released, Iran continues to hold U.S. diplomatic and consular properties in violation of international law and the two nations remain divided by serious disputes concerning, *inter alia*, the expropriation of U.S. nationals' investments in Iran. Given that the protection of foreign investment was a central purpose of the Treaty,[11] the present situation is precisely the moment when treaty provisions setting forth the standard of compensation for expropriated property, in the words of the ICJ, "assume [their] greatest importance."

C. The Treaty Has Not Been "Implicitly Terminated" As a Result of Alleged Breaches by the United States

Despite its repeated reliance upon the Treaty in recent years and despite the ICJ's decision, Iran now appears to have adopted before the Tribunal a new position which alleges that certain actions by the United States "implicitly terminated" the Treaty of Amity.[12] Specifically, Iran alleges that U.S. Executive Orders adopting certain countermeasures [13] in response to Iran's unlawful seizure of the U.S. Embassy in Tehran on November 4, 1979, violated, respectively, Articles VII [14] and VIII of the Treaty. Such an assertion, however, is entirely contrary to established principles of international law.

(1) *The United States has not breached the treaty.*—The measures adopted by the United States, in fact, did not violate the Treaty. Rather, under both the law of treaties and the law of nonforcible reprisals, they were a fully lawful response to Iran's flagrant and continuous violations of the Treaty of Amity.

(a) Iran flagrantly and repeatedly violated the treaty.—Throughout 1979 and 1980,[15]

Footnotes at end of article.

*[Reproduced from the U.S. Congressional Record, Vol. 129, No. 157 (November 14, 1983), pp. S 16055-60.]

the Iranian government, its agencies, instrumentalities and other controlled entities engaged in a long series of actions directed against American lives and property in Iran. These actions included, *inter alia*, government-sponsored attempts to harass and intimidate U.S. nationals with the goal of driving Americans out of Iran,[16] the repudiation of numerous contracts with American firms without legal justification,[17] massive expropriation of American property in Iran without compensation,[18] the imposition of currency restrictions to prevent repatriation of American earnings,[19] and the announced intention (finally implemented) of ceasing all oil exports to the United States.[20] These actions by Iran repeatedly and flagrantly violated numerous provisions of the Treaty of Amity,[21] resulting in the virtual repudiation of all personal, contract and property rights of Americans in Iran and the collapse of commercial relations between the two nations.

Iran's violations of the Treaty culminated on November 4, 1979, with its seizure of the U.S. Embassy and forcible detention of more than sixty U.S. nationals on the Embassy premises. On May 24, 1980, the International Court of Justice held explicitly that these actions by Iran constituted "successive and continuing breaches" of the Treaty of Amity and other applicable international law.[22]

(b) The U.S. countermeasures were justified under the law of treaties and the law of nonforcible reprisals.—Shortly after the seizure of its Embassy, the United States initiated a series of countermeasures in reponse to Iran's violations of the Treaty and other norms of international law. On November 12, 1979, the same day that Iran announced that it would no longer export oil to the United States, President Carter ordered a halt to the importation of Iranian oil.[23] On November 14, 1979, President Carter issued an order to block all official Iranian assets in the United States.[24] Further Executive Orders of April 7 and 17, 1980, prohibited most exports to and imports from Iran and restricted financial transactions related to travel by Americans to Iran.[25]

Each of these countermeasures was adopted in response to Iran's continuous violations of the Treaty.[26] As the International Court of Justice observed in its order of May 24, 1980:

"All measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent detention of its diplomatic and consular staff as hostages. They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran." [27]

Moreover, the countermeasures were reasonably related[28] and proportional[29] to Iran's prior breaches. They were limited in scope, relative to Iran's prior Treaty violations, and involved no harassment of Iranians in U.S. territory and no expropriation of Iranian property. The restrictions on trade with and travel to Iran formalized a situation which had existed in practice for many months as a direct result of Iran's illegal conduct.[30] Similarly, Iran's assets were blocked only after Iran announced that all its assets in the United States were to be withdrawn.[31] The blocking was intended in part to preserve a remedy for Americans whose rights already had been violated by Iran in the course of Iran's unlawful actions.[32]

International law long has recognized that, where a party to a bilateral Treaty has breached its obligations thereunder, the other party may withhold lawfully its performance of the Treaty in a manner reasonably related to the breach.[33] Such withholding of performance by the aggrieved party does not violate the Treaty but, on the contrary, is actually a means of enforcing it. As the foregoing discussion demonstrates, each of the U.S. countermeasures was a reasonable response to Iran's prior breaches of the Treaty and, therefore, was justified under the law of treaties.[34]

Similarly, under the law of nonforcible reprisals, a nation may lawfully take otherwise unlawful nonforcible actions if (1) the actions are in response to prior international delicts by another nation; (2) the aggrieved nation has sought redress unsuccessfully through other means; and (3) the actions are proportional to the prior delicts.[35] As demonstrated above, these requirements were satisfied and thus the U.S. countermeasures were equally justified under the law of nonforcible reprisals.

(2) *Even if the United States had breached the treaty, the treaty would not have been "implicitly" terminated.*—The preceding section makes clear that the actions taken by the United States in response to Iran's violations of the Treaty were fully justified under international law and, therefore, did not breach the Treaty of Amity. Even if those actions had been in breach of the Treaty, however, such violations could not have resulted in its "implicit" or automatic termination.

It is clear as a matter of international law that a treaty cannot be "implicitly" terminated, that is, a breach of a treaty by one party does not of itself terminate the treaty. Rather, a treaty may be terminated by a breach only if (1) the breach is material, going to the heart of the treaty[36]; (2) the aggrieved party sends formal notice of the treaty's termination to the other party; [37] and (3) the formal notice of termination is sent within a reasonable time after the breach.[38]

In this case, the actions taken by the United States in no way violated the Treaty—materially or otherwise. These actions were taken in an effort to restore full observance of the Treaty by Iran and were a limited, gradual and proportional response to Iran's prior violations.

Further, as already noted, Iran has not seent the United States the formal notice necessary to trigger termination of the Treaty, either before or after the alleged U.S. violations. Indeed, more than ten months after the alleged violations, Iran was continuing to plead in U.S. federal court that the Treaty was still in force.[39]

Finally, because a reasonable time after the alleged U.S. violations already has elapsed without a notice of termination, such alleged violations no longer may form the legal basis for termination of the Treaty.

D. Iran Is Estopped From Repudiating the Treaty of Amity

Repudiation of the Treaty of Amity by Iran is further barred because it would violate well-established principles of international law concerning estoppel and good faith. As Sir Hersch Lauterpacht has written:

"A State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous. It is of little importance whether that rule is based on what in English law is known as the principle of estoppel or the more generally conceived requirement of good faith." [40]

Prior to the signing of the Algiers Accords in 1981, Iran repeatedly relied upon the treaty as a defense against litigation in U.S. courts. Now that such litigation has been suspended pursuant to the Accords, Iran simply cannot argue that the Treaty was implicitly terminated as early as November of 1979.

E. Even if the Treaty Had Been Terminated, Its Provisions Would Continue to Apply To All Acts of Expropriation Which Occurred Prior to the Termination Date

Even if the Iranian position were accepted in *toto*, it would have only a minimal effect on the result of the proceedings before the Tribunal. The well-settled rule of international practice is that the termination of a treaty does not affect pre-existing rights created through execution of the treaty.[41] Thus even if the Treaty of Amity were held no longer to be in force, the standard of compensation set forth in the Treaty still would be applicable to any act of expropriation which occurred prior to the Treaty's termination.

II. The Treaty of Amity requires that U.S. claimants be paid prompt, adequate and effective compensation for all property expropriated by Iran.

The Treaty of Amity expressly requires Iran to pay compensation for the expropriation of property owned by U.S. nationals. Such compensation must represent the full equivalent of the expropriated property and must be paid within a reasonable time after expropriation in a readily convertible currency. More particularly, the Treaty requires Iran to pay "prompt, adequate and effective compensation" for expropriated property.[42]

Specifically, Article IV(2) of the Treaty provides that:

Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the *prompt payment of just compensation*. Such compensation shall be in an *effectively realizable* form and shall represent the *full equivalent of the property taken;* and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof. [Emphasis added.]

Thus, Article IV(2) requires "prompt payment . . . in an effectively realizable form" of "just compensation" which represents "the full equivalent of the property taken." This explicit language leaves no doubt that, under the Treaty, Iran must pay prompt, adequate and effective compensation for the expropriation of U.S. property.[43]

The negotiating history of the Treaty clearly confirms this conclusion. Immediately following World War II, the United States negotiated a series of some 21 bilateral FCN treaties with other nations. One important purpose of these treaties, including the Treaty of Amity, was to protect investment abroad,[44] and thus each of the treaties contained a section which required prompt, adequate and effective compensation for the expropriation of foreign investment.[45] Now to interpret those treaties as permitting payment of something less would defeat one central purpose of their execution.

Throughout the negotiation of the Treaty, moreover, Iran was fully aware of the United States' views and treaty practice with respect to the standard of compensation [46] and agreed to that practice in the Treaty of Amity.[47] The language of Article IV(2) was a standard text used by the United States in most of its post-war FCN treaties [48] and, during the negotiations, Iran made numerous references to the language of these other FCN treaties.[49] After negotia-

tions. Article IV(2) was unchanged from the original draft except for the addition of the phrase "in no case less than that required by international law," a phrase which also appears in many other U.S. FCN treaties.[40] Thus, the negotiating history makes clear that the Treaty of Amity, as proposed and executed, requires the payment of prompt, adequate and effective compensation for expropriation.[41]

III. The Treaty of Amity requires that, for purposes of compensation, expropriated property be appraised at fair market value

The Treaty of Amity also requires that, for purposes of determining the amount of compensation, expropriated property be appraised at its fair market value,[42] which in the case of an operating enterprise is equivalent to "going concern" value. This conclusion is evident from both the language and the history of the Treaty.

Article IV(2) of the Treaty madates the payment of "just compensation" for expropriated property. International law long has understood "just compensation" to require payment of fair market value.[43] The term "just compensation" also can be traced to the Fifth Amendment to the U.S. Constitution, which provides that no property may be taken by the government without just compensation. The U.S. Supreme Court repeatedly has held that the payment of "just compensation" requires the use of fair market value.[44]

Article IV(2) further provides that "compensation * * * shall represent the full equivalent of the property taken," i.e., the full value of the property. The term "full equivalent" indicates that compensation must be comprehensive and must take into account *every* valuable element of the expropriated property. The value of property, of course, depends upon its ability to generate future income,[45] a fact which has been repeatedly recognized in international law.[46] Measures of valuation such as "book value" and "replacement cost" do not consider the capacity of an asset to produce future income.[47] Thus, fair market value,[48] which does take account of the property's income-producing capacity, generally represents the truest measure of an asset's full equivalence.[49]

The history of the Treaty confirms that its language requires the use of fair market value for determining compensation. As already shown, Article IV(2) of the Treaty is standard treaty language proposed by the United States and accepted by Iran without substantial modification. Such language consistently has been understood to require that expropriated property be appraised at fair market value.[50]

IV. The Treaty of Amity requires that property be valued as of the date of expropriation, disregarding the effects of any actions attributable to the expropriating government that were unlawful or were taken in anticipation of the expropriation

The Treaty of Amity further requires that, for purposes of determining compensation, expropriated property must be valued as of the date of expropriation disregarding the effects of any actions attributable to the expropriating government (1) that were unlawful or (2) that were taken in anticipation of the expropriation.[51] These requirements concerning valuation are inherent in the principle of just compensation,[52] which is embodied in Article IV(2) of the Treaty. These requirements are also well-established in customary international law and were similarly incorporated into the Treaty of Amity by the further provision of Article IV(2), which states that compensation for expropriation must be "in no case less than that required by international law." [53] The Treaty of Amity, moreover, has been consistently understood to incorporate these requirements.[54]

The authorities cited above make clear that in determining the value of expropriated property, the Tribunal should disregard the effects of actions attributable to the Government of Iran which were unlawful. As explained above,[55] throughout the course of the Islamic Revolution, the Iranian government, its agencies, instrumentalities and controlled entities engaged in a long series of unlawful actions directed against American property in Iran. These actions included, among others, harassment of Americans in Iran, the repudiation of contracts, massive expropriations without compensation, and the imposition of unlawful currency restrictions. As already shown, all of these actions violated the Treaty of Amity and, therefore, the effects of these actions and other Treaty violations must be disregarded in determining the value of expropriated property.[56]

Certain omissions of the Government of Iran were equally unlawful under the Treaty. Article IV (2) of the Treaty contains the solemn promise of the Government of Iran to guarantee to the property of U.S. nationals "the most constant protection and security" in Iran. This article imposed upon the Government of Iran an affirmative duty to protect the property of U.S. nationals against injury arising from unlawful activity, whether by public officials or individual private citizens.[57] The failure of the Government of Iran to extend this protection was itself a violation of the Treaty, and the effects of this failure also must be disregarded in valuing expropriated property.[58]

Actions by the Government of Iran which were arbitrary or discriminatory must also be disregarded in determining the fair market value of expropriated property. Government conduct which does not intrinsically violate international law is nevertheless unlawful if it is arbitrary [59] or it discriminates against aliens.[60] Thus, actions by the Government of Iran which otherwise might have been lawful were unlawful if the Government engaged in these actions arbitrarily or directed them against U.S. nationals. Any decrease in the value of expropriated property attributable to such actions must be disregarded in calculating the fair market value of such property.

The authorities cited above also require that, in determining the value of expropriated property, the Tribunal should disregard the effects of actions attributable to the Government of Iran that, while lawful, nevertheless were taken in anticipation of the expropriation. Any other rule would permit an expropriating government to avoid entirely the requirement of compensation by acting to ruin the value of a company before formally seizing control. Thus, actions by the Government of Iran that were taken in anticipation of the expropriation, including the threat of expropriation or the expropriation of other companies, even if lawful in themselves, must be disregarded in valuing expropriated property.

Furthermore, under settled international law, a government brought to power by revolution is legally accountable for the acts of the revolutionary forces from the revolution's inception.[61] Accordingly, the actions of the revolution which empowered the present Government of Iran are attributable to that Government. Any diminution in the value of exporpriated property caused by the actions of revolutionary forces is equally attributable to present Govenment of Iran. If such actions were unlawful or were taken in anticipation of an exporpriation, their effects on the value of expropriated property must be disregarded.

CONCLUSION

Because it has not been terminated in accordance with its terms of the provisions of international law, the Treaty of Amity remains in force between the United States and Iran. Article IV(2) of that Treaty provides the standard of compensation which must be paid for the expropriation by Iran of property of U.S. nationals. Specifically, that Article requires payment of the fair market value of the expropriated property, calculated as of the date of expropriation without regard to actions attributable to the Government of Iran which were unlawful or taken in anticipation of the expropriation.

Under Article V of the Claims Settlement Declaration,[62] this is the appropriate standard of compensation for application by the Iran-United States Claims Tribunal to pending claims for expropriation.

FOOTNOTES

[1] The Tribunal was established in 1981 pursuant to the Declarations of the Democratic and Popular Republic of Algeria concerning commitments and settlement of claims by the United States and Iran with respect to resolution of the crisis arising out of the detention of 52 United States nationals in Iran, *reprinted in* XX Int'l Leg. Mat. 223 (1981).

[2] Signed August 15, 1955, *entered into force*, June 16, 1957, TIAS 3853, 8 U.S.T. 899.

[3] "If a treaty requires a special standard of compensation, the compensation shall be paid in accordance with the treaty." Sohn and Baxter, "Convention on the International Responsibility of States for Injuries to Aliens," Final Draft, Art. 10(2), in Garcia-Amador, John and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens 133, 204 (1974). Because the Treaty of Amity sets forth the standard of compensation to be used for determining compensation for the expropriation of U.S. property by Iran, the Tribunal need not decide which standard would apply in the absence of the Treaty. The United States maintains, as it has for decades, that in the absence of a treaty customary international law requires the payment of prompt, adequate and effective compensation for property appraised at its fair market value. *See* note 42, *infra*.

[4] Where a treaty specifically establishes the method of its termination, the parties are obligated to adhere to that method. Vienna Convention on the Law of Treaties, Article 54(a), U.N. Doc. A/Conf. 39/27, May 23, 1969, *reprinted* in VIII Int'l Leg. Mat. 679 (1969). Although the United States has not ratified the Vienna Convention and, therefore, is not bound by it, the U.S. considers many provisions of the Convention, including Article 54(a), to be declaratory of customary international law. *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, [1971] I.C.J. 16, 47; I. Brownlie, Principles of Public International Law 601 (3d ed. 1979).

[5] Furthermore, where treaties are terminable by notice, international law generally recognizes certain formal requirements for the notice. As the International Law Commission has noted, "a declaration of termination which is not officially communicated to the other party has no effect. . . ." Special Rapporteur Fitzmaurice, Second Report on the Law of Treaties, [1957] II Y. B. Int'l L. Comm'n 69, *quoted* in 14 M. Whiteman, Digest of International Law 443 (1970). Moreover,

"it is essential that the notice should be in due form, emanate from an authority competent for the purpose, and be regularly communicated to the other interested States. . . . In general it is thought better in the interest of regularity and certainty in treaty relations, to require the legal basis of the notice to be stated in every case. Again, in the interest of regularity and certainty, it is thought desirable to require that the date of the notice and the date when it is considered to take effect should be specified in the instrument.

Special Rapporteur Waldock, Second Report on the Law of Treaties, [1963] II Y. B. Int'l L. Comm'n 86, *quoted* in 14 M. Whiteman, Digest of International Law 444 (1970).

[6] *See, e.g.*, Memorandum of the Government of Iran in Opposition to Continuation of Attachments 16-17, 74-75, *Iranian Attachment Cases* (S.D.N.Y.) (filed April 21, 1980); The Islamic Republic of Iran's memorandum of Points and Authorities in

Support of Motion to Dismiss 2, *Starrett Housing Corporation v. Government of Iran*, Civil Action No. 79-6364 (S.D.N.Y.) (filed July 15, 1980). Defendant Government of Iran's Motion to Dismiss, Memorandum of Points and Authorities 1, *Starrett Housing Corporation v. Government of Iran*, Civil Action No. 79-6364 (S.D.N.Y.) (filed September 18, 1980).

[7] The United States Government, for example, continues to issue "treaty trader" and "treaty investor" visas to Iranian nationals, who qualify for such visas only because the Treaty of Amity remains in force. In Fiscal Year 1982 alone, 514 such visas were granted. These visas permit Iranian nationals entry into the United States for purposes of trade or investment.

[8] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), [1980] I.C.J. 3, 28, *reprinted* in XIX Int'l Leg. Mat. 553 (1980). (Emphasis added.)

[9] *Id.* Emphasis added.

[10] "That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law." *Trail Smelter Arbitration Between the United States and Canada Under Convention of April 15, 1935*, Decision of the Tribunal reported March 11, 1941, at 17, 35 Am. J. Int'l L. 684, 699, *excerpted* in VI G. Hackworth, Digest of International Law 140 (1943); *Company General of The Orinoco Case*, 10 R. Int'l Arb. Awards 184, 276 (1902); *Pious Funds Case*, For. Rel. 1902 Appendix II; D. Sandifer, Evidence Before International Tribunals 404 (1975 ed.); II C. Hyde, International Law Chiefly As Interpreted and Applied by the United States 1633 (1945).

[11] As explained below, the Treaty of Amity is part of a modern series of treaties, known generically as "Friendship, Commerce and Navigation Treaties" ("FCN Treaties"), which were negotiated between the U.S. and other nations after World War II and which had as a major purpose the protection of foreign investment. *See* notes 44 and 45, *infra*.

[12] Iran has made this allegation in a number of its pleadings submitted to the Tribunal. Because of the confidential nature of Tribunal proceedings in specific cases, however, citation to particular pleadings by claim name or number would be inappropriate.

[13] These Executive Orders are described below at pages 10-11.

[14] Article VII limits the right of the parties to apply exchange restrictions, except, *inter alia*, where such restrictions have been approved by the International Monetary Fund. Under IMF Dec. No. 144 (52/51) *reprinted* in Selected Decisions of the International Monetary Fund 203, 204 (9th ed. 1981), a state may assume that the IMF has approved exchange restrictions imposed for security reasons unless the state receives notice to the contrary within 30 days of notification to the IMF of the imposition of the restrictions. The United States notified the IMF of its exchange restrictions on November 28, 1979, and received no notice of disapproval from that body.

[15] Revolutionary forces also engaged in considerable unlawful activity directed against Americans in Iran in 1978 prior to the Ayatollah Khomeini's return. As shown below, this activity is attributable to the current Government of Iran.

[16] Shortly after returning to Iran, Ayatollah Khomeini demanded that all Americans leave Iran. N.Y. Times, Feb. 2, 1979, et al. The weeks following saw considerable harassment of U.S. nationals. In mid-February, armed bands detained and interrogated hundreds of Americans and other foreigners. Int'l Herald Tribune, Feb. 15, 1979, at 1, col. 6. In March, the Government of Iran conducted a two-day demonstration against the United States. *Id.*, March 14, 1979, at 1; March 15, 1979, at 2. Over 150,000 Iranians marched on the U.S. Embassy on May 24, demanding "Death to America," and 80,000 more Iranians marched the following day. *Id.*, May 25, 1979, at 1.

[17] In January of 1979, the Ayatollah Khomeini called for a review of all foreign investment projects in Iran. Kayhan, Jan. 28, 1979, at 8, col. 8; Jan. 22, 1979 at 8, col. 3. Contracts terminated that year included those involving military procurement, Etela'at, June 22, 1979 at 8, col. 1, nuclear power stations, Kayhan, June 3, 1979 at 5, col. 2, a dam and agricultural project, Etela'at, September 29, 1979, at 11, col. 5; and a radar system, Jomhouri Eslami, Nov. 11, 1979, at 7. In early 1980, it was announced that the Revolutionary Council would review all contracts with oil companies. Etela'at, January 10, 1980 at 1, col. 3.

[18] During the spring of 1979, the Government of Iran announced its intention to nationalize firms which were poorly managed or unprofitable. Kayhan, March 25, 1979, at 5, col. 1, or whose owners had left Iran. Kayhan, June 23, 1979, at col 3. In June of that year, Iran nationalized all banks and insurance companies. In July, Iran enacted the Law for the Protection and Development of Iranian Industry, which nationalized additional industries, the share-holdings of certain individuals, and all firms whose debts to the banks exceeded their assets. Additional firms were nationalized by the Act Concerning the Appintment of a Temporary Director or Directors for the Custody of Production and Industrial and Commercial and Agricultural and Service Units whether in the Public or Private Sector, enacted June 16, 1979, and by the Act Concerning the Management and Ownership of the Shares of Contracting and Consulting Companies and Firms, enacted March 3, 1980, *reprinted* in Official Gazette No. 10254. By February of 1981, according to the Minister of Industries and Mines, some 580 companies had been nationalized since the revolution, Etala'at, Feb. 5, 1981, at 14, Col. 1.

[19] *See, e.g.*, Circular NA/11600, Bank Markazi, November 14, 1978; Circular NA 5/2090, Bank Markazi, May 5, 1979. Iran has conceded in its pleadings before the Tribunal the imposition of exchange controls beginning in November of 1978. Because of the confidential nature of Tribunal proceedings in specific cases, however, citation to particular pleadings by claim name or number would be inappropriate.

[20] The Government of Iran repeatedly declared its intention to halt oil exports to the United States. The day after the seizure of the U.S. Embassy, Iranian Oil Minister Ali Akbar Moinfhar announced that he was prepared to stop oil exports to the U.S. if Khomeini gave the order. Washington Post, November 6, 1979, at A1; New York Times, November 6, 1979, at A1. Ayatollah Beheshti reiterated the threat on November 11. The threat was carried out on November 12, when the Revolutionary Council decided to stop oil exports to the U.S. N.Y. Times, November 13, 1979, at A1.

[21] Among the provisions violated by Iran were Article II(1), assuring the right of Americans to travel to Iran for commercial purposes; Article II(4), guaranteeing the lives and property of U.S. nationals "the most constant protection and security"; Article IV, protecting American property and other legal rights in Iran; Article VII, limiting restrictions on the transfer of funds; Article VIII, regulating import and export controls; and Article X, guaranteeing freedom of commerce between the United States and Iran.

[22] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), [1980] I.C.J. 3, 41, *reprinted* in XIX Int'l Leg. Mat. 553 (1980). The provisions of the Treaty violated were Article II(4), guaranteeing to U.S. nationals "the most constant protection and security," and Articles XIII, XVIII and XIX, protecting the rights of consular officials and the security of consular premises.

[23] Proclamation 4702, 44 Fed. Reg. 65581 (1979).

[24] Executive Order No. 12170 of November 14, 1979, 44 Fed. Reg. 65729 (1979).

[25] Executive Order No. 12205 of April 7, 1980, 45 Fed. Reg. 24099 (1980); Executive Order No. 12211 of April 17, 1980, 45 Fed. Reg. 26685 (1980).

[26] Furthermore, the countermeasures were adopted only after the United States had used every available diplomatic and legal means to stop Iran's illegal action, including appeals directly to Iran and indirectly through organs such as the United Nations and the International Court of Justice. *See Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), [1980] I.C.J. 3, 25, *reprinted* in XIX Int'l Leg. Mat. 553 (1980). *See also* Statement of President Carter in his report to Congress concerning the economic sanctions in 16 Weekly Comp. of Pres. Doc. 614 (April 14, 1980) ("The United States has used every diplomatic and legal means available to it to end [Iran's illegal conduct] but to no avail.")

[27] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), [1980 I.C.J. 3, 28, *reprinted in* XIX Int'l Leg. Mat. 553 (1980).

[28] Iran has alleged that the U.S. sanctions violated Articles VII and VIII of the Treaty. As explained above, Iran previously had volated both of these articles, and several others as well.

[29] Indeed, the sanctions adopted by the United States were in accord with sanctions that would have been adopted by the U.N. Security Council, but for a veto by the Soviet Union. 16 Weekly Comp. of Pres. Doc. 614-615 (April 14, 1980). *See also* Security Council Draft Resolution of January 13, 1980, 35 U.N. SCOR, Supp (Jan.-Mar. 1980) 10, U.N. Doc. S/13735 (1980), *reprinted* in XIX Int'l Leg. Mat. 256 (1980).

[30] The restriction of commerce as a form of reprisal has long been recognized as proper under international law. Hyde wrote that

"In order to save itself and its nationals from being subjected to treatment deemed subversive of international law, as well as to compel the abandonment of reprehensible conduct, a State may suspend all commercial intercourse with that other whose acts are the source of complaint."

II C. Hyde, International Law Chiefly As Interpreted and Applied by the United States, 1674-1675 (1945). Similarly, O'Connell writes that:

"The aggrieved State may seize the assets of the wrongdoer situated within its jurisdiction, it may freeze credits, and it may take non-violent measures of reprisal, perhaps involving large-scale economic consequences."

I D. P. O'Connell, International Law 328 (1965). *See also* Bowett, "Economic Coercion and Reprisals by States," 13 Va. J. Int'l L. 1 (1972); Bowett, "International Law and Economic Coercion," 16 Va. J. Int'l L. 245 (1976).

[31] In reporting to Congress the reasons for the asset blocking, President Carter said:

"On November 14, 1979, I took the step of blocking certain property or interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran. At that time the United States Embassy in Tehran was occupied and American personnel were being held hostage there in flagrant violation of international law. In addition, Iran had threatened suddenly to withdraw its assets from United States banks, to refuse payment in dollars for oil, and to repudiate obligations owed to the United States and to United States nationals. Iran's actions attacked the foundations of the international legal order as well as the stability of the world economy and the international monetary system."

16 Weekly Comp. of Pres. Doc. 611-612 (April 14, 1980). The President previously had explained that

"Blocking property and property interests of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran will enable the United States to insure that these resources will be available to satisfy lawful claims of citizens and entities of the United States against the Government of Iran."

15 Weekly Comp. of Pres. Doc. 2118 (November 19, 1979).

[32] Asset freezes specifically have been recognized as legitimate responses to violations of international law. *See* I D. P. O'Connell, International Law 328 (1969); *Sardino v. Federal Reserve Board of New York*, 361 F.2d 106, 113 (2d Cir 1966), *cert. denied*, 385 U.S. 898 (1966).

[33] Vienna Convention on the Law of Treaties, Article 60(1); Special Rapporteur Waldock, Second Report on the Law of Treaties, [1963] II Y.B. Int'l L. Comm'n 72-76; Restatement (Second) of the Foreign Relations Law of the United States § 158 (1965); A. McNair, The Law of Treaties 570-578 (1961); *see generally* authorities cited at 14 M. Whiteman, Digest of International Law 476 (1970).

[34] The U.S. countermeasures also were justified under Article XX(1)(d) of the Treaty, which provides that the Treaty shall not preclude the application of measures "necessary to protect [a party's] essential security interests."

[35] The classic definition of reprisals is:

"Such injurious and otherwise internationally illegal acts of one state against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency."

II H. Lauterpacht, Oppenheim's International Law 110 (1945). The three criteria set forth in the text are derived specifically from the *Naulilaa* arbitration of 1928, [1927-28] Ann. Dig., Case 360. *See* VI G. Hackworth, Digest of International Law 154-155 (1943); 12 M. Whiteman, Digest of International Law 148-149 (1971); Bowett, "economic Coercion and Reprisals by States," 13 Va. J. Int'l L. 1 (1972); Bowett, "International Law and Economic Coercion," 17 Va. J. Int'l L. 245 (1976).

[36] Vienna Convention on the Law of Treaties, Art. 60; Special Rapporteur Waldock, Second Report on the Law of Treaties, [1963] II Y.B. Int'l L. Comm'n 73; Sinha, Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party 215 (1966).

[37] The International Law Commission of the United Nations commented in 1963 that "a breach of treaty, however serious [does] not *ipso facto* put an end to a treaty . . . ." Report of the Commission to the General Assembly, [1963] II Y. B. Int'l L. Comm'n 205, *accord, In re Lepeschkin*, 51 Journal du Droit International 1136 (1924), Ann. Dig. 1923-

1924, Case No. 189, *digested in* VI G. Hackworth, Digest of International Law 347 (1943). Similarly, the publicists are in agreement that violation of a treaty does not automatically terminate it, but only makes it voidable at the option of the aggrieved party. I H. Lauterpacht, Oppenheim's International Law 947 (8th ed. 1955); I. Brownlie, Principles of Public International Law 618 (3d ed. 1979). *See also*, the Vienna Convention on the Law of Treaties, Articles 65-68 (requiring formal notice to terminate treaty), U.N. Conference on the Law of Treaties, Doc. A/CONF. 39/27, May 23, 1969; Restatement (Second) of the Foreign Relations Law of the United States § 158, Comment a (1965) ("The violation of an international agreement does not automatically terminate it."); Sinha, Unilateral Denunciation of Treaty Because of Prior Violation of Obligations by Other Party 206 (1966).

[48] Restatement (Second) of the Foreign Relations Law of the United States § 158, Comment b (1965); I Lauterpacht, Oppenheims International Law 948 (8th ed. 1955); Special Rapporteur Fitzmaurice, Second Report on the Law of Treaties, [1957] II Y. B. Int'l L. Comm'n 31; Sinha, Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party 215 (1966).

[49] *See* note 6, *supra*, and authorities cited therein. The Iranian position, if generally accepted in the international community, would cast international treaty practice into interminable chaos. Without the requirement of formal written notice of termination within a reasonable time after an alleged breach, no party could ever be certain whether any given treaty still was considered binding by the other parties, or, if not, when the treaty supposedly was terminated.

[50] Special Rapporteur Lauterpacht, Report on the Law of Treaties, [1935] II Y.B. Int'l L. Comm'n 90, 144; *accord*, *The Temple of Preah Vihear* (Cambodia v. Thailand), [1962] I.C.J. 32; *The Arbitral Award made by the King of Spain* (Honduras v. Nicaragua), [1960] I.C.J. 212. *See also* MacGibb, "Estoppel in International Law," 7 Int'l & Comp. L.Q. 468 (1958).

[51] "[T]he termination a treaty . . . does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." Vienna Convention on the Law of Treaties, Article 70 (1) (b); Special Rapporteur Waldock, Second Report on the Law of Treaties, [1963] II Y. B. Int'l L. Comm'n 94; Special Rapporteur Fitzmaurice, Second Report on the Law of Treaties, [1957] II. Y. B. Int'l L. Comm'n 35; A. McNair, Law of Treaties 532 (1961).

[52] The phrase "prompt, adequate and effective compensation" is a legal term of art which describes the measure of compensation that a state is required to pay for the expropriation of property of aliens. The term is understood to mean payment within a reasonable time after expropriation of the fair market value of the expropriated property in a readily convertible currency. The United States has long maintained that, in the absence of the Treaty of Amity, customary international law would require compensation for the expropriation of U.S. property to be "prompt, adequate and effective." As shown herein, this is also the standard imposed by the treaty.

For elaborations upon the meaning of prompt, adequate and effective, see "Expropriation of American Investments Abroad," Memorandum by the Office of the Legal Adviser, Department of State, *excerpted in* M. Whiteman, Digest of International Law 1143 (1967); Department of State GIST, July 1978, *excerpted in* 1978 Digest of United States Practice in International Law 1226-27; Address of Richard Smith, Director of the Office of Investment Affairs, Department of State, at Vanderbilt University (April 9, 1976), *excerpted in* 1976 Digest of United States Practice in International Law 443, 444; 1938 correspondence between United States and Mexico, *excerpted in* VI Hackworth, Digest of International Law 655-65 (1942) (first formulation of "prompt, adequate and effective" standard by U.S.); Restatement (Second) of the Foreign Relations Law of the United States, Sections 187-190 (1965); I. Brownlie, Principles of Public International Law 533-536 (3d ed. 1979).

[53] In hearings on other FCN treaties with virtually identical language, the standard of compensation set forth there in was described by the State Department as "prompt, just and effective." Hearings on Commercial Treaties Before the Subcomm. on Commercial Treaties and Consular Conventions of the Senate Comm. on Foreign Relations, 82 Cong. 2d Sess. 8 (1952) (Remarks of Deputy Assistant Secretary of State for Economic Affairs.) (proposed FCN treaties between the U.S. and Colombia, Israel, Ethiopia, Italy, Denmark and Greece.) The subject treaties required payment of "just compensation."

Indeed, in his correspondence with the Mexican government setting forth the original formulation of the "prompt, adequate and effective" standard, Secretary of State Cordell Hull used that phrase and the term "just compensation" interchangeably. *See, e.g.*, 2 Dept. State Bulletin 380 (1940).

U.S. courts have also regarded the terms "just compensation" and "prompt, adequate and effective compensation" as synonymous. *See, e.g., Banco Nacional de Cuba* vs. *Chase Manhattan Bank*, 505 F. Supp. 412 (S.D.N.Y. 1980), *aff'd as modified*, 658 F.2d 875 (2d Cir. 1981).

[54] Hearings on Commercial Treaties Before the Subcomm. of the Senate Comm. on Foreign Relations, 83 Cong. 1st Sess. 2-3 (1953) (Remarks of Assistant Secretary of State for Economic Affairs) (Purpose of FCN treaties was to provide legal protection against expropriation of investment abroad.) Indeed, in forwarding the draft Treaty of Amity to the American Embassy in Tehran on July 24, 1954, the Department of State referred to Article IV(2) as "the essential nucleus" of the proposed treaty. Department of State Airgram No. A-18 of July 23, 1954. *See also* H. Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 Am. J. Comp. L. 229 (1956); R. Wilson, U.S. Commercial Treaties and International Law 95-125 (1960); R. Wilson, The International Law Standard in Treaties of the United States 92-105 (1953).

[55] Language virtually identical to that in the Treaty of Amity is contained in U.S. FCN treaties with the following nations: *Greece*, signed August 3, 1951, TIAS 3057, 5 U.S.T. 1829; *Israel*, signed August 23, 1951, TIAS 2948, 5 U.S.T. 550; *Denmark*, treaty signed October 1, 1951, TIAS 4797, 12 U.S.T. 908; *Japan*, signed April 2, 1953, TIAS 2863, 4 U.S.T. 2063; *Federal Republic of Germany*, signed October 29, 1954, TIAS 3593, 7 U.S.T. 1839; *Nicaragua*, signed January 21, 1956, TIAS 4024, 9 U.S.T. 449, *Netherlands*, signed March 27, 1956, TIAS 3942, 8 U.S.T. 2043; *Korea*, signed November 28, 1956, TIAS 3947, 8 U.S.T. 2217; *Muscat and Oman*, signed December 20, 1958, TIAS 4350, 11 U.S.T. 1835; *Pakistan*, signed November 12, 1959, TIAS 4683, 12 U.S.T. 110; *France*, signed November 25, 1959, TIAS 4625, 11 U.S.T. 2398, *Belgium*, signed February 21, 1961, TIAS 5432, 14 U.S.T. 1284; *Viet-Nam*, signed April 3, 1961, TIAS 4890, 12 U.S.T. 1703; *Luxembourg*, signed February 23, 1962, TIAS 5306, 14 U.S.T. 251; and *Togo*, signed Feb. 8, 1966, T.I.A.S. 6193, 18 U.S.T. 1. Language substantially similar to that in the Treaty of Amity is contained in U.S. FCN treaties with *Republic of China*, signed November 4, 1946, 63 Stat. 1299, TIAS 1871 ("without due process of law and without the prompt payment of just and effective compensation"); *Italy*, signed February 2, 1948, 63 Stat. 2255, TIAS 1965 ("without due process of law and without the prompt payment of just and effective compensation"); *Ireland*, signed January 21, 1949, TIAS 2155, 1 U.S.T. 785 ("without the prompt payment of just and effective compensation"); *Ethiopia*, signed September 7, 1951, TIAS 2864, 4 U.S.T. 2134 ("without the prompt payment of just and effective compensation"); and *Thailand*, signed May 29, 1966, T.I.A.S. 6540, 19 U.S.T. 5843 ("without due process of law or without payment of just compensation").

[56] Less than three years before the Treaty of Amity was negotiated, W. Averell Harriman, serving as special emissary from the U.S. to Iran, sent a note to Prime Minister Mossadegh in which he made clear the U.S. view that prompt, adequate and effective compensation must be paid for expropriated property.

Specifically, he stated:

"As I have pointed out to Your Excellency, in the view of the United States Government the seizure by any government of foreign-owned assets without either prompt, adequate and effective compensation or alternative arrangements satisfactory to the former owner is, regardless of intent, confiscation. . . . There must be more than a willingness to pay; there must be an ability to do so in an effective form."

Reply of September 15, 1951, from Mr. Harriman to Dr. Mossadegh, *reprinted in* Royal Institute of International Affairs, Documents on International Affairs at 510 (Oxford 1951), *quoted in* G. White, Nationalisation of Foreign Property 184 (1961).

[57] Iran has openly acknowledged that it entered into the Treaty of Amity and other international obligations involving the protection of foreign investment because of its desire to attract capital and technology from developed countries. See U.N. Doc. A/C. 2/SR 1650, pp. 10-11, *quoted in* Simmonds (ed.), Legal Problems of Multinational Corporations 148 (1977). Thus, Iran fully recognized and accepted its obligation to pay full compensation for the expropriation of property owned by U.S. nationals.

[58] *See* note 45, *supra*.

[59] These negotiations were reported in the following diplomatic correspondence: Telegram No. 105 of July 15, 1954, from the American Embassy in Tehran to the Secretary of State; Telegram No. 119 of July 16, 1954, from the American Embassy in Tehran to the Secretary of State; Department of State Airgram No. A-18 of July 23, 1954, to the American Embassy in Tehran; Telegram No. 212 of October 16, 1954, from the American Embassy in Tehran to the Secretary of State; Department of State Telegram No. 963 of November 13, 1954, to the American Embassy in Tehran; Telegram No. 1176 of November 27, 1954, from the American Embassy in Tehran to the Secretary of State; Department of State Telegram No. 1137 of November 27, 1954, to the American Embassy in Tehran.

[60] A careful review of U.S. FCN treaty practice, published just one year prior to the negotiation of the Treaty of Amity, concluded that the inclusion of references in treaty language to the international law standard does not affect the standard of "just compensation." U.S. negotiators came to prefer the "just compensation" and "full equivalent" language because it was regarded as more precise than general references to international law. *See* R. Wilson, The International Law Standard In Treaties of the United States 92-105 (1953).

[61] Furthermore, subsequent actions by the United Nations or the Iranian Government do not alter Iran's obligations under the Treaty. For example, in casting Iran's vote in favor of the Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), Ch. II U.N. Doc. A/RES/3201 (1974), approved by the U.N. General Assembly in 1974, the Iranian delegate explicitly stated his government's understanding that approval of the Charter was "without prejudice to any arrangements or agreements reached between states concerning investments and modalities of compensation in the event of nationalization or expropriation of foreign property." U.N. Doc. A/C.2/SR. 1650, pp 10-11, *quoted in* Simmonds (ed.), Legal Problems of Multinational Corporations 148 (1977). Thus, as Iran has acknowledged, the standard set by the Treaty is the governing law between the United States and Iran.

[62] This includes interest from the date of taking until the date compensation is paid. *See Chorzow Factory Case*, P.C.I.J., Ser. A. No. 17 at p. 47; *Norwegian Shipowners' Case* (Norway v. U.S.), 1 R. Int'l Arb. Awards 308 (1922); OECD Draft Convention on the Protection of Foreign Property, Art. 3, Note 9, 7 Int'l Leg. Mat. 117 (1968); 8 M. Whiteman, Digest of International Law 1186-92 (1967).

[63] *See, e.g., Norwegian shipowners Case* (Norway v. U.S.), 1 R. Int'l Arb. Awards 308 (1922); OECD Draft Convention on the Protection of Foreign Property, Art. 3, Comment 9(a), 7 I.L.M. 117, 127 (1968); Sohn and Baxter, "Convention on the International Responsibility of States for Injuries to Aliens," Final Draft, *in* Garcia-Amador, Sohn and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens 133, 203 (1974).

[64] *See, e.g., United States* v. *564.54 Acres of Land*, 441 U.S. 506 (1979); *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470 (1973); *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624 (1961); *United States* v. *Miller*, 317 U.S. 369 (1943); *Olson* v *United States*, 292 U.S. 246 (1934).

[65] Modern economics universally recognizes that the value of property is determined by its capacity to generate future income. *See, e.g.*, J. Williams, The Theory of Investment Value 1 (1938) ("[I]n the end all prices depend on someone's estimate of future income.") I. Fisher, The Theory of Interest 12 (1954 ed.) ("The value of any property . . . is its value as a source of income. . . ."); E. Solomon & J. Pringle, An Introduction to Financial Management 259 (1980 ed.) ("[T]he age-old concept that the value of an asset depends not on its cost or its past usefulness but on its future usefulness . . . underlies the modern theory of value.") *See also* S. Pratt, Valuing a Business Enterprise, 28-29 (1981).

[66] *See, e.g., Sapphire International Petroleums* v. *National Iranian Oil Co.*, 35 I.L.R. 136 (1963); *Chorzow Factory Case*, (1928) P.C.I.J. Ser. A, No. 17; *Delagoa Bay and East African Railway Company Case* (Great Britain & U.S. v. Portugal), 3 Whiteman, Damages in International Law 1694-1703 (1943); *Shufeldt Case* (U.S. v. Guatemala), 2 R. Int'l Arb. Awards, 1080 (1929); *Lena Goldfields Ltd* (1930) (unpublished opinion), 36 Cornell L. Q. 42 (1950); *Norwegian Shipowners' Claim* (Norway v. United States), 1. R. Int'l Arb. Awards 308 (1922); *Palestine Railway Case, discussed in* J. Wetter and S. O. Schwebel, "Some Little-Known Cases on Concessions" 40 Brit. Y. B. Int'l L. 183, 222-231 (1964), *May* v. *Guatemala*, 3 M. Whiteman, Damages in International Law 1704-1710 (1964); *Lighthouse Arbi-*

tration (France v. Greece), 23 I.L.R. 299 (Perm. Ct. Arb. 19560; *Cape Horn Pigeon Case* (U.S. v. Russia), 9 R. Int'l. Arb. Awards 63 (1902); *Aminoil* Arbitration, XXI Int'l Leg. Mat. 976, 1033 (1982); *TOPCO/CALASIATIC* Arbitration, 53 I.L.R. (1977); R. Lillich, International Claims: Postwar British Practice 114 (1967). *See also* cases cited in V Hackworth, Digest of International Law 728-731 (1943).

[9] *See* Address of Richard J. Smith, Director of the Office of Investment Affairs, Dept. of State, at Vanderbilt University, April 9, 1976, *excerpted in* 1978 Digest of United States Practice in International Law 444.

[10] As noted above, in the case of an operating enterprise, fair market value is equivalent to the "going concern" value of the enterprise. *See* sources cited at notes 59 and 60, *infra*. In some instances, a market for a particular enterprise may not exist and, therefore, the "fair market value" of the property must be determined through indirect means. One method for determining indirectly the fair market value of a going concern is the discounted cash flow method, under which the total amount of future net income from an enterprise is discounted by the time value of money and the degree of risk associated with the future income to derive the present value of the asset's future income stream. Another method is to value the enterprise with reference to other comparable going concerns which have similar anticipated cash flows and which recently have been ascribed with a fair market value. *See, e.g., City of Thibodaux v. Louisiana Power & Light Co.*, 373 F.2d 870 (5th Cir. 1967), *cert. denied*, 389 U.S. 975 (1967); *United States v. Eden Memorial Park Association*, 350 F.2d 933 (9th Cir. 1965); *Bailey v. United States* 325 F.2d 571 (1st Cir. 1963); *Fairfield Gardens, Inc. v. United States*, 306 f.2d 167 (9th Cir. 1962); *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398 (5th Cir. 1961), *cert. denied*, 366 U.S. 944 (1961); *Cal-Bay Corp. v. United States*, 169 F.2d 15 (9th Cir. 1948), *cert. denied*, 335 U.S. 859 (19480); *United States, v. Certain Interests in Property*, 205 F. Supp. 745 (D. Mont. 1962).

[11] *See* McCosker, "Book Values in Nationalization Settlements," II Lillich (ed.) The Valuation of Nationalized Property in International Law 35-51 (1973) (Book value generally understates value of an enterprise); Dept. of State Note to the Government of the Libyan Arab Republic, dated September 14, 1973, Dept. of State File No. D730067-0256, *excerpted in* 1975 Digest of United States Practice in International Law 489-490 ("net book value" formula for compensation proposed by Libya did not satisfy requirements of prompt, adequate and effective compensation); Address of Richard J. Smith, Director of Office of Investment Affairs, Department of State, at Vanderbilt University, April 9, 1976, *excerpted in* 1976 Digest of United States Practice in International Law 444 (Replacement cost generally is less acceptable than "going concern" value, and book value is the least acceptable method of valuation).

[12] For example, in the 1920s, the United States negotiated an FCN treaty with Estonia, 44 Stat. [illegible]79 (1925), which required payment of "just compensation" for expropriated property. In the course of negotiations, the U.S. negotiators explained that just compensation required payment of the market value of property (plus interest from the date of expropriation until the date of settlement). These negotiations were described in a leading work on U.S. FCN Treaty practice, published one year prior to the negotiation of the Treaty of Amity. *See* R. Wilson, The International Law Standard in Treaties of the U.S. 98 (1953).

Similarly, the Legal Adviser to the Department of State wrote in 1962 that:

"The Department of State has traditionally defined fair compensation as adequate, prompt and effective payment . . . . In the case of an operating enterprise, adequate compensation is usually considered to be an amount representing the market value or "going concern" value of the enterprise, calculated as if the expropriation or other governmental act decreasing the value of the business had not occurred and was not threatened."

"Expropriation of American Investments Abroad," Memorandum by the Office of the Legal Adviser, Department of State, *excerpted in* 8 Whiteman, Digest of International Law 1143 (1967). *See also* Restatement (Second) of the Foreign Relations Law of the United States § 188, Comments a and b (1965); Department of State GIST, July 1978, *excerpted* in 1978 Digest of United States Practice in International Law 1226-27; Address of Richard J. Smith, Director of Office of Investment Affairs, Department of State, at Vanderbilt University, April 9, 1976, *excerpted in* 1976 Digest of United States Practice in International Law 444; State Department Press Release No. 630 (December 30, 1975), *excerpted in* 74 *Dept. of State Bulletin* No. 1910, at 138 (Feb. 2, 1976) ("foreign investors are entitled to the fair market value of their interests").

[13] This includes, of course, all of the events which constituted or resulted in the expropriation. It also includes the prospect of the expropriation which ultimately occurs, other expropriations by the Government, and the general conduct of the Government which makes such expropriations likely.

[14] *See Lighthouse Arbitration*, 23 I.L.R. 299, (1956); *Chorzow Factory*, (1928) P.C.I.J. Ser. A, No. 17, 1 Hudson, *World Court Reports* 646; *Norwegian Shipowner's Claims*, 1 R. Int'l Arb. Awards 308 (1922); *Mariposa Claim*, 7 Ann. Dig. 255 (1933); *Case concerning the Barcelona Traction, Light and Power Company Ltd.* (Belgium v. Spain), [1970] I.C.J. 3, 46 I.L.R. 1 (Separate Opinion of Judge Gros); Restatement (Second) of Foreign Relations Law of the United States, §188, Comment b (1965); OECD Draft Convention on the Protection of Foreign Property Art. 3, Comment 9(a), 7 Int'l Leg. Mat. 117, 127 (1968); Sohn and Baxter, "Convention on the International Responsibility of States for Injuries to Aliens," Final Draft, in Garcia-Amador, Sohn and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens 133, 203, 210, (1974); R. Lillich, "The Valuation of Nationalized Property by the Foreign Claims Settlement Commission," in The Valuation of Nationalized Property in International Law, 97 n.13 (1972); "Expropriation of American Investments Abroad," Department of State Memorandum, *excerpted in* 8 M. Whiteman, Digest of International Law 1143 (1967). *Cf. Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F. 2d 875 (2d Cir. 1981) (Value of good will at time of expropriation arbitrarily included in "book value" of company not part of fair market value.)

[15] See authorities cited at note 62, *supra*. For the relationship between those two provisions of Article IV(2), see note 50, *supra*.

[16] Thus, for example, three years before the Treaty of Amity was signed, the Legal Adviser of the Department of State described to Congress the meaning of virtually identical language in other FCN treaties:

"*Compensation* based on the value of the initial investment *would not meet the standard of the treaty* or of international law, *if it were less than the value at the time of taking*.

See Commercial Treaties, Hearings Before a Subcomm. of the Senate Comm. on Foreign Relations, 82nd Cong., 2d Sess. 12 (1952) (Statement of the Office of the Legal Adviser) (proposed Treaties of Friendship, Commerce and Navigation between the United States and Colombia, Israel, Ethiopia, Italy, Denmark and Greece). (Emphasis added.) The subject treaties required payment of "just compensation."

[17] See pages 7-10, *supra*.

[18] In his concurring opinion in *ITT Industries, Inc. v. The Islamic Republic of Iran*, Award No. 47-156-2, (May 26, 1983) (Iran-United States Claims Tribunal), Judge Aldrich observed, at page 12, that "[t]he Islamic Revolution in Iran was not a 'wrong' for which foreign investors are entitled to compensation under international law." Leaving aside the legal status of the revolution as a generalized whole, it is clear beyond doubt that certain specific actions taken during the revolution were "wrongs" for which international law provides a remedy. Such wrongs include the expropriation of property of the United States or its nationals without compensation and the failure of the government to provide U.S. nationals and their property with "the most constant protection and security." As shown above, in valuing expropriated property, the Tribunal should disregard the effects of all unlawful acts attributable to the Government of Iran.

[19] The scope of this protection is to be interpreted in light of the overall purpose of the Treaty to establish friendship and commerce between the two nations and, in particular, to provide for the protection of foreign investment. The Treaty contains numerous provisions intended to foster a favorable climate for U.S. investment in Iran. See provisions cited at note 21, *supra*. *See also* Art. 1 of the Treaty ("There shall be firm and enduring peace and sincere freindship between the United States of America and Iran.") As one leading commentator on U.S. FCN treaties wrote in a much-cited article, published during the ratification of the Treaty of Amity,

"In a real sense, therefore, *the FCN treaty as a whole is an investment treaty*; not a mosaic which merely contains discrete investment segments. It regards and treats investment as a process . . . inextricably woven into the fabric of human affairs generally, and its premise is that investment is inadequately dealt with unless set in the total 'climate' in which it is to exist. A specialized 'investment agreement' based on a narrower premise would be to that extent unrealistic and inadequate."

* * * * *

"These treaties focus, in fundamental terms of enduring value over the long range, upon the line between policy favorable and policy unfavorable to foreign investment: namely, hospitality to and equality for the foreigner under the law, and respect for his person and property."

H. Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 Am. J. Comp. L. 229, 246-247 (1956) (emphasis added). Thus, the promise made by Iran in the Treaty of Amity was not merely to protect property of U.S. nationals against violence, but to provide a favorable climate for U.S. investment, and it was in reliance upon this promise that U.S. nationals invested in Iran. *See* note 47, *supra* (admission by Iran that it executed the Treaty of Amity in order to attract foreign investment and technology to Iran). Iran's total abdication of this responsibility in favor of an overt policy of virulent anti-Americanism was in itself a violation of the Treaty of Amity.

[20] Customary international law also imposed on Iran the duty to provide "the most constant protection and security" to U.S. nationals in Iran. *See Case Concerning Barcelona Light, Power and Traction Company, Ltd.*, [1970] I.C.J. 3, 46 I.L.R. 1; OECD Draft Convention on the Protection of Foreign Property, Article 1, Note 5, 7 Int'l Leg. Mat. 117, 120 (1968); Restatement (Second) of the Foreign Relations Law of the United States § 183 (1965); C. Eagleton, The Responsibility of States in International Law 87-92 (1928); Sohn and Baxter, "Convention on the International Responsibility of States for Injuries to Aliens," Final Draft, in Garcia-Amador, Sohn and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens 133, 234-240 (1974). Given its purpose of establishing enduring friendship and commerce between the parties, the Treaty of Amity must be regarded as providing a standard of protection broader than that of customary international law. *See* note 67, *supra*.

[21] Treaty of Amity, Art. IV(1); *See also* Universal Declaration of Human Rights, Art. 17(2), G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948); OECD Draft Convention on the Protection of Foreign Property, Article 1, Note 7, 7 Int'l Leg. Mat. 117, 121-122 (1968); F. V. Garcia-Amador, "Draft Articles on the Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens", in Garcia-Amador, Sohn and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens 42-43 (1974); Sohn and Baxter, "Convention on the International Responsibility of States for Injuries to Aliens," Final Draft, in *Id.*, at 164-176.

[22] Treaty of Amity, Art. IV(1); *See also* Universal Declaration of Human Rights, Arts. 2, 7, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948); OECD Draft Convention on the Protection of Foreign Property, Article 1, Note 7, 7 Int'l Leg. Mat. 117, 122 (1968); Restatement (Second) of the Foreign Relations Law of the United States § 166 (1965).

[23] *George S. Pinson (France) v. United Mexican States*, 5. R. Int'l. Arb. Awards 327 (1928); *Bolivar Ry Company Case* (Great Britain v. Venezuela), 9 R. Int'l. Arb. Awards 445 (1903); *Diz Case* (United States v. Venezuela), 9 R. Int'l. Arb. Awards 119 (1902); 8 M. Whiteman, Digest of International Law 819-824 (1967); V G. Hackworth, Digest of International Law 681-682 (1943); Sohn and Baxter, "Convention on the International Responsibility of States for Injuries to Aliens," Final Draft, in Garcia-Amador, Sohn and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens 133, 257-260 (1974); 2 D.P. O'Connell, International Law 968 (2nd ed. 1970); Restatement (Second) of Foreign Relations Law of the United States §§ 109, 110 (1965); A.H. Feller, The Mexican Claims Commissions 156-7, 163 (1935).

[24] The Claims Settlement Declaration is one of the Declarations of the Democratic and Popular Republic of Algeria pursuant to which the Iran-United States Claims Tribunal was established. *See* note 1, *supra*. Article V of that Declaration provides that "[t]he Tribunal shall decide all cases on the basis of respect for law . . . ."

Annex 20

C. Sullivan, "Treaty of Friendship, Commerce and Navigation, Standard Draft", U.S. Department of State (1962)

Excerpts: p. 1, p. 2, p. 11, pp. 59-68, pp. 98-123, pp. 170-183, pp. 206-221, pp. 270-297, pp. 315-326, pp. 369-373

EX. 53
U.S. Plmr. Obj
Oil Platform Case

STANDARD DRAFT

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION

STANDARD DRAFT

TREATY OF FRIENDSHIP, COMMERCE

AND NAVIGATION

INTRODUCTION

This study of the standard draft treaty of friendship, commerce and navigation is in six parts, as follows:

1. The text of the standard draft treaty of friendship, commerce and navigation as of January 1, 1962, by which time the evolutionary development of the standard draft could be considered as complete. (Page 1)

2. A list of the treaties of friendship, commerce and navigation and related agreements that are currently in force. (Page 50)

3. Article-by-article, paragraph-by-paragraph annotations of the text of the standard draft treaty of friendship, commerce and navigation. (Page 59)

4. Comparative tables for each treaty of friendship, commerce and navigation or related agreement listing its provisions against the provisions of the standard draft and providing brief summaries of the principal variations between the individual treaty and the standard draft. (Page 336)

5. Summaries of court decisions since 1930 that involved consideration of the provisions of treaties of friendship, commerce and navigation or related agreements. (Page 453)

6. A selected bibliography of law review articles and other works relating to treaties of friendship, commerce and navigation or similar agreements. (Page 475)

This study was prepared by Charles H. Sullivan with major research assistance from Jonathan Blatt and George S. Cole.

ANNOTATIONS

There follow article-by-article, paragraph-by-paragraph annotations of the standard draft treaty of friendship, commerce and navigation. The main purpose of these annotations is to provide information as to the intent of the negotiators and as to their understanding of the meaning of particular treaty provisions as developed and explained in the course of negotiations.

There are two main sources that reveal negotiating intent. The first is the actual record of negotiations, in the form of agreed or informal minutes of negotiation, Foreign Service messages providing negotiating instructions or reporting on negotiating sessions, memoranda of conversation recording negotiations held in Washington, and internal memoranda dealing with issues raised in the course of negotiations. In use of these sources, much reliance is placed on negotiations conducted during the period from 1948 to 1955. During this period the basic scheme of the treaty became firmly established through an extensive process of reformulation and rearrangement of material, which included a reduction in the standard text from 12,000 to 4,500 words. The object was to produce a more succinct and readily negotiable draft without, however, sacrificing the integrity of the substantive principles of treaty policy established at the beginning of the post-World War II treaty program.

During this period, moreover, there were a number of negotiations with governments represented by acute, capable and well-informed officials who occasioned a close and critical examination of all vital provisions of the draft. These negotiations provided a thorough testing of the negotiability of the standard draft and required detailed explanations of United States negotiating intent, which have been drawn upon extensively in these annotations.

The other source of guidance as to the intent of the negotiators is United States laws, Federal and State, affecting the rights of aliens. It was not a general policy to use the treaty of friendship, commerce and navigation as a means of overriding State legislation imposing restrictions on aliens. The exceptions were mainly in matters such as inheritance where treaty provisions overriding contrary State legislation rested on long-established precedent. An effort to overcome by treaty State alienage restrictions on the practice of professions was not pursued when the Senate decided that it did not wish to sanction impairment of State prerogatives in this area. In particular, moreover, it was firm treaty policy to avoid any interference with State alien land laws, although this policy made it difficult to obtain wholly satisfactory landholding privileges for United States citizens and companies in foreign countries.

Similarly, there was a general policy of avoiding conflict with Federal legislation, especially legislation strongly expressing the intent of Congress with respect to alien participation in certain economic activities. The principal example is legislation limiting the acquisition by aliens of interests in airlines, mining, shipping, water and nuclear power, and, until recently, banking enterprises. Also, provisions of the standard draft were modified, as in the case of social security, to avoid conflict when Congress enacted incompatible legislation, and military service provisions were dropped from the treaty entirely after a change in Congressional policy on the drafting of aliens.

As a consequence the standard treaty provisions diverge from the stipulations of Federal laws affecting aliens only in a relatively small number of cases that are limited in scope and usually technical in nature. Since there are over 200 Federal statutory restrictions on aliens exclusive

of the immigration and naturalization laws, it is difficult to determine easily how extensive the divergences between treaty provision and statute may be, but the number of readily identifiable differences, which are covered in the annotations, is not large.

In view of the treaty policy towards Federal and State statutes, the references to such statutes in the annotations is a direct representation of the intent of the negotiators. It was their intent to avoid conflict except in a few carefully circumscribed situations, and they expressed this intent by resisting proposals of foreign negotiators to contrary effect or by drafting their way around possible conflicts.

Three special points should be observed about these annotations. First, military service provisions are not annotated. Because they were dropped shortly after the outbreak of the Korean War, they came to be considered an exceptional case and not a part of the standard draft. Second, the sovereign immunity provision is annotated for the reasons outlined in the prefatory comments to Article XVIII, notwithstanding its omission from negotiating drafts in the late 1950's. Third, there is no readily determinable standard provision on the practice of professions, but the various approaches experimented with are outlined in the annotation of Article VII.

PREAMBLE

General:

The Preamble is an integral part of the treaty as a document signed by both treaty partners and consequently is a part of the commitment they have undertaken. By its nature it is not an operative part of the treaty containing specific commitments in the same sense as most other provisions of the treaty. It is introductory and prefatory in character and consequently is stated in imprecise and general terms. On the other hand, it does have legal effect, for the courts rely on it as a guide to interpretation concerning the applicability of the operative articles. The Preamble reference to the unconditional application of the most-favored-nation clause, for example, is tantamount to an authoritative rule of interpretation in relevant cases.

Preamble

The United States of America and _____,(1) desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer econoric and cultural(2) relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements encouraging mutually beneficial investments, promoting mutually advantageous commercial intercourse and otherwise establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general(3) upon the principles of national(4) and of most-favored-nation treatment(5)(6)(7)

unconditionally accorded, [8] and for that purpose have appointed as their Plenipotentiaries, [9]

The President of the United States of America:

and

Who, having communicated to each other their full powers found to be in due form, have agreed as follows:

(1) The formal style of the Preamble is a simplified version of the traditional heads-of-state form.

(2) Use of the word "cultural" here is intended as a signal that the treaty is not concerned exclusively with economic matters. It is used in a general sense. The operative provisions of the treaty deal with a somewhat narrower range of subjects that may be considered cultural in nature. See Article VIII (2), Note 19. The United States resisted efforts to use the treaty as a basis for cultural arrangements of the customary government-to-government kind. It did, however, agree to an exchange of notes on cultural matters in connection with the Treaty with Italy, but the commitment in those notes amounted to little more than an undertaking to discuss the possibility of cultural interchange agreements at a later time.

(3) The words "in general" are used consistently with the overall scheme of the treaty to make allowance for

some absolute provisions, some references to international law as a standard, and some exceptions to national and most-favored-nation treatment.

(4) The unconditional reference in relation to national treatment is not intended to imply that no qualifications can be placed on national treatment. It does not bear on the extent to which national treatment is granted. It means instead that national treatment, wherever and to the extent stipulated, is to be accorded automatically and without condition of reciprocity.

The national treatment rule as stated in the Preamble is strongly insisted upon in the belief that it is good in principle, that it is the only practicable one in establishment matters, especially in connection with a federal state, and that in view of the liberality of United States laws it is advantageous to the treaty partner, It is reciprocal in terms of practical effect, reciprocity being obtained by each treaty partner automatically granting the other national treatment. The total of particular rights one treaty partner grants to the other ordinarily is balanced by the rights it has obtained through the treaty.

It was established policy to avoid stipulating reciprocity in the sense of exact or absolute reciprocity in establishment matters, partly because of administrative difficulties and partly because of the danger that reciprocity so defined could be interpreted and applied in a retaliatory manner.

(5) The first two paragraphs of Note 4 above apply equally to most-favored-nation treatment.

(6) If national treatment and most-favored-nation treatment are specified for the same subject matter, the recipient is to receive whichever is more favorable to him.

(7) In establishment matters national treatment normally is the most favorable that can be obtained. For drafting consistency most-favored-nation treatment has been written into establishment provisions whether there is a demonstrable need or not. In cases where the full measure of national treatment is not obtainable, the most-favored-nation treatment rule affords a context in which to work out adjustments. Unless there is good reason, however, it has not been the policy to insist on most-favored-nation treatment if national treatment is provided.

(8) The form and placement of this phrase is influenced by the semantic problem inherent in "unconditional national treatment" as the term "unconditional" is customarily associated with most-favored-nation treatment.

(9) The phrase "in like situations" in Article XXII(1) and (2) in no way impairs the "unconditionally accorded" rule. The former is a rule for determining what person, entity or object is entitled to treatment to be accorded unconditionally.

(10) The Preamble offers no specific guidance as to the extent to which the treaty applies to government activities in the economic sphere. The original intent was to extend to government-owned or controlled corporations of the treaty partner at least those treaty provisions according rights and privileges to companies. That intent, however, was expressed in terms of granting to such corporations only the rights and privileges of like private companies of the host country. There was no intention of extending to corporations owned by the government of the treaty partner any special privileges the government of the host country extended to corporations that it owned or controlled. As the standard draft was expanded and refined to deal explicitly with situations in which private business activities came into confrontation with state business activities, most notably through the addition of provisions on state trading, state competition and sovereign immunity,

this approach was no longer maintained. Instead, the approach was adopted that the treaty provisions, most particularly those based on the national and most-favored-nation treatment standards, were applicable only to the domain of private rights and did not affect the economic activities of the government, unless it was absolutely clear from the context, as in Articles XVII(1) and (2), and Article XVIII(2) and (3) that there was positive intent to cover particular government activities. Significantly, this matter was seldom raised in the course of negotiations, the treaty partner evidently being satisfied with this canon of construction. When the question was raised, the United States adhered to this canon. In one case, a treaty partner fearing that Article VII(1) might make available to United States private companies those activities reserved to state-owned entities was told that Article VII(1) applies "only to areas open to private enterprise, and thus no rights are asked with respect to engaging in fields of activity reserved to monopolies or government ownership." In another case, a treaty partner concerned whether the most-favored-nation rule would require it to accord rights to companies of a nearby country was told that the companies of that country were state institutions which differ from private companies, and that the United States is only interested in private companies.

ARTICLE I

General Equitable Treatment

General:

This Article is intended to establish a general outlook or approach to the treaty as a whole. It is a statement of general principle rather than a tight legal rule, and its placement makes it a link of agreed principle between the Preamble and the body of the treaty. Article I, however, also provides a basis for making representations against actions detrimental to United States interests that may not be covered by any specific legal rule in the treaty, as, for example, a measure that is superficially nondiscriminatory but is so framed as to harm only some United States interest.

Article I

Each Party shall at all times accord equitable treatment (1) to the persons, property, enterprises (2) and other interests of nationals and companies of the other Party.

(1) Equitable treatment is not intended to serve as a third standard in addition to national treatment and most-favored-nation treatment. Whether treatment is in fact equitable depends on the circumstances of each case. In many situations national treatment, for example, may be equitable. The functions of the concept of equitable treatment are to serve as a guiding principle in cases where the exact terms of a given treaty provision do not furnish complete and definitive guidance and to establish that, in cases where two constructions of a treaty provision are possible, the construction leading to a just or equitable result is to be preferred.

(2) For discussion of the term "enterprises" when used in a treaty context, see Article VII, Note 13, and Article XVIII, Note 18.

(3) The term "nationals" is more inclusive than citizens, inasmuch as the nationals of a country may not always be citizens as well. In the case of the United States, the only nationals who are not citizens are natives of American Samoa.

(4) The term "companies" is used throughout the treaty to designate artificial persons of all kinds even as the term "nationals" is used to designate natural persons.

ARTICLE V

Judicial Rights and Commercial Arbitration

Paragraph 1; Access to Courts

Paragraph 2: Commercial Arbitration

Protocol Paragraph 1: Legal Aid and Security for Costs and Judgment

General:

The basic intent of this Article is to make provision for judicial remedies for aliens on a liberal basis broadly representative of the course of United States jurisprudence and supportive of the principles of international law. It is an essential element of the treaty because of the critical nature of the support it gives to the other provisions of the treaty. The treaty is a legal document, and nondiscriminatory access to judicial remedy is the first line of legal protection when rights granted by other treaty provisions are called into question. Access to the courts is considered essential in support of the establishment provisions in particular.

Article V(1) sets forth the governing rule of national and of most-favored-nation treatment. The provision further provides specific clarification of the application of this rule in areas such as access to courts by corporations, exclusion of special limited causes of action, legal aid, and security requirements where limitations based on nationality or residence may occur.

The provisions of Article V(2) respecting commercial arbitration are much narrower. The scope of these provisions is limited by the need to take cognizance of State laws which in the main were not favorable to commercial arbitration. Accordingly, no effort is made to ensure recognition and enforcement of foreign arbitral agreements and awards. Article V(2) has the limited objective

of precluding assertion of the alienage of an arbitrator or the foreign situs of an arbitral proceeding as grounds for denial of enforcement. It leaves the courts full freedom of action, however, to refuse enforcement on any objective grounds such as incompatibility with the public policy of the forum.

Article V, Paragraph 1: Access to Courts

1. Nationals and companies of either Party shall be accorded national treatment(1)(2) and most-favored-nation treatment(3) with respect to access to the courts of justice and to administrative tribunals(4) and agencies(5) within the territories of the other Party, in all degrees of jurisdiction(6)(7), both in pursuit and in defense of their rights. It is understood(8) that companies(9) of either Party not engaged in activities(10) within the territories of the other Party shall enjoy such access therein without any requirement of registration(11) or domestication(12).

(1) The necessary implication of national treatment as applied to this subject matter is that the courts of each country will observe the precepts of non-discrimination in assessing the costs of litigation, rendering decisions, fixing damages, and ordering and enforcing the execution of judgments.

(2) The national treatment rule does not imply a right to the summary execution of a foreign judgment. Any person seeking execution of a foreign judgment must institute a proceeding before a court of competent jurisdiction to obtain a judgment from that court for enforcement of the foreign judgment.

(3) The national treatment rule was considered to afford adequate protection in the circumstances, and on occasion deletion of the most-favored-nation provision was authorized.

(4) The intent is to take proper account of the growth of administrative law as applied outside the framework of the regular judicial system by specialized tribunals. Because these administrative entities have come to influence and control economic activities to such an extent, it is important that the alien enjoy access to them in the same measure as a citizen in the course of furthering and protecting his legitimate rights and interests.

(5) The term "agencies" is used in addition to "tribunals" to cover executive departments or agencies which may have vested in them by statute administrative law functions similar to those vested in regulatory commissions such as the Federal Communications Commission.

(6) Aliens generally are accorded national treatment with respect to access to Federal and State courts. The Court of Claims Act, however, makes suits by aliens against the Government subject to reciprocity (28 U.S.C. 1502); suits in admiralty brought by aliens under the Public Vessels Act (46 U.S.C. 785) also are subject to reciprocity. Although there are no cases directly on the point, it may be considered that a treaty, if later in date, would override the reciprocity requirement in either case. In any event, the effect of the reciprocity provision of the Court of Claims Act appears to be limited in view of evidence that most foreign

countries accord United States citizens the right to bring suits against the state (8 Whiteman, Digest of International Law 410-413).

The provisions of Federal statute governing venue for suits brought by aliens (28 U.S.C. 1391(d)) may occasion a technical divergence from the rule of national treatment. Under the statute an alien may be sued in any district, but he may sue a United States citizen only in the citizen's own district. In practical terms, however, a United States citizen can sue an alien only in that district where valid service may be had, and the result in those terms may be looked upon as a reasonable approximation of national treatment.

(7) The term "jurisdiction" is used as the most satisfactory single term available. It is intended to encompass the areas subject to the laws and authority of a government and to make the treaty effective wherever a contracting party has the legal authority to enforce its legal obligations.

(8) Phrasing of the kind normally used in a protocol is employed here to strengthen the argument that the substance of the second sentence is included in the first sentence by necessary implication.

(9) The intent is to ensure that a corporation which has not become established in the territories of the treaty partner shall have access to the courts therein for such purposes as collecting a debt or protecting a patent against infringement without having to comply with the formalities and requirements imposed on alien corporations seeking establishment for the purpose of carrying on business activities. This provision represents an effort to establish safeguards against the practice of certain countries, for example, Mexico in the Palmolive case in 1929, to make full compliance with registration requirements a condition precedent to maintaining an action to defend a trademark against infringement (see 3 Hackworth Digest of International Law 711-713).

United States negotiators cited the Declaration on the Juridical Personality of Foreign Companies (55 Stat. 1201; 3 Bevans 274) in support of this principle.

(10) The term "activities" includes the activities of both business and nonprofit corporations. This coverage was stated explicitly in some treaties. (See Treaty with Italy, Article V(4)).

(11) The term "registration" is understood to describe a process by which an alien corporation complies with certain formalities and requirements that, without impairing its alien juridical status, subject it to a degree of local jurisdiction going beyond that which is necessary for access to courts and placing its economic or nonprofit activities within the host country under some form of supervision.

(12) The term "domestication" is understood to describe a process by which an alien corporation in effect organizes under the laws of the treaty partner. It is not intended necessarily to require recharter-ing under domestic law. It may involve some lesser process of assimilating the status of the alien corporation to that of the domestic corporation for various legal purposes. Domestication is analogous to the naturalization of an alien individual. The terms "registration" and "domes-tication," despite the technical distinctions involved, are considered, when taken together, as adequately describing all the procedures equivalent to those for setting up a business establishment that might be required as a condition precedent to bringing suit.

Article V, Paragraph 2: Commercial Arbitration

2. Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies[13][14], shall not be deemed unenforceable within the territories of the other Party[15], merely[16] on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered[17], shall be deemed invalid or denied effective means of enforcement[18] within the territories of either Party merely on the grounds that the place where such award is rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party[19].

(13) This paragraph does not relate to intergovernmental arbitrations whether, pursuant to Article XXIV, for the settlement of controversies arising under the treaty or for other purposes.

(14) This sentence and the succeeding one in effect apply in carefully qualified form a rule of national and of most-favored-nation treatment without recourse to that terminology. The intent is to prohibit the application of alienage tests in determining the legal status of an arbitration contract. The court is foreclosed from applying the two common "subjective" tests based on alienage, i.e., the alien nationality of an arbitrator and the foreign situs of the arbitral proceedings. It may, however, apply any objective test such as conformity with the public policy of the forum that is applicable to arbitration contracts generally. As one example, in the United States gambling debts are not arbitrable on public policy grounds.

(15) The territorial reference has the effect of placing arbitration contracts covered by this provision on a qualified national treatment basis. In the United States the various States treat an arbitration contract entered into outside their boundaries, whether in another State or in a foreign country, as "foreign" and make no distinction between other-State and alien contracts in matters of enforceability.

A considerable number of States, moreover, continue to maintain the old common law approach of reserve towards the arbitration process. When this provision was formulated, only the Federal Government and eleven States had "modern" statutes that recognize the validity of and granted enforcement to contracts to arbitrate future disputes. By the end of 1976, however, 34 States had such statutes. The treaty provision, by leaving to each State the determination of what controversies might lawfully be submitted to arbitration and under what conditions, avoided conflict with the laws of a majority of the States and disturbance of the normal operation of the United States federal system.

(16) Use of the term "merely" is limitative in effect and avoids the need for a reservation for public policy. In some treaties, however, clarifying language was added in the Protocol making explicit reservation for public policy, especially as to enforcement of awards. (See Treaty with Korea, Protocol, para. 3). A reservation for public policy, whether explicit or implicit, is necessary in an area where there is such lack of uniformity as to attitudes. The reservation avoids placing courts in the position of being compelled to enforce a foreign award containing defects that would make it unenforceable if rendered in the local jurisdiction. See Note 19 for effect of Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (21 UST 2517; TIAS 6997).

(17) The treaty rule as to "subjective" restrictions based on alienage of an arbitrator or the foreign situs of the arbitral proceedings applies also to awards.

(18) In the past there was as a general rule no automatic recognition and enforcement of "foreign" awards. The party seeking enforcement must bring a suit based on the foreign award before a court of competent jurisdiction. Enforcement is secured by obtaining from that court a judgment which has the status of any other judgment. The suit is not designed to retry the controversy on the merits, and if the court is satisfied that the award is valid and not contrary to public policy, little difficulty is encountered in obtaining the necessary judgment. The statutes of some States provide for a summary procedure by which the award becomes a judgment of the court.

(19) The enforcement of alien awards in the United States has been affected by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, to which the United States became a party in 1970. The Convention recognizes the validity of agreements to arbitrate future disputes and limits the grounds on which foreign awards may be denied

recognition and enforcement. Article V(1) of the Convention permits refusal of recognition in cases where the parties are subject to incapacity or the underlying agreement is invalid, where there was lack of notice, where the award deals with a controversy not coming within the terms of the arbitral agreement, where the arbitral panel was not formed or the proceedings were not conducted in accordance with the terms of the agreement, or where the award is not binding or has been set aside in the place where it was rendered. Article V(2) further provides for denial of enforcement on two substantive grounds. One is that the award is against the public policy of the forum. The other is that the award deals with a controversy that is not subject to arbitration under the laws of the country where enforcement is sought.

The Convention also allows contracting governments to make two reservations when ratifying the Convention. One is to limit application to awards considered as commercial under the local law. The other is to limit application of the Convention, on the basis of reciprocity, to awards made in the territory of another Contracting Party. The United States made its ratification subject to these reservations.

The Convention was implemented for the United States by enactment of Public Law 91-368 (84 Stat. 692; 9 U.S.C. 201-208). This statute incorporates by reference the grounds for refusal of recognition and enforcement of a foreign award specified by the Convention and provides a summary procedure for enforcement of awards that are valid under the terms of the Convention. Under this procedure the party at interest need not bring suit in order to reduce the award to a judgment but may simply apply to the court for an order confirming the award. Public Law 91-368 further provides, however, that an arbitral agreement or award entirely between United States citizens is not enforceable under the Convention unless it has a reasonable relation to a foreign country.

The net effect of the Convention as between the United States and other contracting parties is to supersede the treaty provision in most cases, for the Convention and the implementing legislation automatically exclude alienage disabilities as grounds for denying recognition and enforcement to arbitral agreements and awards. There are, however, circumstances in which foreign awards would not be covered by the Convention, as, for example, awards made within the territory of a noncontracting country. In such cases enforcement would have to be sought under some law other than Public Law 91-368, and in a given set of circumstances the treaty provision overcoming alienage disabilities might become applicable.

In 1978 50 countries were contracting parties to the Convention. Eleven of these countries has bilateral treaties in force with the United States which contained either the standard provision on commercial arbitration or some variant.

In 1966 the United States became a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (17 UST 1271; TIAS 6090). This Convention, in the limited number of situations in which it is likely to become applicable, also would supersede the treaty provisions as to alienage disabilities.

Protocol, Paragraph 1: Legal Aid and Security for Costs and Judgment

1. The term "access"[20] as used in Article V, paragraph 1, comprehends, among other things, legal aid[21][22][23] and security for costs[24][25], and judgment[26].

(20) The intent in defining "access" in this manner in the Protocol is to build up the doctrine that in all of the treaties which accord national or most-favored-nation treatment with respect to "access" to courts, security for costs and legal aid are covered.

(21) As used in the treaty, the term "legal aid" is not co-extensive with the term "assistance judiciare," which extends to intergovernmental legal relations in such matters as extradition, letters rogatory and reciprocal enforcement of judgments. The intent is to cover services furnished by the government free or at nominal cost to indigents coming before the courts. Examples mights include suits in forma pauperis and court-appointed counsel in criminal prosecutions. Although legal aid is available from private sources in the United States, it is not the intent to bind private legal aid societies by the provisions of the treaty.

(22) In Federal courts aliens were placed on the same basis as citizens by Public Law 86-320 (73 Stat. 590) in 1959. That statute eliminated the citizenship requirement in 28 U.S.C. 1915 for suits in forma pauperis in civil and criminal proceedings in the courts specified in 28 U.S.C. 451. Variations are likely to occur in State practice, however, because of statutory requirements or differing rules of court in those States where discretion as to permitting actions in forma pauperis is left to the local courts.

(23) The treaty provision would not preclude residence qualifications, although the intent in negotiating this provision is to seek to avoid attaching such qualifications to the national treatment rule. The controlling consideration is that any residence test that may be adopted should apply equally to the citizen and the alien.

(24) Under the treaty rule, there can be no alienage tests in the security requirements imposed by either treaty country. The courts, however, would remain free to apply objective tests such as residence or possession of property within the jurisdiction of the court. Again, however, these restrictions must apply equally to the citizen and the alien.

(25) With limited exceptions, there are no Federal statutes granting exemption from posting security for costs. The general solution is found in the Federal Rules of Civil Procedure, Rule 83, pursuant to which the courts may apply a local rule or, if no such rule exists, proceed on the basis of whatever action will facilitate disposition of the case, such as the requirement of security on a showing of good cause. Any such rule adopted by a court would, of course, have to be consistent with the Federal Rules of Civil Procedure. Under Federal statute, however, seamen may file suits in all United States courts for wages, salvage, and enforcement of health and safety laws without prepaying costs or furnishing security (28 U.S.C. 1916).

(26) This provision includes within the rule of Article V(1) the bond given to ensure payment of the judgment (cautio judicatum solvi). In this case also, special requirements may be imposed such as residence or possession of property within the jurisdiction of the court, but these requirements must apply equally to the citizen and the alien. The rules of nondiscrimination that express the intent of this provision are treated as of special importance because of experience with discriminatory security requirements so excessive in amount as to discourage resort to foreign courts by United States citizens in pursuit of their lawful rights.

ARTICLE VI

Protection of Property

Paragraph 1: Constant Protection and Security for Property

Paragraph 2: Protection of Physical Premises

Paragraph 3: Protection of Legally Acquired Rights and Interests

Paragraph 4: Expropriation

Paragraph 5: National and Most-Favored-Nation Treatment in Expropriation

Protocol, Paragraph 2: Treatment of Indirect Interests in Property

General:

Article VI is one of the most important parts of the treaty because it provides guarantees essential to maintaining the conditions of security needed in order to attain the economic objectives of the treaty. The Article has two major divisions. The first two paragraphs are analogous to the provisions of Article III. Whereas the latter accord certain general rules and specific assurances of protection for the person, Article VI, paragraphs 1 and 2, provide in similar fashion general rules and specific assurances of protection for the property of both persons and companies.

The remaining paragraphs of Article VI are investment-oriented. While their value to the individual not engaged in business activities is evident, their main intent is to give the investor a clear and specific understanding of the rules that will apply if his investment property is taken by the government. Such an understanding is a vital

element in the decision to invest. Its essentiality has been heightened by a long history of expropriations with inadequate compensation or no compensation at all. The Mexican petroleum expropriations were relatively recent when the expanded language of the standard draft provisions on the subject was first introduced, and the international investment climate during the most active period of treaty negotiations following World War II was unsettled by major expropriations such as that of the Anglo-Iranian Oil Company.

In these circumstances a strong rule on expropriation was essential. The treaties concluded during the 1920's and 1930's contained a simply stated rule, based on the Fifth Amendment, which provided for "just compensation" given through "due process." This simple formulation was amplified by wording designed to make specific mention of the various elements that enter into the concept of just compensation. In addition, provision was made for nondiscrimination in the application of expropriations and nationalization programs and for safeguards against governmental harassments falling short of expropriation or acting as a kind of "creeping confiscation" in which the position of a foreign enterprise is made untenable by small, successive restrictions or impairments, leading the enterprise eventually to sell out to the government on the latter's terms.

The last three paragraphs of Article VI are a tightly constructed code of fair treatment in the event of a governmental taking of a foreign enterprise or its property. In its details it anticipates the kinds of situations which experience has shown foreign enterprises are most likely to face in the event of expropriation. During the course of negotiation, individual terms were changed from time to time, but in no case has the integrity of the basic expropriation provisions been impaired.

Such impairment has always been treated as non-negotiable. In fact, it is probable that more negotiations have failed because of inability to obtain forthright acceptance of these provisions than from any other single cause.

Article VI, Paragraph 1: Constant Protection and Security for Property

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party. (1) (2)

(1) Article VI(1), like its counterpart in Article III(1), although broadly expressive of the applicable principles of international law, actually goes beyond the international law standard. In some treaties the phrase "in no case less than that required by international law" was added to this provision, indicating by necessary implication that the international law standard was a "floor" and that more favorable treatment might reasonably be claimed in a given set of circumstances. (See Treaty with Ireland, Article VIII(2)).

It was decided to omit the international law reference initially because of the view that the treaty commitments expressed in absolute terms were adequate and that the international law standard did not in fact strengthen this provision. Later, the Legal Adviser's Office took a stronger view to the effect that the international law reference was positively disadvantageous. It considered the treaty provisions stronger than any universally accepted international law rule, and the international law reference might open the way to a claim that Article VI is merely declaratory of a weaker principle of international law.

(2) Because it is stated in absolute terms, Article VI was considered as not requiring the additional support of the rules of national and of most-favored-nation treatment. It was deemed preferable to write a precise standard like national treatment into a treaty only in relation to a particular and clearly definable subject matter where the treaty partners can visualize with some degree of precision the scope and extent of their commitments. Such terms as "protection" and "security" are broader and less definite concepts. The paragraph in which they appear is intended to establish a residual basis for treaty protection in situations not expressly or adequately covered by the more detailed provisions of this Article.

Article VI, Paragraph 2: Protection of Physical Premises

2. The dwellings,[3] [4] offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to molestation or to entry without just cause.[5] Official searches and examinations of such premises and their contents, when necessary, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

(3) This paragraph is the property counterpart of Article III(2), although like Article VI(1) it does not include an international law reference.

It derives from earlier treaties. A comparable but weaker provision may be seen in Article III of the Treaty of 1928 with Norway (47 Stat. 2135; 10 Bevans 481).

(4) This paragraph is framed in absolute terms. It is not necessarily limited to the prescriptions of international law, although it broadly reflects the international law rules. It is an unqualified statement of the treatment the United States wishes its citizens to receive irrespective of the treatment that the treaty partner accords to its own citizens or to other aliens. It should be noted in this connection that the Fourth Amendment and Section 1 of the Fourteenth Amendment apply to aliens as well as to citizens.

(5) In some cases the term "unlawful entry" is used in lieu of "entry without just cause," but this change was made solely for reasons of clarity. (See Treaty with Japan, Article VI(2)).

Article VI, Paragraph 3: Protection of Legally Acquired Rights and Interests

3. Neither Party (6) shall take unreasonable or discriminatory (7) measures that would impair the legally acquired rights or interests (8) within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts and technology which they have supplied. (9)

(6) This paragraph was included in the treaty as generally supportive of its investment objectives. It is considered as additional to rather than in replacement

of investment-oriented provisions framed in specific terms. It is in effect a general statement of a favorable attitude towards private enterprise. More immediately, this paragraph offers a basis in rather general terms for asserting protection against excessive governmental interference in business activities or particular activities not specifically covered by the treaty. In common with Article I, it affords a basis for making representations against actions detrimental to United States citizens or companies that fall outside any legal rule in the treaty, for example, by not being discriminatory on their face but being applied in such a way as to harm only some United States interest.

(7) The term "discriminatory" as used in this context would comprehend denials of either national or most-favored-nation treatment, or both.

(8) Since the intent is to protect against retroactive impairment of vested rights if the acquisition of such rights was lawful, it is not material whether such rights were acquired by statute or by treaty.

(9) The reference to skills, arts and technology was included in recognition of the fact that investment consists of more than money and includes contributions of know-how of all kinds.

Article VI, Paragraph 4: Expropriation

4. Property of nationals and companies of either Party shall not be taken [10] within the territories of the other Party except for a public purpose, [11] nor shall it be taken without the prompt [12] payment of just compensation. [13] Such compensation shall be in an effectively realizable

form [14] and shall represent the full equivalent[15] of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.[16]

(10) The concept of taking is considered as covering, in addition to physical seizure, a wide variety of whole or partial sequestrations and other impairments of interests in or uses of property. The term "taken" is synonymous with "expropriated" and the latter term is substituted in some cases. It includes use of the property by the government for a public purpose without formal transfer of ownership. The term "taken" as used in Article VI(4) also is synonymous with "taking of privately owned enterprises into public ownership and the placing of such enterprises under public control" used in Article VI(4) of the Treaty with Japan.

(11) The term "public purpose" is preferred as a term familiar to United States jurisprudence. Such terms, however, as "public benefit" and "social utility" or "social interest" were considered as conveying the same meaning.

(12) The term "prompt" does not necessarily mean instantaneous. The intent is that the government diligently carry out orderly and nondilatory procedures that may be established to ensure correct compensation and make payment as soon as possible. It is not considered an instruction to the courts but rather as a general prescription to all the authorities concerned that matters relating to expropriation should be pursued expeditiously. It also could be taken as a reminder to the legislature not to be dilatory in making appropriations. Explanations of the meaning of "prompt payment" in terms of United States practice involve reference to three procedures: condemnation, declaration of taking, and proceedings under the Tucker Act (28 U. S. C. 1346a, 1401, 1402).

(13) The term "just compensation" is considered as affording the strongest and most accurate rendering of the intended meaning. It has a strong content of meaning, built up through judicial decitions, arbitral awards, treaty practice, and the writings of publicists. Additionally, it has particular constitutional sanction in the United States inasmuch as it is the term employed in the Fifth Amendment.

On occasion such words as "fair," "full," and "effective" have been used in this context. Use of "equitable," however, has been resisted as a term of uncertain dimensions lacking the sense of moral imperative that imbues the term "just."

Irrespective of the term employed, the intent is to ensure compensation that will represent the true and proper worth of the property taken to the owner and the government. It is generally considered that the compensation shall be sufficient to place the owner in approximately the same financial position as that he was in before the taking.

The rule of just compensation covers partial takings. In such cases, the compensation should be a full approximation of the amount by which the taking impaired the value of the property. Situations are conceivable, however, in which a partial taking should be compensated at full market value, because the partial taking constituted such grave impairment of the remainder of the property as to render it useless or valueless to the owner. In the opposite situation, where a partial taking enhances the value of the remaining property, the amount of compensation can be adjusted to offset the change in value resulting from the public improvement.

(14) The term "effectively realizable" is intended to ensure that the compensation reaches the expropriated person in a practically and economically usable form. Payment in dollars is not required, although payment

in dollars or in fully convertible local currency with a right in either case of immediate withdrawal from the country would be the most satisfactory forms of payment. The treaty rule on withdrawals is found in Article XII (3) (a). It is considered that the expropriating government, as the causative factor in the taking of the property, should assume the risk of currency depreciation in connection with conversion and withdrawal.

The intent of the term is to ensure that compensation be given in cash or readily negotiable media and to preclude payment in long-term nonnegotiable bonds or promissory notes or the like. An extreme example of ineffectively realizable compensation would be payment in nonnegotiable, noninterest bearing promissory notes in a blocked currency.

(15) The term "full equivalent of the property taken" is intended to provide guidance in determining the scope of just compensation. As such, it is a point of reference for the legislature which initially authorized the taking by general or specific statute and provides for the compensation through appropriations, and for the courts in determining whether such compensation is just.

It is emphasized that any such determination would not preclude the government of the treaty partner from inquiring through diplomatic channels as to the adequacy of the courts's determination. Any contrary position, of course, would be supportive of the Calvo doctrine.

Payment based on the value of the initial investment would not meet the treaty standard, if it were less than the value of the property at the time of taking. If the value of the investment at the time of taking were less than the value of the initial investment, the treaty rule would require payment of only the value at the time of taking (Commercial Treaties: Hearing before a Subcommittee of the Senate Committee on Foreign Relations, 82d Congress, 2d Session (1952) p. 12).

Payment in kind is allowable provided that there is no departure from the principle of just compensation representing the full equivalent of the value of the property taken.

(16) The intent of this requirement is to afford protection against ex post facto proceedings that could work to the disadvantage of the person whose property is taken. Foreknowledge of the procedures for determination and payment of compensation strengthens the position of the person whose property is taken in the assertion of his legal rights. This element is important in light of the "exhaustion of local remedies" rule of international law.

Article VI, Paragraph 5: National and Most-Favored Treatment in Expropriation

5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. (17) Moreover, enterprises in which nationals and companies of either Party have a substantial interest (18) shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters (19) relating to the taking of privately owned enterprises (20) into public ownership and to the placing of such enterprises under public control. (21)

(17) This provision establishes a minimum. In any case, however, the absolute requirements set forth in the cited paragraphs must be met.

Inclusion of the most-favored-nation rule here represents one of the two places in the treaty, the other being Article XI, where most-favored-nation treatment conceivably could be more favorable than national treatment. One example of more favorable treatment of aliens than citizens in an expropriation matter is the French nationalization program shortly after World War II. By virtue of a treaty with Spain concluded during the Nineteenth Century France was obligated to give Spanish citizens more favorable compensation than it accorded to its own citizens.

The general approach is to retain the most-favored-nation rule in Article VI(5) on the grounds that a country owes certain minimum obligations to aliens regardless of the treatment it accords to its own citizens.

(18) The term "substantial interest" depends in large part upon the circumstances. In all cases it would include whole or majority interests. In the case of minority interests a substantial interest might be as little as two per cent, particularly if that interest gave control of the enterprise. The intent is to exclude petty interests, but this result could not be reached by the use, for example, of a term such as "any financial interest."

(19) The intent of this sentence, as implied by the reference to "all matters," is to establish a treaty right in connection with such matters as the selection of enterprises for expropriation and the procedures for transferring possession to the expropriating government. This sentence, for example, might support a right to insist that a given United States enterprise not be nationalized unless all similar domestic and foreign enterprises are nationalized.

(20) The term "enterprise" is used here and elsewhere in the treaty principally as the most useful single term encompassing all the forms under which economic activities may be conducted. These forms may range from single partnerships to corporations, and use of the term may, as in this case, avoid the necessity for a lengthy recitation of specific types of economic entity. This consideration is important because many civil law countries have types of business organization unknown to United States law and practice.

The term "enterprise," however, goes beyond the collective designation of juridical entities empowered to engage in business activities. It is not defined in the treaty, and its precise meaning derives in each case from the particular context in which it is used. A general indication of the intended meaning may be found in a definition of the term included in a draft treaty of economic cooperation and development proposed to the Philippines in 1974. That definition reads: "The term 'enterprise' shall mean an activity, including but not limited to, a business venture, lawful in the territory of the Party in which it is carried on, whether carried on by a company of the Party in which such property is located, or by a national or company of the other Party, together with the property, whether real or personal, tangible or intangible, devoted thereto."

This definition implies a territorial limitation. The nexus of activities and property that make up the enterprise must be within the territories of the treaty partner. This limitation is implicit in the use of this term in Article VI(5), for a government as a practical matter may take property only within its own territories. The limitation is equally clear in Article VI(3) and in such provisions of the treaty as Article II(1)(b) relating to treaty investors. The most likely provision where use of the term might imply an extraterritorial application is Article XVIII(1) on restrictive business practices.

This territorial limitation gives rise to another limitation. The term "enterprise" is defined as including the activities and property of a company of one treaty partner in the territories of the other. Under normal corporate practice the company in question does not limit its operations to the territories of the treaty partner. It has its seat or headquarters abroad and may in fact do business in many countries. For treaty purposes the enterprise consists of the activities carried on and property located within the territories of the treaty partner and not the global activities or property of the company.

For a detailed discussion of the meaning of the term "enterprise" when used in a treaty context, see Setser, Vernon G., "The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties," 1961 Proceedings of the American Society of International Law 89, 93 - 97.

(21) The intent of the words "the placing of such enterprises under public control" is to cover situations in which the private owner is permitted to retain legal title but the government has assumed actual management and operation.

Protocol, Paragraph 2: Treatment of Indirect Interests in Property

2. The provisions of Article VI, paragraph 4, providing for the payment of compensation shall extend to interests (22) held directly or indirectly (23) by nationals and companies of either Party in property which is taken within the territories of the other Party.

(22) The intent of this provision is to make it clear that all rights in property upon which it is possible to place a monetary value are covered, including not only rights of ownership but rights of possession, use and enjoyment. It thus extends to leaseholds, easements, contracts, franchises, and other tangible and intangible property rights. This provision is designed to reinforce the principle that the compensable taking of property can involve something less than the entire fee.

The most probable example of a situation covered by this provision is that where the government of the treaty partner expropriates one of its own companies in which United States citizens or companies hold a minority interest. This provision ensures that the property interests of United States citizens in companies of the treaty partner, whether such companies are subsidiaries or not, are entitled to the protection afforded by Article VI(4). It is not necessary that such interests amount to 100 per cent or even reach the level of "substantial" specified for the purposes of Article VI(5). The proprietary interest in an expropriated company is compensable, regardless of the relative amount of that interest.

(23) The intent of the term "indirectly" is to ensure that the ultimate beneficial United States owner receives just compensation pursuant to Article VI(4). A case in point would be the property of an expropriated corporation of the treaty partner owned in turn by a third party corporation the stock of which is owned by United States citizens.

ARTICLE IX

Property Rights

Paragraph 1: Real Property

Paragraph 2: Personal Property

Paragraph 3: Inheritance

Paragraph 4: Disposition of Property

General:

The place of this Article in the overall scheme of the treaty derives from the practical necessity of consolidating in a single Article all rights conferred with respect to the acquisition, ownership and disposition of property. This necessity arises from the existence of legal restrictions on the holding by aliens of both real and personal property. In the case of the former, these restrictions are extensive. Since they are established in the main by State law, a grant of national treatment would constitute a substantial interference with State prerogatives and doubtless would prove unacceptable to the Senate. That body frequently expressed concern during the course of the treaty program about the maintenance of State prerogatives. Accordingly, it has been a consistent treaty policy to avoid grants of either national or of most-favored-nation treatment with respect to real property.

It is important that any rights to existing property be governed solely by Article IX. Article VII provides for national treatment with respect to engaging in a wide range of business activities, and Article VIII with respect to a similar range of non-profit activities. National treatment presupposes a right to obtain the use of land or other property needed for the conduct of the permitted activities. In the absence of a specific article on real property

such as Article IX, it might be held that the national treatment provisions of Articles VII and VIII confer, among other things, the right to acquire and hold real property. Any such result would imply an extensive overriding of State laws, as almost half of the States maintain restrictions of various kinds on alien land ownership.

The policy of avoiding most-favored-nation commitments with respect to real property is a practical consideration. The Treaty of Friendship, Commerce and Navigation of 1853 with Argentina (10 Stat. 1005; 5 Bevans 91) accords national treatment to nationals of that country. A most-favored-nation provision in a subsequent treaty in all likelihood would be considered to extend national treatment, as a consequence of the Treaty with Argentina, to nationals of the treaty partner. The result again would be an extensive overriding of State laws, most of which, incidentally, were enacted years after conclusion of the Treaty with Argentina.

In an effort to obtain the broadest possible rights of land ownership for United States interests, the Department of State experimented with a number of formulations to minimize the effect of inability to undertake a mutual commitment of national treatment. The most satisfactory from the standpoint of the United States was the so-called "de facto reciprocity" formula. This formula made up part of a dual provision. In the first part, nationals and companies of the treaty partner received national treatment for leasing, occupying and using real property in the United States for treaty purposes and residential purposes, with other rights in real property subject to State laws. In the second part, United States nationals and companies received national treatment for all rights in real property in the territories of the treaty partner subject to "de facto reciprocity." This formula usually was expressed in the following terms:

> "In the case of any such national domiciled in, or any such comapny constituted under the laws of, any State, Territory or possession of the United States of America that accords less than national treatment to nationals and companies of _____ in this respect, _____ shall not be obligated to accord treatment more favorable in this respect than such State, Territory or possession accords to nationals and companies of _____."

The provision for "de facto reciprocity" proved difficult to negotiate, however, because of lack of mutuality. In time it was decided that the only practical approach was to limit the treaty commitment on real property to a mutual provision for national treatment for leasing for treaty and residential purposes, with all other rights in real property subject to the local laws.

The treaty commitment of national treatment for leasing actually accords the alien substantial rights in this country. A long-term lease is tantamount to ownership in terms of the freedom it allows the lessee in use of the leased property, and there are situations in United States real estate practice where leasing is more advantageous than ownership. The treaty provision would, of course, override State laws insofar as they restricted lease-holding by aliens. Only a small number of State statutes, however, impose such restrictions. Some of these restrictive statutes fail to pierce the corporate veil, and the alien-controlled domestic corporation apparently would be able to obtain leaseholds without difficulty.

In any event, the treaty provision is largely residual in nature. The bias of most restrictive

State legislation is against large-scale alien holdings of agricultural land. Frequently, these statutes contain exceptions allowing alien acquisition and ownership of nonagricultural land, and the treaty alien often finds recourse to the treaty unnecessary in order to obtain the relatively small amounts of real property needed for the conduct of commercial, industrial or other activities sanctioned by the treaty. Moreover, the alien may acquire land in the face of restrictive State legislation, hold it subject only to possible escheat by the State, and pass good title at any time before escheat. Although this action does not afford the security the alien investor normally would seek, there is some reason to believe that a considerable number of aliens have accepted the risk and hold land on this basis in States with restrictive statutes.

Article IX(2) has two important features. First, it is the only provision in the treaty dealing directly with portfolio investment. It is through the provisions of Article IX(2) that aliens are enabled to exercise the rights to acquire and control enterprises that are conferred by Article VII(1). Absent this provision, it would be necessary to rely on the provisions of Article VII. Second, this provision complements Article X. This Article controls the acquisition and ownership of property rights already in existence. These rights may include patent rights and rights in other kinds of industrial property. If an alien wishes to acquire a patent held by a United States citizen, Article IX (2) would be controlling. If, however, he wishes to obtain a patent on an invention, he would have recourse to Article X, for the patent right in that case does not exist but is only prospective.

Article IX(2) is subject to two broad reservations. One is intended to preserve the restrictions in Federal and State law on alien ownership of shares in communications, transportation, banking and other enterprises in "sensitive" fields of economic activity. The other is to preserve

certain restrictions imposed by State laws upon alien ownership of such materials as firearms and explosives.

Article IX(3) deals with the inheritance of real and personal property, which has been traditionally a concern of these treaties and well may have given rise to more litigation than any other treaty subject. This provision is framed in light of the restrictive features of State laws, which characteristically were expressed in terms of freely permitting acquisition by devise or descent but limiting the right of the alien heir to continued possession and enjoyment of the property. These statutes, most of which relate only to real property, require disposition within a stipulated period, usually three to five years. The treaty provision follows the pattern of these laws, but establishes a period of five years for enforced disposition. It was believed that this period was sufficient to avoid the likelihood of distress sale under unfavorable market conditions.

Article IX, Paragraph 1: Real Property

1. Nationals and companies of either Party shall be accorded within the territories of the other Party: (a) national treatment with respect to leasing land, (1)(2) buildings and other real property (3) appropriate to the conduct of activities in which they are permitted to engage pursuant to Articles VII and VIII (4) and for residential purposes, (5) and with respect to occupying and using (6) such property; (7)(8) and

(b) other rights in real property [9] permitted by the applicable laws of such other Party.[10]

(1) The leasing rights may be extensive, as national treatment presumably would extend to leaseholds of, for example, 99 years that offer security and stability tantamount to outright ownership.

(2) Restrictions on leaseholds by aliens are not common in State laws. They occurred mainly in the anti-Japanese laws of California and other States which have been invalidated.

(3) The terms "realty," "real property" and "immovable" property are considered as synonymous, covering land, buildings, appurtenances and other things permanently affixed to the land.

(4) This provision applies to the restricted activities in Article VII(2) as well as to the permitted activities in Article VII(1). Insofar as the alien is allowed to engage in a restricted activity he may lease real property appropriate to conduct of the activity. This provision also applies to the activities mentioned in Article II(1) but they ordinarily would be subsumed under Article VII(1).

(5) Most restrictive State statutes, being directed at controlling alien ownership of agricultural land, contain exceptions that would allow alien ownership as well as leasing of land for residential purposes. One example is an exception for alien ownership of land in incorporated cities and towns. This exception appears not only in a number of State statutes but in the Territorial Land Act of 1887 (48 U. S. C. 1502). In view of the structure of restrictive State legislation, it is doubtful whether an alien would meet any serious obstacles to leasing land for residential purposes even in the absence of the treaty provision.

(6) The intent of the words "occupying and using" is to ensure that the right to acquire a leasehold for treaty purposes is not vitiated by restrictions on access to the leased real property or on the uses to which it can be put that are not equally applicable to citizens.

(7) In treaties containing the de facto reciprocity formula, that formula does not apply to leaseholds.

(8) The national treatment provision is not considered as extending to special provisions reserving rights in real property to indigenous populations in island possessions of the United States, as long as those rights are not extended to other United States nationals or citizens. The only such reservation at the present time is the matai system in American Samoa.

(9) The avoidance of a national treatment commitment for rights in real property other than leasehold rights is occasioned not only by the existence of a national treatment provision in the Treaty of 1853 with Argentina but by most-favored-nation provisions specifically referring to rights in real property in the Treaty for Facilitating and Developing Commercial Relations of 1881 with Serbia (Yugoslavia) (22 Stat. 963; 12 Bevans 1227), the Treaty of Friendship and General Relations of 1902 with Spain (33 Stat. 2105; 11 Bevans 628), and the Consular Convention of 1910 with Sweden (37 Stat. 1479; 11 Bevans 730). Additionally, there is the possibility that the broad most-favored-nation provision in the Treaty of Establishment and Sojourn of 1931 with Turkey (47 Stat. 2432; 11 Bevans 1127)could be construed as extending to real property.

(10) In post-World War II treaties, most-favored-nation provisions have been included in Article IX (1) only sparingly and in a context that precludes

"triggering" the national treatment provision of the Treaty of 1853 with Argentina. The principal example is Article IX(5) of the Treaty with the Netherlands. This provision was included in response to Netherlands concern about the real property rights in the United States of corporations organized under the laws of one of the States and controlled by Dutch nationals and companies. Their concern was that a State with restrictive legislation would pierce the corporate veil and apply the restrictions to such "controlled companies." They accordingly proposed a provision that would in effect exempt real property of controlled companies from application of the State escheat laws. The United States rejected this proposal as an unacceptable interference with State prerogatives, but agreed to most-favored-nation treatment for controlled companies so that they would be assured of all rights, whatever they might be, that might be enjoyed by the controlled companies of any third country. The United States acknowledged that there was a hiatus in the treaty coverage of companies which, however, could be dealt with only by a limited commitment. The most-favored-nation commitment was possible in this case without bringing national treatment in "through the back door" of the Treaty with Argentina because that Treaty conferred rights with respect to real property only upon natural persons.

Because of frequent changes in legislative policy, it is difficult to obtain complete and current lists of State statutes imposing restrictions on alien land ownership. The most recent compilation is in Morison, Fred L., "Limitations on Alien Investment in American Real Estate, "60 Minnesota Law Review 621, 629 - 638 (1976). Recent concern over increasing foreign investment in the United States has extended to investment in real property by aliens. A number of States have adopted new restrictions on alien land ownership, and action by additional States appears likely.

Article IX, Paragraph 2: Personal Property

2. Nationals and companies of either Party shall be accorded within the territories of the other Party national and most-favored-nation treatment[11] with respect to acquiring,[12] by purchase, lease, or otherwise, and with respect to owning and possessing,[13] personal property[14] of all kinds, both tangible and intangible.[15] However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety[16] and alien ownership of interests[17] in enterprises carrying on particular types of activity,[18] but only to the extent that this can be done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.[19]

(11) Originally the provision on personal property was limited to most-favored-nation treatment because of restrictive legislation affecting alien rights in such property. With the development of the second sentence of Article IX(2), it became possible to include a national treatment commitment.

(12) The term "acquiring" has a generic rather than a technical meaning. Consequently, the term "otherwise" includes gift, exchange, inheritance, judicial process and any other legal means of acquisition.

(13) The term "possessing" may also be defined as "holding." It usually implies ownership, as the entire legal concept is best expressed by the term "own and possess."

(14) The terms "personalty," "personal property" and "movable property" are considered as synonymous.

(15) The term "tangible" is understood to refer to physical objects which can be moved about or carried away, whereas the term "intangible" defines property the ownership of which is identified by some form of document, as in the case of securities, patents, copyrights and the like.

(16) This provision is intended to make allowance for State laws restricting alien ownership of such articles as firearms, explosives, narcotics and poisons.

(17) The term "interests" is considered as extending to shares, partnerships and any other kind of rights susceptible of ownership. Mortgages, debentures and other evidences of indebtedness also might be deemed interests in enterprises but not necessarily as interests affecting control of the enterprise, unless there is specific provision to that effect.

(18) The intent of this reservation is to prevent alien enterprises from taking advantage of the national treatment rule on acquisition of personal property to obtain through the purchase of shares of stock entry into activities in which they have no treaty right to engage under Article VII.

(19) The reference to other provisions of the treaty is intended to be precautionary, with the object of preventing the impairment of ancillary privileges needed for enjoyment of rights conferred by provisions other than Article VII, as, for example, ownership of a vehicle to facilitate the freedom of travel provided by Article II(2). It is not intended, moreover, that restrictions permissible under Article IX(2) should be allowed to frustrate the accomplishment of legitimate

business purposes. It should not, for example, prevent a United States building contractor from obtaining the explosives needed to excavate a site as cheaply or efficiently as his local competitor. The effect of the restriction and not its purpose is the critical factor, and provision should be allowed for arriving at a proper result, for example, by issuing a permit to obtain explosives for a limited purpose.

Article IX, Paragraph 3: Inheritance

3. Nationals and companies of either Party shall be accorded national treatment(20) within the territories of the other Party with respect to acquiring property of all kinds(21) by testate or intestate succession(22) or judicial process.(23) Should they because of their alienage be ineligible to continue to own(24) any such property, they shall be allowed a period of at least five years(25) in which to dispose of it.(26)

(20) The provision for national treatment involves State statutes of three main types. One is the statute which permits acquisition but requires disposition, under penalty of escheat, usually within a stipulated period of time. The second sentence of Article IX(3) makes allowance for statutes in this category. The second type of statute requires a showing of reciprocity, often quite detailed in character, as a condition for acquiring property. Such statutes would be in conflict with the treaty, because the treaty rule is stated in terms of reciprocal national treatment and not of absolute or material reciprocity. The continued validity of such statutes is in doubt because of the decision of the Supreme

Court in Zschernig v. Miller, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. (2d) 683 (1968), rehearing den. 390 U. S. 974, (1968), which held an Oregon reciprocity statute to be an unconstitutional State intrusion into foreign affairs. The third type of statute is the so-called Iron Curtain statute, which permits acquisition but sequesters the proceeds of the estate until the nonresident alien heir can establish that he will be able to obtain unrestricted use or enjoyment of the funds.

(21) The provision applies to both real and personal property. Although State restrictions originally applied almost exclusively to real property, most of the more recent reciprocity and Iron Curtain statutes have tended to cover both kinds of property.

(22) For the most part, this provision is for the benefit of nationals of the treaty partner, as it overcomes the old common law bar to inheritance of real property by aliens wherever it may remain in effect or where it has been continued on the basis of statute. In theory also, it would overcome the now obsolete European concept of the "droit d'aubaine."

(23) The term "judicial process" is intended to provide broad coverage, including mortgage foreclosure, collection of debts, and matters coming within the concept of operation of law.

(24) This provision maintains the distinction, conformably with many State statutes, between legal ownership or title, and possession or control. The alien is assured the first by the preceding sentence of Article IX(3) but the latter may be abridged pursuant to the second sentence. Moreover, if policy requires that certain property, such as shares of stock in corporations engaged in activities subject to restriction under Article VII(2), be kept completely out of an alien's possession, such possession and control can be vested in a

court-appointed trustee pending sale and transfer of title to an eligible owner.

(25) The five-year term may appear unduly long, but inheritance cases may be so long and complicated, with litigation and subsequent sale of the property, that a period of five years might be needed, especially if the alien heir were to avoid sale in a depressed market. The specific five-year term in fact was considered preferable to a less precise term such as "reasonable" to ensure a more readily workable treaty rule.

The principle of a stipulated term for the forced disposition of property in case of alienage restrictions is long established in United States treaty policy, going back well into the Nineteenth Century. See, for example, the Convention on the Disposal of Property of 1847 between the United States and Switzerland (9 Stat. 902; 11 Bevans 892). Article II of that Convention provided for a term of three years for real property, and a number of States subsequently incorporated the three-year term in their inheritance statutes. The five-year term was substituted in the belief that it ensured more equitable treatment of the alien heir. A number of State statutes allow a longer period, in one case sixteen years.

(26) The right to dispose of the property is governed by the provisions of Article IX(4). In practical terms, the alien heir normally receives national treatment for all elements except ownership, and in approximately half of the States he is subject to no restrictions whatsoever.

Article IX, Paragraph 4: Disposition of Property

4. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment[27] with respect to disposing[28] of property of all kinds.

(27) There is no conflict with the preceding provisions of Article IX(2) and (3). If the alien is required to sell property for any reason, he will enjoy national and most-favored-nation treatment as to all sales procedures, taxes, selection of purchaser, and the like. He could in theory sell to another alien, who in turn would become subject to any existing alienage disabilities, unless a United States national were restricted as to sale to an alien.

(28) The term "dispose" is used in a broad sense as an antonym of "acquire."

ARTICLE XII

Exchange Control

Paragraph 1: National and Most-Favored-Nation Treatment

Paragraph 2: Exchange Restrictions

Paragraph 3: Remittances in Cases of Exchange Stringency

Paragraph 4: Equitable Imposition of Exchange Restrictions

Paragraph 5: Definition of Exchange Restrictions

Paragraph 6: Consultation

General:

During the period following World War II when most modern treaties of friendship, commerce and navigation were negotiated, Article XII was one of the most important articles of the treaty and one of the most difficult to negotiate. Many countries facing the burden of post-war reconstruction, and possessing limited capabilities for earning dollar exchange, were apprehensive about the effects of United States investment, however badly it might be needed in support of their economies. Stated briefly, their apprehension was that the servicing of United States investments would subject their monetary reserves to intolerable strain. In many cases they foresaw situations in which they would not be able to live up to their treaty commitments without risking severe economic and political repercussions.

The treaty seeks to strike a balance between these understandable apprehensions and the legitimate expectations of investors and other United States interests that they will be afforded reasonable latitude in withdrawing earnings and other funds. That balance is achieved by a twofold approach.

The first element is a reservation to each treaty partner of its rights and obligations under the Articles of Agreement of the International Monetary Fund (60 Stat. 140); 3 Bevans 1351). The second element is to establish treaty rules for those categories of financial transactions which the IMF does not attempt to regulate. The IMF is essentially trade oriented and has as a major objective the regulation of current transactions in the servicing of international trade. It does not undertake to regulate capital transactions. The IMF may authorize exchange restrictions but does not control the purposes or priorities for the granting of exchange when restrictions are in effect. Since IMF members may exercise their discretion in allocating exchange outside of current transactions, they could as readily grant exchange for the importation of luxuries as for the remittance of earnings.

In the face of this situation, the intent of the treaty is to obtain reasonable assurances for investors. It moves into the area of discretion left open by the IMF and sets out rules for dealing with capital transfers and other investor requirements. In effect, it supplements the IMF in this discretionary area. The treaty rule is not rigid. In fact, it has great flexibility, allowing the treaty partner to use exchange restrictions to ensure the availability of essential goods and services for the welfare of its people and to prevent its monetary reserves from falling to a very low level. Investor needs receive consideration only after these basic requirements have been met.

Again the treaty requirements are flexible. The basic rule for investor needs is that "reasonable provision" be made for servicing a list of specific categories of transactions, including such major investor concerns as compensation for expropriated property, amortization of loans, and depreciation

of direct investments. These categories are presented in a suggested but not immutable order of priority, and provision further is made for due consideration to meritorious transactions not immediately related to investor needs such as the transfer of an inheritance.

The flexibility of the treaty rule has been carried further in the case of some countries with severe stringencies of foreign exchange. These countries expressed extreme concern about the impact of new United States investments upon their exchange situation, as a substantial and continuing flow of such investment would go beyond their capacity to service the investments in question. These apprehensions were allayed by protocol provisions permitting such countries to "screen" or regulate and, if need be, restrict the entry of new investments on balance-of-payments grounds.

The liberality of the approach embodied in Article XII, however, does not imply a bias in favor of exchange restrictions. On the contrary, such restrictions were looked upon as undesirable in theory and practice, and their ultimate elimination was deemed a desirable goal. This attitude is summed up in the notes exchanged at the signing of the Treaty with the Federal Republic of Germany which read in part "It is also understood that in the implementation of Article XII each Party will be guided by the principle that exchange restrictions interfere with a multilateral system of payments and hamper the growth of production and world trade, and that accordingly their elimination is a major objective of economic policy."

Article XII, Paragraph 1: National and Most-Favored-Nation Treatment

1. Nationals and companies of either Party [1] shall be accorded by the other Party

national treatment [2] and most-favored-nation treatment [3] with respect to payments, remittances and transfers of funds or financial instruments [4] between the territories of the two Parties as well as between the territories of such other Party and of any third country. [5]

(1) Article XII(1) is concerned with the rights of persons, and its intent is to assure them, whether individually or in corporate form, nondiscriminatory treatment in the application of any exchange restrictions that may be in effect. It is not intended to prevent differential treatment of different currencies or currency areas, for it does not deal with currency areas as such.

(2) The term "national treatment" as used in this context is not intended to require the treaty partner to grant to United States nationals and companies identical treatment with respect to the various payment or currency areas, but rather to assure them the same rights as nationals and companies of the treaty partner, irrespective of the different regulations which the treaty country may wish to enforce for each of the different payment or currency areas. The object is to ensure national treatment as to access to available foreign exchange without interfering with the government's prerogative to establish the amounts which might be allocated for any particular currency.

The provisions on nondiscriminatory treatment in the administration of exchange controls were on occasion construed by foreign negotiators as implying equal treatment of dollar transactions and transactions in other currencies. This is not the intent. Article XII does not prevent maintenance of exchange controls that differentiate among

countries when such differentiation is based on shortages of particular currencies.

(3) The intent of most-favored-nation treatment in this context is assure to United States citizens and companies the same treatment in access to available foreign exchange as that received by the nationals and companies of third countries. It means that the United States citizen would have the same rights of access to available pounds, francs, lira or deutschmarks as any third country national or company in similar circumstances, but they would not have access to dollars unless the latter were available to any one. There is no obligation to give to a United States citizen in an exchange transaction in dollars between the treaty partner and the United States the same treatment that the treaty partner accords to anyone in a transaction with a third country carried out in the latter's currency.

(4) The term "financial instruments" is considered as consisting of written certificates or acknowledgements pertaining to financial transactions and includes letters of credit, drafts, cashier's checks, personal and travelers' checks, and all forms of negotiable documents referring to such transactions.

(5) Residence requirements are not referred to in Article XII(1) as the transfer of funds from the territories of the treaty partner might be required for the credit of United States citizens without necessitating their residence in such territories. Examples include inheritances and debts accruing from shipments of goods.

It is recognized that Article XII(1) does not preclude the application of residence requirements as an objective consideration in the administration of exchange restrictions, and this consideration is implicit in the term "in like situations" as used in Article XXII(1) and (2). See Treaty with the Netherlands, Protocol, paragraph 13.

Article XII, Paragraph 2: Exchange Restrictions

2. Neither Party shall impose exchange restrictions (6) as defined in paragraph 5 of the present Article except to the extent necessary to prevent its monetary reserves (7) from falling to a very low level or to effect a moderate increase in very low monetary reserves.(8) It is understood that the provisions of the present Article do not alter the obligations either Party may have to the International Monetary Fund (9) or preclude imposition of particular restrictions (10) whenever the Fund specifically authorizes (11) or requests a Party to impose such particular restrictions.

(6) In the scheme of this Article, Article XII(2) establishes the right to impose exchange restrictions subject to certain qualifications, including the IMF reservation. Article XII(3) deals with the manner in which any such restrictions shall be applied to United States interests, especially investor interests. The two provisions, read together, circumscribe the freedom of action of the treaty partner, although the limitative effect is substantially mitigated by the fact that the treaty partner is the judge of such critical terms as "reasonable provision" and "very low monetary reserves." If the United States should take issue with such exercise in judgment in any given instance, its recourse is to consultation under Article XII(6) or Article XXIV(1).

(7) Monetary reserves refer to gold and foreign exchange holdings that are in an effectively usable form for the purpose of meeting the treaty partner's balance-of-payments needs. In effect, these holdings are in convertible currencies, for if certain holdings are frozen and unavailable, they would not be included as monetary reserves. See IMF, Article XIX (a) (d) (g).

(8) The provisions relating to the level of monetary reserves follow closely the provisions of Article XII (2) (a) (i) (ii) of the General Agreement on Tariffs and Trade (61 Stat. (5) and (6); TIAS 1700; 4 Bevans 639).

(9) The intent of the IMF reservation is to ensure that the treaty does not undercut the IMF. The treaty applies only where there is no conflict with the IMF, that is, in those matters which the IMF leaves to the discretion of its members. In essence the treaty provides that the discretionary rights available under IMF Articles VI(3) and XIV(2) and the general rights under IMF Article VIII shall not be exercised in derogation of the provisions on withdrawal of earnings and other funds contained in Article XII(3) of the treaty except pursuant to an affirmative decision of the IMF.

(10) Since the intent is to avoid conflict with or overriding of actions taken by the IMF, Article XII (2) makes allowance for the imposition of any special or particular restrictions imposed by the IMF under the Articles of Agreement. These restrictions may include restrictions on capital transfers, regardless of the provisions of Article XII. Article XII deals with matters left by the Articles of Agreement of the IMF to the discretion of members, and the imposition of a particular restriction by the IMF would be in effect a narrowing of the member's discretionary authority, to the extent of the restriction.

(11) The term "specifically authorizes" refers to authorizations made by the Board of Governors of the IMF, whether given on a case-by-case basis, or by category, or in response to a specific situation.

Article XII, Paragraph 3: Remittances in Case of Exchange Stringency

3. If either Party imposes exchange restrictions in accordance with paragraph 2 of the present Article, (12) it shall, after making whatever provision may be necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of its people, (13) make reasonable provision (14) for the withdrawal, in foreign exchange in the currency of the other Party, (15) of: (a) the compensation referred to in Article VI, paragraph 4, (16) (b) earnings, (17) whether in the form of salaries, (18) interest, dividends, commissions, royalties, payments for technical services, or otherwise, (c) amounts for amortization of loans, depreciation of direct investments, (19) and capital transfers, (20) giving consideration to special needs for other transactions. (21) If more than one rate of exchange is in force, the rate applicable to such withdrawal

shall be a rate which is specifically approved by the International Monetary Fund for such transactions (22) or, in the absence of a rate so approved an effective rate which, inclusive of any taxes or surcharges on exchange transfers, (23) is just and reasonable.

(12) The intent is that exchange controls so imposed must be justified by balance-of-payments reasons. It would not be in accord with Article XII to invoke balance-of-payments reasons for restricting or prohibiting a particular investment at a time when the treaty partner's overall balance-of-payments position was considered generally satisfactory. The treaty reflects the principle that free market conditions should govern investment decisions. In consequence, an investment application should not be disapproved unless balance-of-payments difficulties exist and disapproval is correlated exclusively with balance-of-payments considerations.

(13) The treaty partner determines the amount of foreign exchange necessary for the goods and services essential to the welfare of its people. This provision, although by necessary implication dealing with imports, is not intended to be a reservation to the rules of nondiscriminatory treatment of imports contained in Article XIV. Any such reservation which might be needed by a country for balance-of-payments reasons is to be found in Article XXI(3). That provision enables each treaty partner to maintain its rights under GATT, which include the right to impose discriminatory import restrictions for balance-of-payments reasons.

The term "welfare" is of broad meaning, referring to a country's general well-being, including the necessities and minimum comforts needed for the maintenance of an adequate standard of living.

(14) The term "reasonable provision" is the key to the application of Article XII(3). The basic commitment is that in a period of exchange stringency the treaty partner is to make "reasonable" provision for servicing investor needs from such amounts of exchange as it may have available after meeting its needs for essential goods and services. In periods of extreme stringency, a complete moratorium on certain kinds of transfers might be reasonable.

The term "reasonable," however, caused much difficulty for foreign negotiators, especially from countries with a civil law tradition. In amplifying its meaning, stress was normally placed on its standing in United States jurisprudence and the meaning it has acquired through numerous court decisions. The customary explanation was that the term was used characteristically to describe standards of performance in situations where more precise standards would be impracticable. Such situations are those calling for flexibility in adjusting to varying circumstances and calling for exercise of the powers of judgment as a matter of primary importance. "Reasonable" measures are those which rational and informed men would acknowledge to be justified in a given set of circumstances, all relevant factors having been duly considered.

(15) There is no treaty obligation for the government to find exchange for the investor so that he can convert his local holdings into the currency of his own country unless the government actually controls the purchase and sale of foreign exchange. In that case the government's obligation would be to allow the investor access to that portion of its exchange holdings not required for the acquisition of essential goods and services.

The obligation to make available foreign exchange in the currency of the treaty partner would not require

its government to permit a United States citizen or company to convert earnings into dollars if the original investment had been made, for example, in pounds sterling. Conversion of earnings from a nondollar investment into dollars would be appropriate if the identity of the original currency of investment had been lost, but such a situation would be most likely where a substantial degree of convertibility among various currencies prevails.

(16) The recitation of bases for the withdrawal of funds in clauses (a), (b) and (c) is not intended to establish a firm order of priorities. It is intended, however, to indicate a qualitative evaluation of the items involved and to suggest reasonable preferences in terms of the investor's scale of values. The recitation, however, is subject to the rule of reason, and the plan is to ensure the necessary flexibility to permit a fair balancing of the various claims likely to be advanced under this provision.

(17) The term "earnings" is not limited to current or future earnings but extends to earnings from past investments, even those made prior to entry into force of the treaty. A phased withdrawal of earnings in such amounts as not to place undue burden on foreign exchange resources would be considered "reasonable provision" within the meaning of Article XII(3).

(18) Provision for a limited withdrawal of salaries based on such considerations as family status, location of dependents and estimated living expenses in the country is considered to be "reasonable."

(19) Most items in clauses (a) and (b) derive from Article XIX (i) of the Articles of Agreement of the IMF.

(20) The term "capital transfers" means capital funds other than those involved in compensation for expropriated property under clause (a).

The treaty commitment on capital transfers raised particular negotiating problems because of apprehensions lest large-scale transfers be required. It was emphasized that the rule of reason applied equally to such measures and to other legitimate claims. Under conditions of exchange stringency, a secondary place could be assigned to capital transfers in the scheme of Article XII(3) so long as such transfers were given fair and proportionate consideration in the circumstances. It is not the purpose of the treaty, for example, to force defaults on debts or to suspend reasonable remittances of dividends in order to allow a large bloc of capital to be exported at will.

(21) The phrase "giving consideration to special needs for other transactions" is not limited to clause (c) but applies to the treaty rule on remittances as a whole. That rule represents an effort to strike a fair balance among all the equities at stake in a complex situation. Given the objectives of the treaty, Article XII(3) gives particular emphasis to investor interests but does not assign them an absolute priority. This phrase in particular is intended to afford flexibility to make allowance for other proper and legitimate claims on a share of the limited exchange available during a period of stringency. Examples of such claims would be a cultural or student interchange program, the transfer of a small inheritance or the annual contribution to an international organization. This approach further reflects the view that it would be unrealistic and even hazardous to attempt a rigid scheduling of priorities in a treaty intended to endure over a long and uncertain future.

(22) In a treaty given over to general principles, it would be unrealistic and probably impossible to define the specific rate of exchange that would be equitable over the years for the transfers covered by Article XII(3). In the first instance, therefore, the rate for such transfers is that approved by the IMF, which, it is considered, would be likely in any event to meet the treaty test of "just and reasonable." In the absence of a rate set by the IMF, the treaty partner may fix the rate for withdrawals, subject to the caveat that it be just and reasonable. The application of different and discriminatory rates for the various categories of remittances covered by Article XII(3) would not be inconsistent with that provision if the various differential rates met the treaty test of reasonableness.

(23) The reference to taxes and surcharges is included to ensure that the total sum the buyer must pay to obtain foreign exchange, consisting of the base rate plus taxes and surcharges, shall meet the treaty test of "just and reasonable."

The more common differential, however, is likely to be between the rate for foreign trade payments and that for the remittances covered by Article XII (3), and a complex system of multiple official and semi-official rates prevailed in a substantial number of countries after World War II.

Article XII, Paragraph 4: Equitable Imposition of Exchange Restrictions

4. Exchange restrictions shall not be imposed [24] by either Party in a manner unnecessarily detrimental or arbitrarily discriminatory [25] [26] to the claims, investments, transport, trade,

and other interests of nationals and companies of the other Party, nor to the competitive position thereof.(27)

(24) The intent of this provision is to provide assurances that exchange restrictions are applied for their proper purpose, that is, to safeguard monetary reserves in times of exchange stringency, and not used as protective devices for the benefit of national enterprises of the country imposing such restrictions. Article XII(4) accepts the reality of differential treatment in applying exchange restrictions, forbidding only such restrictions as would be "unnecessarily detrimental" or "arbitrarily discriminatory."

(25) The treaty partner imposing exchange restrictions would decide in the first instance whether such restrictions were unnecessarily detrimental or arbitrarily discriminatory within the meaning of Article XII(4) and whether they impaired the competitive position of nationals and companies of the other treaty partner. The purport of such decisions would be a matter of direct and understandable concern to such other treaty partner, and these decisions are open to question and rebuttal under Article XII(4) to the same extent as under Article XII(3). See Note 6 above.

(26) These terms eliminate the need for specific reservations to Article XII. They represent an intent to strengthen the treaty rule against inequitable or unjustifiable applications of exchange restrictions, supplementing the national and most-favored-nation rules, which do not invariably provide effective protection in view of the complexity of some exchange control situations.

(27) The provision on competitive position is intended to ensure the opportunity to compete. It does not require the guarantee of a stipulated or historical share of the market.

Article XII, Paragraph 5: Definition of Exchange Restrictions

5. The term "exchange restrictions" as used in the present Article includes all restrictions, regulations, charges, taxes, or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds (28) or of financial instruments (29) between the territories of the two Parties.

(28) The intent of this term, and of the definition as a whole, is to ensure broad coverage. This intent is revealed more specifically in formulations used in certain earlier treaties to the effect that the financial transactions covered in the exchange control article of the treaty include "all international payments and transfers of funds effected through the medium of currencies, securities, bank deposits, dealings in foreign exchange or other financial arrangements." See, for example, Treaty with Ireland, Article XVII(1).

The term "transfer of funds" covers by necessary implication licensing requirements imposed as a condition precedent to transfer.

(29) See Note 4 above. This term is considered as including securities.

Article XII, Paragraph 6: Consultation

6. Each Party shall afford the other Party adequate opportunity for consultation at any time regarding application of the present Article.(30)

(30) Foreign negotiators objected to Article XII(6) because they considered it too categorical, requiring extensive consultations not only with the United States but possibly with other countries, and because it was unnecessary in view of the inclusion in the treaty of Article XXIV(1), the standard consultation provision. The latter establishes a broad, continuous obligation, and the inclusion of a special provision in Article XII implies a more restricted consultation on exchange control matters.

The United States view was that Article XXIV(1) is a conventional statement of diplomatic usage. Article XII (6) is not in derogation but goes somewhat further. Consultation under Article XII (6) is likely to be more technical and detailed. It further might take place in advance of the point where any assertions of dissatisfaction would be warranted. In contrast Article XXIV(1) visualizes "representations," which imply that a problem already has arisen.

The intent of Article XII(6) is to provide a specific legal basis for timely discussion of an intricate special problem, often in circumstances where flexibility is needed in order to adapt to changing conddidions. Exchange control matters affect both treaty partners, and informal consultations help to avoid misunderstandings.

ARTICLE XVIII

Cartels and State Business Practices

Paragraph 1: Restrictive Business Practices

Paragraph 2: Competition between Private and State-Owned Enterprises

Paragraph 3: Waiver of Sovereign Immunity

General:

Although Article XVIII, taken in its entirety, may seem to be made up of disparate elements, it has a unifying theme, which is the restraint of unfair competition. Article XVIII(1) is directed at cartels and restrictive trade practices maintained primarily but not exclusively by private enterprises. It reflects the general bias of United States antitrust law and the principles, broadly representative of that body of law, that were written into the Havana Charter for an International Trade Organization (Department of State Publication 3206, Commercial Policy Series 114 (1948)). Much of the wording of Article XVIII(1) was taken directly from Article 46 of the Charter, as well as its limitation in matters of substance to the taking of "appropriate measures." The only significant difference between the two provisions in fact is that Article 46, consistent with the original concept of the Charter as an instrument for economic development as well as international trade, relates to restrictive practices with harmful effects on production as well as trade. Article XVIII(1), on the other hand, relates only to the latter.

Article XVIII(2) and (3) are a response to a problem of a different nature. It became clear during the years immediately after the Second World War that in many parts of the world there would be not only massive governmental intervention in economic affairs, but that in many situations the state would carry on business operations on its own account in

direct competition with private enterprises, both citizen and alien. There was evidence of this trend in post-war nationalization programs in Europe. In some of these programs entire industries were taken over by the state. In others, only a portion of the affected industry was expropriated, leaving the remainder facing the prospect of competition with the state. One conspicuous example was France, where nationalized Renault competed with privately-owned Citroen. Another was pre-Communist Czechoslovakia, where state and privately-owned breweries competed with each other.

The problem therefore became one of providing some measure of protection for a United States enterprise doing business abroad and coming into head-to-head competition with state-controlled entities. It became necessary to place some curb on the tendency of the state to take unfair advantage of its power in these circumstances to run the private concern out of business. Efforts to provide protection against unfair competition took two forms. One was an experimental provision, carefully limited in scope, to place the private United States concern on a plane of equality with its state-controlled competitor by assuring to the former the benefit of any special favors such as subsidies or tax exemptions, which otherwise would have placed the latter at a competitive advantage.

In large part because of the nature of the principle involved, which implies a possibility of more favorable treatment for the alien than the citizen, it was deemed prudent to limit the scope of this provision. It applies only to trading and manufacturing enterprises, and exceptions are made for special advantages given in connection with government procurement, and with what amount to government welfare or relief programs.

The second element in the response to state competition was Article XVIII(3), which would bar foreign government enterprises from claiming sovereign immunity when they engage in business activities within the territories of the treaty partner.

This provision, like Article XVIII(2), had its origin in the growth of state-controlled business enterprises after the Second World War. The treaty program at that time contemplated negotiations with a number of countries that had undertaken extensive nationalization programs. Of necessity, these treaties would have to extend rights of establishment in the United States to foreign enterprises. It was expected that there would be difficulties of adjustment to United States conditions if the United States branches of foreign enterprises were nationalized, or if nationalized enterprises sought to establish new branches in this country. Hence Article XVIII(3) was developed as a safeguard. Its purpose was to ensure that state-owned enterprises with a claim to treaty rights would not be able to escape the liabilities to which private United States enterprises in competition with them were subject.

Adoption of the policy represented by Article XVIII(3) antedated, and had no direct connection with the issuance of the Tate letter (26 Department of State Bulletin 984 (1952)). The Tate letter was an announcement that in responding to requests from foreign governments for a grant of immunity from suit, the Department of State would adhere to the restrictive theory of sovereign immunity. This action was in effect an endorsement of the European concept of state responsibility under which the immunity of the sovereign is recognized with respect to sovereign or public acts (jure imperii) but not with respect to private acts (jure gestionis). The treaty policy involved in Article XVIII(3) was, of course, a clear application of the restrictive theory and in harmony with the Tate letter, although it has rather a different purpose. It is not concerned with the private acts of the sovereign as such but with the acts of state entities that are in competition with enterprises to which treaty rights are accorded.

Negotiation of treaty provisions such as Article XVIII(3) was suspended in 1958 because of objections by the Department of Justice. That agency leaned heavily towards the theory of the absolute immunity of the sovereign, in major part because it wished to raise the defense of sovereign immunity in virtually every case brought against the United States in a foreign court. It expressed concern lest the treaty interfere with its ability to plead such immunity effectively. The attitude of Justice is set forth, without specific mention of Article XVIII(3), in Leonard, George S., "The United States as Litigant in Foreign Courts," Proceedings of the American Society of International Law, 1959, 95-104. Although not finding the Justice position wholly persuasive, the Department of State decided to omit Article XVIII(3) from future treaties.

Article XVIII(3) is treated as a part of the standard draft because it differs from other discontinued provisions such as the military service article in important particulars. It was dropped as a matter of policy rather than as a result of conflict with a later statute. It reflects the growing opinion of legal writers and publicists here and abroad. Its principle received practical application even before the Second World War when the United States waived its immunity with respect to vessels of the United States Merchant Fleet Corporation in the 1920's (4 Hackworth 439-442). The principle also has been applied to air carriers by the Civil Aeronautics Board, which makes waiver of immunity from suit a condition for the granting of a foreign air carrier permit. (See 49 U.S.C. 482).

More conclusively, Congress has given specific endorsement to the principles embodied in Article XVIII(3) by anactment of the Foreign Sovereign Immunities Act of 1976 (90 Stat. 2891, 28 U.S.C. 1602-1611). That Act, among other provisions, requires the application of the restrictive principle in United States courts, makes the courts responsible for determinations of immunity, establishes procedures for

exercising jurisdiction over a foreign state, and eliminates the absolute immunity of a foreign state from execution of judgment in United States courts. Congress, moreover, made plain its intent to ensure harmony between the Act and treaties containing provisions such as Article XVIII(3). In its report on the legislation the House Committee observed: "Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest." (House Rept. No. 94-1487, pp. 17-18).

Article XVIII, Paragraph 1: Restrictive Business Practices

1. The two Parties agree(1) that business practices which restrain competition, limit access to markets or foster monopolistic control(2), and which are engaged in or made effective by one or more public or private commercial enterprises(3) or by combination, agreement or other arrangement among such enterprises, may have harmful effects(4) upon commerce between their respective territories(5). Accordingly, each Party agrees upon the request of the other Party to consult(6) with respect to any such practices and to take such measures as it deems appropriate(7)(8) with a view to eliminating such harmful effects.

(1) The agreement recorded in the first sentence is in the nature of a declaration of principle. The actual treaty commitment is found in the second sentence. The intent is to enlist the cooperation of other governments in efforts, sanctioned by Congress, on the part of the United States to reduce the adverse effects of cartels and other restrictive practices on international trade (Commercial Treaties, Hearing before Subcommittee of Senate Committee on Foreign Relations, 82nd Congress, 2d Session, May 9, 1952, p. 29). The object is to prevent restrictive business practices from developing to a point where they might adversely affect relations between the treaty partners.

(2) The terms used to define the effects of restrictive practices are intended to avoid conflict with the Export Trade Act, or Webb-Pomerene Act (15 U.S.C. 61-65), which authorized competing United States firms to form export associations in order to compete more effectively in export markets. (Hearing, supra, p. 29).

(3) The provision is intended to apply to situations where there is some measure of private enterprise engaged in the activity concerned. If a state monopoly permits no private competition, the provision would not apply.

(4) This wording is intended to establish the principle that cartels and other arrangements may have harmful consequences for trade, without, however, necessarily asserting that such arrangements are inherently evil.

(5) The provision is limited to external trade. It does not, however, extend to international commodity agreements.

(6) The provision as a whole is stated so moderately and imprecisely that the rule on consultation was deemed essential in order to make Article XVIII(1) worth including in the treaty. Consultation is central to this provision, whereas in Article XII(6) and XXIV(1) it is a procedural requirement additional to the basic commitment.

(7) The aim is that, if consultation verifies the complaint, each treaty partner would take whatever measures it deemed appropriate to correct or eliminate the harmful practices. Whether it would act at all is not left to the discretion of the treaty partner. It is under an obligation to act, but the choice of appropriate corrective measures is left to its discretion.

(8) This element of Article XVIII(1) is not deemed to be self-executing. In one negotiation the United States offered to substitute the term "Government" for "Party" in this sentence to emphasize that the obligation rests with the executive and administrative authorities in each country and does not commit their respective legislatures to the enactment of legislation.

Article XVIII, Paragraph 2: Competition between Private and State-Owned Enterprises

2. The Parties recognize that conditions of competitive equality(9) should be maintained in situations in which publicly owned or controlled trading and manufacturing enterprises of either Party engage in competition(10)(11), within the territories thereof(12), with privately owned or controlled enterprises of nationals and companies of the other Party(13). Accordingly, such private enterprises shall, in such situations, be entitled to the benefit of any special advantages of an economic nature accorded such public enterprises, whether in the nature of subsidies, tax exemptions or otherwise(14)(15). The foregoing rule

shall not apply, however, to special advantages given in connection with: (a) manufacturing goods for government use, or supplying goods and services to the Government for government use[16]; or (b) supplying at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise practically obtainable by such groups.[17]

(9) The principle of competitive equality is introduced in this manner to establish a consensus between the treaty partners and register in this open fashion their mutual disapproval of the abuses actually occurring in some parts of the world in situations where state entities compete unfairly against like private enterprises. Essentially, the intent was to provide a legal barrier against "creeping confiscation." Experience in the years immediately following the Second World War showed that, while some countries adopted straightforward nationalization programs, others resorted to subterfuges to achieve the same result. Such countries, especially in Eastern Europe, resorted to such devices as establishing government-controlled enterprises which, because of state subsidies, tax exemptions, and other favors, could run competing private companies into bankruptcy. The result would be that the government could absorb private property in the form of the assets and facilities of the bankrupted private enterprise without compensation, or with nominal compensation only.

(10) The principle embodied in the first sentence of Article XVIII(2) further represents an effort, however limited in nature, to come to grips with the general problem of what rules should apply in situations where private enterprise faces the state rather than

a private competitor. This problem is dealt with to some extent in Article XVII, but its provisions are concerned largely with monopolies and government procurement. The provisions of Article VII, although they might have been adequate in times past, no longer suffice when the state in fact competes with private enterprises. There is, accordingly, a gap in treaty coverage which Article XVIII(2) seeks to fill in part, on admittedly an experimental basis.

(11) The provision is limited to these two specific categories of activities. It includes processing activities (Note formulation used in Protocol, paragraph 2, of the Treaty with Italy). It does not cover transportation, public utilities or mining, other than the processing of mineral products.

(12) The territorial reference, combined with use of the verb "engage," is critical to the application of Article XVIII(2). The intent is to make this provision cover the situation in which the state enters into competition with a private enterprise. It does not apply in a situation where a private enterprise enters into competition with an established state enterprise.

(13) This provision does not extend to situations in which the government enjoys a monopoly inasmuch as in such cases private competition would be nonexistent.

(14) Other examples would be procurement discounts, special warehousing and transportation facilities, rationing priorities. An export subsidy would be covered, and such a subsidy, if granted to the state enterprise, could not be withheld from a competing private enterprise of the treaty partner if established and doing business in the host country.

(15) A situation like that of the export subsidy could create a situation where, at least hypothetically, a private United States-owned enterprise might be entitled to better treatment than a like private enterprise of the treaty partner. This result is not considered inappropriate. While the United States is not seeking to indicate to a foreign government how it should

treat its own citizens, it is seeking to strengthen the basic philosophy of competitive equality when private business enterprises face the superior economic power of the state. In a sense, Article XVIII(2) goes beyond the national treatment rule of Article VII, although it would seem unlikely that a government would wish to withhold the benefits specified from domestically owned firms.

(16) This is an important exception, narrowing the application of the provision to trading and manufacturing enterprises by excluding activities wholly for Government account such as the Government Printing Office or, in the case of services, such activities as the G.S.I. cafeterias. Armaments would be covered by the exception in Article XXI(1).

(17) This is an equally important exception, further narrowing the application of the provision to trading and manufacturing enterprises by excluding activities undertaken primarily for social rather than economic purposes. A major example would be the construction of subsidized low-cost housing for the poor.

Article XVIII, Paragraph 3: Waiver of Sovereign Immunity

3. No enterprise(18) of either Party, including corporations, associations, and government agencies and instrumentalities(19), which is publicly owned or controlled(20) shall, if it engages(21) in commercial, industrial, shipping(22) or other business activities(23) within the territories of the other Party(24), claim or enjoy, either for itself or its property, immunity therein from taxation(25), suit(26), execution of

judgment[27] or other liability to which privately owned and controlled enterprises are subject therein[28].

(18) The term "enterprise" is used here as a derivative of the classic meaning of that term to denote the basic unit in the organization of a free enterprise economy. It is intended to refer to the counterparts in a mixed or socialized economy of entities having the character of enterprises in a free enterprise system. These entities could include, as major example, a formerly private corporation now controlled by the government through stock purchase, enterprises formerly private but since nationalized, and entities created by the government that are counterparts of economic units of free enterprise. These entities need not be government corporations. They can take various other forms, even mixed enterprises formed under private law.

(19) This provision adds little to the intent of Article XVIII(3) except to make clear the intention of covering every entity, regardless of its legal form or juridical status, and in particular to ensure that enterprises in the form of government agencies and instrumentalities are covered as well as those in the form of government corporations.

It should be noted that the Foreign Sovereign Immunities Act of 1976 defines an agency or instrumentality of a foreign state as any entity which is: (1) a separate legal person; (2) an organ of a foreign state or any of its political subdivisions, or with a majority of its shares or other ownership interest held by a foreign state or its political subdivisions; (3) not a State of the United States as defined in 28 U.S.C. 1332(c); and (4) not created under the laws of any third country (90 Stat. 2892; 28 U.S.C. 1603). The fourth category is directed at entities such as Amtorg.

(20) The reference to control does not mean control in the sense of being subject to the prescriptions of general public law but in the sense, as contemplated in business law, of management, direction or administration of an enterprise.

(21) What is intended to be encompassed by the verb "engages" as used in this context may be determined by references to Article VII(1) and the range of business operations specified there.

(22) Although the treaty ordinarily does not cover aviation in view of the established policy of governing relations in this field through bilateral air transport agreements, the wording of this clause is broad enough to cover aviation, as was the intent in view of the number of state-owned airlines operating to and from the United States.

(23) The term "business activities" is intended to be synonymous with the terms "activities for gain (business activities)" in Article VII(1) and "trade or other gainful pursuit" in Article XI(1). One of its functions, which is important in the context of Article XVIII(3), is to distinguish between these activities and the nonprofit activities normally dealt with in Article VIII(2). This distinction is important in determinations as to whether the waiver of immunity is applicable in a given situation involving the normal and traditional activities of a government.

(24) The territorial reference is limiting in its effect. A state-controlled enterprise is subject to denial of its claim to sovereign immunity only if it is present within the territories of the treaty partner by reason of engaging in activities there.

(25) The provision denying immunity from taxation goes somewhat further than most proposals for modifying the doctrine of sovereign immunity but is essential if conditions of competitive equality are to be maintained between the domestic private enterprise and the foreign state-controlled enterprise. The provision is not

considered self-executing to the extent of requiring the levying of taxes on the state-controlled enterprise, and presumably it would not override the provisions of the Internal Revenue Code (26 U.S.C. 892) exempting from taxation the income of foreign governments from sources within the United States.

(26) The provision for immunity from suit refers to civil suits. The subsequent reference to "other liability," however, presumably would cover criminal cases should the situation arise.

(27) The provision as to execution of judgment would leave the courts free to use their discretion in enforcing decisions against the property of state enterprises. It extends only to such property and not to the property of the government generally.

(28) For detailed analysis of the intent and scope of Article XVIII(3), see Setser, Vernon G., "The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties," 1961 Proceedings of the American Society of International Law 89-105.

ARTICLE XIX

Navigation

Paragraph 1: Freedom of Commerce and Navigation

Paragraph 2: Nationality of Vessels

Paragraph 3: Treatment of Vessels

Paragraph 4: Treatment of Cargoes

Paragraph 5: Treatment of Vessels in Distress

Paragraph 6: Definition of "Vessels"

General:

Article XIX deals in highly compressed form with a traditional treaty subject. From the beginning treaties of this kind contained detailed provisions on the treatment of vessels, for shipping was the most important service needed by traders in order to do business with foreign countries. The second most important ancillary service, insurance, is adequately covered in Articles VII(1) and XVII(3). It was considered important, however, to consolidate all of the provisions on shipping into a single article, for in the case of shipping, unlike insurance, the object of discriminatory treatment is the vessel or the cargo and not necessarily the person or company owning either.

With the treaty as a whole grounded on the principles of national and most-favored-nation treatment, it became feasible to omit many of the detailed provisions that were characteristic of earlier treaties. It was possible instead to subsume the content of those provisions under simply worded statements of the rules of national and of most-favored-nation treatment. The single Article XIX contains all of the provisions needed in order to prevent the discriminatory treatment of vessels and

cargoes. In a few instances, such as the Treaty with the Netherlands, more detailed provisions are included, but only as a concession to the preferences of the treaty partner.

Maintaining the integrity of these principles of nondiscrimination has been a strong and inflexible element of treaty policy. It has been considered preferable to omit provisions on shipping rather than compromise those principles, and Article XIX was dropped from the Convention with France and the Treaty with Pakistan for this reason.

The crucial element in Article XIX is that it relates to the treatment of vessels and to the treatment of their cargoes. It is not concerned with the treatment of the enterprises which own the vessels and the cargoes. That treatment is stipulated in other provisions of the treaty, most particularly Article VII(2), which reserves freedom of action with respect to the treatment of shipping enterprises.

Article XIX has two essential objectives One is to prevent discriminations based on the vessel. Many of these discriminations are of a traditional kind, such as unequal harbor, tonnage or lighthouse duties. A modern example is preferential berthing arrangements for national vessels, which can be a significant discrimination where ports are badly congested rules as they apply to vessels are subject to ditional exceptions for the coasting trade, inland navigation and the national fisheries. The latter exception is important because one measure by which the United States favors its fishing industry is by prohibiting foreign fishing vessels from landing their catch at United States ports (46 U. S. C. 251).

The other major objective is to prevent discriminations based upon cargo and made effective by cargo preference laws. Such legislation characteristically takes the form of reserving

to national vessels a percentage of cargoes in a given commodity or all commodities. A more extreme form is the division of all cargoes between vessels of the two trading countries involved, thus shutting third-flag vessels out of the trade. Cargo discrimination became sufficiently widespread after the Second World War to make the provisions of Article XIX on nondiscriminatory treatment of cargoes an important safeguard for United States shipping interests.

The negotiation of Article XIX often encountered difficulty because of United States subsidy and cargo preference policies. In order to obtain acceptance of Article XIX, it was necessary to draw distinctions between the special character of these policies and the treaty rules of nondiscrimination.

The subsidy program, although difficult to explain as outside the reach of Article XIX, raised fewer problems than the cargo preference legislation. One partial explanation is that many treaty partners granted subsidies in various forms to their own merchant fleets and were reluctant to raise questions about United States policies in a treaty context. Another partial explanation is that the provisions of the Merchant Marine Act, 1936, for construction differential subsidies (46 U. S. C. 1151 - 1161), operating differential subsidies (46 U. S. C. 1171 - 1183a) and ship mortgage insurance (46 U. S. C. 1271 - 1281) apply to citizens of the United States rather than to United States-flag vessels as such. It is possible therefore to consider those provisions as coming within Article VII(2), with its reservation for water transport, rather than under Article XIX, although there apparently is no record of this relationship ever having been thoroughly explored.

Cargo preference legislation raised more acute problems. This legislation consists principally of the Military Transportation Act of 1904 (10 U.S.C. 2631) reserving carriage of supplies for the armed forces to United States-flag vessels, Public Resolution No. 17, 73rd Congress (15 U.S.C.616(a)) requiring Government lending agencies financing exports, such as the Export-Import Bank, to ensure that such export cargos are carried in United States vessels, and the Cargo Preference Act of 1954 (46 U.S.C. 1241 (b)), requiring that 50 per cent of foreign aid cargoes be carried in United States-flag vessels. This legislation contains various provisions for waivers or exemptions under stated circumstances, and administration of the measures has not always been sufficiently precise to ensure that United States vessels receive the full measure of preference intended. There was nevertheless a serious negotiating problem in reconciling the cargo preference legislation with the intent of the treaty provisions. This problem was made more acute by the fact that the cargo preference legislation did not apply exclusively to Government shipments but included commercial transactions. Such transactions, however, were not entirely commercial, in the sense that no matter what their outward form might be, they were in fact carried out under, and in pursuance of, Government programs.

Article XIX, Paragraph 1: Freedom of Commerce and Navigation

1. Between the territories of the two Parties there shall be freedom of commerce and navigation.(1)

(1) This provision is in the nature of a declaration of principle rather than a definite legal rule. It is considered as having special relevance to seaborne traffic. It is in traditional terminology,

probably directed against mercantilist restrictions of the kind commonplace in the Nineteenth Century. There is no record of discussion of its scope or intent in recent negotiations, but in two cases (Federal Republic of Germany, Netherlands) it was transferred from Article XIX to Article II.

Article XIX, Paragraph 2: Nationality of Vessels

2. Vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality,(2) shall be deemed to be vessels of that Party both on the high seas and within the ports, places(3) and waters of the other Party.(4)

(2) The United States does not accept dual registry. A United States vessel surrenders its registry when it is placed under foreign flag or registry (46 C.F.R. 67.33-1), and a foreign flag vessel will not obtain United States registry unless it has given up its foreign registry (46 C.F.R. 67.63-3, 67.65-5).

(3) It is difficult to assign a precise meaning to the traditional term "places" or to determine what it adds to the treaty. The probable intent is to cover "roads," channels, basins and other areas that may not come within the legal meaning of "ports" or "waters."

(4) This paragraph excludes vessels of third countries owned by or operated under bareboat charter by nationals or companies of the treaty partner. A Netherlands proposal to this effect was rejected on the basis that the United States was not prepared in a bilateral instrument of this kind, based on principles of "bilateral reciprocity", to undertake treaty obligations as to vessels of third countries that do not assume like obligations as to United States vessels.

Article XIX, Paragraph 3: Treatment of Vessels

3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party[5] and on equal terms with vessels of any third country, to come with their cargoes[6] to all ports, places and waters of such other Party open to foreign commerce and navigation.[7][8][9] Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other Party;[10] but each Party may reserve exclusive rights[11] and privileges to its own vessels with respect to the coasting trade,[12] inland navigation and national fisheries.[13]

(5) The national treatment rule is an innovation in treaties concluded after the Second World War. Earlier treaties made access to ports subject to most-favored-nation treatment only.

(6) In the case of the United States, this provision covers ports on the Great Lakes and St. Lawrence Seaway as well as on the Atlantic, Gulf and Pacific Coasts. It was held that any arrangement between the United States and Canada reserving more favorable treatment on the St. Lawrence Seaway for United States and Canadian vessels would contravene this provision and the most-favored-nation provision.

The term "cargoes" is considered to include passengers, but direct reference to passengers in the treaty is limited to the greatest extent possible in order to avoid raising questions as to the scope of the term "cargoes" when used alone in earlier treaties. In some cases, however, a protocol provision to the effect that "cargoes" includes passengers was inserted in terms indicating that it was a clarification, and not a basic amendment of Article XIX(3). See Treaty with the Netherlands, Protocol, paragraph 17.

(7) The intent of the reference to all ports "open to foreign commerce and navigation" is to preclude discriminations of the kind common in the early Nineteenth Century when certain trades were reserved to national vessels. A leading example is the Convention to Regulate Commerce of 1815 with Great Britain (8 Stat. 228; 12 Bevans 49), which restricted United States vessels to British ports in Europe and the East Indies, excluding them from British ports in North America and the West Indies. Under the national treatment rule in this sentence, if the treaty partner permits voyages to foreign destinations from any of its ports by its own vessels, it shall grant access to those ports to United States-flag vessels. In practical effect, United States-flag vessels could be excluded only from ports reserved exclusively to the coasting trade.

(8) This provision is intended to permit vessels of one treaty partner to enter a port of the other to discharge part of its cargo there or to load cargo and then proceed to one or more other ports to discharge or take on additional cargo before proceeding to a foreign destination, but it could not take on and discharge cargo in the domestic or cabotage trade of the treaty partner. In a few cases it was found expedient to include a specific provision along these lines. See Article XXII(1) of the Treaty with Italy. See also note 12 below.

(9) The first sentence of Article XIX(3) deals with access to ports. The second sentence deals with treatment accorded to the vessel after it has entered the port.

(10) The key phrase is "in all respects," which is designed to compress into a few words the great variety of discriminatory practices usually set forth in lengthy recitations in earlier treaties. One example is Article XX(2) and (3) of the Treaty with Italy, listing tonnage, harbor, pilotage, lighthouse, quarantine and similar charges, charges on passengers, their fares and tickets, freight payments, bills of lading, and insurance contracts, and conditions relating to the employment of ship brokers. These discriminations are traditional in nature, and it is important to ensure treaty coverage of more recent practices such as berthing preferences and discriminatory assignment of pilots. The problem with detailed recitations is that they are vulnerable to being construed as limitative. This result is avoided by the sweeping formulation of Article XIX(3).

A technical deviation from national treatment may occur with respect to tonnage duties, as differences in United States and foreign systems of tonnage measurement may result in the calculation of lower duties for United States flag vessels. Recent legislation has reduced this possibility to a material extent. Foreign governments have shown more interest in maintaining the practice of accepting United States measurements for the purpose of assessing tonnage duties, thereby avoiding the need for remeasurement. The Treaties with Greece (Article XXI (3)) and the Federal Republic of Germany (Article XIX (2)) contain specific provisions to this effect.

(11) The reservations here must be exclusively for national vessels and not accorded to any other country. Should the latter occur, the most-favored-nation rule would apply.

(12) The reservation for the coasting trade is intended to extend to voyages between any two ports under United States sovereignty. Voyages between American Samoa and ports in the United States, however, are not considered as in the coasting trade (48 U.S.C. 1664).

The Jones Act (46 U.S.C. 883), which is the basic statute governing the coasting trade, contains a number of exceptions, mainly designed to deal with special situations on the Great Lakes or in Alaska. One exception is of general applicability. It permits foreign-flag vessels to transport empty van containers, empty LASH barges and other instruments of international traffic (as defined in 19 U.S.C. 1322(a)) between United States ports. Such transport equipment must be owned or leased by the vessel owner or operator, and be transported without charge for use in handling cargo in international trade. This privilege, moreover, is granted only on condition of reciprocity. Since Article XIX (3) stipulates that rights and privileges reserved with respect to the coasting trade shall be "exclusive," this exception to the broad exclusionary provisions of the Jones Act raises questions as to the application of the most-favored-nation rule.

Efforts to include the term "cabotage" in this provision were resisted. Germany sought its inclusion because of a special situation on the Rhine which it considered as not adequately covered under the reservations for the coasting trade and inland navigation. A major reason was that the term "cabotage," which is unfamiliar in United States jurisprudence, normally means voyages between ports in the same country but is open to possible interpretation as applying to voyages between ports in two different countries that are reserved to vessels of those countries to the exclusion of third-party vessels. Any such interpretation would open Article XIX(3) to discriminatory practices of the kind it is intended to preclude. Navigation

provisions were omitted from the Treaty with Pakistan because of Pakistani insistence on reserving the right to this kind of cabotage for ports on the Indian sub-continent.

(13) The reservation for national fisheries rounds out the group of restrictive provisions on this subject that includes Articles VII(2) and XIV(6). While its necessity may be arguable in view of those provisions and of the definition of "vessels" in Article XIX(6), its inclusion is considered important in order to avoid any implication of weakening the traditional treaty policy with respect to fisheries. In a number of treaties, however, this reservation and that in Article XIV(6) were omitted, and a provision added to Article XXI(1) reserving freedom of action with respect to the "national fisheries and landing of the products thereof." In either case the intent is the same, that is, to reserve to each treaty partner complete control over its own fisheries, including restrictions on the nationality of the vessels permitted to engage in such fisheries and on the landing of fish and fish products directly from the high seas.

The reservation does not increase or diminish the rights either treaty partner may have outside its fisheries jurisdiction but deals only with its policies within that jurisdiction. Hence it does not interfere with fisheries arrangements of a bilateral or multilateral nature with effect outside such jurisdiction.

Article XIX, Paragraph 4: Treatment of Cargoes

4. Vessels of either Party[14] shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to

the right to carry all products that may be carried by vessel[15] to or from the territories[16] of such other Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.[17][18][19]

(14) This paragraph is directed at the things ships carry rather than at ships as ships. It thus is aimed at "flag discrimination" or "cargo preference" arrangements.

(15) This provision is construed as not conflicting with the requirements of United States cargo preference legislation because of the particular character of those requirements. In one situation the legislation deals with goods that are actually the property of the Government. In that case the Government is acting in a proprietary capacity as owner of the goods, and it is free as owner to make whatever arrangements it sees fit for transportation of its property. In the other situation, involving foreign aid and goods financed by the Export-Import Bank, the Government is acting again in a proprietary capacity as grantor or lender, and the treaty does not bind the Government as to the conditions it may wish to attach to the way its funds are spent.

On the other hand, a law or regulation requiring that all or a stipulated portion of exports from or imports to the United States must be carried in United States vessels would contravene the treaty rule. Proposals in the 92nd and subsequent Congresses to require that half of all petroleum imported

into the United States be carried in United States-flag tankers are such measures and have been opposed, among other reasons, on grounds of conflict with the treaty.

(16) The territorial reference is not intended to limit treaty coverage to voyages exclusively between ports of the treaty partners. It deals with two categories of voyages: (1) to ports of either country from ports of the treaty partner or any other foreign place, and (2) from ports of either country to ports of the treaty partner or to any other foreign place. The object is to ensure that in all voyages touching at ports of the treaty partners, vessels of the two partners shall be on a plane of equality. The only significant category of voyages not covered by the treaty involves voyages in the carrying trade, that is, voyages by vessels of the treaty partners between two or more ports, all of which are in third countries.

The United States has insisted on maintaining the territorial reference because its elimination would be likely to extend treaty coverage to the carrying trade, which is not an appropriate subject for a bilateral treaty of this kind.

(17) The relationship with the "commercial" provisions is evident in these provisions dealing with the customs treatment of goods. The difference is that the former are directed at discriminations based on the national origin of the goods, and these provisions are directed at discriminations based on the nationality of the vessels which transport them. Most of the matters specifically mentioned are traditional subjects of discrimination, but they still prevail in some areas. An Ecuadoran consular invoice fee discriminating in favor of the Flota Mercante Gran Colombiana, for example, had the effect of driving United States vessels out of trade with that country until strong countermeasures were taken.

(18) Because the rules of Article XIX(4) are specifically identified with cargo, the effect is to leave the treaty partners free to favor their national merchant marine by such devices as the construction and operating differential subsidies which not only are conferred on the owner or operator and not on the vessel as such, but are not correlated with the cargo the vessel carries.

(19) By means of a Protocol provision, mail subsidies also are reserved from Article XIX(4). There is some doubt as to the need for this reservation, but the United States postal authorities at one time insisted on it because of the provisions of 46 U.S.C. 1145 to the effect that all mails carried by vessel between ports which foreign vessels can serve be carried by United States-flag vessels insofar as practicable. This provision was repealed in 1960.

Article XIX, Paragraph 5: Treatment of Vessels in Distress

5. Vessels of either Party that are in distress shall be permitted to take refuge[20] in the nearest port[21] or haven[22] of the other Party, and shall receive friendly treatment and assistance.[23]

(20) Article XIX(5) is not based on national or most-favored-nation treatment. The treatment actually accorded could, consistently with this provision, be less than national treatment.

(21) It is not necessary that the port be one open to foreign commerce or navigation.

(22) The term "haven" is intended to denote any place of refuge such as a harbor, sheltered anchorage or other place of safety accessible to a vessel in distress.

(23) In certain treaties, Article XIX(5) has been expanded by addition of specific provisions as to salvage and made subject to a national treatment rule. Goods salvaged in such cases may be entered for consumption or may be reladen on the vessel from which they were taken. (See 19 C.F.R. 4.32). The customary provision of this kind may be found in the Treaty with the Federal Republic of Germany (Article XXI). The Treaty with Greece contains a much more detailed provision (Article XXII) of a type more usually found in Consular Conventions.

Article XIX, Paragraph 6: Definition of Vessels

6. The term "vessels," as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated;(24)(25) but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels(26) or vessels of war.(27)

(24) This provision extends to all likely combinations, including privately owned but government operated vessels, government-owned but privately operated, and all private or all government-owned and operated vessels.

(25) This definition is construed as extending to mail vessels.

(26) The term "fishing vessels" is understood to include not only vessels actually engaged in fishing but vessels engaged in marine exploration in connection with the national fisheries, vessels used as "spotters" for a fishing fleet, and vessels used to transport the catch. Apparently, the status of a vessel serving as "mother ship" to a fishing fleet and receiving its catch for processing

but not transporting the catch to port was not considered, but the broad construction given to the term "fishing vessel" in connection with other ancillary fishing activities suggests that the term would be deemed to include mother ships or processing ships.

(27) The right of refuge of warships in time of war is subject to recognized rules of neutrality in conformity with the general principle that treaty commitments are to be construed in light of international law. See Treaty with Ireland, Protocol, paragraph 12.

ARTICLE XXII

Definitions

Paragraph 1: Definition of National Treatment

Paragraph 2: Definition of Most-Favored-Nation Treatment

Paragraph 3: Definition of Companies

Paragraph 4: "Most-Favored-State" Rule

General:

The main purpose of this Article is to gather in a single place definitions of those terms that are used generally and consistently throughout the treaty. Definitions of terms that are used only in a single article normally are placed in that article, as in the case of the definition of "vessels" in Article XIX(6) and "exchange restrictions" in Article XII(5). Also, in some earlier treaties the term "products of" was defined and placed in Article XIV, although it applied to Article XVI as well.

The most important features of Article XXII are: (1) the rule of like situations, used in defining national treatment and most-favored-nation treatment as guidance for the application of those definitions to particular circumstances; (2) the provision in Article XXII(3) for determining the nationality of a company; and (3) the "most-favored-State" rule in Article XXII(4), which, while technically not a definition, establishes a legal rule reconciling the treaty with the requirements of the United States federal system.

Article XXII, Paragraph 1: Definition of National Treatment

1. The term "national treatment" means treatment accorded [1] within the territories of

a Party upon terms no less favorable [2] than the treatment accorded therein, in like situations, [3] to nationals, companies, products, vessels or other objects, [4] as the case may be, of such Party.

(1) This definition dispenses with earlier formulationns specifying national treatment in terms of treatment "now or hereafter" accorded by a treaty partner to its own antionals, but the temporal intent remains the same. In such terms, the treatment contemplated is that accorded at any given point in time. It means equality of treatment at all times in the future.

(2) More favorable treatment is not precluded.

(3) The phrase "in like situations" is the controlling element in the definition. It is designed to convey the idea that equal treatment is to be accorded in similarity of circumstances. An alien is entitled to an even-handed application of the standards and the laws and regulations that apply to citizens. He is not to be discriminated against merely because he is an alien. On the other hand, he can not demand immunity from the requirements of law to which citizens are subject.

The basic principle is that, all things other than nationality being equal, the treatment accorded shall, at the least, be equal. The creation of a fictitious equality, in which the conditions and requirements applied to citizens are deliberately constructed in such a way as to be patently impossible of compliance by aliens, would be contrary to the rule of national treatment.

The term "like" is considered as meaning similar but not necessarily identical. It would be contrary

(4) The recitation is intended to make clear that the definition of national treatment should not be construed as applying only to nationals.

Article XXII, Paragraph 2: Definition of Most-Favored-Nation Treatment

2. The term "most-favored-nation treatment" means treatment accorded (5) within the territories of a Party upon terms no less favorable than the treatment accorded therein, (6) in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

(5) The general considerations set forth above with respect to the definition of national treatment are also valid for the definition of most-favored-nation treatment.

(6) It was made clear early in the first negotiation following the Second World War that wherever most-favored-nation treatment is provided in the treaty, including the establishment and navigation provisions as well as the trade articles, it is in the unconditional form. This construction is indicated in the Preamble, and it applies except, as in Article XI(5), where the context clearly imposes a reservation or condition.

Article XXII, Paragraph 3: Definition of Companies

3. As used in the present Treaty, the term "companies" (7) means corporations, partnerships, companies and other associations, whether or

not with limited liability and whether or not for pecuniary profit. (8) Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof (9) and shall have their juridical status recognized within the territories of the other Party.

(7) The intent of this definition is to encompass all "juridical" or "artificial" persons of whatever denomination and to distinguish them from natural persons. They are creations of the state and not the state as such.

(8) This sentence is entirely a definition and has no legal effect otherwise. The second sentence, however, establishes a definite legal rule, although essentially for definitional purposes.

(9) This sentence establishes the place of charter or incorporation as the sole fact determining the nationality of a company. This test is in contrast to the so-called "seat" test favored in some European countries where the location of the real center of management of the company or the place or places where its principal activities are carried on are looked to as determining its nationality, even though its place of incorporation may be in another country. Under the test of place of incorporation, there is no specific requirement of a substantial de facto contact of the company with the chartering country other than the issuance of the charter. One consideration in using the single test of place of incorporation was an intent to extend treaty coverage, for example, to Western Hemisphere Trade Corporations and corporations organized in accordance with the China Trade Act concept.

to the national treatment rule, for example, to apply to an alien company engaged in activities in which domestic companies organized under the general corporation laws are permitted to engage the more stringent requirements of a special incorporation law such as that applicable to insurance companies. The alien company is entitled to be equated with the domestic companies with which it is in like situation, namely, domestic companies organized under the general corporation laws of the treaty partner and engaged in the same kind of activity.

Nevertheless, differentiation of treatment between citizen and alien that are in like situation is permissible so long as discrimination in fact does not result. Such differentiation reflects the practical consideration that for administrative reasons it is not always possible to treat the alien and the citizen in an identical manner. Such differentiation is provided for in Article VII (3) and in detailed terms in various Protocol provisions relating to the treatment of alien insurers.

This definition dispenses with such phrases as "in conformity with the applicable laws and regulations," which are used in certain of the treaties concluded shortly after the close of the Second World War. Because of the tendency of the treaty partner to assume during negotiations that such phrases were "local laws clauses," it was necessary to make clear that in the context of national treatment the intent was to refer only to the laws and regulations applicable to nationals of the two treaty partners alike and not to sanction restrictions on nationals of one treaty partner seeking to enjoy treaty privileges that did not apply equally to nationals of the other partner. In later treaties, the concept of nondiscriminatory "applicable" laws and regulations is contained within the definition by necessary implication.

The adoption of the single test of place of incorporation went beyond earlier United States practice as exemplified by the Protocol on the Juridical Personality of Foreign Companies of 1936 (55 Stat. 1201; 3 Bevans 274), which imposes a seat test.

Adoption of the single test of place of incorporation was based in part on the practical consideration that it makes the nationality of a company simple and easy to determine. It is analogous to the determination of a person's nationality and conforms to the treaty scheme of equating the corporation to the individual for most treaty purposes. No apparent reason is seen, for example, why the "seat" of a company should govern its nationality any more than domicile or residence should govern a person's nationality. The test contributes to good order in treaty relations, whereas the seat test or similar criteria often may raise difficult questions of fact.

The single test of place of incorporation is set forth in Article XXII for purposes of definition. It confers no right to engage in activities. For such rights it is necessary to look to other provisions of the treaty. In terms of practical application, Article V(1) is especially pertinent as it sets forth, in light of this definition, the conditions for recognition of the juridical personality of companies. In this context in particular it is more equitable than the seat test, which can be indiscriminate in application. It is hardly equitable, for example, to deny on the basis of the seat test the right of a company such as a Western Hemisphere Trade Corporation or China Trade Act Corporation to bring suit in the courts of the treaty partner for patent infringement or breach of contract.

It is possible to prevent abuse of the place of incorporation test by recourse to the provisions of Article XXI(1) that permit piercing the corporate

veil. Those provisions, it should be noted, are carefully framed to avoid denial of the juridical existence of the corporation.

A Japanese proposal to add "domicile" as a test of nationality of a company was turned down not only because domicile would be a difficult concept to apply to a corporation, but because it would impair the place of incorporation test, contrary to consistent treaty policy, and weaken a sound juridical position.

Article XXII, Paragraph 4: "Most-Favored-State" Rule

4. National treatment accorded under the provisions of the present Treaty to companies of _____ shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized (10) in (11) other States, Territories, and possessions of the United States of America. (12)

(10) The term "constituted" would be an acceptable substitute.

(11) The preposition "in" was deliberately used rather than "under" or "under the laws of" to take account not only of situations existing in a State by reason of State legislation, but also of situations prevailing in a State by reason of Federal law.

(12) This provision, although unilateral in appearance, and designed to reconcile the treaty with the special requirements of the United States federal

system, was readily accepted by the treaty partner on the basis of explanations of the constitutional nature of the federal system and the interstate character of most business activities in the United States. Those explanations stressed both constitutional and practical considerations which resulted in fair and equitable treatment for alien corporations. Those considerations included the fact that: (1) since there is no general Federal incorporation law, jurisdiction over the admission of corporations to do business vested mainly in the States, and the treaty had to make due allowance for their constitutional prerogatives; (2) while the States conceivably could apply measures that would place out-of-State corporations at a disadvantage, their overall policies were liberal, most conditions imposed on such corporations being procedural in character; (3) business in the United States in practice is organized along interstate lines, and many corporations, domestic and alien, do business in every State; (4) the provisions of the Constitution, particularly the due process, interstate commerce and equal protection clauses, tend to restrain the States from adopting discriminatory business legislation; and (5) alien corporations have the right under the treaty to charter a subsidiary in any State with laws they consider advantageous to them. Moreover, many States seek as a matter of policy to attract outside investment and are not likely to place legal obstacles in the way of the foreign investor.

The most significant area from the standpoint of the treaty where the States enjoy special regulatory prerogatives is insurance, but even in this case the States tend to equate out-of-State with local insurance companies to the extent that the technicalities of insurance operations allow. State regulation, even with some differentiation in treatment, has not impeded the interstate operations of insurers, and

the United States branches or subsidiaries of a number of alien companies do business in every State of the Union.

It also was customary to point out that a number of States actually imposed greater burdens on their own corporations than on out-of-State corporations, especially in the field of taxation. This differential occurred because they elected to tax the entire income of their own corporations whereas they could not tax the out-of-State corporation except on income derived from within the State. Some States also imposed a heavier aggregate burden on their own corporations under franchise tax legislation. Because of the variety and complexity of State tax laws, it should not necessarily be assumed that this situation still prevails.

ARTICLE XXIII

Territorial Application

Article XXIII: Territorial Application

Protocol, Paragraph 7: Areas under Military Control

General:

This Article is intended to define as precisely as possible the territories to which the treaty applies but without resort to superfluous detail. The objective is to provide the widest coverage possible in any given set of bilateral circumstances. For its part, the United States reserved from coverage only two areas where it exercised political authority at the time the basic treaty draft was formulated but where it did not have sovereign rights. Some treaty partners insisted on outright exceptions for dependent territories. One example is Denmark which sought a reservation for Greenland, where it maintained special policies for the benefit of the indigenous population. Others required special formulas to take account of particular or unusual circumstances. The Federal Republic of Germany, for example, needed special provisions in order to extend the treaty to Land Berlin (West Berlin), and the Netherlands similarly required special rules to take proper account of the autonomous rights, at the time, of Surinam and the Netherlands Antilles.

Article XXIII

The territories (1) (2) to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each Party, other than the Panama Canal Zone (3)

and the Trust Territory of the Pacific Islands.(4)

(1) This formulation replaces a somewhat more detailed version which, however, employs the same key terms to describe the extent of coverage. In the case of the United States, the territories referred to are the separate States, the District of Columbia, and the island possessions irrespective of the extent to which they have local self-government.

(2) Special provision is made in Protocol, paragraph (6), for the possible future independence of Puerto Rico, considered at the time as the only island possession likely to achieve complete self-rule. This provision is set in the context of Article XXI(2) on trade preferences. In view of the special trade relationship between the United States and Puerto Rico, the latter would be in a position in the event of independence similar to that of the Republic of the Philippines, for which a specific reservation is made in Article XXI(2).

(3) The exception for the Panama Canal Zone was necessitated by the fact that it was under the authority, but not the sovereignty, of the United States, and citizens of the Republic of Panama had special rights there.

(4) The exception for the Trust Territory of the Pacific Islands derives from the fact that the United States exercises authority there by virtue of a United Nations trusteeship, and the rights of aliens there are not properly the subject of bilateral negotiation. In earlier formulations of Article XXIII, provision was made for extension of provisions of the treaty to the Trust Territory by Presidential proclamation, but such action has never been taken.

Protocol, Paragraph 7: Areas under Military Control

7. Article XXIII does not apply to territories under the authority of either Party solely as a military base or by reason of temporary military occupation.(5) (6) (7)

(5) The intent of this reservation is to make clear that the treaty is not to be construed as extending to the territories occupied by United States forces as a result of the Second World War.

(6) The reference to military bases was added to avoid possible ambiguity as to the status of military, naval and air bases held by the United States, usually under lease, by virtue of special agreements with foreign countries.

(7) The text and substance of both Article XXIII and Protocol, paragraph 7, were omitted from the short draft treaty for less developed countries on grounds that the inclusion of these standard provisions in various other treaties sufficiently established the position of the United States as to the applicability of treaties of this kind.

TREATY WITH IRAN

STANDARD	IRAN
--	Art. I (Peace and friendship)
Art. I	Art. IV(1)
Art. II(1)	Art. II(1), XX(4)
Art. II(2)	Art. II(2)
Art. II(3)	Art. II(3)
Art. III(1)	Art. II(4)
Art. III(2)	Art. II(4)
Art. IV	--
Art. V(1)	Art. III(2)
Art. V(2)	Art. III(3)
Art. VI(1)	Art. IV(2)
Art. VI(2)	Art. IV(3)
Art. VI(3)	Art. IV(1)
Art. VI(4)	Art. IV(2)
Art. VI(5)	--
Art. VII(1)	Art. IV(4)
Art. VII(2)	Art. IV(4)
Art. VII(3)	--
Art. VII(4)	Art. IV(4)
Art. VIII(1)	Art. IV(4)
Art. VIII(2)	Art. II(2), XX(2)

STANDARD	IRAN
Art. IX(1)	Art. V(1)
Art. IX(2)	Art. V(1)
Art. IX(3)	--
Art. IX(4)	Art. V(1)
Art. X(1)	Art. V(2)
Art. X(2)	--
Art. XI(1)	Art. VI(1)
Art. XI(2)	--
Art. XI(3)	Art. VI(1)
Art. XI(4)	Art. VI(3)
Art. XI(5)	Art. VI(2)
Art. XII(1)	--
Art. XII(2)	Art. VII(1)
Art. XII(3)	Art. VII(2)
Art. XII(4)	Art. VII(3)
Art. XII(5)	--
Art. XII(6)	Art. VII(3)
Art. XIII	--
Art. XIV(1)	Art. VIII(1)
Art. XIV(2)	Art. VIII(2)*
Art. XIV(3)	Art. VIII(3)*
Art. XIV(4)	Art. VIII(4)*
--	Art. VIII(5) (Measures to use inconvertible currencies or deal with exchange stringency)

STANDARD	IRAN
Art, XIV(5)	Art. IX(2)
Art. XIV(6)	Art. VIII(6)
Art. XV(1)	Art. IX(1)
Art. XV(2)	Art. IX(1)
Art. XVI(1)	Art. VIII(1)
Art. XVI(2)	--
Art. XVII(1)	Art. XI(1)*
Art. XVII(2)	Art. XI(2)*
Art. XVII(3)	Art. IX(3)*
Art. XVIII(1)	--
Art. XVIII(2)	Art, XI(3)*
Art. XVIII(3)	Art. XI(4)*
Art. XIX(1)	Art. X(1)*
Art. XIX(2)	Art. X(2)*
Art. XIX(3)	Art, X(3)*
Art. XIX(4)	Art, X(4)*
Art, XIX(5)	Art. X(5)*
Art. XIX(6)	Art. X(6)*
--	Arts. XII-XIX (Rights and privileges of consular officers)
Art, XX	--
Art. XXI(1)	Art, XX(1)
Art, XXI(2)	Art. XX(3)

STANDARD	IRAN
Art. XXI(3)	Art. VIII(6)
Art. XXI(4)	--
Art. XXII(1)	--
Art. XXII(2)	--
Art. XXII(3)	Art. III(1)
Art. XXII(4)	--
Art. XXIII	--
Art. XXIV(1)	Art. XXI(1)*
Art. XXIV(2)	Art. XXI(2)*
Art. XXV	Art. XXII
Art. XXVI	Art. XXIII*
Prot. (1)	--
Prot. (2)	Art. IV(2)
Prot. (3)	Art. II(2)
Prot. (4)	--
Prot. (5)	--
Prot. (6)	Art. XX(3)
Prot. (7)	--

TREATY WITH IRAN

Principal Variations from Standard Draft

No rights of entry for business enterprises.

Reservation from provisions on treatment of goods for measures needed to utilize accumulated inconvertible currencies or deal with a foreign exchange stringency.

No provisions on restrictive business practices, commercial travelers, transit, or territorial application.

No right to engage in religious activities, i.e., to proselytize.

Practice of professions subject to local laws clause.

Industrial property provision in terms of "effective protection."

No right to bring in professionals to carry out special assignments without meeting local qualifications.

Treaty trader and investor provisions based on most-favored-nation treatment.

Annex 21

U.S. Department of State, Determination Pursuant to Section 6(I) of the Export Administration Act of 1979 – Iran, 23 January 1984, 49 Fed. Reg. 2836

DATE AND TIME: February 13, 1984, 8:30 a.m. to 5 p.m.; and February 14, 1984, 8:30 a.m. to 12 noon.

ADDRESS: National Aeronautics and Space Administration, FB 10–B, February 13, Room 625–T, and February 14, Room 226–A, 600 Independence Ave. SW, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Henry V. Bielstein, M.D., Code EB, National Aeronautics and Space Administration, Washington, DC 20546 (202/453–1546).

SUPPLEMENTARY INFORMATION: The Life Sciences Advisory Committee consults with and advises the Council and NASA on the accomplishments and plans of NASA's Life Sciences Programs.

This meeting will be closed to the public from 4 p.m. to 5 p.m. on February 13 for a discussion of candidates being considered for Committee membership. During this session, the qualifications of proposed new members will be candidly discussed and appraised. Since this session will be concerned throughout with matters listed in 5 U.S.C. 552(c)(6), it has been determined that this session should be closed to the public. The remainder of the meeting will be open to the public up to the seating capacity of the room (approximately 35 persons including committee members and other participants).

Type of Meeting

Open—except for a closed session as noted in the agenda below.

February 13, 1984

8:30 a.m.—Committee Functions (Open session).

9 a.m.—SL–1 Preliminary Results (Open session).

10:30 a.m.—Review Life Sciences' Program Plan (Open session).

1 p.m.—Review of Space Station Plan (Open session).

4:00 p.m.—LSAC Membership (Closed session).

February 14, 1984

8:30 a.m.—Status of space Biomedical Institute (Open session).

9:30 a.m.—Advocacy Paper (Open session).

12 noon—Adjourn.

Dated: January 17, 1984.

Richard L. Daniels,

Director, Management Support Office, Office of Management.

[FR Doc. 84–1748 Filed 1–20–84; 8:45 am]

BILLING CODE 7510–01–M

PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL

Hydropower Options Task Force; Regular Meeting Notice

AGENCY: Hydropower Options Task Force of the Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

ACTION: Notice of meeting.

Notice of meeting to be held pursuant to the Federal Advisory Committee Act, 5 U.S.C. Appendix I, 1–4. Activities will include:

- Review of Hydropower Options Task Force Charter
- Discussion of Bonneville proposal
- Discussion of Work Schedule
- Business
- Public Comment.

STATUS: Open.

SUMMARY: The Northwest Power Planning Council hereby announces a forthcoming meeting of its Hydropower Options Task Force.

DATE: Tuesday, January 31, 1984. 9 a.m.

ADDRESS: The meeting will be held at the Council Hearing Room at 700 SW. Taylor; Suite 200, in Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Tom Foley, (503) 222–5161.

Edward Sheets,

Executive Director.

[FR Doc. 84–1787 Filed 1–20–84; 8:45 am]

BILLING CODE 0000–00–M

DEPARTMENT OF STATE

Office of the Secretary

[Secretarial Determination 84–3]

Determination Pursuant to Section 6(i) of the Export Administration Act of 1979—Iran

In accordance with Section 6(i) of the Export Administration Act of 1979, 50 U.S.C. App. 2405(i), I hereby determine that Iran is a country which has repeatedly provided support for acts of international terrorism.

George P. Shultz,

Secretary of State.

[FR Doc. 84–1625 Filed 1–20–84; 8:45 am]

BILLING CODE 4710–06–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

National Airspace Review; Meeting

AGENCY: Federal Aviation Administration, DOT.

ACTION: National Airspace Review Plan Revision.

SUMMARY: On April 22, 1982, the National Airspace Review plan was published in the Federal Register. The plan encompassed a review of airspace use and the procedural aspects of the air traffic control system. Subsequent revisions to the schedule of various task groups have been made. This notice advises that Task Group 2–4.4, Helicopter Operations, Approach Procedures, which was scheduled to begin February 20, 1984, has been postponed until after April 30, 1984, in order to ensure availability of pertinent flight test data results to the task group. A specific date for this task group session will be provided in a subsequent notice in conjunction with other plan revisions.

FOR FURTHER INFORMATION CONTACT: National Airspace Review Program Management Staff, room 1005, Federal Aviation Administration, 800 Independence Avenue. SW., Washington, D.C. 20591, 202–426–3560.

Issued in Washington, D.C., on January 11, 1984.

Karl D. Trautmann,

Manager, Special Projects Staff Air Traffic Service.

[FR Doc. 84–1750 Filed 1–20–84; 8:45 am]

BILLING CODE 4910–13–M

Radio Technical Commission For Aeronautics (RTCA), Special Committee 151—Airborne Microwave Landing System Area Navigation Equipment; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. I) notice is hereby given of a meeting of RTCA Special Committee 151 on Airborne Microwave Landing System (MLS) Area Navigation Equipment to be held on February 8–10, 1984, in the RTCA Conference Room, One McPherson Square, 1425 K Street NW., Suite 500, Washington, D.C. commencing at 9:30 a.m.

The Agenda for this meeting is as follows: (1) Chairman's Introductory Remarks; (2) Approval of Minutes of the

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Annex 22

Executive Order 13599, 5 February 2012, 77 Fed. Reg. 6659

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U.S. GOVERNMENT
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FEDERAL REGISTER

Vol. 77 Wednesday,
No. 26 February 8, 2012

Part III

The President

Executive Order 13599—Blocking Property of the Government of Iran and Iranian Financial Institutions

Federal Register
Vol. 77, No. 26
Wednesday, February 8, 2012

Presidential Documents

Title 3—

The President

Executive Order 13599 of February 5, 2012

Blocking Property of the Government of Iran and Iranian Financial Institutions

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.*), section 1245 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81) (NDAA), and section 301 of title 3, United States Code,

I, BARACK OBAMA, President of the United States of America, in order to take additional steps with respect to the national emergency declared in Executive Order 12957 of March 15, 1995, particularly in light of the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties, the deficiencies in Iran's anti-money laundering regime and the weaknesses in its implementation, and the continuing and unacceptable risk posed to the international financial system by Iran's activities, hereby order:

Section 1. (a) All property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(b) All property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(c) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

Sec. 2. I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 1 of this order would seriously impair my ability to deal with the national emergency declared in Executive Order 12957, and I hereby prohibit such donations as provided by section 1 of this order.

Sec. 3. The prohibitions in section 1 of this order include but are not limited to: (a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 4. (a) The prohibitions in section 1 of this order apply except to the extent provided by statutes, or 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.

(b) The prohibitions in section 1 of this order do not apply to property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979, and thereafter made subject to the transfer directives set forth in Executive Order 12281 of January 19, 1981, and implementing regulations thereunder.

Sec. 5. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 6. Nothing in section 1 of this order shall prohibit transactions for the conduct of the official business of the Federal Government by employees, grantees, or contractors thereof.

Sec. 7. For the purposes of this order: (a) the term ''person'' means an individual or entity;

(b) the term ''entity'' means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term ''United States person'' means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States;

(d) the term ''Government of Iran'' means the Government of Iran, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iran, and any person owned or controlled by, or acting for or on behalf of, the Government of Iran;

(e) the term ''Iran'' means the territory of Iran and any other territory or marine area, including the exclusive economic zone and continental shelf, over which the Government of Iran claims sovereignty, sovereign rights, or jurisdiction, provided that the Government of Iran exercises partial or total de facto control over the area or derives a benefit from economic activity in the area pursuant to international arrangements; and

(f) the term ''Iranian financial institution'' means a financial institution organized under the laws of Iran or any jurisdiction within Iran (including foreign branches), any financial institution in Iran, any financial institution, wherever located, owned or controlled by the Government of Iran, and any financial institution, wherever located, owned or controlled by any of the foregoing.

Sec. 8. For those persons whose property and interests in property are blocked pursuant to 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 those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 12957, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

Sec. 9. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA as may be necessary to carry out the purposes of this order, other than the purposes described in section 11. The Secretary of the Treasury may redelegate any of these functions and authorities to other officers and agencies of the United States Government consistent with applicable law.

All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 10. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to exercise the functions and authorities conferred upon the President by section 1245(d)(1)(A) of the NDAA and to redelegate these functions and authorities consistent with applicable law. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby further authorized to exercise the functions and authorities conferred upon the President by section 1245(g)(1) of the NDAA to the extent necessary to exercise the other functions and authorities delegated in this section and may redelegate these functions and authorities consistent with applicable law.

Sec. 11. The Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of Energy, and the Director of National Intelligence, is hereby authorized to exercise the functions and authorities conferred upon the President by section 1245(d)(4)(D) of the NDAA and to redelegate these functions and authorities consistent with applicable law. The Secretary of State, in consultation with the Secretary of the Treasury, is hereby further authorized to exercise the functions and authorities conferred upon the President by sections 1245(e)(1) and 1245(e)(2) of the NDAA and to redelegate these functions and authorities consistent with applicable law. The Secretary of State, in consultation with the Secretary of the Treasury, is hereby further authorized to exercise the functions and authorities conferred upon the President by section 1245(g)(1) of the NDAA to the extent necessary to exercise the other functions and authorities delegated in this section and may redelegate these functions and authorities consistent with applicable law.

Sec. 12. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 13. The measures taken pursuant to this order are in response to actions of the Government of Iran occurring after the conclusion of the 1981 Algiers Accords, and are intended solely as a response to those later actions.

Sec. 14. This order is effective at 12:01 a.m. eastern standard time on February 6, 2012.

THE WHITE HOUSE,
February 5, 2012.

[FR Doc. 2012–3097
Filed 2–7–12; 11:15 am]
Billing code 3295–F2–P

Annex 23

Veto Message from the President – S.2040, 23 September 2016

Veto Message from the President -- S.2040

www.whitehouse.gov/the-press-office/2016/09/23/veto-message-president-s2040

TO THE SENATE OF THE UNITED STATES:

I am returning herewith without my approval S. 2040, the "Justice Against Sponsors of Terrorism Act" (JASTA), which would, among other things, remove sovereign immunity in U.S. courts from foreign governments that are not designated state sponsors of terrorism.

I have deep sympathy for the families of the victims of the terrorist attacks of September 11, 2001 (9/11), who have suffered grievously. I also have a deep appreciation of these families' desire to pursue justice and am strongly committed to assisting them in their efforts.

Consistent with this commitment, over the past 8 years, I have directed my Administration to pursue relentlessly al Qa'ida, the terrorist group that planned the 9/11 attacks. The heroic efforts of our military and counterterrorism professionals have decimated al-Qa'ida's leadership and killed Osama bin Laden. My Administration also strongly supported, and I signed into law, legislation which ensured that those who bravely responded on that terrible day and other survivors of the attacks will be able to receive treatment for any injuries resulting from the attacks. And my Administration also directed the Intelligence Community to perform a declassification review of "Part Four of the Joint Congressional Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11," so that the families of 9/11 victims and broader public can better understand the information investigators gathered following that dark day of our history.

Notwithstanding these significant efforts, I recognize that there is nothing that could ever erase the grief the 9/11 families have endured. My Administration therefore remains resolute in its commitment to assist these families in their pursuit of justice and do whatever we can to prevent another attack in the United States. Enacting JASTA into law, however, would neither protect Americans from terrorist attacks nor improve the effectiveness of our response to such attacks. As drafted, JASTA would allow private litigation against foreign governments in U.S. courts based on allegations that such foreign governments' actions abroad made them responsible for terrorism-related injuries on U.S. soil. This legislation would permit litigation against countries that have neither been designated by the executive branch as state sponsors of terrorism nor taken direct actions in the United States to carry out an attack here. The JASTA would be detrimental to U.S. national interests more broadly, which is why I am returning it without my approval.

First, JASTA threatens to reduce the effectiveness of our response to indications that a foreign government has taken steps outside our borders to provide support for terrorism, by taking such matters out of the hands of national security and foreign policy professionals and placing them in the hands of private litigants and courts.

Any indication that a foreign government played a role in a terrorist attack on U.S. soil is a matter of deep concern and merits a forceful, unified Federal Government response that considers the wide range of important and effective tools available. One of these tools is designating the foreign government in question as a state sponsor of terrorism, which carries with it a litany of repercussions, including the foreign government being stripped of its sovereign immunity before U.S. courts in certain terrorism-related cases and subjected to a range of sanctions. Given these serious consequences, state sponsor of terrorism designations are made only after national security, foreign policy, and intelligence professionals carefully review all available information to determine whether a country meets the criteria that the Congress established.

In contrast, JASTA departs from longstanding standards and practice under our Foreign Sovereign Immunities Act and threatens to strip all foreign governments of immunity from judicial process in the United States based solely upon allegations by private litigants that a foreign government's overseas conduct had some role or connection to a group or person that carried out a terrorist attack inside the United States. This would invite consequential decisions to be made based upon incomplete information and risk having different courts reaching different conclusions about the culpability of individual foreign governments and their role in terrorist activities

directed against the United States -- which is neither an effective nor a coordinated way for us to respond to indications that a foreign government might have been behind a terrorist attack.

Second, JASTA would upset longstanding international principles regarding sovereign immunity, putting in place rules that, if applied globally, could have serious implications for U.S. national interests. The United States has a larger international presence, by far, than any other country, and sovereign immunity principles protect our Nation and its Armed Forces, officials, and assistance professionals, from foreign court proceedings. These principles also protect U.S. Government assets from attempted seizure by private litigants abroad. Removing sovereign immunity in U.S. courts from foreign governments that are not designated as state sponsors of terrorism, based solely on allegations that such foreign governments' actions abroad had a connection to terrorism-related injuries on U.S. soil, threatens to undermine these longstanding principles that protect the United States, our forces, and our personnel.

Indeed, reciprocity plays a substantial role in foreign relations, and numerous other countries already have laws that allow for the adjustment of a foreign state's immunities based on the treatment their governments receive in the courts of the other state. Enactment of JASTA could encourage foreign governments to act reciprocally and allow their domestic courts to exercise jurisdiction over the United States or U.S. officials -- including our men and women in uniform -- for allegedly causing injuries overseas via U.S. support to third parties. This could lead to suits against the United States or U.S. officials for actions taken by members of an armed group that received U.S. assistance, misuse of U.S. military equipment by foreign forces, or abuses committed by police units that received U.S. training, even if the allegations at issue ultimately would be without merit. And if any of these litigants were to win judgments -- based on foreign domestic laws as applied by foreign courts -- they would begin to look to the assets of the U.S. Government held abroad to satisfy those judgments, with potentially serious financial consequences for the United States.

Third, JASTA threatens to create complications in our relationships with even our closest partners. If JASTA were enacted, courts could potentially consider even minimal allegations accusing U.S. allies or partners of complicity in a particular terrorist attack in the United States to be sufficient to open the door to litigation and wide-ranging discovery against a foreign country -- for example, the country where an individual who later committed a terrorist act traveled from or became radicalized. A number of our allies and partners have already contacted us with serious concerns about the bill. By exposing these allies and partners to this sort of litigation in U.S. courts, JASTA threatens to limit their cooperation on key national security issues, including counterterrorism initiatives, at a crucial time when we are trying to build coalitions, not create divisions.

The 9/11 attacks were the worst act of terrorism on U.S. soil, and they were met with an unprecedented U.S. Government response. The United States has taken robust and wide-ranging actions to provide justice for the victims of the 9/11 attacks and keep Americans safe, from providing financial compensation for victims and their families to conducting worldwide counterterrorism programs to bringing criminal charges against culpable individuals. I have continued and expanded upon these efforts, both to help victims of terrorism gain justice for the loss and suffering of their loved ones and to protect the United States from future attacks. The JASTA, however, does not contribute to these goals, does not enhance the safety of Americans from terrorist attacks, and undermines core U.S. interests.

For these reasons, I must veto the bill.

BARACK OBAMA

THE WHITE HOUSE,
September 23, 2016.

Annex 24

U.S. Department of the Treasury, OFAC Frequently Asked Questions: Iran Sanctions, as of 30 December 2016

U.S. DEPARTMENT OF THE TREASURY

Resource Center

OFAC FAQs: Iran Sanctions

OFAC FAQ Index	General Questions	Sanctions Compliance	Sanctions Lists and Files	Iran Sanctions	Other Sanctions Programs

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- CISADA (Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010)
- Executive Order 13599 (Blocking Property of the Government of Iran and Iranian Financial Institutions)
- NDAA (Section 1245 of the National Defense Authorization Act for Fiscal Year 2012)
- Executive Order 13606 (the GHRAVITY E.O.)
- FSE Executive Order (Prohibiting Certain Transactions with and Suspending Entry into the United States of Foreign Sanctions Evaders with Respect to Iran and Syria)
- Treasury CISADA Findings Against Bank of Kunlun
- Executive Order 13622, "Authorizing Additional Sanctions With Respect to Iran"
- Determination Pursuant to Section 312 of the Iran Threat Reduction and Syria Human Rights Act
- Section 4 of Executive Order "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions with Respect to Iran"
- Iranian Transactions and Sanctions Regulations and the Statement of Licensing Procedure on Support Of Human Rights-, Humanitarian-, and Democracy-Related Activities With Respect to Iran
- Implementation of Section 504 of the Iran Threat Reduction and Syria Human Rights Act of 2012
- Issuance of the Executive Order "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Freedom and Counter-Proliferation Act of 2012 and Additional Sanctions With Respect to Iran" and the Implementation of Certain Provisions of the Iran Freedom And Counter-Proliferation Act of 2012 (IFCA)
- General Licenses (GL) for Agricultural Commodities, Medicine, and Medical Devices in the Iranian Transactions and Sanctions Regulations
- Extension of Temporary Sanctions Relief to Implement the Joint Plan of Action between the P5 + 1 and the Islamic Republic of Iran
- Iranian General License D-1
- Payments or the Facilitation of Payments to Iranian Civil Aviation Authorities for Overflights of Iran or Emergency Landing in Iran
- Joint Comprehensive Plan of Action "Adoption Day"
- Provision of Routine Goods and Services by non-U.S. persons to Diplomatic Missions of the Government of Iran
- The Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day
- Additional Iran-related Questions From Financial Institutions
- Amendments to General Licenses for the Exportation or Reexportation of Agricultural Commoditites, Medicine, and Medical Devices to Iran
- Amendment to the Definition of "Iranian-origin goods" or "goods of Iranian origin" in the Iranian Transactions and Sanctions Regulations

CISADA (Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010)

Print this topic

149. What activities by foreign financial institutions can subject them to CISADA sanctions?

As described in the Iranian Financial Sanctions Regulations, the sanctionable activities of a foreign financial institution are:

- Facilitating the efforts of the Government of Iran (GOI) to acquire or develop Weapons of Mass Destruction (WMD) or delivery systems for WMD or to provide support for terrorist organizations or acts of international terrorism;
- Facilitating the activities of a person subject to financial sanctions pursuant to UNSCRs 1737, 1747, 1803, or 1929, or any other Security Council resolution that imposes sanctions with respect to Iran;
- Engaging in money laundering, or facilitating efforts by the Central Bank of Iran or any other Iranian financial institution, to carry out either of the facilitating activities described above; or
- Facilitating a significant transaction or transactions or providing significant financial services for: (i) the Islamic Revolutionary Guard Corps or any of its agents or affiliates whose property and interests in property are blocked pursuant to the International Emergency Economic Powers Act (IEEPA), or (ii) a financial institution whose property and interests in property are blocked pursuant to IEEPA in connection with Iran's proliferation of WMD, Iran's proliferation of delivery systems for WMD, or Iran's support for international terrorism.

150. Where can I find a list of Islamic Revolutionary Guard Corps (IRGC) affiliates and Iran-linked financial institutions "blocked pursuant to IEEPA"?

The list of blocked IRGC affiliates and blocked Iran-linked financial institutions is dynamic and is based on the identity of "designated" persons, which refers both to natural persons (i.e., individuals) and legal persons (such as corporations and other entities). The most recent list of designated persons – which includes most, but not all, blocked entities* – can be found at www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx. The listings of designated IRGC entities will be followed by the tag [IRGC]; those of designated Iran-linked financial institutions will have the tag [IFSR].

**Under Department of the Treasury regulations, designated persons are those that are named on the list. All interests in property of such persons are blocked, and such persons are considered to have an interest in all property and entities in which they own, directly or indirectly, a 50 percent or greater interest. As a result, such property and entities are also blocked, even if they do not themselves appear on the list.*

151. How do the IFSR define "U.S. financial institutions"?

The Iranian Financial Sanctions Regulations define "U.S. financial institutions" to include: depository institutions, banks, savings banks, money service businesses, trust companies, insurance companies, securities brokers and dealers, commodities exchanges, clearing corporations, investment companies, employee benefit plans, and U.S. holding companies, U.S. affiliates, or U.S. subsidiaries of any of these entities. Covered institutions include those branches, offices, and agencies of foreign financial institutions that are located in the United States.

152. How do the Iranian Financial Sanctions Regulations define "foreign financial institutions"?

The Iranian Financial Sanctions Regulations define "foreign financial institutions" to include foreign depository institutions, banks, savings banks, money service businesses, trust companies, securities brokers and dealers, commodities exchanges, clearing corporations, investment companies,

employee benefit plans, and holding companies, affiliates, or subsidiaries of any of these entities.

153. How do the Iranian Financial Sanctions Regulations (IFSR) define the term "knowingly"?

The term "knowingly" as used in the IFSR means that a person has actual knowledge or should have known of specific conduct, a circumstance, or a result. In other words, the IFSR could be implicated if the Treasury Department finds that a foreign financial institution knew or should have known that it engaged in one or more of the sanctionable activities.

154. How does the Treasury Department determine whether a transaction or financial service is "significant" for purposes of the Iranian Financial Sanctions Regulations?

As set out in the Iranian Financial Sanctions Regulations, in determining whether a transaction or financial service is "significant," the Treasury Department may consider: (1) the size, number, frequency, and nature of the transaction(s); (2) the level of awareness of management of the transaction(s) and whether or not the transaction(s) are a part of a pattern of conduct; (3) the nexus between the foreign financial institution involved in the transaction(s) and a blocked Islamic Revolutionary Guard Corps individual or entity or blocked Iran-linked financial institution; (4) the impact of the transaction(s) on the goals of CISADA; (5) whether the transaction(s) involved any deceptive practices; and (6) other factors the Treasury Department deems relevant on a case-by-case basis.

155. When are the prohibitions and strict conditions on foreign financial institutions' correspondent accounts or payable-through accounts in the United States effective?

A finding by the Treasury Department that a foreign financial institution knowingly engages in one or more of the sanctionable activities is necessary before the Treasury Department can prohibit or impose strict conditions on the opening or maintaining in the United States of correspondent accounts or payable-through accounts for that foreign financial institution.

156. How will U.S. and foreign financial institutions know that the Treasury Department has made such a finding?

As a general matter, the Treasury Department will reach out to foreign financial institutions to inquire about their conduct before making a finding. If the Treasury Department decides to impose strict condition(s), the Treasury Department will issue an order or a regulation that sets out the strict condition(s) to be imposed on the U.S. correspondent accounts or U.S. payable-through accounts of the relevant foreign financial institution and publish the order or regulation in the Federal Register. The Federal Register is available at www.gpo.gov/fdsys/. If the Treasury Department decides to prohibit the opening or maintaining of U.S. correspondent accounts or U.S. payable-through accounts for a foreign financial institution, the Treasury Department will add the name of the foreign financial institution to the Appendix to the Iranian Financial Sanctions Regulations and publish it in the Federal Register.

157. How will the Treasury Department enforce the Iranian Financial Sanctions Regulations (IFSR) with respect to U.S. entities?

Any U.S. person who violates the correspondent account provisions of the IFSR may be subject to civil penalties of up to the greater of $250,000 or twice the transaction value, and criminal penalties for willful violations of up to $1 million and 20 years in prison. A U.S. financial institution may be subject to civil penalties of up to the greater of $250,000 or twice the transaction value, if any person that it owns or controls violates the IFSR prohibition on engaging in any transaction with or benefitting the Islamic Revolutionary Guard Corps or any of its agents or affiliates whose property and interests in property are blocked pursuant to IEEPA, and if the U.S. financial institution knew or should have known that the person violated the Iranian Financial Sanctions Regulations.

158. Can the application of any part(s) of the Iranian Financial Sanctions Regulations be waived by the Department of the Treasury?

CISADA provides for a waiver of the sanctions under the Iranian Financial Sanctions Regulations if the Secretary of the Treasury determines that a waiver is necessary to the national interest of the United States.

159. Where can I find the text of the Iranian Financial Sanctions Regulations?

The text of the Iranian Financial Sanctions Regulations can be found at: www.treasury.gov/resource-center/sanctions/Programs/Documents/fr75_49836.pdf.

Executive Order 13599 (Blocking Property of the Government of Iran and Iranian Financial Institutions)

Print this topic

On February 5, 2012, the President signed Executive Order 13599 to implement section 1245(c) of the National Defense Authorization Act for Fiscal Year 2012, Public Law 112-81 ("NDAA") and to take additional steps with respect to Iran. Effective as of 12:01 a.m. eastern standard time on February 6, 2012, the order blocks all property and interests in property of the Government of Iran (including the Central Bank of Iran), all Iranian financial institutions, and all persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the order. [02-06-2012]

160. Section 1 of E.O. 13599 blocks all property and interests in property of the Government of Iran, including the Central Bank of Iran, and of all Iranian financial institutions, that are in the United States, that come within the United States, or that come within the possession or control of U.S. persons (including overseas branches). Can you provide further clarification about this provision of E.O. 13599?

E.O. 13599 requires U.S. persons to block (i.e., freeze) all property and interests in property of the Government of Iran, including the Central Bank of Iran, and of all Iranian financial institutions, which also includes the Central Bank of Iran. This means that all individuals and entities that meet the definition of "Government of Iran" ("GOI") as defined by section 7(d) of the new E.O. as well as all Iranian financial institutions (whether or not they meet the definition of the GOI) are now blocked. Previously, under the Iranian Transactions Regulations, 31 C.F.R. part 560 (the "ITR"), financial institutions and other U.S. persons were prohibited from engaging in transactions with the GOI. Under those prior rules, U.S. financial institutions receiving instructions to execute transactions involving these entities were not required to block the transactions, but were instead required to reject those instructions rather than carry them out, unless the transactions were exempt, authorized, or not prohibited by OFAC. The Executive Order defines an "Iranian financial institution" as a financial institution organized under the laws of Iran or any jurisdiction within Iran (including foreign branches), any financial institution in Iran, any financial institution, wherever located, owned or controlled by the Government of Iran, and any financial institution, wherever located, owned or controlled by any of the aforementioned entities.

As a result, transactions involving entities bearing the [IRAN] tag on OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN List") will now need to be blocked unless exempt or authorized by OFAC. Going forward, the [IRAN] tag will connote that a person or entity meets the definition of the term "GOI" or "Iranian Financial Institution". OFAC will continue to update the SDN List and may add, delete, or edit entries as appropriate.

E.O. 13599 blocks the property and interests in property of any individual or entity that comes within its definition of the term "Government of Iran" regardless of whether it is listed on the SDN List, and similarly it blocks the property and interests in property of all Iranian financial institutions as defined in the order regardless of whether the Iranian financial institution is listed on the SDN List.

E.O. 13599 builds upon the prohibitions in the ITR, which remain in effect.

Please note, pursuant to OFAC guidance, even when an entity does not itself appear on the SDN List or otherwise meet the definition of the GOI or an Iranian financial institution, the property and interests in property of that entity are blocked if the entity is owned, directly or indirectly, 50% or more by a person whose property and interests in property are blocked pursuant to an Executive Order or regulations administered by OFAC. [02-06-2012]

161. If all property and interests in property of the Government of Iran, including the Central Bank of Iran, and of all Iranian financial institutions are blocked, can I conduct transactions involving the Government of Iran that have been previously authorized by OFAC?

Generally yes. Under new General License A, almost all transactions that are authorized under existing general licenses issued pursuant to the ITR or under existing OFAC specific licenses will continue to be authorized under the authority of E.O. 13599. However, transactions previously

authorized under one existing ITR general license are not authorized pursuant to E.O. 13599. Specifically, the closing of accounts of the Government of Iran or an Iranian financial institution and the lump sum transfer of the balances to an account outside of the United States, which is authorized by sections 560.517(a)(3) & (b)(2) of the ITR, is not authorized by General License A, and, therefore, those transactions are prohibited by E.O. 13599 and the accounts must be blocked. In addition, General License A does not authorize any payments from blocked funds or debits to blocked accounts, with a limited exception for payments from funds or debits to accounts blocked under the Iranian Assets Control Regulations (the hostage crisis blocking program that began in 1979) that are authorized by specific licenses issued by OFAC.

New General License B authorizes U.S. depository institutions and U.S. registered brokers or dealers in securities to process noncommercial, personal remittances, to or from Iran, or for or on behalf of individuals ordinarily resident in Iran who are not included in the term "Government of Iran", provided that such funds transactions are not made by, to, or through a financial institution blocked pursuant to the Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 C.F.R. part 544 (the "WMDPSR"), or the Global Terrorism Sanctions Regulations, 31 C.F.R. part 594 (the "GTSR"), or a person whose property and interests in property are blocked pursuant to any other part of 31 C.F.R. chapter V, or any Executive order, except an Iranian financial institution whose property and interests in property are blocked solely pursuant to E.O. 13599.

Transactions not previously authorized by OFAC that involve property or interests in property of the Government of Iran, including the Central Bank of Iran, or of Iranian financial institutions must be blocked. [02-06-2012]

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162. Are U.S. persons still required to comply with the Iranian Transactions Regulations?

Yes. E.O. 13599 builds upon the prohibitions of the ITR, and the prohibitions of the ITR remain in effect. [02-06-2012]

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163. What are the differences and similarities between E.O. 13599 and the Iranian Transactions Regulations?

The ITR prohibit virtually all direct or indirect transactions involving Iran or the Government of Iran by U.S. persons or with a nexus to the United States, unless otherwise authorized by OFAC or exempted by statute, but they do not contain blocking provisions. E.O. 13599 requires U.S. persons to block all property and interests in property of the Government of Iran, including the Central Bank of Iran, and of Iranian financial institutions, which also includes the Central Bank of Iran, unless it relates to a transaction that is exempted by statute or authorized by OFAC.

To illustrate the difference between how a transaction would be treated under the ITR and the new E.O., imagine a commercial wire transfer being processed through the U.S. financial system by order of a third-country, non-U.S. company for credit to a third-country financial institution in favor of a correspondent account it maintains for an Iranian financial institution. The transaction is not exempt or authorized by a general or specific license, and the Iranian bank is not blocked pursuant to the GTSR or the WMDPSR. Previously, under the ITR, any U.S. financial institution handling the transaction would have needed to reject the payment because allowing it to be processed would constitute a prohibited exportation of services to Iran. With the new E.O. in place, the U.S. financial institution would be required to block ("freeze") that transaction. [02-06-2012]

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164. The Iranian Transactions Regulations authorize U.S. depository institutions and U.S. registered brokers or dealers in securities to process transfers of funds to or from Iran if the transfer is a non-commercial, personal remittance. Are U.S. depository institutions and U.S. registered brokers or dealers in securities still authorized to process such payments to or from a Government of Iran-owned bank that is not otherwise designated pursuant to another part of 31 C.F.R. Chapter V?

General License B under E.O. 13599 authorizes U.S. depository institutions and U.S. registered brokers or dealers in securities to process noncommercial, personal remittances to or from Iran provided that the payment is not made by, to, or through a financial institution designated by OFAC under the WMDPSR, or the GTSR, or a person whose property and interests in property are blocked pursuant to any other part of 31 C.F.R. chapter V, or any Executive order, except an Iranian financial institution whose property and interests in property are blocked solely pursuant to E.O. 13599. Exempt or authorized transactions to or from Iran may also be processed subject to the above conditions.

Such transactions must be processed through a third country, as U.S. banks are prohibited from operating correspondent accounts for Iranian banks. The transactions may involve the use of blocked Iranian financial institutions as long as the Iranian financial institution is blocked solely pursuant to E.O. 13599 (and not pursuant to any other Executive order or part of 31 C.F.R. chapter V) and there is a third-country, non-U.S. financial institution as an intermediary between the U.S. financial institution and the Iranian financial institution. [02-06-2012]

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165. To what extent are U.S. persons expected to conduct enhanced due diligence to determine if transactions contain a Government of Iran interest?

E.O. 13599 requires U.S. persons to block all property and interests in property of the Government of Iran, unless otherwise exempt or authorized by OFAC.

Please contact the OFAC Hotline at 202-622-2490 or 1-800-540-6322, or by email at OFAC_Feedback@treasury.gov, for guidance regarding entities that you suspect are owned or controlled by the Government of Iran that do not appear on the SDN List. As a general matter, OFAC expects financial institutions to conduct due diligence on their own direct customers (including, for example, their ownership structure) to confirm that those customers are not persons whose property and interests in property are blocked.

With regard to other types of transactions where a financial institution is acting solely as an intermediary and fails to block transactions involving a sanctions target, OFAC will consider the totality of the circumstances surrounding the bank's processing of the transaction to determine what, if any, regulatory response is appropriate. [02-06-2012]

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166. OFAC's SDN List contains a list of entities identified by OFAC as being the Government of Iran. Should U.S. persons now block the property and interests in property of those entities?

Yes, U.S. persons should now block the property and interests in property of the Government of Iran entities appearing on the SDN List, unless OFAC has authorized the underlying transaction or the transaction is exempt. [02-06-2012]

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167. OFAC has granted my company a license under the Trade Sanctions Reform and Export Enhancement Act of 2000 ("TSRA") and the ITR. Can I continue to conduct the licensed transaction?

Under General License A issued pursuant to E.O. 13599, transactions authorized under existing specific licenses issued pursuant to TSRA and the ITR are authorized under E.O. 13599 until the specific license expires, per the terms of the license. [02-06-2012]

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168. OFAC has issued me a (non-TSRA) specific license related to Iran, or the Government of Iran. Can I continue to conduct the licensed transactions?

Under General License A issued pursuant to E.O. 13599, transactions authorized by (non-TSRA) specific licenses issued prior to the issuance of E.O. 13599 and issued pursuant to any part of 31 C.F.R. chapter V are also authorized under E.O. 13599. As set forth in General License A, in most cases these new authorizations under E.O. 13599 are in effect until theexpiration date of the individual specific license, or, if the specific license has no expiration date, until April 6, 2012. [02-06-2012]

NDAA (Section 1245 of the National Defense Authorization Act for Fiscal Year 2012)

Print this topic

On December 31, 2011, the President signed into law the National Defense Authorization Act for Fiscal Year 2012, Public Law 112-81 ("NDAA"). Section 1245 of this statute requires the President to block the property and interests in property subject to U.S. jurisdiction of all Iranian financial institutions, including the Central Bank of Iran ("CBI"). It also aims to reduce Iranian oil revenues and discourage transactions with the CBI by providing for sanctions on foreign financial institutions that knowingly conduct or facilitate certain significant financial transactions with the CBI. Although the sanctions on foreign financial institutions authorized by section 1245 are similar to the financial sanctions under the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (22 U.S.C. 8513(c)) ("CISADA") (i.e., prohibiting and/or imposing strict conditions on opening or maintaining correspondent accounts or payable-through accounts in the United States), there are differences in the scope and operation of the two statutes. [02-14-2012]

169. What is the NDAA?

On December 31, 2011, the President signed into law the NDAA. Section 1245 of the NDAA requires the President to block the property and interests in property subject to U.S. jurisdiction of all Iranian financial institutions, including the CBI. It also aims to reduce Iranian oil revenues and discourage transactions with the CBI by providing for sanctions on foreign financial institutions that knowingly conduct or facilitate certain significant financial transactions with the CBI. [02-14-2012]

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170. What activities can trigger sanctions on a foreign financial institution under the NDAA?

For private financial institutions, the Act mandates that the President sanction those institutions that are found to knowingly conduct or facilitate any significant transactions with a U.S.-designated Iranian financial institution or with the CBI – whether for the purchase of petroleum or otherwise – unless the transaction is for the sale of food, medicine, or medical devices to Iran. For all transactions with the CBI other than petroleum purchases, this provision takes effect on February 29, 2012, i.e., 60 days after the enactment of the Act. The timing of the petroleum purchase sanctions is discussed immediately below.

Private financial institutions and all other foreign financial institutions – including central banks or foreign state-owned or -controlled banks – potentially face sanctions under the NDAA if they knowingly conduct or facilitate significant financial transactions for the purchase of Iranian petroleum or petroleum products with a U.S.-designated Iranian financial institution or with the CBI after the provision takes effect as early as June 28, 2012, i.e., 180 days after enactment.* This NDAA provision may be held in abeyance beyond June 28, 2012, depending on the President's determination on the availability and price of alternative supplies. Foreign central and foreign state-owned or -controlled banks are also subject to these sanctions if the transactions are for the sale of petroleum or petroleum products to Iran and they occur after June 28, 2012.

All foreign financial institutions, including private and state-owned institutions, remain subject to section 104(c) of CISADA, which calls for sanctions on foreign financial institutions that are found to have knowingly engaged in facilitating significant transactions for specific Iranian-linked individuals and entities. (See CISADA: The New U.S. Sanctions on Iran, available at http://www.treasury.gov/resource-center/sanctions/Programs /Documents/CISADA_english.pdf .) [02-14-2012]

**Irrespective of the timeframes set forth in the NDAA, any foreign financial institution that knowingly facilitates significant transactions with any U.S.-designated Iranian financial institution would still be subject to CISADA.*

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171. Does the NDAA repeal or amend Section 104(c) of CISADA?

No. Any foreign financial institution that knowingly facilitates significant transactions or provides significant financial services for a U.S.-designated, Iranian-linked financial institution can be sanctioned under section 104(c) of CISADA and section 561.201 of the Iranian Financial Sanctions Regulations ("IFSR") even if those transactions are not sanctionable under section 1245(d) of the NDAA. Though the NDAA imposes sanctions on foreign financial institutions similar to financial sanctions under CISADA and the IFSR (i.e., prohibiting and/or imposing strict conditions on opening or maintaining correspondent accounts or payable-through accounts in the United States), there are differences in the scope and operation of the statutes. [02-14-2012]

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172. How does Executive Order 13599, "Blocking Property of the Government of Iran and Iranian Financial Institutions," and the blocking of all Iranian financial institutions affect the financial sanctions provisions in CISADA? Do CISADA sanctions now apply to financial transactions with any Iranian financial institution?

CISADA applies to transactions with only those Iranian financial institutions that are designated in connection with Iran's WMD or terrorism activities and are denoted on OFAC's List of Specially Designated Nationals and Blocked Persons (the SDN list) with the [IFSR] tag. While E.O. 13599 does block the property of all Iranian financial institutions, that action is not grounded in the authorities that relate to counterproliferation or counterterrorism, and therefore does not implicate CISADA. [02-14-2012]

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173. Are there any exceptions to the sanctions provisions in the NDAA?

Yes. The NDAA includes an exception that prohibits the President from imposing sanctions "with respect to any person for conducting or facilitating a transaction for the sale of food, medicine, or medical devices to Iran." [02-14-2012]

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174. What are definitions for the following NDAA terms: "significant financial transaction," "knowingly," "owned or controlled by the government of a foreign country," "food, medicine, and medical devices," "foreign financial institution," "Iranian financial institution," "significantly reduced," and "whether the price and supply of petroleum and petroleum products produced in countries other than Iran is sufficient"?

"significant financial transaction"

The IFSR, which implement section 104(c) of CISADA, identify factors to be used in determining what is significant (as it relates to transactions) in 31 C.F.R § 561.404, which allows the Secretary of the Treasury to consider the "totality of the facts and circumstances" while providing a list of seven broad factors that can play a role in the determination, including: (1) the size, number, and frequency of transactions; (2) the nature of the transaction(s); (3) the level of awareness of management and whether the transaction(s) are part of a pattern of conduct; (4) the nexus between the transaction(s) and a blocked person; (5) the impact of the transaction(s) on statutory objectives; (6) whether the transaction(s) involve deceptive practices; and (7) such other factors that the Secretary deems relevant on a case-by-case basis. Treasury anticipates closely modeling the definition of "significant" for NDAA purposes on the IFSR.

We anticipate utilizing a broad definition of "financial transaction" that encompasses "any transfer of value involving a financial institution." The term "transaction" includes, but is not limited to, the following:

- The holding of nostro, vostro, or loro accounts for or with the Central Bank of Iran or designated banks, such as Bank Melli Iran and/or Bank Saderat Iran, including any of their branches or subsidiaries worldwide (collectively the "Listed Parties");
- The provision of trade finance and/or letter of credit services for or with Listed Parties;
- The provision of guarantees or similar instruments for or with Listed Parties;
- The provision of investment products or instruments for Listed Parties and/or the participation with Listed Parties in investments;
- The receipt or origination of wire transfers on behalf of or involving Listed Parties;
- The acceptance of commercial paper (both retail and wholesale) drawn on Listed Parties, and the clearance of such paper (including, but not limited to, checks and similar drafts);
- The receipt or origination of ACH or ATM transactions with Listed Parties; and/or
- *Any* other transactions for or on behalf of, directly or indirectly, Listed Parties and/or with Listed Parties serving as correspondents, respondents, or beneficiaries. That would include transactions where the Listed Parties do not appear on the face of the transaction but where the transaction is undertaken with knowledge of the involvement of a Listed Party based on a relationship that exists through a third party such as a money exchange or trading house.

"**knowingly**"

The IFSR defines "knowingly" with respect to conduct, a circumstance, or a result, to mean that an entity or individual had actual knowledge, or should have known, about the conduct, the circumstance, or the result. 31 C.F.R. § 561.314. Treasury anticipates closely modeling the definition of this term on the IFSR.

"owned or controlled by the government of a foreign country"

The Iranian Transactions Regulations ("ITR") define "an entity owned or controlled by the Government of Iran" in section 560.313. Borrowing from that definition, a financial institution "owned or controlled by the government of a foreign country" would be deemed to include a financial institution in which a foreign government owns a 50% or greater interest or which is otherwise controlled by a foreign government. Treasury anticipates closely modeling the definition of this term under the NDAA on the ITR definition.

"food, medicine, and medical devices"

"Food": The October 2011 general license for the ITR and the Sudanese Sanctions Regulations ("SSR") authorizing certain food exports to Iran and Sudan defines "food" as "items that are intended to be consumed by and provide nutrition to humans or animals in Iran – including vitamins and minerals, food additives and supplements, and bottled drinking water – and seeds that germinate into items that are intended to be consumed by and

provide nutrition to humans or animals in Iran." The regulations also specify that food does not include alcoholic beverages, cigarettes, gum, or fertilizer. Treasury anticipates closely modeling the definition of this term under the NDAA on this license definition.

"Medicine": ITR section 560.530(e)(2) states that: "For the purposes of this part, the term medicine has the same meaning given the term 'drug' in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321) but does not include any item listed on the Commerce Control List in the Export Administration Regulations, 15 CFR part 774, supplement no. 1 (excluding items classified as EAR 99)." Similarly, under the Trade Sanctions Reform and Export Act ("TSRA"), 22 U.S.C. 7201(5), "[t]he term 'medicine' has the meaning given the term "drug" in section 321 of title 21." Treasury anticipates closely modeling the definition of this term under the NDAA on the ITR and TSRA.

"Medical Devices": ITR section 560.530(e)(3) states that: "For the purposes of this part, the term medical device has the meaning given the term 'device' in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 321) but does not include any item listed on the Commerce Control List in the Export Administration Regulations, 15 CFR part 774, supplement no. 1 (excluding items classified as EAR 99)." Similarly, under TSRA, 22 U.S.C. 7201(4), "[t]he term "medical device" has the meaning given the term 'device' in section 321 of title 21." Treasury anticipates closely modeling the definition of this term under the NDAA on the ITR and TSRA.

"foreign financial institution"

"Foreign financial institution" is defined in section 1245 of the NDAA with reference to section 104(i) of CISADA (22 U.S.C. § 8513(i)). As further defined in the IFSR, a "foreign financial institution" is "any foreign entity that is engaged in the business of accepting deposits, making, granting, transferring, holding, or brokering loans or credits, or purchasing or selling foreign exchange, securities, commodity futures or options, or procuring purchasers and sellers thereof, as principal or agent. It includes but is not limited to depository institutions, banks, savings banks, money service businesses, trust companies, securities brokers and dealers, commodity futures and options brokers and dealers, forward contract and foreign exchange merchants, securities and commodities exchanges, clearing corporations, investment companies, employee benefit plans, and holding companies, affiliates, or subsidiaries of any of the foregoing." 31 C.F.R. § 561.308. It does not include "the international financial institutions identified in 22 U.S.C. 262r(c)(2), the International Fund for Agricultural Development, or the North American Development Bank." 31 C.F.R. § 561.308. Treasury anticipates closely modeling the definition of this term under the NDAA on the IFSR.

"Iranian financial institution"

This term is defined in E.O. 13599 as: "a financial institution organized under the laws of Iran or any jurisdiction within Iran (including foreign branches), any financial institution in Iran, any financial institution, wherever located, owned or controlled by the Government of Iran, and any financial institution, wherever located, owned or controlled by any of the foregoing." Such financial institutions include, but are not limited to, any foreign entity that is engaged in the business of accepting deposits, making, granting, transferring, holding, or brokering loans or credits, or purchasing or selling foreign exchange, securities, or commodity futures or options, or procuring purchasers and sellers thereof, as principal or agent. It includes but is not limited to depository institutions, banks, savings banks, money service businesses, trust companies, insurance companies, securities brokers and dealers, commodity futures and options brokers and dealers, forward contract and foreign exchange merchants, securities and commodities exchanges, clearing corporations, investment companies, employee benefit plans, and holding companies, affiliates, or subsidiaries of any of the foregoing.

"significantly reduced"

The Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of Energy, and the Director of National Intelligence, will make determinations as to whether any country has significantly reduced the volume of Iranian crude oil purchases. Any determinations will be preceded by a process of rigorous due diligence. The Secretary of State intends to consider relevant evidence in assessing each country's efforts to reduce the volume of crude oil imported from Iran, including the quantity and percentage of the reduction in purchases of Iranian crude oil over the relevant period, termination of contracts for future delivery of Iranian crude oil, and other actions that demonstrate a commitment to substantially decrease such purchases.

"whether the price and supply of petroleum and petroleum products produced in countries other than Iran is sufficient"

The President will make a determination, based on the reports required by subparagraph (A) of Section 1245(d)(4) of the NDAA, as to whether the price and supply of petroleum and petroleum products produced in countries other than Iran is sufficient to permit purchasers of petroleum and petroleum products from Iran to reduce significantly in volume their purchases from Iran. [02-14-2012]

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175. What is the scope of "petroleum products" under the law?

As defined by the U.S. Energy Information Administration (EIA), petroleum products include unfinished oils, liquefied petroleum gases, pentanes plus, aviation gasoline, motor gasoline, naphtha-type jet fuel, kerosene-type jet fuel, kerosene, distillate fuel oil, residual fuel oil, petrochemical feedstocks, special naphthas, lubricants, waxes, petroleum coke, asphalt, road oil, still gas, and miscellaneous products obtained from the processing of crude oil (including lease condensate), natural gas, and other hydrocarbon compounds. In keeping with the EIA's standard definition, petroleum products do not include natural gas, liquefied natural gas, biofuels, methanol, and other non-petroleum fuels. [02-14-2012]

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176. If oil is being provided as payment for an outstanding debt, is such a transfer considered a "financial transaction"?

If a transfer involves a financial institution it would likely be considered a financial transaction. [02-14-2012]

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177. If the CBI is involved in providing settlement services for a transaction, or is otherwise acting solely as an intermediary in a transaction between a non-designated Iranian bank and a foreign financial institution, is the foreign financial institution deemed to be engaging in a transaction with the CBI?

Section 1245 targets any significant transactions "with" the CBI; a transaction involving the CBI in an intermediary role would likely be viewed as a transaction "with" the CBI. [02-14-2012]

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178. Are barter trades involving the CBI considered "financial transactions" under Section 1245?

If a transfer involves a financial institution it would likely be considered a financial transaction. [02-14-2012]

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179. Does the definition of "significant financial transaction" exclude the passive holding of CBI reserves? Is the U.S. willing to give assurances that this will not be a basis for sanctions?

This will be a case-by-case determination and will require specifics on what "passive holding" entails. As a general matter, we would likely not view the holding of reserves as sanctionable in the following circumstances: the accounts are frozen or restricted, under which the CBI would be allowed to maintain accounts that it had already opened as of December 31, 2011, but would otherwise be unable to direct the disposition of those funds, with ordinary commercial interest payments and routine roll-overs of time deposits under pre-existing instructions being the only new transactions. [02-14-2012]

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180. Are payments made under contracts existing prior to the date of enactment of the NDAA statute (December 31, 2011) exempted from the definition of "significant transactions"?

No general exception will be provided for payments arising out of pre-existing contracts. The assessment of whether such payments are "significant" will be done on a case-by-case basis in line with the criteria discussed above. [02-14-2012]

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181. Will the U.S. refrain from sanctioning foreign financial institutions that receive funds from the CBI to repay loans? What if these loans were granted for projects that might be subject to the food, medicine, and medical device exemptions under the NDAA?

As noted, no general exception will be provided for payments arising out of pre-existing contracts. The assessment of whether such payments are "significant" will be done on a case-by-case basis in line with the criteria discussed above. Regarding payments for food, medicine, and medical devices, the NDAA does not allow sanctions based on transactions for the sale of food, medicine, or medical devices to Iran. Payments related to the export of broader humanitarian items would be dealt with in our analysis of what constitutes a "significant financial transaction" and would be considered on a case-by-case basis. [02-14-2012]

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182. Is there a difference between entities that have been designated by the United States Government for illicit conduct, such as

proliferation of weapons of mass destruction or support for terrorism, and those that are being blocked under E.O. 13599? How can I tell which entities appear on the SDN List for which reasons?

Both blocked and designated entities appear on the SDN List.

"Blocked" persons, in the context of E.O. 13599, appear on the SDN List due to the United States Government's identification of these entities as the Government of Iran and/or as an Iranian financial institution. Such entities are identified on the SDN List with the tag [IRAN]. For example, Bank Keshavarzi is a Government of Iran owned Iranian financial institution and is identified with the [IRAN] tag. Additionally, the National Iranian Oil Company (NIOC) is a non-financial institution that has been identified as the Government of Iran and bears the [IRAN] tag.

"Designated" persons appear on the SDN List due to the United States Government's having determined that they meet the criteria set forth in any of a number of other Executive Orders concerning, for example, assisting Iran's weapons of mass destruction development, or aiding international terrorism and designating them for such activities. Such entities are identified on the SDN List with various tags other than [IRAN], such as [NPWMD] or [SDGT]. For example, Islamic Republic of Iran Shipping Lines is listed as: "IRISL [NPWMD]."

Note that many entries on the SDN List have more than one tag. For example: Bank Saderat Iran has three tags: [SDGT], indicating that it has been sanctioned for providing services to terrorism; [IRAN], indicating that it is the Government of Iran; and [IFSR], referring to the Iranian Financial Sanctions Regulations to signal to third country financial institutions that engage with entities with this tag that they risk sanctions under CISADA. [02-14-2012]

Executive Order 13606 (the GHRAVITY E.O.)

Print this topic

On April 22, 2012, the President signed Executive Order 13606 Blocking The Property And Suspending Entry into the United States of Certain Persons with Respect to Grave Human Rights Abuses by the Governments of Iran and Syria Via Information Technology (the "GHRAVITY E.O."). Effective 12:01 a.m. eastern daylight time on April 23, 2012, the GHRAVITY E.O. blocks all property and interests in property of persons listed in its Annex, and all persons determined by the Secretary of the Treasury, in consultation with or at the recommendation of the Secretary of State, to meet the criteria in the order. [04-23-2012]

183. Why did the President issue the GHRAVITY E.O.?

The GHRAVITY E.O. follows prior Executive orders issued by the President in response to the commission of human rights abuses by the Governments of Iran and Syria. With the GHRAVITY E.O., the President recognized that the commission of serious human rights abuses against the people of Iran and Syria by their governments, facilitated by computer and network disruption, monitoring, and tracking by those governments, threatens the national security and foreign policy of the United States. The GHRAVITY E.O. targets this activity in order to deter and disrupt such abuses. [04-23-2012]

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184. What does the GHRAVITY E.O. do?

The GHRAVITY E.O. blocks (i.e., freezes) the property and interests in property of, among others, any person determined by the Secretary of the Treasury, in consultation with or at the recommendation of the Secretary of State, (1) to have operated, or to have directed the operation of, information and communications technology that facilitates computer or network disruption, monitoring, or tracking that could assist in or enable serious human rights abuses by or on behalf of the Government of Iran or the Government of Syria; or (2) to have sold, leased, or otherwise provided, directly or indirectly, goods, services, or technology to Iran or Syria likely to be used to facilitate such activities.

U.S. persons in possession of property or interests in property belonging to persons listed in the Annex to the GHRAVITY E.O., or designated in the future by Treasury under the E.O., are obligated to block the property and report the blocking to OFAC within 10 days of blocking. Entities that are 50% or more owned by persons blocked by the GHRAVITY E.O. are also blocked, regardless of whether such entities appear on the Annex or OFAC's list of Specially Designated Nationals and Blocked Persons ("SDN list"). [04-23-2012]

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185. What type of activities does the GHRAVITY E.O. target?

The GHRAVITY E.O. targets the provision and use of information and communications technology to facilitate computer or network disruption, monitoring, or tracking that could assist in or enable serious human rights abuses by or on behalf of the Government of Iran or the Government of Syria. It is not intended to block exports of technology that enable the Syrian and Iranian people to freely communicate among themselves and with the outside world.

"Information and communications technology" means any hardware, software, or other product or service primarily intended to fulfill or enable the function of information processing and communication by electronic means, including transmission and display, including via the Internet. [04-23-2012]

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186. How do I know that a person has been designated under the GHRAVITY E.O.?

Persons designated under the GHRAVITY E.O. appear on the publicly available SDN list bearing the [HRIT] tag. U.S. persons are obligated to block property involving the persons bearing the tag [HRIT] on the SDN list, unless the transaction is exempt or otherwise authorized by OFAC. [04-23-2012]

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187. Does the GHRAVITY E.O. prohibit me from exporting technology to companies that do business with Iran or Syria?

This E.O. does not generally prohibit transactions involving persons that do business with Iran or Syria, unless the person has been designated pursuant to this order. You should consult with the Department of Commerce's Bureau of Industry and Security (BIS) regarding exports to companies that do business with Syria. [04-23-2012]

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188. If I am a non-U.S. company that exports information and communications technology to Iran or Syria, will I be designated under the GHRAVITY E.O.?

The measures in this order are designed primarily to address the need to prevent entities located in whole or in part in Iran and Syria from facilitating or committing serious human rights abuses. These measures are not designed to prevent the provision of information and communications technology necessary to enable the Iranian and Syrian people to freely communicate with each other and the outside world. That said, those providing communications technology to Iran or Syria that has the potential to facilitate computer or network disruption, monitoring, or tracking should exercise great caution given Iran and Syria's use of this technology to assist in the commission of serious human rights abuses. [04-23-2012]

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189. Would I need authorization from OFAC or BIS if I wanted to export goods or technology to persons blocked under the GHRAVITY E.O.?

Yes. For more information regarding exports of goods or technology to persons blocked under the GHRAVITY E.O., please contact OFAC or BIS. [04-23-2012]

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190. Are existing licenses issued by the U.S. Government involving persons designated under the GHRAVITY E.O. still valid?

U.S. persons who have been issued licenses involving persons designated under the GHRAVITY E.O. should check with the issuing agency regarding the validity of their licenses. [04-23-2012]

FSE Executive Order (Prohibiting Certain Transactions with and Suspending Entry into the United States of Foreign Sanctions Evaders with Respect to Iran and Syria)

Print this topic

191. What does Executive Order 13608 "Prohibiting Certain Transactions with and Suspending Entry into the United States of Foreign Sanctions Evaders with Respect to Iran and Syria" do?

This Executive Order gives Treasury new authorities. First, it strengthens Treasury's ability to address behavior by foreign individuals and entities determined to have violated, attempted to violate, conspired to violate, or caused a violation of U.S. sanctions on Syria or Iran. This E.O. also gives Treasury the authority to impose sanctions on foreign persons who have facilitated deceptive transactions for or on behalf of persons subject to U.S. sanctions.

Transactions by U.S. persons or within the United States involving persons sanctioned under this authority are prohibited, effectively cutting the listed persons off from the U.S. marketplace and financial system. By cutting off access to the U.S. marketplace and financial system to such sanctions evaders, Executive Order 13608 provides Treasury with a powerful tool to prevent and deter such behavior and to hold such persons accountable and to convince them to change their behavior. Publicly identifying such persons will also allow U.S. persons to avoid unwittingly engaging in transactions with identified foreign persons that may expose U.S. persons to the risk of sanctions violations. [05-01-2012]

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192. Why was this authority needed?

Executive Order 13608 expands Treasury's ability to address the behavior of foreign persons determined to have violated or attempted to violate U.S. sanctions on Syria or Iran, or to have facilitated deceptive transactions on behalf of persons subject to those sanctions, where the foreign person had no physical, financial, or other presence in the United States and did not submit to U.S. administrative proceedings. Treasury may use this authority where it appears that a foreign person violated U.S. sanctions on Iran or Syria but may not meet criteria for designation under existing Executive Orders. Executive Order 13608 will provide a means through which Treasury can limit the risk to U.S. commercial and financial systems posed by foreign persons determined to have violated U.S. sanctions on Iran or Syria, or to have engaged in deceptive transactions for or on behalf of persons subject to U.S. sanctions on Iran or Syria.

Such a listing under Executive Order 13608 also provides Treasury with the capability to put the world on notice as to such foreign persons' activity and the risk of similar future activity. Such identification will help prevent U.S. persons from unwittingly engaging in transactions with foreign persons that may pose a risk of sanctions violations. [05-01-2012]

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193. What are the repercussions of an individual or entity being identified under Executive Order 13608?

If an individual or entity is made subject to sanctions under this authority, U.S. persons generally may no longer provide to or procure from such individual or entity any goods, services, or technology. From a practical standpoint, it means that the sanctioned individual or entity will be cut off from the U.S. commercial and financial systems. [05-01-2012]

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194. Are U.S. persons required to block the property of individuals and entities identified under Executive Order 13608?

No. Identifications or listings under Executive Order 13608 do not block any assets. However, a U.S. person may not provide or procure goods or services, including financial services, or technology to or from a listed person without authorization from OFAC, unless the transaction is otherwise exempt from regulation under the International Emergency Economic Powers Act (e.g., certain travel-related transactions). [05-01-2012]

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336. How do I know whether a person is identified under E.O. 13608?

Please refer to the Foreign Sanctions Evaders (FSE) List. [02-06-2014]

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195. I am a financial institution. What do I do if I receive a wire transfer involving a listed party?

A U.S. financial institution must reject any wire transfer involving a listed person and file a report with OFAC within 10 days. [05-01-2012]

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196. I am a financial institution and I hold an account for a listed person. What do I do with the funds?

The account is not blocked; however, it is restricted and you cannot allow it to be operated without authorization from OFAC. [05-01-2012]

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197. What are U.S. persons obligated to do with property of a person listed under Executive Order 13608?

Property of a listed person is not blocked, but U.S. persons must have authorization from OFAC to provide or procure such property to or from a listed person, or to provide or procure services to or from a listed person in connection with such property. Additionally, wire transfers involving the assets of an Executive Order 13608-listed person must be rejected. [05-01-2012]

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198. May a U.S. person deal with an Executive Order 13608-listed person so long as the dealing does not involve Iran or Syria?

No. U.S. persons are prohibited from all transactions or dealings described in Executive Order 13608 with persons listed under Executive Order 13608, unless authorized by OFAC or where the transaction is otherwise exempt from regulation under the International Emergency Economic Powers Act. [05-01-2012]

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199. How is an identification or listing under Executive Order 13608 different from a designation?

Like a designation, a U.S. person is prohibited, unless authorized by OFAC or if the underlying transaction is exempt from regulation under the International Emergency Economic Powers Act, from dealing with an identified or listed person. Unlike a blocking designation, the property and the interests in property of a person listed under Executive Order 13608 are not blocked. [05-01-2012]

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200. How is this different from lists maintained by the Department of Commerce?

Treasury's authority under Executive Order 13608 has some similarities to Commerce's authority under the Export Administration Regulations ("EAR"). Commerce may impose denial orders on persons (both foreign and U.S.) who have committed violations of the EAR or present an imminent risk of committing a violation. These individuals or organizations are listed on Commerce's Denied Persons List. It is prohibited to deal with Denied Persons in any export transaction involving items (commodities, software, and technology) subject to the EAR. Treasury's authority under Executive Order 13608 complements Commerce's authority by addressing at least two types of sanctions violations that are outside the scope of the EAR. Specifically, Treasury may prohibit the provision of services (in addition to goods and technology) to or from identified or listed persons and Treasury may prohibit transactions or dealings involving goods and technology that are not subject to the EAR. However, unlike Commerce's authority, Treasury's authority to sanction or list an individual or entity under Executive Order 13608 may be implemented only with respect to foreign individuals or entities. [05-01-2012]

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201. May a U.S. person deal with a person listed under Executive Order 13608 in a transaction that was previously licensed by OFAC?

No. U.S. persons cannot have any dealings with a person identified or listed under this Executive Order absent specific authorization from OFAC pursuant to the Executive Order 13608, unless the transaction is exempt from regulation under the International Emergency Economic Powers Act. [05-01-2012]

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202. What if the transaction is already underway?

If a transaction is underway at the time of a listing, a U.S. person must cease dealing with the listed person and the U.S. person is prohibited from engaging in transactions or dealings in or related to any goods, services, or technology to or from the listed person, unless the transaction is exempt under the International Emergency Economic Powers Act, or until such time that OFAC authorizes the transactions pursuant to the Executive Order 13608. Additionally, if the transaction underway involves a wire transfer, a U.S. financial institution must reject it and file a report with OFAC within 10 days.

Like all of its programs, OFAC has the authority under Executive Order 13608 to license transactions that are consistent with U.S. foreign policy. [05-01-2012]

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203. Can a U.S. person use a listed person to facilitate personal remittances to or from Iran or Syria?

No. Without specific authorization from OFAC, U.S. persons cannot use a listed person to process personal remittances. [05-01-2012]

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204. Will Treasury pursue an enforcement action before identifying or listing a person pursuant to Executive Order 13608?

The authorities granted under this Executive Order are in addition to current authorities that Treasury has to pursue an enforcement action for violations of U.S. law, and Treasury is not required to pursue a civil enforcement action prior to identifying or listing a person pursuant to Executive Order 13608. [05-01-2012]

Treasury CISADA Findings Against Bank of Kunlun

Print this topic

207. What were the criteria for this finding? How many other institutions were you looking at and why did you decide to take action against Bank of Kunlun?

Based on information made available to the Treasury Department, the Department has found that China's Bank of Kunlun has knowingly facilitated significant transactions for various Iranian-linked banks designated by the United States under our WMD or terrorism authorities.

Upon finding that Bank of Kunlun was knowingly engaged in these activities that are sanctionable under CISADA, the Secretary of the Treasury has prohibited U.S. banks from opening or maintaining correspondent accounts or payable-through accounts in the United States for Bank of Kunlun – effectively cutting off Bank of Kunlun's direct access to the U.S. financial system.

Since CISADA was signed into law in July 2010, Treasury has engaged with over 120 financial institutions and bank regulators in more than 60 countries all over the world to brief them on the financial provisions of CISADA, and, in cases where we had specific concerns, has shared information about those concerns.

This global engagement campaign has proven highly successful, as we have seen the overwhelming majority of financial institutions with which we have engaged change their business practices – even close any correspondent accounts with U.S. designated Iranian banks – to ensure that their access to the U.S. financial system is not put at risk.

The July 31, 2012 action against Bank of Kunlun was in response to its ongoing relationships with U.S.-designated Iranian banks.

Note: The Treasury Department had also made a CISADA finding against Iraq's Elaf Islamic Bank on July 31, 2012. On May 17, 2013, Elaf Islamic Bank was delisted and its name was removed from the Part 561 List. [05-17-2013]

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208. How are you defining "significant" transactions and financial services?

In determining whether transactions or financial services are significant, the Secretary of the Treasury may consider a number of factors related to the transactions or services, including, but not limited to: size, number, and frequency; type, complexity and commercial purpose; the level of awareness or involvement by the bank's management; whether the activity or payment illustrates a pattern of practice or is an isolated event; the ultimate economic benefit conferred upon the designated person(s); and whether the transactions involved the use of deceptive financial practices to obscure the identities of the parties involved.

Bank of Kunlun

Bank of Kunlun has provided hundreds of millions of dollars' worth of services to U.S. designated Iranian banks. These financial services include maintaining accounts, transferring payments, and serving as the paying bank for letters of credit opened by U.S. designated Iranian banks. The facilitation of hundreds of millions of U.S. dollars worth of transactions with U.S. designated Iranian banks over the past year is significant.

In 2012, after Treasury designated Bank Tejarat, Bank of Kunlun transferred hundreds of payments totaling approximately $100 million dollars for accounts it holds for Bank Tejarat and made a payment for an IRGC affiliate pursuant to a letter of credit opened by Bank Tejarat. [05-17-2013]

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209. What happens to the correspondent and payable-through accounts held by Bank of Kunlun in the United States?

To our knowledge, Bank of Kunlun does not currently hold correspondent accounts with U.S. financial institutions.

The July 31, 2012 action prohibits financial institutions in the United States from opening or maintaining correspondent or payable-through accounts for Bank of Kunlun. [05-17-2013]

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210. What are the consequences for a U.S. financial institution that maintains or opens a new correspondent or payable-through account for Bank of Kunlun?

A U.S. financial institution that maintains or opens a correspondent or payable-through account for Bank of Kunlun is subject to civil penalties in the amount of up to $250,000 or twice the value of the transaction, whichever is greater.

Criminal penalties of up to $1 million can be imposed for willful violations, and individuals who willfully violate the prohibition can face up to 20 years in prison. [05-17-2013]

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211. If a foreign financial institution continues to do business with Bank of Kunlun, could that lead to a CISADA finding against the other institution?

Any foreign financial institution that knowingly facilitates significant transactions on behalf of designated Iranian banks – whether directly or indirectly – may face CISADA sanctions. OFAC defines "knowingly" in this context as meaning the financial institution knew or should have known of the conduct, circumstance, or result. Bank of Kunlun has demonstrated its willingness to move hundreds of millions dollars on behalf of designated Iranian banks. Accordingly, we would expect heightened due diligence in any dealings with Bank of Kunlun. [05-17-2013]

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212. Does this finding affect Bank of Kunlun's branches or subsidiaries around the world? Does this finding affect any holding companies?

The prohibitions implemented as a result of today's action apply to Bank of Kunlun and all of its offices, around the world. [05-17-2013]

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213. Are United States financial institutions that do not hold correspondent or payable-through accounts for Bank of Kunlun required to block or reject transactions that otherwise involve Bank of Kunlun?

No. U.S. financial institutions are not required to block or reject financial or trade transactions that involve Bank of Kunlun.

That said, we would expect heightened due diligence in any dealings with Bank of Kunlun given its demonstrated willingness to facilitate transactions on behalf of Iranian banks designated by well over a dozen countries worldwide. [05-17-2013]

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214. What is the licensing process for U.S. financial institutions that need to conduct transactions in order to close correspondent or payable-through accounts with a foreign financial institution sanctioned pursuant to CISADA?

Treasury regulations provide a 10-day period in which U.S. financial institutions are authorized to engage in the transactions necessary to close an affected account. If a U.S. financial institution that is in the process of closing an affected account seeks to engage in transactions beyond those already authorized, Treasury may issue specific licenses on a case-by-case basis. [05-17-2013]

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215. What is the difference, in practical effect, between this and a designation under one of your other authorities, like E.O. 13382?

The July 31, 2012 CISADA finding prohibits the opening or maintaining of correspondent accounts or payable-through accounts in the United States for Bank of Kunlun. This action does not require the immediate freezing of any assets that Bank of Kunlun may hold within U.S. jurisdiction. [05-17-2013]

Executive Order 13622, "Authorizing Additional Sanctions With Respect to Iran"

Print this topic

On July 30, 2012, the President signed Executive Order 13622 to authorize additional sanctions with respect to Iran. Effective as of 12:01 a.m. Eastern Standard Time on July 31, 2012, the order provides additional sanctions authorities to the Secretary of the Treasury and the Secretary of State. The order builds, in part, on prior authorities set forth in the National Defense Authorization Act for Fiscal Year 2012 ("NDAA") and in the Iran Sanctions Act ("ISA"). [07-31-2012]

216. What does E.O. 13622 "Authorizing Additional Sanctions With Respect to Iran" do?

Executive Order 13622 imposes new sanctions against the Iranian energy and petrochemical sectors.

E.O. 13622 authorizes the Secretary of the Treasury, in consultation with the Secretary of State, to impose financial sanctions on foreign financial institutions found to have knowingly conducted or facilitated any significant financial transaction with the National Iranian Oil Company ("NIOC") or Naftiran Intertade Company ("NICO") (except for sales of refined petroleum products to NIOC or NICO that are below the dollar threshold that could trigger sanctions under ISA). It also provides new authority to impose sanctions on foreign financial institutions found to have knowingly conducted or facilitated significant transactions for the purchase or acquisition of petroleum or petroleum products from Iran through any channel, with the aim of deterring Iran or any other country or institution from establishing workaround payment mechanisms for the purchase of Iranian oil to circumvent the NDAA oil sanctions. The existing exception rules under the NDAA apply to these new sanctions. Thus, countries that are determined by the Secretary of State to have significantly reduced their purchases of Iranian crude oil will be excepted from this new measure as well.

In addition, E.O. 13622 provides new authority to impose sanctions on foreign financial institutions found to have knowingly conducted or facilitated significant transactions for the purchase or acquisition of petrochemical products from Iran.

Finally, E.O. 13622 provides authority for the Secretary of the Treasury to block the property and interests in property of any person determined to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of:

- NIOC, NICO, or the Central Bank of Iran ("CBI"), or
- the purchase or acquisition of U.S. bank notes or precious metals by the Government of Iran.

Additionally, E.O. 13622 grants the Secretary of State, in consultation with the Secretary of the Treasury and other cabinet officials, new powers to impose a range of sanctions on individuals or entities determined to knowingly engage in significant transactions for the purchase or acquisition of petroleum, petroleum products or petrochemical products from Iran. Individuals or entities determined to meet such criteria will be subject to the same sanctions that may be imposed under ISA. [07-31-2012]

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217. Why was this authority needed?

E.O. 13622 further strengthens the Iran sanctions framework by deterring work-around financial transactions involving NIOC or NICO that were not captured under the sanctions previously implemented against the CBI. The E.O. also addresses concerns that the Government of Iran is utilizing sales of petrochemical products to replace revenue lost as a result of previously enacted sanctions. In addition, the E.O. provides additional authority to combat and deter the use of non-bank intermediaries to conduct petroleum and petrochemical trade, provide support to or for the CBI, NIOC or NICO, or procure U.S. bank notes or precious metals for the Government of Iran. [07-31-2012]

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218. What constitutes a "significant" financial transaction under the new E.O. 13622? Is there a certain dollar threshold?

Treasury expects to apply the same framework under section 1 of E.O. 13622 that it has applied under section 1245 of the NDAA and section 104 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"). Under that framework, in determining whether transactions are significant, the Secretary of the Treasury may consider a number of factors related to the transaction or services, including, but not limited to: size, number, and frequency; type, complexity, and commercial purpose; the level of awareness or involvement by the bank's management; whether the activity or payment illustrates a pattern or practice or an isolated event; the ultimate economic benefit conferred upon the sanctions target; and whether the transactions involved the use of deceptive financial practices to obscure the identities of the parties involved. [07-31-2012]

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219. Does E.O. 13622 mean that Iranian trade partners should no longer buy petroleum products from Iran? How will this affect exports of Iranian oil?

These new measures further strengthen the existing comprehensive Iran sanctions framework by deterring work-around financial transactions involving NIOC or NICO that were not being captured under the sanctions previously implemented against the CBI. Iranian trade partners can continue to buy petroleum and petroleum products from Iran without risking sanctions under this E.O. if they have received a significant reduction exception under the NDAA. However, in jurisdictions that do not have a significant reduction exception, the purchase of petroleum or petroleum products and significant dealings with NIOC or NICO may be subject to sanctions under this E.O. [07-31-2012]

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220. Does E.O. 13622 mean you are designating NIOC and NICO? Can countries that have been excepted from NDAA sanctions still purchase oil through these companies without facing sanctions?

All property and interests in property of NIOC and NICO subject to U.S. jurisdiction are already blocked pursuant to E.O. 13599 and U.S. persons are prohibited from all dealings with these entities. This new E.O. 13622 provides authority to sanction foreign financial institutions that knowingly conduct or facilitate any significant financial transaction with NIOC or NICO. Financial institutions in countries that have received a significant reduction exception are not subject to these sanctions for petroleum purchase transactions with NIOC and NICO while the exemption is in effect. [07-31-2012]

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221. E.O. 13622 targets transactions between foreign financial institutions and NIOC or NICO. What about a NIOC or NICO subsidiary? Are transactions with those entities also sanctionable under this E.O.?

Yes. E.O. 13622 defines these terms to include any entity owned or controlled by, or operating for or on behalf, these entities. [07-31-2012]

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222. Does E.O. 13622 make sanctionable activities related to the pipeline project to supply natural gas from the Shah Deniz gas field in Azerbaijan to Europe and Turkey, given that NICO reportedly has a 10 percent stake in the project?

No. The relevant provisions of E.O. 13622 do not apply to transactions involving the pipeline project to supply natural gas from the Shah Deniz gas field in Azerbaijan to Europe and Turkey. [07-31-2012]

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223. Are barter arrangements or other non-cash trade transactions involving petroleum, petroleum products, or petrochemical products originating from Iran sanctionable under the terms of the new E.O. 13622?

Yes. To the extent a financial institution is involved, that financial institution could be sanctioned under E.O. 13622 for a barter arrangement related to the purchase or acquisition of petroleum, petroleum products, or petrochemical products from Iran. In addition, barter transactions knowingly conducted with NIOC, NICO, or the CBI also could result in sanctions – regardless of whether a financial institution is involved – to the extent that those transactions constitute material support for, or services to, NIOC, NICO, or the CBI. [07-31-2012]

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224. What are the definitions of "petroleum products" and "petrochemical products"?

The term "petroleum products" includes unfinished oils, liquefied petroleum gases, pentanes plus, aviation gasoline, motor gasoline, naphtha-type jet fuel, kerosene-type jet fuel, kerosene, distillate fuel oil, residual fuel oil, petrochemical feedstocks, special naphthas, lubricants, waxes, petroleum coke, asphalt, road oil, still gas, and miscellaneous products obtained from the processing of: crude oil (including lease condensate), natural gas, and other hydrocarbon compounds. The term does not include natural gas, liquefied natural gas, biofuels, methanol, and other non-petroleum fuels.

The term "petrochemical products" includes any aromatic, olefin, and synthesis gas, and any of their derivatives, including ethylene, propylene, butadiene, benzene, toluene, xylene, ammonia, methanol, and urea. [07-31-2012]

Determination Pursuant to Section 312 of the Iran Threat Reduction and Syria Human Rights Act

Print this topic

Section 312 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHRA) requires the Secretary of the Treasury, no later than 45

days after the date of the enactment of ITRSHRA, to determine whether the National Iranian Oil Company (NIOC) or the National Iranian Tanker Company (NITC) is an agent or affiliate of Iran's Islamic Revolutionary Guard Corps (IRGC), and to report to Congress on these determinations and the reasons for them. On September 24, 2012, the Department of the Treasury made a determination that NIOC is an agent or affiliate of the IRGC. Based on the information currently available, Treasury is not able to determine at this time whether NITC is an agent or affiliate of the IRGC.

233. Isn't NIOC already subject to sanctions?

Yes. Executive Order 13622 provides for sanctions on foreign financial institutions found to have knowingly conducted or facilitated significant financial transactions with NIOC (except for sales of refined petroleum products to NIOC that fall below the dollar threshold that could trigger sanctions under the Iran Sanctions Act). Executive Order 13622 also provides authority for the Secretary of the Treasury to block the property and interests in property of persons determined to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, NIOC (as well as other specified entities). Note, however, that these sanctions are not applicable to certain transactions related to the Shah Deniz pipeline project, in which NIOC has a minority stake, under Executive Order 13622. In addition, NIOC was already blocked as an entity of the Government of Iran under Executive Order 13599, which was issued pursuant to the International Emergency Economic Powers Act (IEEPA), as amended, among other authorities. Nevertheless, as described below, the determination that NIOC is an agent or affiliate of the IRGC carries consequences.

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234. What is the effect of the NIOC determination? Are there CISADA implications?

As a result of this ITRSHRA section 312 determination, NIOC now is also a person described under section 104(c)(2)(E)(i) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) as an agent or affiliate of the IRGC whose property or interests in property are blocked pursuant to IEEPA. This means that foreign financial institutions determined to knowingly facilitate significant transactions or provide significant financial services for NIOC are exposed to CISADA sanctions, including prohibitions or the imposition of strict conditions on the opening or maintaining of correspondent or payable-through accounts in the United States.

In addition, section 302 of ITRSHRA requires sanctions on foreign persons determined to have knowingly provided certain material support to, or engaged in significant transactions with, the IRGC or its officials, agents, or affiliates whose property or interest in property are blocked. Consequently, foreign persons that knowingly engage in significant transactions with NIOC after the September 24, 2012 determination could be exposed to sanctions.

An "IRGC" identifier will be added to NIOC's entry on the Specially Designated Nationals and Blocked Persons List available on OFAC's website.

As noted below, the potential application of sanctions under section 104(c)(2)(E)(i) of CISADA and section 302 of ITRSHRA is affected by whether the country with primary jurisdiction has received a significant reduction exception from the Secretary of State.

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235. What are the implications for petroleum purchase transactions involving NIOC by financial institutions and entities in countries that have received a significant reduction exception from the Secretary of State?

Significant transactions, financial services, or material support involving NIOC for the purchase of Iranian petroleum or petroleum products by a foreign financial institution or entity based in a country that has received a significant reduction exception from the Secretary of State do not carry potential sanctions consequences – under CISADA, sections 302 and 312 of ITRSHRA, section 1245 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA), or sections 1 and 2 of Executive Order 13622. Sections 302 and 312 of ITRSHRA authorize the President not to impose sanctions for the purchase of petroleum or petroleum products from Iran if an exception under subsection 1245(d)(4)(D) of the NDAA applies to the country with primary jurisdiction over the foreign financial institution at the time of the transactions or the provision of services. Notwithstanding the foregoing, any significant transaction for other sanctioned entities (such as Iranian designated banks or other persons described in section 104(c)(2)(E) of CISADA) may result in sanctions, regardless of whether the transaction is for the purchase of petroleum or petroleum products and involves NIOC.

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236. Does the determination regarding NITC mean that there is no affiliation between NITC and the IRGC?

This statement means only that, based on the currently available information, Treasury is not able to determine at this time that NITC is an agent or affiliate of the IRGC.

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237. How does the effect of this determination compare to the effect of section 1(a) of Executive Order 13622 as to transactions with NIOC?

The effect of the determination is similar to the effect of Executive Order 13622 section 1(a), which provides for prohibitions on the opening of and prohibitions or strict conditions on maintaining correspondent accounts or payable-through accounts in the United States for foreign financial institutions determined by the Secretary of the Treasury, in consultation with the Secretary of State, to have knowingly conducted or facilitated significant financial transactions with NIOC. Executive Order 13622 likewise contains an exception that covers transactions with NIOC conducted or facilitated by foreign financial institutions based in NDAA-excepted jurisdictions. A significant difference between these authorities is that the NDAA exception in ITRSHRA section 312 is limited to transactions or financial services for the purchase of petroleum or petroleum products from Iran.

Section 4 of Executive Order "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions with Respect to Iran"

Print this topic

Executive Order 13628 of October 9, 2012, "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions with Respect to Iran," ("E.O. 13628") implements certain statutory requirements of the Iran Threat Reduction and Syria Human Rights Act of 2012 (the "TRA"), including amendments to the Iran Sanctions Act and the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010. Specifically, E.O. 13628 implements the requirements of Sections 204, 402, and 403 of the TRA. In addition, consistent with Section 218 of the TRA, Section 4 of E.O. 13628 prohibits foreign subsidiaries (defined below) of United States persons from knowingly violating the Iranian Transactions Regulations, E.O. 13599, section 5 of E.O. 13622, or Section 12 of E.O. 13628, and provides for civil penalties on the U.S. parent company for any such violations.

238. What is the new prohibition on foreign subsidiaries of U.S. persons, and how does it work?

Section 4 of Executive Order 13628 prohibits an entity owned or controlled by a U.S. person and established or maintained outside the United States (a "foreign subsidiary") from knowingly engaging in any transaction, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran, if that transaction would be prohibited by certain Executive orders prohibiting trade and other dealings with, and investment in, Iran and blocking the Government of Iran and Iranian financial institutions, or any regulation issued pursuant to the foregoing, if the transaction were engaged in by a United States person or in the United States. Civil penalties for the foreign subsidiary's violation shall be applied to the U.S. parent company to the same extent that they would apply to a U.S. person for the same conduct. [10-9-2012]

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239. Are foreign subsidiaries of U.S. companies covered under OFAC general licenses and/or permitted to apply for specific licenses from OFAC?

To the extent a transaction is exempt from the prohibitions of the Iranian Transactions Regulations, Executive Order (E.O.) 13599, section 5 of E.O. 13622, or Section 12 of E.O. 13628, or is authorized by a general license issued pursuant to these authorities if engaged in by a U.S. person, it would not be prohibited for a foreign subsidiary (as defined above) to engage in the transaction, provided that it satisfies all the conditions and requirements of the exemption or general license. Similarly, if the transaction is one for which a U.S. person might apply for a specific license — for example, the exportation of medical devices to Iran — a foreign subsidiary or its U.S. parent may apply for a specific license for the foreign subsidiary to engage in the transaction. Note: Whether a U.S. parent company's specific license covers transactions by its foreign subsidiary that are otherwise prohibited by section 4 of E.O. 13628 will depend on the terms of that license and the scope of the authorized activities. [10-9-2012]

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240. Is there a wind-down or safe harbor provision in Section 4 of Executive Order 13628?

Consistent with Section 218(d) of the Iran Threat Reduction and Syria Human Rights Act of 2012, Subsection 4(c) of Executive Order 13628 provides that civil penalties shall not apply if the U.S. person divests or terminates its business with the foreign subsidiary (as defined above) not later than February 6, 2013. [10-9-2012]

Iranian Transactions and Sanctions Regulations and the Statement of Licensing Procedure on Support Of Human Rights-, Humanitarian-, and Democracy-Related Activities With Respect to Iran

Print this topic

The Office of Foreign Assets Control ("OFAC") issued a final rule in the Federal Register on October 22, 2012, changing the heading of the Iranian Transactions Regulations, 31 C.F.R. part 560 (the "ITR"), to the Iranian Transactions and Sanctions Regulations, 31 C.F.R. part 560 (the "ITSR"), and amending the renamed ITSR to implement Executive Order ("E.O.") 13599 (other than section 11) and sections 1245(c) and (d)(1)(B) of the National Defense Authorization Act for Fiscal Year 2012 (the "NDAA"). These new regulations implement the blocking of the Government of Iran and all Iranian financial institutions pursuant to E.O. 13599 and the NDAA.

OFAC is adding numerous new sections to the ITSR, including prohibitions, definitions, interpretations, and licensing provisions. OFAC also is revising many existing sections of the ITSR in order to take account of the new government-wide blocking as well as the blocking of all Iranian financial institutions. Due to the extensive nature of these and other amendments described below, OFAC is reissuing the ITSR in their entirety.

In addition, OFAC is publishing on the Iran section of its Web site a Statement of Licensing Procedure on Support of Human Rights-, Humanitarian-, and Democracy-Related Activities with Respect to Iran. The Statement of Licensing Procedure reflects procedures established pursuant to the Iran Threat Reduction and Syria Human Rights Act of 2012 (the "TRA"), which was signed into law by the President on August 10, 2012.

241. What are the major changes that the ITSR implement in superseding the ITR?

The ITSR block the property and interests in property of the Government of Iran and all Iranian financial institutions that come within the possession or control of any U.S. person, including any foreign branch, and prohibit all U.S. persons from dealing with any property interests whatsoever, present, future, or contingent, of persons identified as already blocked pursuant to E.O. 13599 and the NDAA.

OFAC is adding section 560.211 to the ITSR to implement the blocking prohibitions set forth in E.O. 13599 and the NDAA. New sections 560.212 through 560.214 are being added to set forth certain consequences and requirements that stem from the blocking prohibitions, including, inter alia, the requirement to hold blocked funds in interest-bearing accounts. New paragraphs (e) and (f) are being added to section 560.210 to incorporate two exemptions from the blocking prohibitions that are set forth in E.O. 13599. These exemptions concern the official business of the Federal Government and the property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979. [10-22-2012]

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242. The ITSR includes revisions to the ITR pertaining to the transfer of funds to or from Iran. Accordingly, how may I transfer funds to or from Iran that arise from, and are ordinarily incident and necessary to give effect to, an underlying transaction that is authorized under the ITSR?

The ITSR authorize United States depository institutions to process transfers of funds to or from Iran, or for the direct or indirect benefit of persons in Iran or the Government of Iran, if the transfer arises from, and is ordinarily incident and necessary to give effect to, an underlying transaction that has been authorized by a specific or general license issued pursuant to, or set forth in, the ITSR and does not involve debiting or crediting an Iranian account. See 31 CFR 560.516(a).

In addition, the ITSR authorize United States registered brokers or dealers in securities to process transfers of funds to or from Iran, or for the direct or indirect benefit of persons in Iran or the Government of Iran, if the transfer arises from, and is ordinarily incident and necessary to give effect to, an underlying transaction that has been authorized by a specific or general license issued pursuant to, or set forth in, the ITSR and does not involve debiting or crediting an Iranian account. See 31 CFR 560.516(b).

The authorizations set forth in section 560.516 of the ITSR do not allow a U.S. person who is authorized to engage in the underlying transaction to deal directly with money service businesses (MSBs) or hawalas, wherever located. However, these authorizations do not preclude United States depository institutions or United States registered brokers or dealers in securities from engaging or dealing with third-country MSBs or hawalas in the processing of the authorized transfers pursuant to section 560.516 of the ITSR. [10-22-2012]

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243. How can I send personal remittances to or from Iran under the ITSR?

The ITSR authorize the transfer of funds that are noncommercial and personal in nature to or from Iran or for or on behalf of an individual ordinarily resident in Iran, other than an individual whose property and interests in property are blocked pursuant to § 560.211, subject to certain restrictions and limitations. See 31 CFR 560.550. Such transfers must be processed by a United States depository institution or a United States registered broker or dealer in securities and not by any other U.S. person. The personal remittances general license does not permit a U.S. person to deal directly with money service businesses (MSBs) or hawalas, wherever located. However, this general license does not preclude United States depository institutions or United States registered brokers or dealers in securities from engaging or dealing with third-country MSBs or hawalas in the processing of the authorized transfers pursuant to section 560.550 of the ITSR.

The hand-carrying of certain noncommercial, personal remittances is also authorized, provided that the individual who is a U.S. person is hand-carrying the funds on his or her behalf, but not on behalf of another person. See 31 CFR 560.550. [10-22-2012]

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244. What effect will the ITSR have on Iranian-Americans and the people of Iran?

The ITSR include several general licenses that newly authorize, or continue to authorize, activities that are otherwise prohibited by the regulations. Categories of activities affected by these changes include, among other things, visa-related transactions, journalistic activities in Iran, the sale of real property in Iran and the transfer of related proceeds to the United States, educational activities (including certain exchange programs), participation in conferences, and the exportation and reexportation of medicine and basic medical supplies to Iran. [10-22-2012]

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245. What does the Statement of Licensing Procedure on Support of Human Rights-, Humanitarian-, and Democracy-Related Activities with Respect to Iran do?

The Statement of Licensing Procedure reflects procedures established pursuant to section 413 of the TRA. These procedures stipulate that, as of the effective date of the TRA, license determinations for complete requests for authorization under this policy shall be made not later than 90 days after receipt by OFAC, with certain exceptions. The Statement of Licensing Policy applies to applications submitted by the following categories of U.S. persons seeking to engage in certain human rights-, humanitarian-, and democracy-related activities with respect to Iran: (1) entities receiving funds from the Department of State to engage in the proposed activity; (2) the Broadcasting Board of Governors; and (3) other appropriate agencies of the United States Government. The ITSR also include separate statements of licensing policy related to the sharing of information over the Internet in Iran and the support of democracy and human rights in Iran and academic and cultural exchange programs. [10-22-2012]

Implementation of Section 504 of the Iran Threat Reduction and Syria Human Rights Act of 2012

Print this topic

On August 10, 2012, the President signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012, Public Law 112-158 (“TRA”). Section 504 of the TRA amends section 1245(d)(4)(D) of the National Defense Authorization Act for Fiscal Year 2012, Public Law 112-81 (“NDAA”), which the President signed into law on December 31, 2011. The section 504 amendments to the NDAA took effect February 6, 2013.
Amendments to the Iranian Financial Sanctions Regulations, 31 C.F.R. part 561 (the “IFSR”) were published on March 15, 2013, to implement sections 503 and 504 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (the “TRA”) and certain provisions of Executive Order 13622 of July 30, 2012.

254. What does section 504 of the TRA do?

Pursuant to the restrictions already in place under the NDAA, foreign financial institutions (“FFIs”) face restrictions on, or loss of, correspondent and payable-through account access in the United States if they knowingly engage in significant financial transactions with the Central Bank of Iran (“CBI”) or a designated Iranian financial institution, unless an NDAA exception, such as the significant reduction exception, applies. The NDAA significant reduction exception applies if the Secretary of State, in consultation with the Secretary of the Treasury and other agencies, has determined that the country with primary jurisdiction over the FFI has significantly reduced its purchases of Iranian crude oil during a specified period of time.

Effective February 6, 2013, section 504 amends the NDAA in several ways. Most importantly, it narrows the NDAA's significant reduction exception to (a) exempt from sanctions only transactions that conduct or facilitate **bilateral trade** in goods or services between the country granted the exception and Iran, and (b) require that funds owed to Iran as a result of the bilateral trade be **credited to an account located in the country granted the exception and not be repatriated to Iran**. In addition, it -

(i) eliminates the distinction between state-owned or -controlled FFIs (not including foreign central banks) and private FFIs, thereby expanding the scope of sanctionable transactions for state-owned or -controlled FFIs with the CBI or designated Iranian financial institutions; and

(ii) clarifies that countries that have reduced their Iranian crude oil purchases to zero may continue to receive the significant reduction exception.

The sale of agricultural commodities, food, medicine, or medical devices to Iran (the "Humanitarian Exception") is not impacted by section 504 of the TRA.

The purchase or acquisition of petrochemicals from Iran remain sanctionable activities and are not subject to the significant reduction exception. [2-6-2013]

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255. Do the section 504 modifications restrict any other dealings with Iran?

Yes, the section 504 modifications also narrow the scope of transactions excepted from certain sanctions available under E.O. 13622. Accordingly, FFIs in countries that are determined by the Secretary of State to have significantly reduced their purchases of Iranian crude oil pursuant to the NDAA, that knowingly conduct significant financial transactions with the National Iranian Oil Company ("NIOC"), the Naftiran Intertrade Company ("NICO"), or otherwise for the purchase of petroleum or petroleum products from Iran, are only eligible for the significant reduction exception if the FFIs adhere to the bilateral trade restrictions, credit the funds to an account in the country with primary jurisdiction over the FFI, and do not repatriate the funds to Iran.

Example 1: A FFI in a country which has received a significant reduction exception and with primary jurisdiction over the FFI may facilitate a transaction enabling an oil refinery in that country to purchase crude oil from Iran without having exposure to U.S. correspondent account sanctions, so long as the transaction meets section 504's bilateral trade requirements, the funds are credited to an account in the FFI in the country with primary jurisdiction over the FFI, and the funds are not repatriated to Iran.

Example 2: If, however, a FFI in a country which has received a significant reduction exception facilitates a third country's crude oil purchase – even a third country with a significant reduction exception – from Iran, the FFI would have exposure to sanctions because the transaction was not solely for the FFI host country's purchase of crude oil from Iran. [2-6-2013]

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256. What transactions are impacted by section 504 of the TRA?

Starting February 6, 2013, significant financial transactions* knowingly conducted or facilitated by a FFI –

(i) with the CBI or designated Iranian financial institutions;
(ii) with NIOC or NICO (irrespective of the FFI involved); or
(iii) for the purchase or acquisition of petroleum or petroleum products from Iran (irrespective of the FFI involved);

may be subject to NDAA and/or E.O. 13622 sanctions unless –

(i) the country that has primary jurisdiction over the FFI conducting or facilitating such significant financial transactions has received a significant reduction exception; **and**
(ii) the significant financial transaction is for bilateral trade only, and any funds owed to Iran as a result of such trade are credited to an account at the FFI in the country that has primary jurisdiction over the FFI and are not repatriated to Iran.

Any FFI that knowingly facilitates significant transactions or provides significant financial services for Iranian-linked individuals or entities designated for activities related to terrorism or the proliferation of weapons of mass destruction pursuant to E.O.s 13224 and 13382 can be sanctioned under section 104(c) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA") and section 561.201 of the IFSR even if those transactions are not sanctionable under section 1245(d) of the NDAA and section 561.203 of the IFSR. [2-6-2013]

**These do not include sales relating to the Humanitarian Exception.*

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257. To which jurisdictions does the significant reduction exception apply?

As of February 6, 2013, 20 jurisdictions have been granted a 180-day significant reduction exception.

The following jurisdictions received their 180-day significant reduction exception to NDAA sanctions on September 14, 2012: Belgium, the Czech Republic, France, Germany, Greece, Italy, Japan, the Netherlands, Poland, Spain, and the United Kingdom.

The following jurisdictions received their 180-day significant reduction exception to NDAA sanctions on December 7, 2012: China, India, Malaysia, Republic of Korea, Singapore, South Africa, Sri Lanka, Taiwan, and Turkey. [2-6-2013]

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258. What is meant by section 504's requirement that bilateral trade consist of trade in goods and services between the country with primary jurisdiction over the FFI and Iran?

OFAC interprets bilateral trade between Iran and the country with primary jurisdiction over the FFI to mean trade in only those goods or services originating in (e.g., produced in or substantially transformed in) –

(i) the country with primary jurisdiction over the FFI conducting or facilitating the transaction, or
(ii) Iran (for purposes of the import of Iranian-origin goods or services by the country with primary jurisdiction over the FFI),

and the trade in services cannot include brokering transactions involving goods or services from or to third countries.

Furthermore, the goods or services must be exported and sold directly to either the country with primary jurisdiction over the FFI (in the case of Iranian-origin goods or services), or Iran (in the case of goods or services originating in the country with primary jurisdiction over the FFI).

The Humanitarian Exception is not impacted by section 504's bilateral trade limitations (see FAQ 265). [2-6-2013]

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259. What can a FFI do with the funds resulting from the import of Iranian-origin goods or services once the funds are credited to an account? Can funds be transferred to other accounts?

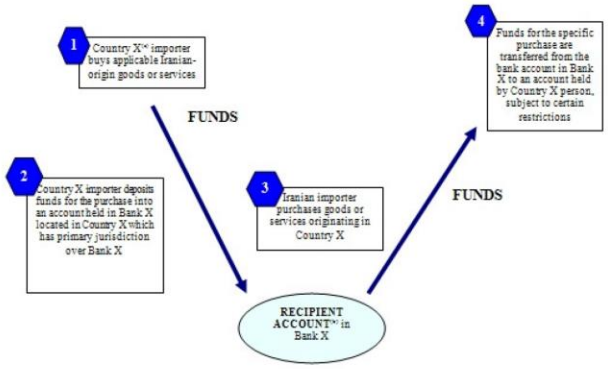
Section 504 of the TRA requires that, in order for a sanctionable transaction to fall within the bounds of the significant reduction exception, any funds owed to Iran as a result of the bilateral trade transaction must be credited to an "account located in the country with primary jurisdiction over the [FFI]." For purposes of implementing this requirement, OFAC interprets the "account located in the country with primary jurisdiction over the [FFI]" to be an account in the country with primary jurisdiction over the FFI, and at the same FFI that facilitated the transaction for the importation of goods or services from Iran.

Once the funds are deposited in the FFI, they can be -

(i) used to pay for a purchase by Iran of goods or services originating in the country with primary jurisdiction over the FFI which are exported and sold directly to Iran, or for the Humanitarian Exception (see Figure 1); or
(ii) transferred to a SPECIAL PURPOSE ACCOUNT (see FAQ 260) within that same FFI, in the country with primary jurisdiction over the FFI, where the funds may be later debited to purchase goods or services originating in the country with primary jurisdiction over the FFI which are exported and sold directly to Iran, or for the Humanitarian Exception (see Figure 2).

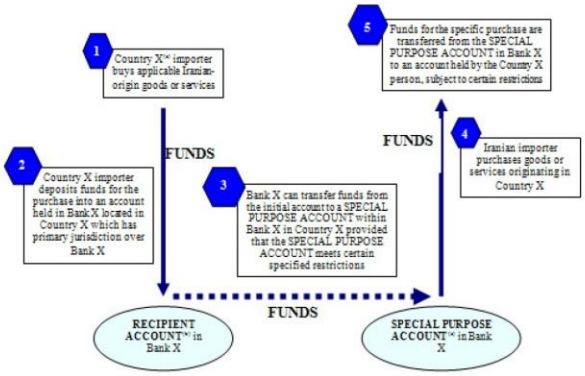
The funds may not be repatriated to Iran. [2-6-2013]

Figure 1: Direct Model
Subject to the NDAA and E.O. 13622 (§1)



(a) Country X has been determined by the Secretary of State to have significantly reduced its volume of crude oil purchases from Iran in the prior 180-day period.
(b) Funds from this account may be used for sales made pursuant to the Humanitarian Exception.

Figure 2: Special Purpose Account Model
Subject to the NDAA and E.O. 13622 (§1)



(a) Country X has been determined by the Secretary of State to have significantly reduced its volume of crude oil purchases from Iran in the prior 180-day period.
(b) Funds from these accounts may be used for sales made pursuant to the Humanitarian Exception.

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260. What is a SPECIAL PURPOSE ACCOUNT for purposes of the NDAA's significant reduction exception?

A SPECIAL PURPOSE ACCOUNT is an account set up with conditions and safeguards that require the account to be used only for bilateral trade in goods or services between Iran and the country with primary jurisdiction over the FFI, and for sales made under the Humanitarian Exception (see FAQ 265). Funds paid as a result of bilateral trade under the NDAA's significant reduction exception may be transferred to a SPECIAL PURPOSE ACCOUNT, so long as the account is at the same FFI that facilitated or conducted the original transaction, in the country with primary jurisdiction over the FFI. [2-6-2013]

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261. Are there any circumstances in which funds can be transferred to third-country financial institutions?

Transfers on or after February 6, 2013, of funds deposited in the RECIPIENT ACCOUNT or the SPECIAL PURPOSE ACCOUNT to third-country financial institutions are not covered by the NDAA's significant reduction exception, and create exposure to sanctions for FFIs conducting or facilitating such transfers, unless the transfer is to pay a third-country exporter for sales made pursuant to the Humanitarian Exception (see FAQ 265). [2-6-2013]

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262. Can funds be withdrawn from the RECIPIENT ACCOUNT or a SPECIAL PURPOSE ACCOUNT?

In order for the NDAA's significant reduction exception to apply on or after February 6, 2013, funds withdrawn from the RECIPIENT ACCOUNT or SPECIAL PURPOSE ACCOUNT at the FFI may only be used to pay for bilateral trade or purchases relating to the Humanitarian Exception. Cash withdrawals from the RECIPIENT ACCOUNT or SPECIAL PURPOSE ACCOUNT would be deemed to fall outside of the scope of bilateral trade and would expose the FFI to sanctions. Bank checks written on the account may be used only to pay for bilateral trade or purchases relating to the Humanitarian Exception, and are subject to further restrictions set out in FAQ 263 below. [2-6-2013]

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263. Who can receive payments from funds credited to a RECIPIENT ACCOUNT or SPECIAL PURPOSE ACCOUNT?

In order for the NDAA's significant reduction exception to apply on or after February 6, 2013, the person receiving payment (e.g., the manufacturer or service provider) for goods or services being exported to Iran **must be** –

(i) a citizen, national, or permanent resident of the country with primary jurisdiction over the FFI maintaining the accounts containing the bilateral trade funds; or
(ii) an entity organized under the laws of the country with primary jurisdiction over the FFI maintaining such accounts.

Furthermore, the person receiving such payment **may not be** -

(i) the Government of Iran (as defined in 31 CFR Part 561.321) ("GOI");* or
(ii) a financial institution that appears on the List of Foreign Financial Institutions Subject to Part 561, which is maintained on the Office of Foreign Assets Control's Web site (www.treasury.gov/ofac). [2-6-2013]

**The term "Government of Iran" as defined in 31 CFR Part 561.321 includes: (a) The state and the Government of Iran, as well as any political subdivision, agency, or instrumentality thereof; (b) Any entity owned or controlled directly or indirectly by the foregoing; (c) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, acting or purporting to act directly or indirectly on behalf of any of the foregoing; and (d) Any person or entity identified by the Secretary of the Treasury to be the Government of Iran under 31 CFR Part 560.*

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264. Can funds be remitted to Iran or the GOI without exposure to sanctions?

No. If funds from the RECIPIENT ACCOUNT or the SPECIAL PURPOSE ACCOUNT are remitted, directly or indirectly, to Iran, or paid to any person that is the GOI, the FFI would be exposed to sanctions. [2-6-2013]

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265. Can the funds be used for sales made under the Humanitarian Exception?

The NDAA generally exempts from sanctions sales made under the Humanitarian Exception (i.e., the sale of agricultural commodities, food, medicine, or medical devices from third countries to Iran). Funds deposited in the RECIPIENT ACCOUNT or the SPECIAL PURPOSE ACCOUNT can be used to pay for sales made pursuant to the Humanitarian Exception. [2-6-2013]

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314. Can an exporter of agricultural commodities, food, medicine, or medical devices get paid out of a Central Bank of Iran (CBI) account at a foreign financial institution (FFI) in a country with a significant reduction exception, even though the exporter is located in a third-country? Can the third-country exporter's bank handle this transaction?

Yes. So long as the transaction does not involve a designated individual or entity, banks on the Part 561 List located on OFAC's website (http://www.treasury.gov/ofac/downloads/561list.pdf), or otherwise proscribed conduct, such transactions are not sanctionable under U.S. law. Furthermore, there is no requirement under U.S. law that agricultural commodities, food, medicine, or medical devices be routed through the country with the significant reduction exception.

Such a payment mechanism is not the exclusive mechanism for the purchase of agricultural commodities, food, medicine, or medical devices under U.S. law. Other options include receiving payment from a third-country account of the CBI or a non-designated Iranian financial institution.

The Department of the Treasury Office of Foreign Assets Control regulations describe the exception for transactions relating to agricultural commodities, food, medicine, or medical devices in 31 CFR § 561.203(g) and Note 2 to 51 CFR § 561.203. Additional information and clarifying guidance about humanitarian assistance and related exports to the Iranian people can be found at http://www.treasury.gov/resource-center /sanctions/Programs/Documents/hum_exp_iran.pdf . [6-2013]

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266. Does the November 8, 2012 designation of NIOC under E.O. 13382 impact the scope of permissible transactions by FFIs in significantly reducing countries?

Yes. On September 24, 2012, NIOC was identified as an agent or affiliate of Iran's Islamic Revolutionary Guard Corps ("IRGC") under section 312 of the TRA, and designated on November 8, 2012, under E.O. 13382 for providing services and support to the IRGC. Accordingly, CISADA applies to transactions with NIOC. As a result of these additional sanctions against NIOC, only transactions solely for the purchase of petroleum or petroleum products from NIOC will fall within the scope of the significant reduction exception. A FFI in a significantly reducing country that is found to knowingly conduct or facilitate other types of significant transactions with NIOC (i.e., transactions unrelated to the purchase of petroleum or petroleum products from Iran) would face exposure to CISADA sanctions.

Example 3: If a FFI in a country with a significant reduction exception facilitates a transaction enabling a company in that country to purchase drilling equipment from NIOC, the FFI risks restrictions on, or loss of, correspondent and payable-through account access in the United States, because the transaction was not solely for the purchase of petroleum or petroleum products from Iran. [2-6-2013]

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267. What are definitions for the following NDAA terms: "significant financial transaction," "knowingly," "food, medicine, and medical devices," "foreign financial institution," and "country with primary jurisdiction over the FFI,"?

These definitions are set out in 31 CFR Part 561. [2-6-2013]

Issuance of the Executive Order "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Freedom and Counter-Proliferation Act of 2012 and Additional Sanctions With Respect to Iran" and the Implementation of Certain Provisions of the Iran Freedom And Counter-Proliferation Act of 2012 (IFCA)

Print this topic

On June 3, 2013, the President signed an Executive Order (E.O.) "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Freedom and Counter-Proliferation Act of 2012 and Additional Sanctions With Respect to Iran." The E.O. implements certain statutory provisions of the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA) and authorizes the imposition of additional sanctions with respect to Iran. Most of the IFCA provisions target conduct occurring on or after July 1, 2013. The E.O. becomes effective on July 1, 2013. [06-03-13]

General Questions (Print)

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313. What is the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA)?

IFCA was signed into law on January 2, 2013, as a part of the National Defense Authorization Act for Fiscal Year 2013, and provides for several new sanctions related to Iran. IFCA authorizes broad sanctions on: certain activities related to Iran's energy, shipping, and shipbuilding sectors; the sale, supply, or transfer to or from Iran of precious and certain other metals, graphite, coal, and industrial software; the provision of underwriting services, insurance, or reinsurance to activities and persons targeted by U.S. sanctions against Iran; financial transactions involving sanctioned Iranian individuals and entities; and persons involved in the diversion of goods intended for the Iranian people. Most of the IFCA provisions target conduct occurring on or after July 1, 2013.

The U.S. Department of the Treasury will be issuing regulations to implement certain provisions in IFCA. In addition, the U.S. Department of State expects to adopt an interpretation of IFCA similar to that set forth below. [06-03-13]

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288. What is the purpose of the Executive Order of June 3, 2013 entitled "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Freedom and Counter-Proliferation Act of 2012 and Additional Sanctions With Respect to Iran" (E.O.)?

The E.O. implements certain statutory provisions of IFCA. The E.O. also authorizes the imposition of additional sanctions with respect to Iran, targeting certain transactions and other activity related to the Iranian rial, Iran's automotive sector, and persons that materially assist Iranian persons on the list of Specially Designated Nationals and Blocked Persons (SDN List) as well as certain persons whose property and interests in property are blocked under the E.O. or Executive Order 13599. The E.O. becomes effective at 12:01 a.m. eastern daylight time on July 1, 2013. Questions and Answers (Q&As) 306-312 below provide guidance regarding the E.O.

The Department of the Treasury will be issuing regulations to implement certain provisions in the E.O. In addition, the Department of State expects to adopt an interpretation of the E.O. similar to that set forth below [06-03-13]

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289. How will the following IFCA terms be interpreted: "Iran," "knowingly," "significant," "transfer," "Iranian person included on the SDN List "?

As a general matter, we intend to rely, where applicable, on definitions of terms previously included in Treasury regulations.

"Iran"

The Iranian Financial Sanctions Regulations (31 CFR part 561) (IFSR) define "Iran" as the Government of Iran and the territory of Iran and any other territory or marine area, including the exclusive economic zone and continental shelf, over which the Government of Iran claims sovereignty, sovereign rights, or jurisdiction, provided that the Government of Iran exercises partial or total de facto control over the area or derives a benefit from economic activity in the area pursuant to international arrangements. (31 CFR § 561.329)

"Iranian person included on the SDN List"

OFAC anticipates publishing on its website a list to assist in identifying Iranian persons included on the SDN List for purposes of IFCA and the E.O.

"knowingly"

The IFSR define "knowingly" with respect to conduct, a circumstance, or a result, to mean that a person has actual knowledge, or should have known, of the conduct, the circumstance, or the result. (31 CFR § 561.314)

"significant"

As a general matter, in determining for purposes of IFCA and the E.O. whether transactions, financial transactions, or financial services are significant, the Department of the Treasury will rely on the interpretation set out in §561.404 of the IFSR. The IFSR provide a list of broad factors that can play a role in the determination whether transactions, financial services, and financial transactions are significant, including: (a) the size, number, and frequency of the transactions, financial services, or financial transactions; (b) the type, complexity, and commercial purpose of the transactions, financial services, or financial transactions; (c) the level of awareness of management and whether the transactions are part of a pattern of conduct; (d) the nexus of the transactions, financial services, and financial transactions and blocked persons; (e) the impact of the transactions, financial services, and financial transactions on statutory objectives; (f) whether the transactions, financial services, and financial transactions involve deceptive practices; (g) whether the transactions solely involve the passive holdings of Central Bank of Iran (CBI) reserves or repayment by the CBI of official development assistance or the transfer of funds required as a condition of Iran's membership in an international financial institution; and (h) other relevant factors that the Secretary of the Treasury deems relevant. We anticipate adopting a similar approach to interpreting the term "significant" as it applies to goods or services.

"transfer"

"Transfer" includes import, transshipment, export, or reexport, whether direct or indirect. [06-03-13]

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290. Are payments or deliveries that are made on or after July 1, 2013, for contracts that existed prior to July 1, 2013, exempted from IFCA provisions?

There is no general exception for payments, sales, deliveries, or transfers arising out of contracts entered into prior to July 1, 2013, on or after which date certain activities become sanctionable under IFCA. The assessment of whether such payments are "significant" or result in the transfer of "significant goods or services" or "significant financial support" will be done on a case-by-case basis in line with the criteria discussed above. [06-03-13]

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291. How does the Executive Order relate to the IFCA provisions?

The E.O. implements and builds upon certain provisions of IFCA as set out in more detail in Q&As 306 and 312 below. [06-03-13]

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292. What are the implications of IFCA on the provision of humanitarian goods to the people of Iran?

IFCA generally excepts from sanctions transactions for the sale of agricultural commodities, food, medicine, or medical devices to Iran, as set out in more detail in Q&As 297 and 304. (See Q&A 312 for a similar exception in the E.O.) [06-03-13]

Sanctions Relating to Iran's Energy, Shipping, and Shipbuilding Sectors (Print)

IFCA provides for sanctions involving activities or transactions related to Iran's energy, shipping, and shipbuilding sectors.

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293. What will the "energy, shipping, and shipbuilding sectors of Iran" mean for the purposes of IFCA?

We anticipate that regulations to be promulgated will define "energy sector of Iran" to include activities involving the exploration, extraction, production, refinement, or liquefaction of petroleum, natural gas, or petroleum products in Iran. (See also discussion of activities involving natural gas in Q&A 297.)

We anticipate that regulations to be promulgated will define "shipping sector of Iran" to include activities involving the transportation of goods by seagoing vessels, including oil tankers and cargo vessels, flying the flag of the Islamic Republic of Iran, or owned, controlled, chartered, or operated directly or indirectly by the Government of Iran. Two entities previously identified or designated under Treasury authorities that are part of the shipping sector of Iran are the National Iranian Tanker Company and the Islamic Republic of Iran Shipping Lines.

We anticipate that regulations to be promulgated will define "shipbuilding sector of Iran" to include activities involving the construction of seagoing vessels, including oil tankers and cargo vessels, in Iran. [06-03-13]

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294. How will I know if someone is part of Iran's energy, shipping, or shipbuilding sectors or is a port operator in Iran?

Persons determined to be part of Iran's energy, shipping, or shipbuilding sectors, or a port operator in Iran for purposes of section 1244(c) will be identified as such on the SDN List. Knowingly providing certain significant support to persons determined to be part of Iran's energy, shipping, or shipbuilding sectors, or a port operator in Iran will have exposure to sanctions, unless the transaction is excepted (see also Q&A 297). [06-03-13]

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295. What are goods or services used in connection with Iran's energy, shipping, or shipbuilding sectors for purposes of section 1244(d)(3)?

We anticipate that regulations to be promulgated will define goods and services used in connection with Iran's energy, shipping and shipbuilding sectors to include:

a. Energy Sector: In the case of Iran's energy sector, goods or services that contribute to,

- Iran's ability to develop its domestic petroleum resources;
- The maintenance or expansion of Iran's domestic production of petroleum products; and
- Iran's ability to import or export petroleum or petroleum products.

b. Shipping Sector: In the case of Iran's shipping sector,

- The provision of crude and product tankers to Iran;
- The provision of registry, flagging, or classification services of any kind;
- The supervision of and participation in the repair of ships and their parts;

- The inspection, testing, and certification of marine equipment materials and components;
- The carrying out of surveys, inspections, audits and visits, and the issuance, renewal or endorsement of the relevant certificates and documents of compliance, as they relate to ships and shipping; and
- Any other goods or services relating to the maintenance, supply, bunkering, and docking of vessels flying the flag of the Islamic Republic of Iran, or owned, controlled, chartered, or operated directly or indirectly by, or for or on behalf of the Government of Iran (GOI) or an Iranian person.

c. Shipbuilding Sector: In the case of Iran's shipbuilding sector,

- The building and refit of vessels;
- The provision or refit of items such as (i) steam turbines and their parts for marine propulsions, (ii) marine propulsion engines and parts used solely or principally with them, (iii) other gas turbines for marine propulsion, (iv) ship or boat propellers and blades, and (v) direction finding compasses and other navigational instruments and appliances solely for the maritime industry;
- Other goods used in connection with building and propulsion of vessels; and
- Technical assistance and training relating to, and financing of, the building, maintenance or re-fitting of vessels.

Sections 1244(d)(1) and (2) of IFCA make sanctionable certain transactions for the sale, supply, or transfer to or from Iran of such goods and services if they are significant goods or services used in connection with Iran's energy, shipping, or shipbuilding sectors. (See Q&A 289 above for an interpretation of "significant.") The provision of goods or services identified above could be sanctionable regardless of whether any person involved in the transaction has been determined to be part of Iran's energy, shipping, or shipbuilding sectors. [06-03-13]

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296. Will payment for bunkering of third-country ships carrying non-sanctionable goods to or from Iran be subject to sanctions?

If a non-Iranian vessel is transporting non-sanctionable goods to or from Iran, bunkering in a third country will not be subject to sanctions provided that no other sanctionable activity is involved. [06-03-13]

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297. Are there any exceptions to the sanctions provisions of section 1244 of IFCA?

The following transactions are excepted from the provisions of section 1244 of IFCA.

a. Transactions for the sale of agricultural commodities, food, medicine, or medical devices to Iran or for the provision of humanitarian assistance to the people of Iran.

b. The export of petroleum or petroleum products from Iran to a country with a significant reduction exception under section 1245(d)(4)(D)(i) of the National Defense Authorization Act for Fiscal Year 2012.

c. A significant financial transaction conducted or facilitated by a foreign financial institution (FFI), provided that a significant reduction exception under 1245(d)(4)(D)(i) of the National Defense Authorization Act For Fiscal Year 2012 (NDAA) applies to the country with primary jurisdiction over the FFI and the financial transaction is for trade in goods or services (i) between Iran and the country with primary jurisdiction over the FFI and (ii) not otherwise subject to sanctions under the law of the United States, and any funds owed to Iran as a result of the trade are credited to an account located in the country with primary jurisdiction over the FFI. We anticipate the implementation of these trade requirements to be similar to the trade requirements set forth in the IFSR, in particular 31 CFR §561.203(j) and 31 CFR §561.203(k).

d. The sale, supply, or transfer of natural gas to or from Iran. Section 1244, however, does set out sanctions that may apply to FFIs that conduct or facilitate a transaction for the sale, supply, or transfer of natural gas to or from Iran unless the financial transaction is for trade in goods or services (i) between Iran and the country with primary jurisdiction over the FFI and (ii) not otherwise subject to sanctions under the law of the United States, and any funds owed to Iran as a result of the trade are credited to an account located in the country with primary jurisdiction over the FFI. We anticipate the implementation of these trade requirements to be similar to the trade requirements set forth in the IFSR, in particular 31 CFR §561.203(j) and 31 CFR §561.203(k).

e. Certain activities relating to the pipeline project to supply natural gas from the Shah Deniz gas field in Azerbaijan to Europe and Turkey. [06-03-13]

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315. Will routine payments or fees be subject to sanctions if they are made to a person determined to be a port operator in Iran and if the vessel is carrying non-sanctioned goods?

Any company involved in loading or unloading cargo in Iran should exercise great caution to avoid engaging in transactions with entities designated by the United States, including the Tidewater Middle East Co. and South Shipping Line Iran which were both designated for their involvement in Iran's proliferation of weapons of mass destruction. However, to the extent that a shipping company transacts with port operators in Iran that have been identified as such under IFCA but not otherwise designated, and as long as such payments are limited strictly to routine fees including port dues, docking fees, or cargo handling fees, paid for the loading and unloading of non-sanctioned goods at Iranian ports, we anticipate that such transactions would not be considered significant transactions for the purposes of IFCA. Non-routine and/or large payments or fees that materially exceed standard industry rates could expose a person to sanctions. Furthermore, providing any port operator in Iran with any significant financial, material, technological, or other support could expose a person to sanctions. [07-01-13]

Sanctions Relating to the Sale, Supply, or Transfer of Certain Materials to or from Iran (Print)

IFCA provides for sanctions involving the sale, supply, or transfer of certain materials to or from Iran.

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298. What materials are considered graphite, raw or semi-finished metals?

For purposes of IFCA, we anticipate that regulations to be promulgated will define graphite, raw or semi-finished metals described in section 1245(d) of IFCA to include steels; aluminum metal and its alloys; base metals of single or complex borides of titanium; beryllium metal and its alloys; boron metal and its alloys; cobalt metal and its alloys; copper infiltrated tungsten metal; copper-beryllium metal; germanium metal and its alloys; graphites; hastelloy; inconel; magnesium metal and its alloys; molybdenum metal and its alloys; neptunium-237 metal and its alloys; nickel metal and its alloys; nickel aluminide metals; niobium metal and its alloys; niobium-titanium filaments; plutonium metal and its alloys; porous nickel metal; silver infiltrated tungsten metal; tantalum metal and its alloys; tellurium metal and its alloys; titanium aluminide metals; titanium metal and its alloys; tungsten metal, tungsten carbide metal, and their alloys; uranium titanium alloy metals; and zirconium metal and its alloys and compounds. [06-03-13]

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299. What are considered precious metals?

For purposes of IFCA, we anticipate that regulations to be promulgated will define the term "precious metals" to include silver (including silver plated with gold or platinum, unwrought or in semi-manufactured forms, or in powder form); gold (including gold plated with platinum, unwrought or in semi-manufactured forms, or in powder form); base metals or silver, clad with gold, not further worked than semi-manufactured; platinum, unwrought or in semi-manufactured forms, or in powder form; iridium; osmium; palladium; rhodium; ruthenium; base metals, silver or gold, clad with platinum, not further worked than semi-manufactured; waste and scrap of precious metal or of metal clad with precious metals, other waste and scrap containing precious metal or precious-metal compounds, of a kind used principally for the recovery of precious metal. [06-03-13]

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300. For purposes of sanctions under section 1245, how will I know which sectors are controlled by Iran's Islamic Revolutionary Guard Corps?

By July 1, 2013, a report will be published in the Federal Register with respect to which sectors of the Iranian economy are controlled directly or indirectly by Iran's Islamic Revolutionary Guard Corps. [06-03-13]

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301. How will the determination be made as to whether materials are used in a manner that would make them subject to sanctions under section 1245 of IFCA?

A FFI, prior to conducting or facilitating a significant financial transaction for the sale, supply, or transfer to or from Iran of the materials will need to undertake due diligence to ensure that the transaction does not involve the materials listed in section 1245(d) – as described in part in Q&A 298 – being sold, supplied, or transferred, directly or indirectly, to or from Iran for sanctionable uses under section 1245. [06-03-13]

302. Are there any exceptions to section 1245 of IFCA?

A person will not be subject to sanctions under section 1245 of IFCA if a determination is made by the Department of the Treasury or the Department of State, as appropriate, that the person has established and enforced official policies, procedures, and controls to ensure that the person does not sell, supply, or transfer to or from Iran, or facilitate or conduct a significant financial transaction to sell supply, or transfer to or from Iran, materials listed in section 1245 as sanctioned under section 1245. The Department of the Treasury or the Department of State, as appropriate, will make this determination on a case by case basis as part of an investigation or enforcement action by the relevant Department. [06-03-13]

Sanctions Relating to Insurance, Reinsurance, or Underwriting (Print)

303. Which insurance, reinsurance, or underwriting activities are potentially subject to sanctions under section 1246(a)(1)?

A number of insurance activities are subject to sanctions under IFCA, including providing insurance, reinsurance, or underwriting services to persons on the SDN List sanctioned for activities with respect to Iran. [06-03-13]

304. Are there exceptions to insuring, reinsuring, or underwriting sanctioned activities?

Yes. IFCA includes the following exceptions to insuring, reinsuring, or underwriting sanctioned activities.

a. Transactions for the sale of agricultural commodities, food, medicine, or medical devices to Iran or for the provision of humanitarian assistance to the people of Iran can be insured, reinsured, or underwritten.
b. A person that provides insurance, reinsurance, or underwriting services to sanctioned activity, if a determination is made by the Department of the Treasury or the Department of State, as appropriate, that the person has established and enforced official policies, procedures, and controls to ensure that the person does not underwrite or enter into a contract to provide insurance or reinsurance for activities targeted under section 1246 of IFCA. The Department of the Treasury or the Department of State, as appropriate, will make this determination on a case by case basis as part of an investigation or enforcement action by the relevant Department. [06-03-13]

Sanctions Relating to FFIs that Facilitate Transactions with SDNs (Print)

305. Sanctions under section 1247 of IFCA apply to FFIs that facilitate financial transactions on behalf of an Iranian person on the SDN List. How does the Executive Order relate to section 1247?

The E.O. tightens the financial sanctions applicable to FFIs under section 1247 of IFCA. (See Q&A 312 below for a discussion of the applicable financial sanctions and exceptions.) [06-03-13]

Executive Order (Print)

306. How does the Executive Order relate to the IFCA provisions?

The E.O. provides additional tools related to the IFCA provisions by:

a. Authorizing prohibitions or restrictions on the importation of goods; and
b. Implementing the statutory requirements of section 105C of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, as added by section 1249 of IFCA, by blocking the property and interests in property and suspending the entry into the United States of persons determined to have engaged, on or after January 2, 2013, in corruption or other activities relating to the diversion of goods intended for the Iranian people or the misappropriation of proceeds from the sale or resale of such goods. [06-03-13]

307. In addition to implementing certain IFCA provisions, what else does the Executive Order do?

In addition to implementing IFCA, the E.O. authorizes both new sanctions with respect to Iran and the broadening of existing sanctions.

The new sanctions under the E.O. target significant transactions related to (1) the purchase or sale of Iranian rials and derivative, swap, future, forward, or other similar contracts whose value is based on the exchange rate of the Iranian rial, as well as the maintenance of significant funds and accounts outside the territory of Iran denominated in the Iranian rial (see Q&A 309 below), and (2) Iran's automotive sector (see Q&As 310 and 311 below).

The broadened sanctions under the E.O. allow for the imposition of sanctions on:

a. Persons that materially assist certain Iranian persons on the SDN List (see Q&A 308 below);
b. Persons that materially assist certain other persons whose property and interests in property are blocked under Executive Order 13599 and the E.O. (see Q&A 308 below); and
c. FFIs that knowingly conduct or facilitate a significant financial transaction on behalf of an Iranian person included on SDN List, and certain other persons whose property and interests in property are blocked under Executive Order 13599 or the E.O. (see Q&A 312 below). [06-03-13]

Sanctions Relating to the Provision of Material Assistance to Certain Persons (Print)

308. What are the implications of the material assistance provision of the Executive Order?

Subsection 2(a)(i) of the E.O. authorizes the Department of the Treasury to block the property and interests in property of persons determined to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, (i) Iranian persons included on the SDN List as well as other persons included on the SDN List whose property and interests in property are blocked pursuant to Executive Order 13599, in both cases other than Iranian depository institutions whose property and interests in property are blocked solely pursuant to Executive Order 13599, and (ii) persons whose property and interests in property are blocked pursuant to subsection 2(a)(i) of the E.O. Certain activities relating to the pipeline project to supply natural gas from the Shah Deniz gas field in Azerbaijan to Europe and Turkey are excepted from the material support provision of the E.O.

In implementing this provision, the United States Government will take appropriate steps to avoid, among other things, undue impacts on the access of the people of Iran to humanitarian items, telecommunications, and other basic services. [06-03-13]

Sanctions Relating to Certain Transactions Involving the Iranian Rial (Print)

309. What transactions involving the Iranian rial will be subject to sanctions?

FFIs risk correspondent and payable-through account and blocking sanctions for (i) knowingly conducting or facilitating, on or after July 1, 2013, significant transactions related to the purchase or sale of Iranian rials or a derivative, swap, future, forward, or other similar contract whose value is based on the exchange rate of the Iranian rial, or (ii) maintaining, on or after July 1, 2013, significant funds or accounts outside the territory of Iran denominated in the Iranian rial. [06-03-13]

Sanctions Relating to Iran's Automotive Sector (Print)

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310. What is considered Iran's automotive sector for purposes of the Executive Order?

The E.O. authorizes the imposition of correspondent and payable-through account and Iran Sanctions Act-style sanctions for certain transactions, on or after July 1, 2013, for the sale, supply, or transfer to Iran of significant goods or services used in connection with Iran's automotive sector. The E.O. defines the automotive sector of Iran as the manufacturing or assembling in Iran of light and heavy vehicles including passenger cars, trucks, buses, minibuses, pick-up trucks, and motorcycles, as well as original equipment manufacturing and after-market parts manufacturing relating to such vehicles. [06-03-13]

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311. What are goods or services used in connection with Iran's automotive sector for purposes of the E.O.?

We anticipate that regulations to be promulgated will define goods or services used in connection with Iran's automotive sector to include goods or services that contribute to (i) Iran's ability to research, develop, manufacture, and assemble light and heavy vehicles, and (ii) the manufacturing or assembling of original equipment and after-market parts used in Iran's automotive industry.

The E.O. makes sanctionable certain transactions for the sale, supply, or transfer to Iran of "significant" goods or services used in connection with the automotive sector of Iran. (See Q&A 289 above for an interpretation of "significant.") [06-03-13]

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316. Is the sale, supply, or transfer of finished vehicles or "auto kits" to Iran sanctionable under the E.O.?

The E.O. does not make sanctionable the export of finished vehicles to Iran if no further assembly or manufacturing is required. As such, exporting fully assembled and finished vehicles to Iran for sale by a non-sanctioned Iranian dealer or distribution network would not be sanctionable.

In contrast, "auto kits" (or "knock-down kits") exported to Iran for assembly in Iran would be considered goods or services used in connection with the automotive sector of Iran and the export of such kits to Iran would be sanctionable if the transaction is "significant." (See Q&A 289 above for an interpretation of "significant.") [07-01-13]

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317. Is the sale, supply, or transfer of goods or services for the maintenance of finished vehicles sanctionable under the E.O.?

Goods or services for the maintenance of finished vehicles exported to Iran would generally not be considered "significant goods or services used in connection with the automotive sector of Iran," for the purposes of the E.O., and the provision of such goods or services would generally not be sanctionable. However, the export, sale, or distribution of goods (e.g., auto parts and accessories) or services that would contribute to Iran's ability to manufacture or assemble vehicles, or manufacture original equipment and after-market parts in Iran could create exposure to sanctions. Persons exporting parts and services to Iran for the maintenance or upkeep of finished automobiles, and foreign financial institutions facilitating such exports, should exercise caution to ensure that the parts or services are not diverted for the manufacturing or assembly of vehicles in Iran or the manufacturing of original equipment or after-market parts in Iran, and are used only for maintenance and upkeep. [07-01-13]

Financial Sanctions Relating to Financial Transactions on Behalf of Certain Persons (Print)

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312. How does the Executive Order tighten the financial sanctions applicable to FFIs under section 1247 of IFCA?

Section 3 of the E.O. tightens the financial sanctions applicable to FFIs under section 1247 of IFCA and provides for correspondent and payable-through account sanctions on FFIs that knowingly conduct or facilitate a significant financial transaction on behalf of an Iranian person included on the SDN List (other than Iranian depository institutions whose property and interests in property are blocked solely pursuant to Executive Order 13599) or any other person included on the SDN List whose property and interests in property are blocked pursuant to Executive Order 13599 (other than Iranian depository institutions whose property and interests in property are blocked solely pursuant to Executive Order 13599) or subsection 2(a)(i) of the E.O.

The following transactions would not be subject to sanctions under this section of the E.O.:

a. Transactions for the provision of agricultural commodities, food, medicine, or medical devices to Iran.
b. A significant financial transaction conducted or facilitated by a FFI for the purchase of petroleum or petroleum products from Iran if a significant reduction exception under section 1245(d)(4)(D) of the NDAA applies to the country with primary jurisdiction over such FFI and the financial transaction is for trade between Iran and the country with primary jurisdiction over the FFI, and any funds owed to Iran as a result of the trade are credited to an account located in the country with primary jurisdiction over the FFI. We anticipate the implementation of these trade requirements to be similar to the trade requirements set forth in the IFSR, in particular 31 CFR § 561.203(j) and 31 CFR § 561.203(k).
c. A significant financial transaction conducted or facilitated by a FFI for the sale, supply, or transfer of natural gas to or from Iran only if the financial transaction is solely for trade between the country with primary jurisdiction over the FFI and Iran, and any funds owed to Iran as a result of such trade are credited to an account located in the country with primary jurisdiction over the FFI. We anticipate the implementation of these trade requirements to be similar to the trade requirements set forth in the IFSR, in particular 31 CFR § 561.203(j) and 31 CFR § 561.203(k).
d. Certain activities relating to the pipeline project to supply natural gas from the Shah Deniz gas field in Azerbaijan to Europe and Turkey. [06-03-13]

General Licenses (GL) for Agricultural Commodities, Medicine, and Medical Devices in the Iranian Transactions and Sanctions Regulations

Print this topic

318. Does the GL for medical devices authorize the exportation or reexportation of all medical devices?

No. The GL for medical devices appearing at section 560.530(a)(3)(i) of the Iranian Transactions and Sanctions Regulations (ITSR) authorizes covered persons, as defined in section 560.530(e)(4), to export or reexport to Iran medical devices as defined in section 560.530(e)(3) of the ITSR, except for items on the List of Medical Devices Requiring Specific Authorization, which is maintained on OFAC's website. This list will be published in the Federal Register, as will any changes to the list. [12-22-16]

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319. Does the GL for medical devices authorize the exportation or reexportation of these items to all entities in Iran?

No. While the GL under section 560.530(a)(3)(i) of the ITSR authorizes exports or reexports of certain medical devices to most entities in Iran, it does not authorize exports or reexports to military, intelligence, or law enforcement purchasers or importers, nor does it authorize exports or reexports to persons whose property and interests in property are blocked under any of the programs administered by OFAC, except for persons whose property and interests in property are blocked solely pursuant to Executive Order 13599 and the ITSR. When engaging in activities pursuant to this GL, exporters and reexporters are expected to undertake due diligence regarding all parties to the transactions, just as they would when acting pursuant to a specific license issued by OFAC. [12-22-16]

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361. What items and persons are excluded from the agricultural commodities general license in the ITSR?

The specified items excluded from the scope of the agricultural commodities general license are: castor beans, castor bean seeds, certified

pathogen-free eggs (unfertilized or fertilized), dried egg albumin, live animals (excluding live cattle, shrimp, and shrimp eggs), embryos (excluding cattle embryos), Rosary/Jequirity peas, non-food-grade gelatin powder, peptones and their derivatives, super absorbent polymers, western red cedar, and all fertilizers.

The persons excluded from the scope of the agricultural commodities general license are Iranian military, intelligence, or law enforcement purchasers or importers. In addition, the agricultural commodities general license does not authorize exports or reexports to persons whose property and interests in property are blocked under any of the programs administered by OFAC, except for persons whose property and interests in property are blocked solely pursuant to Executive Order 13599 and the ITSR. .

Exports or reexports involving the excluded items or excluded persons discussed above continue to require the level of review afforded by specific licensing and therefore are not authorized by the agricultural commodities general license. [12-22-16]

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362. Is the exportation or reexportation of non-U.S.-origin agricultural commodities, medicine, or medical devices by a U.S. person to Iran authorized?

Yes. The definitions of the terms “agricultural commodities,” “medicine,” and “medical device” used in the relevant general licenses in the ITSR include, in the case of items subject to the Export Administration Regulations (EAR), items that are designated as EAR99 and, in the case of items not subject to the EAR, items that would be designated as EAR99 if they were located in the United States. For example, under the agricultural commodities general license, a company located in the United States would be authorized to arrange for the exportation from a third country to Iran of agricultural commodities produced in the third country if those commodities would be designated as EAR99 if they were located in the United States, provided that all conditions of the general license are otherwise satisfied. [12-22-16]

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363. Is the exportation or reexportation by non-U.S. persons of agricultural commodities, medicine, or medical devices that are subject to the EAR to Iran authorized?

Yes. A non-U.S. person may export or reexport agricultural commodities, medicine, or medical devices to Iran under the relevant general licenses in the ITSR, provided that the items are subject to the EAR and all conditions of the relevant general license are otherwise satisfied. For example, a non-U.S. person would be authorized under the medicine and medical devices general license to arrange for the exportation or reexportation to Iran of EAR99 medicines located in the United States or a third country.

In addition, an entity owned or controlled by a U.S. person and established or maintained outside the United States (a “U.S.-owned or -controlled foreign entity”) may export or reexport agricultural commodities, medicine, and medical devices to Iran under the relevant general licenses in the ITSR (including both items subject to the EAR and items not subject to the EAR), provided that all conditions of the relevant general license are otherwise satisfied. For example, a U.S.-owned or -controlled foreign entity would be authorized under the medicine and medical devices general license to arrange for the reexport to Iran of EAR99 medicines, as well as the export to Iran of medicines not subject to the EAR (e.g., medicines produced outside the U.S. by a non-U.S. person with no controlled U.S. content) that would be designated as EAR99 if they were located in the United States. [12-22-16]

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364. Who can apply for a specific license if an export or reexport to Iran is not authorized by general license?

If an export or reexport is not authorized by general license, any U.S. person, or non-U.S. person exporting items subject to the EAR and designated as EAR99, wherever located, or U.S.-owned or -controlled foreign entity may apply for a specific license. For example, a U.S.-owned or -controlled foreign entity may apply for a specific license for the export or reexport to Iran of agricultural commodities excluded from the scope of the agricultural commodities general license, such as live animals. [12-22-16]

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365. What is authorized with respect to brokerage services related to exports or reexports of agricultural commodities, medicine, or medical devices to Iran?

U.S. persons continue to be authorized to provide brokerage services on behalf of U.S. persons for the sale and exportation or reexportation by U.S. persons of agricultural commodities, medicine, and medical devices to Iran, provided that the sale and exportation or reexportation itself is authorized by either general or specific license. [4-7-2014]

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366. Do I still need to come in to OFAC for a specific license to export certain types of agricultural commodities to Iran?

OFAC will no longer issue specific licenses for exports or reexports that are covered by the agricultural commodities general license in the ITSR.

However, a small number of specified agricultural commodities and certain persons are excluded from the agricultural commodities general license and continue to require the level of review afforded by specific licensing. As a result, persons seeking authorization for the exportation or reexportation to Iran of castor beans, castor bean seeds, certified pathogen-free eggs (unfertilized or fertilized), dried egg albumin, live animals (excluding live cattle, shrimp, and shrimp eggs), embryos (excluding cattle embryos), Rosary/Jequirity peas, non-food-grade gelatin powder, peptones and their derivatives, super absorbent polymers, western red cedar, or all fertilizers, or for the exportation or reexportation of any agricultural commodities to Iranian military, intelligence, or law enforcement purchasers or importers, must still apply for a specific license from OFAC.

The agricultural commodities general license in the ITSR also does not authorize exports or reexports to persons whose property and interests in property are blocked under any of the programs administered by OFAC, except for persons whose property and interests in property are blocked solely pursuant to Executive Order 13599 and the ITSR. [12-22-16]

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367. What is the definition of a “bioactive peptide”?

For purposes of the relevant exclusion from the agricultural commodities general license in the Iranian Transactions and Sanctions Regulations, the term “bioactive peptide” means an item that must be less than 50 amino acids in length and bioactive (antioxidant, antiallergic, antimicrobial, antithrombotic, antiatherogenic, hypoglycaemic, anti-inflammatory, antitumor, cytostatic, immunosuppressive properties, or hepatoprotective properties.) [4-7-2014]

Amendments to the General Licenses for the Exportation or Reexportation of Agricultural Commodities, Medicine, and Medical Devices to Iran

Print this topic

482. What key changes did the December 23, 2016 regulatory amendment to the Iranian Transactions and Sanctions Regulations (ITSR) make relating to the exportation and reexportation of agricultural commodities, medicine, and medical devices to Iran?

The amendment primarily expands the scope of medical devices that can be exported or reexported to Iran without specific authorization. It authorizes the exportation or reexportation to Iran of all items meeting the definition of the term “medical device” as defined in section 560.530(e)(3) of the ITSR, except for certain excluded persons as well as certain medical devices that are excluded from the authorization and published on the List of Medical Devices Requiring Specific Authorization. The exportation and reexportation of items on the List of Medical Devices Requiring Specific Authorization or to excluded persons requires a specific license from OFAC. The amendment also adds shrimp and shrimp eggs to the list of agricultural commodities that may be exported to Iran without specific authorization, other than to certain excluded persons.

In addition, the amendment authorizes covered persons to provide training, other than to certain excluded persons, necessary and ordinarily incident to the safe and effective use of agricultural commodities, medicine, and medical devices exported or reexported pursuant to section 560.530 of the ITSR. It also authorizes the importation into the United States of certain U.S.-origin agricultural commodities, medicine, and medical devices that were previously exported or reexported to Iran pursuant to the authorizations in section 560.530 of the ITSR and that are broken, defective, or non-operational, or are connected to product recalls, adverse events, or other safety concerns. Additionally, the amendment authorizes the exportation or reexportation to Iran, and storage within Iran for future use, of a limited number of replacement parts for certain medical devices previously exported or reexported to Iran pursuant to an OFAC license to replace broken or non-operational components or where it is ordinarily incident and necessary to proper preventative maintenance of the medical device, and the exportation or reexportation of software and services related to the operation, maintenance, and repair of medical devices. [12-22-16]

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483. How does an exporter determine which medical devices need to be specifically licensed by OFAC for exportation or reexportation to Iran?

An exporter should refer to the List of Medical Devices Requiring Specific Authorization , which is maintained on OFAC's website, www.treasury.gov/ofac, on the Iran Sanctions page. An exporter must obtain a specific license from OFAC to export or reexport any medical device on that list to Iran. An exporter must also obtain a specific license for exports to excluded persons as defined in section 560.530(a)(3)(iv) of the ITSR. [12-22-16]

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484. What types of training activities are considered to be necessary and ordinarily incident to the safe and effective use of medicine and medical devices?

OFAC considers training activities including the dissemination of product information on the intended use of the device; comparisons of other devices and options; and the manufacturer's instructions for use, labeling, warning, contraindications, storage, and maintenance of the medicine or device to be necessary and ordinarily incident to the safe and effective use of medicines and medical devices. Other examples include training health care professionals to use medical devices safely in order to achieve the desired patient outcome, training on procedures for cleaning and inspecting devices regularly to ensure they are functioning correctly, ongoing training and periodic testing to ensure users stay competent, and training on procedures for adverse events or device failure. [12-22-16]

Amendment to the Definition of "Iranian-origin goods" or "goods of Iranian origin" in the Iranian Transactions and Sanctions Regulations

Print this topic

485. What key changes did the December 23, 2016 regulatory amendment to the ITSR make to the definition of "Iranian-origin goods" or "goods of Iranian origin"?

OFAC amended section 560.306 of the ITSR to clarify that the terms "goods of Iranian origin" and "Iranian-origin goods" do not include the following categories of goods, provided that such goods were not grown, produced, manufactured, extracted, or processed in Iran: (i) goods exported or reexported to Iran under an authorization issued pursuant to the ITSR (e.g., a medical device or a personal communications device exported or reexported to Iran pursuant to a general or specific license issued pursuant to the ITSR) and that subsequently have been reexported from and are located outside of Iran, or (ii) goods transported on a vessel or aircraft that passed though Iranian territorial waters or stopped at a port or place in Iran en route to a destination outside of Iran and that have not otherwise come into contact with Iran. [12-22-16]

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486. What is an example of goods otherwise coming into contact with Iran?

Goods have come into contact with Iran, if, for example, they are removed from a port or airport in Iran or are processed through Iranian customs, or if they transit Iran by truck or train en route to a destination outside of Iran. [12-22-16]

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487. Are goods that are unloaded from a ship in an Iranian port, put on a truck, and driven out of the boundaries of the port or place of unloading considered to be Iranian-origin goods?

Yes. These goods have otherwise come in contact with Iran and thus do not fall within the carve-out to the definition of Iranian-origin goods or goods of Iranian-origin at section 560.306(b)(2) of the ITSR. However, if these goods are being exported or reexported to Iran under an authorization issued pursuant to the ITSR and they subsequently are reexported from and are located outside of Iran, they would fall within the carve-out to the definition of Iranian-origin goods or goods of Iranian-origin at section 560.306(b)(1) of the ITSR. [12-22-16]

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488. Are goods that are unloaded from a ship in an Iranian port, moved within the boundaries of the port, and loaded onto a second ship en route to a destination outside of Iran, without ever leaving the port considered to be Iranian-origin goods?

No, provided that they have not otherwise come in contact with Iran. [12-22-16]

Licenses Authorizing Exports of Agricultural Commodities, Medicine, and Medical Devices

For information regarding specific licenses authorizing exports of agricultural commodities, medicine, and medical devices to Iran and Sudan pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), please see the following topic.

Iranian General License D-1

Print this topic

On May 30, 2013, the Department of the Treasury, in consultation with the Departments of State and Commerce, issued General License D ("GL D") authorizing the export and reexport to Iran of certain hardware, software, and services incident to personal communications. On February 7, 2014, the Department of the Treasury, in consultation with the Departments of State and Commerce, issued amended Iranian General License D-1 ("GL D-1") , which clarifies certain aspects of GL D and adds certain new authorizations. Effective February 7, 2014, GL D-1 replaces and supersedes in its entirety GL D.

General Questions (Print)

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337. What are key changes made by amended General License D-1?

First, GL D-1 expands the authorization in GL D to permit the exportation, reexportation, or provision, directly or indirectly, to Iran of certain personal communications software, hardware, and related services subject to the Export Administration Regulations, 15 C.F.R. parts 730 through 774 ("EAR") (rather than just the exportation or reexportation from the United States or by a U.S. person of such software, hardware, and services). See GL D-1, paragraphs (a)(2)(i) & (a)(3). For purposes of GL D-1, the term "provision" could include, for example, an in-country transfer of covered software or hardware. The general license now authorizes, for example, a non-U.S. person located outside the United States to export certain hardware and software subject to the EAR to Iran. *See* FAQ #341.

Second, GL D-1 adds new authorizations for the exportation, reexportation, or provision, directly or indirectly, by a U.S. person located outside the United States to Iran of certain software and hardware not subject to the EAR. *See* GL D-1 , paragraphs (a)(2)(ii) & (a)(3). The general license now authorizes, for example, a U.S. company to export to Iran, from a location outside the United States, certain hardware or software that is not subject to the EAR (including foreign-origin hardware or software containing less than a *de minimis* amount of U.S. controlled content). *See* FAQ #342.

Third, a new Note has been added to paragraphs (a)(2) and (a)(3) clarifying that the authorization in those paragraphs includes the exportation, reexportation, or provision, directly or indirectly, of the authorized items by an individual leaving the United States for Iran. GL D-1 also adds a new authorization for the importation by an individual into the United States of certain hardware and software previously exported by the individual to Iran pursuant to other provisions of GL D-1 or 31 C.F.R. § 560.540. *See* GL D-1 , paragraph (a)(5). The general license now authorizes, for example, an individual to carry a smartphone that falls within the scope of the GL D-1 authorization while traveling to and from Iran. *See* FAQ #343.

Finally, to further ensure that the sanctions on Iran do not have an unintended chilling effect on the willingness of companies to make available certain publicly available, no cost personal communications tools to persons in that country, GL D-1 adds a new authorization related to the potential recipients of certain publicly available, no cost services and software. *See* GL D-1 , paragraph (a)(6).

Notwithstanding these changes, nothing in this general license relieves an exporter from compliance with the export license requirements of another Federal agency. [02-07-2014]

338. With respect to the authorizations in paragraphs (a)(1) and (a)(2), what services and software are covered?

Qualifying services or software must be "incident to the exchange of personal communications over the Internet." In addition, qualifying software under paragraph (a)(2) must meet the stated export control-related criteria. Both paragraphs provide an illustrative but not exhaustive list of the types of services that are authorized: "instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging." *See* FAQ #344 and OFAC's Interpretive Guidance and Statement of Licensing Policy on Internet Freedom in Iran (March 20, 2012), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/internet_freedom.pdf.

Qualifying services or software need not be specifically listed in the Annex in order to be authorized by paragraphs (a)(1) or (a)(2), provided that they otherwise meet the requirements of paragraphs (a)(1) or (a)(2). [02-07-2014]

339. With respect to the authorization in paragraph (a)(3), do exporters need to make a determination as to whether an export of an item or service listed in the Annex to GL D-1 is "incident to personal communications"?

No. The Annex lists software, hardware, and related services determined to be "incident to personal communications" for purposes of the authorization in paragraph (a)(3) of GL D-1. [02-07-2014]

340. What should I do if I am unsure whether an item or service is covered by GL D-1?

If you require assistance interpreting the authorizations contained in GL D-1 and how they apply to your situation, please contact OFAC's Licensing Division online at http://www.treasury.gov/resource-center/sanctions/Pages/licensing.aspx, by phone at 202-622-2480, or by email at ofac_feedback@do.treas.gov. [02-07-2014]

341. May a non-U.S. person export, reexport, or provide to Iran hardware and software that is subject to the EAR pursuant to GL D-1?

Yes, for purposes of the authorities administered by OFAC, amendments made by GL D-1 authorize the exportation, reexportation, or provision of certain hardware and software subject to the EAR by non-U.S. persons outside the United States. *See* GL D-1 , paragraphs (a)(2)(i) & (a)(3). For example, a non-U.S. person manufacturer of smartphones that are (a) subject to the EAR because they contain more than a de minimis amount of U.S. controlled content and (b) within the scope of the GL D-1 authorization may export the smartphones from its third-country manufacturing facility directly or indirectly to Iran. *See* FAQ #337. [02-07-2014]

342. Does GL D-1 authorize U.S. persons located outside the United States to export or reexport to Iran certain specified hardware or software that is not subject to the EAR?

Yes. Amendments made by GL D-1 authorize the exportation, reexportation, or provision to Iran by U.S. persons located outside of the United States of certain specified hardware and software items that are not subject to the EAR. *See* GL D-1 , paragraphs (a)(2)(ii) & (a)(3). GL D-1 also extends this authorization to an entity owned or controlled by a U.S. person and established or maintained outside the United States ("a U.S.-owned or -controlled foreign entity"), subject to the conditions set forth in 31 C.F.R. § 560.556. *See* GL D-1 , Note 2 to paragraph (a). Under these amendments, for example, an overseas branch of a U.S. company or a U.S.-owned or -controlled foreign entity may export to Iran, from a location outside the United States, certain hardware or software that is not subject to the EAR (including foreign-origin hardware or software containing less than a de minimis amount of U.S. controlled content) if the hardware or software is within the scope of the GL D-1 authorization. These amendments also authorize the exportation, reexportation, or provision of certain fee-based software that is not subject to the EAR because it is described in section 734.3(b) of the EAR. *See* FAQ #337. Section 734.3(b) of the EAR describes "publicly available" software for purposes of those regulations. [02-07-2014]

343. Does GL D-1 authorize the exportation to Iran and importation into the United States of personal communication devices by persons travelling from the United States to Iran and back to the United States?

Yes. As amended, GL D-1 authorizes both the exportation, reexportation, or provision to Iran and the importation into the United States by an individual entering the United States directly or indirectly from Iran, of software authorized by 31 C.F.R. § 560.540 paragraph (a)(2) and software and hardware authorized by paragraphs (a)(2) and (a)(3) of GL D-1, provided that the items were previously exported, reexported, or provided by the individual to Iran. *See* GL D-1 , paragraph (a)(5) and the Note to paragraphs (a)(2) and (a)(3). *See* FAQ #337. [02-07-2014]

344. How do the authorizations in paragraphs (a)(1), (a)(2), and (a)(6) of GL D-1 compare to the previously existing general license in 31 C.F.R. § 560.540 authorizing certain services and software incident to Internet-based communications?

The general license in § 560.540 authorizes the exportation from the United States or by U.S. persons, wherever located, to persons in Iran of no-cost services incident to the exchange of personal communications over the Internet and no-cost software necessary to enable such services. Please also see OFAC's Interpretive Guidance and Statement of Licensing Policy on Internet Freedom in Iran (March 20, 2012). *See* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/internet_freedom.pdf. Paragraphs (a)(1) and (a)(2) of GL D-1 go beyond § 560.540 by, among other things, authorizing fee-based services and software incident to the exchange of personal communications over the Internet.

In addition, to further ensure that the sanctions on Iran do not have an unintended chilling effect on the willingness of companies to make available certain publicly available, no cost personal communications tools to persons in Iran, pursuant to paragraph (a)(6) of GL D-1, the exportation, reexportation, or provision to the Government of Iran of certain publicly available, no-cost services and software described in § 560.540(a) or categories (6) through (11) of the Annex to GL D-1 is authorized. U.S. persons continue generally to be prohibited from exporting goods and services to persons whose property and interests in property are blocked pursuant to any part of 31 C.F.R. chapter V, other than Government of Iran end-users blocked solely pursuant to Executive Order 13599. *See* GL D-1 paragraph (b)(2). Prohibited end-users include Iranian persons whose property and interests in property are blocked pursuant to OFAC authorities relating to WMD proliferation, terrorism, and human rights abuses. In addition, GL D-1 does not authorize any action or activity involving any item (including information) subject to the EAR that is prohibited by, or otherwise requires a license under, part 744 of the EAR or participation in any transaction involving a person whose export privileges have been denied pursuant to part 764 or 766 of the EAR, without authorization from the Department of Commerce. [02-07-2014]

345. How can U.S. companies arrange for payment from Iran for exports authorized under GLD-1?

In general, the payment requirements under GL D-1 are the same as for all other general licenses under the Iranian Transactions and Sanctions Regulations ("ITSR"). Section 560.516 of the ITSR authorizes U.S. depository institutions to process transfers of funds to or from Iran, or for the direct or indirect benefit of persons in Iran or the Government of Iran, if the transfer arises from, and is ordinarily incident and necessary to give effect to, an underlying transaction that has been authorized by a specific or general license issued pursuant to the ITSR and does not involve debiting or crediting an Iranian account. 31 C.F.R. § 560.516(a). [02-07-2014]

346. What kind of due diligence is required for the exportation of fee-based services, software, or hardware authorized by GL D-1?

Due diligence programs should be tailored to the particular risks encountered by exporters. As a general matter, companies selling fee-based services, software, or hardware authorized by GL D-1 should undertake reasonable, risk-based measures designed to ensure that they do not export their products to persons whose property and interests in property are blocked pursuant to any sanctions program administered by OFAC, regardless of whether the Government of Iran or other end-user appears on OFAC's list of Specially Designated Nationals and Blocked Persons (or any of OFAC's other sanctions lists). [02-07-2014]

347. Are there any restrictions as to the use of the Farsi language in authorized advertising or software?

U.S. sanctions on Iran do not impose any restrictions as to the use of the Farsi language. [02-07-2014]

348. May U.S. persons employ agents in Iran to facilitate sales, create or fund a physical sales presence on the ground in Iran, or utilize Iranian commercial marketing services in furtherance of exports authorized under GL D-1?

No. GL D-1 does not authorize the employment of persons in Iran to facilitate sales, the maintenance of a physical sales presence in Iran, or the utilization of Iranian marketing services. However, certain copy-ready advertising materials are exempt from the prohibitions of the ITSR to the extent

they qualify as information or informational materials pursuant to 31 C.F.R. § 560.210(c). [02-07-2014]

Specific Software, Hardware, and Services Covered by General License D-1 for Iran

For additional information regarding specific software, hardware, and services in Iran, please see the following topic.

Payments or the Facilitation of Payments to Iranian Civil Aviation Authorities for Overflights of Iran or Landing in Iran

Print this topic

417. Are payments or the facilitation of payments not involving U.S. persons to Iranian civil aviation authorities for overflights of Iran or landing in Iran by aircraft that are owned by a non-U.S. person and registered outside the United States sanctionable under U.S. law?

No. Provided that the relevant transactions do not involve the U.S. financial system or persons on the Specially Designated Nationals and Blocked Persons List (SDN List), payments of charges for services rendered by the Government of Iran in connection with the overflight of Iran or landing in Iran of aircraft owned by a non-U.S. person and registered outside the United States are not subject to sanctions under U.S. law. The involvement of persons on the SDN List, including Iranian financial institutions or airlines designated pursuant to Executive Order 13224 or Executive Order 13382, would create sanctions exposure for participants to such transactions.

U.S. persons cannot participate in transactions related to the payment of overflight or landing fees to the Government of Iran, nor can such transactions transit the U.S. financial system, unless the transactions fall within the scope of 31 C.F.R. § 560.522 or a specific license issued by OFAC and the payments in connection with such authorized transactions are consistent with 31 C.F.R. § 560.516. U.S.-owned or -controlled foreign entities are authorized to participate in transactions related to the payment of overflight or landing fees to the Government of Iran to the extent such transactions are consistent with the terms of General License H. [04-27-2016]

Provision of Routine Goods and Services by non-U.S. persons to Diplomatic Missions of the Government of Iran

Print this topic

455. Is the provision of routine goods and services by non-U.S. persons to diplomatic missions of the Government of Iran located outside the United States sanctionable under U.S. law?

The provision of goods and services for the conduct of the official business of the diplomatic missions of the Government of Iran located outside the United States or for the personal use of the employees of the missions, including financial services such as the opening of a bank account, by a non-U.S. person would not be sanctionable under U.S. law, provided that such goods and services do not involve persons on OFAC's List of Specially Designated Nationals and Blocked Persons (other than any political subdivision, agency, or instrumentality of the Government of Iran listed solely pursuant to Executive Order 13599 or any Iranian depository institution listed solely pursuant to Executory Order 13599) or other activities that would be sanctionable under U.S. law.

Further, the provision of goods and services to the diplomatic missions of the Government of Iran outside the United States cannot involve U.S. persons or U.S.-owned or -controlled foreign entities, or the provision to the Government of Iran of goods, technology, or services subject to the prohibitions of 31 C.F.R. §§ 560.204-205, nor can related transactions transit the U.S. financial system, unless the activities and/or transactions are authorized by OFAC. [10-22-2015]

Additional Iran-related Questions From Financial Institutions

Print this topic

37. My bank operates accounts for individuals living in Iran. OFAC has told us that these accounts cannot be operated. Does this mean that the accounts are blocked?

No, the accounts are restricted. The Iranian sanctions prohibit the export of goods or services to Iran. By operating an account for an individual or company in Iran, the bank would be exporting services to that person or entity in violation of the Iranian Transactions Regulations. The accounts, however, are not blocked. The account holder can close the account and have the funds transferred to his or her account outside the United States. [09-10-02]

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38. Are U-Turn payments for Iran still permitted?

No, as of November 10, 2008 U-Turn payments are no longer allowed. [11-10-08]

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118. I have a client that is in Iran to visit a relative. Do I need to restrict the account?

No. As long as you are satisfied that the client is not ordinarily resident in IRAN, then the account does not need to be restricted. [07-28-09]

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54. I have an account with a W-8 showing an address in Iran. Is the account automatically restricted?

In the absence of information proving to your satisfaction that the account holder is not in Iran, you should consider the account restricted based on the W-8 filing. [06-24-05]

Return to the OFAC FAQ Index

Annex 25

U.S. Department of State, "State Sponsors of Terrorism", as of 20 December 2016

U.S. Department of State
Diplomacy in Action

State Sponsors of Terrorism

Countries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism are designated pursuant to three laws: section 6(j) of the Export Administration Act, section 40 of the Arms Export Control Act, and section 620A of the Foreign Assistance Act. Taken together, the four main categories of sanctions resulting from designation under these authorities include restrictions on U.S. foreign assistance; a ban on defense exports and sales; certain controls over exports of dual use items; and miscellaneous financial and other restrictions.

Designation under the above-referenced authorities also implicates other sanctions laws that penalize persons and countries engaging in certain trade with state sponsors. Currently there are three countries designated under these authorities: Iran, Sudan, and Syria.

Country	Designation Date
Iran	January 19, 1984
Sudan	August 12, 1993
Syria	December 29, 1979

For more details about State Sponsors of Terrorism, see "Overview of State Sponsored Terrorism" in Country Reports on Terrorism (http://www.state.gov/j/ct/rls/crt/).

BUSINESS (/BUSINESS)

Business Support: Frequently Asked Questions (FAQ) (http://www.state.gov/e/eb/cba/faq/index.htm)

Office of Global Partnerships (http://www.state.gov/s/partnerships/)

Commercial and Business Affairs Office (http://www.state.gov/e/eb/cba/index.htm)

Key Officers of Foreign Service Posts (http://www.state.gov/documents/organization/111812.pdf)

Trade Policy and Programs (http://www.state.gov/e/eb/tpp/index.htm)

Defense Trade Controls (http://www.pmddtc.state.gov/)

Small and Disadvantaged Business Utilization (http://www.state.gov/s/dmr/sdbu/index.htm)

Recovery and Reinvestment Act (http://www.state.gov/recovery/index.htm)

Service Contract Inventory (http://csm.state.gov/content.asp?content_id=135&menu_id=71)

CAREERS (/CAREERS)

Consular Fellows Program (https://careers.state.gov/work/foreign-service/consular-fellows)

Foreign Service Officer (http://careers.state.gov/officer/index.html)

Civil Service Officer (http://careers.state.gov/civil-service/index.html)

Foreign Service Specialist (http://careers.state.gov/specialist/index.html)

International Organizations (http://iocareers.state.gov/Main/Home)

Student Programs (http://careers.state.gov/students/)

USAJobs: Working for America (http://www.usajobs.gov/)

EDUCATION & EXCHANGES (/YOUTHANDEDUCATION)

Discover Diplomacy (http://diplomacy.state.gov/discoverdiplomacy/)

Global Youth Issues (http://www.state.gov/r/ppr/gyi/index.htm)

Diplomatic History (http://history.state.gov/)

Office of Overseas Schools (http://www.state.gov/m/a/os/)

Exchange Visitor Program (http://j1visa.state.gov)

Fulbright Program (http://eca.state.gov/fulbright)

Student Career Programs (http://careers.state.gov/students/)

The Office of Website Management, Bureau of Public Affairs, manages this site as a portal for information from the U.S. State Department.
External links to other Internet sites should not be construed as an endorsement of the views or privacy policies contained therein.
Note: documents in Portable Document Format (PDF) require Adobe Acrobat Reader 5.0 or higher to view, download Adobe Acrobat Reader (http://get.adobe.com/reader/).

Annex 26

Statements by the White House Spokesperson of 18 April 2016 and of 17 May 2016

Press Briefing by Press Secretary Josh Earnest, 5/17/16

www.whitehouse.gov/the-press-office/2016/05/17/press-briefing-press-secretary-josh-earnest-51716

James S. Brady Press Briefing Room

1:11 P.M. EDT

MR. EARNEST: Good afternoon, everybody. Welcome to the dry White House Briefing Room. (Laughter.) I do not have any announcements to start, so we can go straight to your questions.

Darlene, do you want to go first?

Q Thank you. The Senate passed legislation today by voice vote that will allow families of 9/11 victims to sue in U.S. court for any role the Saudi government may have played in the attack. Does the White House threat to veto that bill still stand?

MR. EARNEST: Darlene, I know that the advocates of this legislation have suggested that they have taken into account our concerns by more narrowly tailoring the legislation. But, unfortunately, their efforts were not sufficient to prevent the longer-term, unintended consequences that we are concerned about. This legislation would change longstanding international law regarding sovereign immunity. And the President of the United States continues to harbor serious concerns that this legislation would make the United States vulnerable in other court systems around the world.

There's also a concern that hasn't gotten as much attention about the potential vulnerability that is created for some of our allies and partners in U.S. courts. And the concern is related to the fact that sovereign immunity is a principle that is critical to our national security. The United States is more engaged in activities in other countries than any other country in the world. Typically, those are actually activities that other countries benefit from significantly. These are peacekeeping activities, or humanitarian relief activities, or other activities in which the United States is supporting the national security activities of other countries, and the national security of other countries is enhanced by the involvement of the United States.

But out involvement in those activities is made more complicated by the chance that the principle of sovereign immunity could be eroded. So the administration strongly continues to oppose this legislation. And we're obviously going to begin conversations with the House about it.

Q Are the serious concerns that you just cited -- are those strong enough to lead to a veto of the bill?

MR. EARNEST: Yes, as I think I mentioned before, given the concerns that we have expressed, it's difficult to imagine the President signing this legislation. That continues to be true.

Q Will the White House -- as the bill goes to the House, will the White House work with lawmakers in the House to maybe keep the bill from coming up for a vote there? Is it important enough to try to do that and stop it?

MR. EARNEST: Well, I think there are a variety of options. That would certainly be one of them. I think the other option would be seeking additional changes to the bill that would more directly address the concerns that we have been raising for months now. So there are multiple options, but we certainly anticipate having conversations with members of Congress about this issue.

I would just note that there are both Democrats and Republicans in the House of Representatives that have expressed concerns with the bill. So there is an opportunity for us to work in bipartisan fashion to try to address the serious concerns that we've raised about the unintended consequences of this legislation being enacted.

Q Just to before we came out -- concerning the veto theme -- the Statement of Administration Policy that was released on the $622 million Zika funding bill in the House -- saying that -- would recommend that the President veto that if it got to him. The Senate today is voting on three different Zika funding measures. There's one for about $1.1 billion that seems most likely to advance. Where does the White House fall on that particular bill? If the $622 million is not enough.

MR. EARNEST: Well, we have several concerns with the House bill. The first concern is that it is woefully insufficient given the significant risk that is posed by Zika. That's not just my own personal analysis -- that actually is the analysis of our public health professionals who advise the administration about what should be included in the supplemental appropriations package that we sent up to Congress nearly three months ago.

So it's disappointing that Congress is -- at least the House of Representatives is three months late and more than a billion dollars short of doing what's necessary to protect the American people. There's no reason that this should be a partisan or ideological issue -- this isn't a question of government philosophy. This is a question about whether or not you're actually committed to ensuring that we're doing everything possible to protect pregnant women and babies in the United States of America from getting a debilitating disease, or at least a virus that has debilitating consequences for the neurological development of babies.

So we're quite disappointed that the House is so late in acting and what they've put together is so woefully insufficient. It's not just our public health professionals who have expressed those concerns. I would note that one certain Republican senator from Florida was on the floor of the United States Senate today expressing those concerns. So I do think it does raise a question for the 17 Republican House members from the state of Florida about what their view is. The Republican senator from the state of Florida has indicated that the Congress should act expeditiously to pass the $1.9 billion funding proposal that our public health experts say is needed.

I think it would be interesting to understand exactly what position the 17 other Republicans from Florida who represent that state in the Congress think of this. I think it's certainly a relevant question. I think it underscores the point that I was making before that there's no reason this should be a partisan issue. This is a basic matter of the public health and well-being of the American people.

Q And the $1.1 billion -- where does the administration fall on that?

MR. EARNEST: Well, the Senate, fortunately, appears to be making more progress. They will also include a vote today on the $1.9 billion proposal that we put forward back in February. And we strongly encourage Democrats and Republicans to come together around that bill. That's what our public health professionals say is needed to do everything possible to protect the American people from Zika. And this would be an emergency appropriation that would be available to state and local officials, and federal government scientists immediately. We believe that is the preferred -- we believe that's the best way to protect the American people from the Zika virus.

Q You seem to be saying the $1.9 billion or nothing. I mean --

MR. EARNEST: Well, what I'm saying is that is what our public health professionals say that we need. So we're looking for Congress to act on that request and that's what we would like to see move forward.

The other concern that we have with the House bill isn't just that the amount of resources committed is much smaller; the funding would be offset by taking away resources that are currently being used to protect the American people from Ebola. And traditionally, when Congress has been faced with a public health emergency, they haven't wasted a lot of time looking for funding offsets. And that's a pretty dangerous exercise because it delays the needed funding, but it also risks gutting other critical priorities.

Let's talk a little bit about how that Ebola funding is currently being used. Right now, that funding is being used by the CDC to work with the health ministries in both Guinea and Liberia to investigate the rapidly changing situation

related to new Ebola cases there. Right now, the CDC is assisting those governments in tracing nearly a thousand contacts. These are individuals who are at heightened risk of potentially spreading Ebola. So the CDC has 100 staff that are deployed over there, and that staff is helping to process 10,000 samples per month in Liberia, Sierra Leone, and Guinea.

So it's pretty clear that what's happening -- that the work that the CDC is doing in West Africa was very helpful in the fall of 2014 in stopping the spread of that terrible disease, but it requires vigilance. And the lesson that we should have learned from 2014 is that the United States and the American people benefit from enhanced capacity of public health officials in other countries, that stopping the spread of a dangerous virus in another country makes the American people safer. And when that was an academic hypothetical exercise, there was some skepticism that some people expressed about that notion. But there weren't many people expressing skepticism about that notion in the fall of 2014 when there was concern about the Ebola virus appearing in the United States.

So it is a bad idea for Republicans to move forward with a proposal that would gut our efforts to follow through in the fight against Ebola and it's a bad idea for Republicans to further delay the emergency funding that's necessary to protect the American people from the Zika virus.

Tim.

Q In Baghdad, several bombings today, extending the deadliest wave of the year in bombings there. And on Saturday, Prime Minister Abadi said that he's afraid that the political crisis there is hampering the fight against Islamic State. Does the administration share that concern?

MR. EARNEST: Tim, let me start by saying that the United States strongly condemns the barbaric terrorist attacks in Iraq today by ISIL that specifically targeted innocent civilians. We extend our deepest condolences to the victims and their families. These string of attacks by ISIL is the latest reminder of the danger that this group poses to all Iraqis and the importance of Iraqi leaders from all communities, working together against a common enemy.

Tim, you'll recall back in 2014, the President made the offer of U.S. military assistance to Iraq contingent upon Iraq's central government more effectively uniting that country to confront ISIL. So that should be an indication to you that a unified, effectively governed Iraq is critical to our success against ISIL. It has been a central part of our strategy from the very first day. And we've been encouraged over the last year and a half by the efforts that Prime Minister Abadi has undertaken to unify that country and pursue the kind of inclusive governing agenda that can inspire the confidence of Iraq's diverse population that the central government in Baghdad is looking out for their best interests. We believe that that will have a corresponding impact on the effectiveness and resilience of Iraq's security forces.

I think that's largely proved to be true. Iraq's security forces, backed by coalition military airpower and the advice and assistance of coalition militaries from around the world, has bene effective in driving ISIL out of territory that they previously controlled. We know that ISIL has been driven out of about 40 percent of the populated areas that ISIL previously controlled in Iraq. That's tangible progress.

And our coalition is committed to trying to keep up that momentum and continue to pressure ISIL while also providing the Iraqi central government necessary resources to rebuild those areas that ISIL had taken over. We know that in places like Ramadi. ISIL didn't just occupy that community -- they essentially destroyed it. And rebuilding that infrastructure and rebuilding those communities so that people feel confident in moving back home is going to be critical to our longer-term success of bringing some stability to that region of the world. And so the important financial contributions that have been made by countries around the world are also an important part of our strategy, but they're all predicated on the Iraqi people and the international community having confidence in the effectiveness of the Iraqi central government.

Q Well, Abadi seems to be very concerned about the turmoil in his own government. Are you saying that the troops that are coming in, the U.S. troops that are coming in are going to help him deal with that while he figures out

the turmoil?

MR. EARNEST: No. I think the U.S. troops that are in Iraq are there for a very specific reason, which is to degrade and ultimately destroy ISIL. And they're focused on missions that involve protecting the embassy, carrying out military air operations against ISIL targets, in some cases providing training and advice and assistance to Iraqi security forces, and there's a small number of special operators that have been organized into these expeditionary forces that can carry out raids against senior ISIL figures. We've been very clear about the mission that U.S. forces in Iraq are pursuing.

Q And on Syria, there's a lot of pessimism over the talks in Vienna. Does the White House believe that the Syrian government has systematically denied humanitarian aid?

MR. EARNEST: Well, there's extensive reporting and plenty of evidence to indicate that too often the Assad regime or forces that are operating under the command and control of the Assad regime are making a concerted effort to prevent the kind of humanitarian access that's needed for Syrian populations that are caught in the crossfire of that conflict.

And we've expressed our concerns on a variety of occasions about the tendency of Assad regime forces to either prevent convoys of humanitarian goods from moving into needed areas -- in some cases, there actually are reports of Syrian forces essentially raiding those convoys for the supplies that they would like to have or at least prevent those supplies from reaching the intended audience. So that is a source of significant concern. And one of the reasons that the administration has worked aggressively to hold the Assad regime accountable for living up to the commitments that they made in the context of the cessation of hostilities is to make it easier for those kinds of humanitarian supplies to get to those areas that badly need it.

So access for humanitarian relief workers and for humanitarian assistance continues to be a critical concern not just of the United States but the rest of the international community. And that includes the Assad regime following through on the commitment that they've made to abide by the cessation of hostilities and create conditions where it's much easier for humanitarian aid workers to get access to communities that have spent years caught in the crossfire.

Justin.

Q Vice President Biden, tomorrow, is going to announce the final overtime rule, and the news here is that it's pegged now to the 40th percentile in sort of the lowest-paid region of the country rather than the country overall. It's about a $3,000 dip. I'm wondering if you can explain why the administration ultimately decided not to extend this benefit to more workers.

MR. EARNEST: Well, Justin, the Department of Labor has been considering this change to overtime rules for quite some time, and their focus has been on making sure that people are fairly paid, including for their hard work. And by definition, this is a rule that would apply to the hardest-working Americans.

But this is a rule that continues to be under consideration and is in the process. It has been for some time, and I would expect an announcement about a decision soon, but I don't have any information about the conclusions that have been reached at this point. Once they've made an announcement, then we can engage in a discussion about why they've reached the decision that they have.

Q Senator Warren wrote a letter to the administration earlier this month and urged you guys that, one, too often the voices of workers are buried beneath a flood of comments from lobbyists and lawyers. If there an erosion here that would leave hundreds of thousands of people without getting that benefit, wouldn't that be a sign that lobbyists and lawyers ended up winning out with the administration?

MR. EARNEST: No, I think there is a strong track record of this administration making sure that the rulemaking

process represents the best interests of middle-class families. And that is true when it comes to establishing the Consumer Financial Protection Bureau, an agency that was established specifically to look out for the interests consumers that aren't as well represented in Washington and in the rulemaking process as much larger financial institutions that can afford highly paid lobbyists.

So whether it's the implementation of rules related to Wall Street reform, or the implementation of rules related to health care reform, or the implementation of rules related to fighting carbon pollution, the administration's track record of protecting the interest of middle-class families is rock-solid.

Q On the 9/11 bill, obviously it's got to pass through the House, but Senator Schumer said today that he believes -- that he would vote to override the President's veto and he thinks that he could have the votes to do that. Is that a legitimate concern? Are you guys going to start whipping against a veto override in the Senate?

MR. EARNEST: Well, before we get to the question of a veto override there's a question about whether or not this legislation will pass the House. So as I noted to Darlene, there are Democrats and Republicans in the House of Representatives that have raised concerns about the bill in the same way that the administration has. So we'll engage in a conversation with the House of Representatives, and we'll take it from there.

Q Last one, on Gitmo. You guys released a veto threat against the NDAA yesterday, and in it you said specifically that the restrictions preventing you from coming up with an alternative site for Guantanamo Bay was potentially unconstitutional. That's also the reason that you cited, back a few months ago when presenting the plan to Congress, for why you couldn't say which site would be picked -- your hands were tied because of this restriction. So if you believe it's unconstitutional, I guess the question is, why not either defy the law and let the courts decide, or challenge the law in the courts to allow you to do this work that you say is necessary for the President?

MR. EARNEST: Well, Justin, we have made clear that closing the prison at Guantanamo Bay is a top priority, and it's a top priority because taxpayer funds could be much more effectively spent in housing those individuals in facilities that have already been built here in the United States. And we could do that -- and in doing so, we could save millions of dollars in taxpayers funds. We've also expressed a concern that is shared by national security experts in both parties that extremist organizations use the continued operation of the prison at Guantanamo Bay as a recruiting tool. And the President believes that the American people would be safer if we took that recruiting tool, that propaganda tool away from extremist organizations.

This is all important, particularly when you consider that we've demonstrated in this country that we can effectively detain convicted terrorists on American soil in a way that doesn't pose an enhanced security threat to the American people. We've also demonstrated that we can bring terrorists to justice on American soil, using the American criminal justice system to hold them accountable for their crimes. That would give the United States the benefit of being able to say we're going to protect the American people and we're going to do it in a way that's entirely consistent with our values even if our adversaries and our enemies aren't willing to subscribe to those values.

It's a pretty powerful argument and a pretty powerful statement, and something that makes the American people safer. So that's our motivation.

And, frankly, what we would like to see, Justin, is we'd just like to see Congress get out of the way. In some ways, it's not even a situation -- so often -- let's take Zika, for example. To fight Zika and protect the American people from Zika we need Congress's affirmative cooperation to do that. And right now, Republicans, particularly in the House of Representatives, are falling down on the job and putting the American people at greater risk because they aren't working effectively with the administration to fight the Zika virus, because they won't appropriate the emergency funding.

When it comes to Gitmo, the standard is much lower. We just need Congress to get out of the way. They have, time and time again, included all these restrictions that have prevented the administration from doing what is necessary

to protect the American people. So we just need Congress to remove those obstacles so that we can move forward effectively in closing the prison at Guantanamo Bay and doing it in a way that will enhance the national security of the American people.

Q But I think my question was if you believe the restriction is unconstitutional, and for all the reasons that you just outlined, strongly believe that the prison should be closed, why not either mount a legal challenge or just defy what you see is an unconstitutional restriction?

MR. EARNEST: Well, I can't speak to our legal strategy. I think the most direct route is not one that winds through the federal courts for years, but rather --

Q Well, we're in year eight, right, so, you might as well try something, right?

MR. EARNEST: Well, I actually think that that's sort of my point, which is we are in year eight, so initiating a years-long legal process is certainly an option that's available to the administration. I'm not going to take it off the table. But given the priority that the President has established here, we'd like to just see Congress take the steps that are necessary to remove those obstacles so that we can get this important business done. That's the most direct route to accomplishing a national security goal that has been advocated by both Democrats and Republicans, including Republican President George W. Bush.

Olivier.

Q Thanks, Josh. Staying on Gitmo for a second. The NDAA has a section that would appear to reopen the door to detainees there now to take plea deals in Article 3 courts and then be transferred to third countries. Is that something that you guys support? And by how much do you think that would reduce the population?

MR. EARNEST: Well, Olivier, I haven't considered every single proposal in the NDAA, so let me consult with our policy staff in terms of the way that proposal is written and get back to you with a position on it.

Q And then on the talks about Syria, John Kerry today said if Assad "has reached a conclusion that there is no plan B. He has done so without any foundation whatsoever and it's very dangerous." It's dangerous for whom?

MR. EARNEST: Well, I think the concern that Secretary Kerry is expressing there is that the longer that President Assad remains in power in Syria, the more chaos and violence and division plagues that country. And that's why the United States and most of the rest of the international community is strongly in favor of executing a political transition inside of Syria as soon as possible. He has lost the legitimacy to lead that country, he continues to order the Syrian military to carry out attacks against innocent, unarmed civilians, and by doing so, he has lost any claim within the realm of reason to being able to govern the country of Syria. Just as a practical matter, it's hard to imagine that Syrian citizens who are on the receiving end of barrel bombs would at all be open to President Assad continuing to lead the country.

So the longer that he is there, the more dangerous and violent that country becomes. And that's dangerous for the United States because we know that extremist organizations like ISIL -- and they're not the only one -- try to capitalize on that chaos and that violence to establish a safe haven and plot and carry out attacks against targets outside of Syria, including areas -- including locations that are important to the United States and including on the soil of close American allies.

Chris.

Q Josh, on the NDAA, the Statement of Administration Policy objects to a provision in the bill that would undermine President Obama's federal -- executive order prohibiting anti-LGBT discrimination among federal contractors. Would that provision alone be enough for the President to veto the House version of the NDAA?

MR. EARNEST: Well, Chris, the way that it's detailed in the Statement of Administration Position that you've clearly reviewed quite closely, there's a long list of concerns that we have with the proposal that Republicans have put forward. So at this point, I don't think I can single out any one as being sufficient to garner a presidential veto, and the reason for that is just that there are a whole lot of reasons why the bill is bad and why the President strongly opposes it.

So I think what I can say as a general matter is that the President has been forceful in using his executive authority to prevent discrimination and the executive order that you've cited is a good example of that. And the President has on a number of occasions protected his ability to use that executive authority in his negotiations with Congress. Because we know that there are some in Congress who, for reasons that seem rather perverse to me, believe that the President shouldn't be taking actions to prevent discrimination. So I'll leave it to them to explain why that's an appropriate position for them to take. It's one that seems hard -- difficult to justify, in my opinion. But the President has worked hard to protect his executive authority that can be used to prevent discrimination, and that's something that we take quite seriously.

Q How confident are you that the Republican-controlled Congress will present the President a version of a defense authorization bill that will omit this provision against his executive order?

MR. EARNEST: Well, again, I think it's very difficult to predict exactly what this Congress will do. But what is true is that there are a long list of reasons why we have strong concerns about the way that the NDA legislation is currently written, and we're hopeful that Republicans will begin to make some changes.

After all, this is their responsibility. Republicans have a strong majority in the House of Representatives. Republicans have a strong majority in the United States Senate. So, ultimately, it's Republicans who need to carry the weight of figuring out how to ensure that our national security professionals and our men and women in uniform have the authority and funding that they need to protect the country.

So this is a basic function of the United States Congress. It's unfortunate that it is being larded up with a bunch of proposals like the one that you just cited that aren't related to our national security but are intended to be divisive. And we hope that at some point Republicans in Congress will act responsibly to put forward a funding authorization proposal that is consistent with our national security interests.

Lesley.

Q Thanks, Josh, appreciate it. I wanted to ask you, going back to the directive on Friday, on the bathrooms, transgender bathrooms. There's an impression that the administration has been particularly aggressive on transgender issues, sort of more so than it was on gay marriage before the President's evolution in 2012. I'm just wondering if you see that reflecting society or if that's an administrative decision?

MR. EARNEST: Well, I don't think I would describe our position that way for a variety of reasons. I think the first is, this is a confrontation that Republicans have sought out, rather cynically, because they are seeking a political advantage. So it's the Republicans in the North Carolina legislature, for example, that convened a one-day special session to ram through HB2, the now infamous HB2 in North Carolina so that it could be quickly passed in both houses of the legislature and then signed into law by the governor of that state. They have since walked back some aspects of that bill in the face of significant criticism, particularly from the business community, and it's clear that it's had a negative impact on the economic climate in North Carolina.

So the comments that we've seen from Republicans in other places I think makes clear that they're not really interested in helping schools across the country confront what is a difficult policy challenge; they'd rather just cynically try to appeal to people's fears in order to try and gin up political support for their campaigns.

And that's not the approach that the administration is taking, and in fact, I think this was evident from the guidance

that was issued by the Department of Education on Friday, that in response to specific requests from school administrators across the country, the Department of Education put forward best practices and good ideas with regard to how schools can implement this policy in a way that will protect the dignity and safety of every student at the school. And these weren't just ideas that were developed by administrators in Washington, D.C. -- these are actually ideas that were developed by school administrators across the country who had found workable solutions that could be successfully applied in their schools. And sharing those ideas with school administrators across the country is a tangible, constructive offer of assistance that I think the majority of school administrators appreciated.

And that's not the kind of constructive contribution that we've seen from conservatives. From conservatives, you basically have seen the suggestion that they don't really have a way of -- they haven't really put forward a specific suggestion for how they believe that the rules should be applied. The best that they seem to have come up with is suggesting that birth certificates should be examined before anyone can enter a public bathroom. So that doesn't make sense. That certainly is an indication that they are much more interested in politics than they are in actually trying to solve the problem.

Q But you said that the directive was not necessarily brought about by the North Carolina law. So I'm wondering if the administration has made a concerted effort -- I mean, the Wall Street Journal calls it an effort to start a culture war to drive voter turnout in November -- I mean, if they've made a decision to sort of be more aggressive on these measures.

MR. EARNEST: I don't make a habit of reading the editorial page of the Wall Street Journal I think for obvious reasons, but I did happen to take a look at it today, and I noticed that the editorial also noted that somehow Democrats appeared to be obsessed with sex, which I thought was a rather amusing observation on their part because it's Republicans who have, for example, passed this HB2 law in North Carolina. It's Republicans in the Congress that have created a special congressional committee to take a look at Planned Parenthood. It's Republicans who have sued the administration over the implementation of the Affordable Care Act, including as it relates to women being able to get access to their birth control. So it's a curious observation by the Wall Street Journal that I don't think stands up to a lot of scrutiny.

Q Getting back to the President, is he making more of a decision to be more forceful on these issues than he had been back in 2012 when he was criticized for being sort of slow on gay marriage?

MR. EARNEST: No, I don't think so. And again, I think that at every stage, it's this administration that fought for and successfully ended "don't ask, don't tell." It's this administration that declined to continue defending the Defense of Marriage Act as litigation contesting that law wound its way through the courts.

So, again, I think as it relates to this issue, it is clear that it's Republicans who are seeking a political advantage and an administration that is seeking to offer tangible, practical advice to school administrators who are seeking to protect the safety and dignity of every student at their school.

Julie.

Q Thanks, Josh. On lifting sanctions on Burma, the Treasury Department announced today you're going to be lifting a variety of those sanctions tomorrow. But the President did say that the national emergency is going to continue and called Burma an extraordinary threat. So I wonder if you could tell us whether the President feels like the human rights situation in Myanmar warrants this action, and whether you might like to see some more progress on that front before additional sanctions come off.

MR. EARNEST: Well, let's start by saying that the U.S. government announced steps to support Burma's new democratic government, including the recalibration of sanctions on Burma, to demonstrate support for the new government's democratic reforms and the broad-based economic development.

There's no denying the important political process that has been made in Burma, and the United States has been strongly supportive of the Burmese people and Burmese government as they pursue these reforms. One high-profile piece of evidence about that progress was the election that was conducted just in the last few months that allowed for the peaceful democratic transfer of power. It's an important development in that country's history and is indicative of the important progress that they're making in pursuing long overdue political reforms.

At the same time, the United States wants to continue to further incentivize democratic reforms and continue to pressure targeted individuals and entities, including the military, so that work of reforming that government continues. There obviously is more work that needs to be done, and the sanctions that remain in place do serve to pressure those entities that may be advocating for rolling back some of those reforms.

So the government has made important progress. We want them to build on that momentum. And that's why the recalibrated sanctions announcement will move forward. But there still are entities that are obstacles to needed reform and we continue to apply pressure against those entities so that we can hopefully nurture the continued progress that Burma has met.

Q But if you still think that there are concerns as it relates to human rights and the military's control and the government potentially rolling back the progress they've made, wouldn't it be wiser to wait until you see some more of that progress before you go lifting sanctions?

MR. EARNEST: Again, I think that's why we've described it as recalibrating the sanctions rather than lifting them, because --

Q -- entities that you listed, though.

MR. EARNEST: Well, again, for discussion of specific entities and what impact they may have had on political reforms, I'd refer you to the Treasury Department. They can sort of walk you through our policy towards specific entities. But most of the remaining sanctions are primarily intended to discourage economic activity with certain individuals and entities, particularly those who undermine or obstruct political reform in Burma, commit human rights abuses in Burma, or propagate military trade with North Korea.

Those are the entities that are targeted. And I think for those reasons, continuing to apply those sanctions makes sense. At the same time, it's also important to recognize the progress that Burma has made, and by recalibrating the sanctions and easing the sanctions against some entities in Burma, we acknowledge the important progress that they've made and further incentivize additional reforms.

So that's the recalibration strategy that's been applied in this instance.

Michelle.

Q Okay, so the White House has now issued several strongly worded warnings about the 9/11 bill to members of Congress. And you've come out publicly and said these exact same things before. But today, when this bill passed on a voice vote, there was no opposition. So doesn't that tell you that there's just as strong a feeling even from the President's own party that this is a legitimate concern, and that the needs of these families to at least bring their claims to a court are more important than some indeterminate risk that some other country could do something similar to the U.S.?

MR. EARNEST: Well, look, the administration is strongly committed to assisting the 9/11 families, and there are a variety of ways in which this administration has gone to bat for 9/11 families and those who did such important work around Ground Zero to recover and rebuild in the aftermath of the 9/11 attacks. I have in mind, of course, the legislation that on a number of occasions got bottled up in the Congress to ensure that those who performed so heroically at Ground Zero were able to get access to health care.

So the administration's commitment to our nation's national security and to those who lost the most on 9/11 is steadfast. And our commitment to those principles will not change.

But we have to acknowledge the significant unintended consequences of moving forward with a piece of legislation like this. And this is a concern that's not just expressed by the Democratic administration; there are Republicans in Congress who have also expressed concerns about this in the past. So this is a sensitive issue, and I would acknowledge that the politics are tough. But focusing on the substance, we need to make sure that we don't overlook the potential unintended consequences of a bill that could put the United States at risk around the world. That is a dangerous proposition and one that the Commander-in-Chief I think is rightly concerned about.

Q So it just seems like Democrats in the Senate, by there being zero opposition on this bill, it seems like they're sending a message to the White House that the concerns of the White House aren't as important. What's your response to that?

MR. EARNEST: I'll let them explain their position and I'll let them explain why they did not object to a proposal that has significant, though, admittedly, unintended consequences. But, look, the accusation here is not that somebody in Congress voting for this legislation is seeking to intentionally inflict harm against the United States. Our concern is that that is an unintended consequence of this particular piece of this legislation. And it's the responsibility of the President of the United States and the Commander-in-Chief to look out for the interests of the United States and our servicemembers and diplomats around the world.

The concern that we have is that other countries could use the passage of this bill as an excuse to initiate their own proceedings in their own courts that puts the United States uniquely at risk.

Q Are you disappointed that Democrats in the Senate didn't voice the same concerns or oppose this bill that the White House is --

MR. EARNEST: Well, look, we oppose the bill, so we obviously are not pleased to see it move forward in the Senate. But we're going to engage with the bipartisan members in the House of Representatives who have expressed similar concerns and see if we can ensure that they are addressed as this legislative process moves forward.

Q In the past, you've urged members of Congress not to proceed because this could have ramifications. So the fact that it has now passed the Senate, are there ramifications to that alone in terms of the relationship with Saudi Arabia or anything else?

MR. EARNEST: Well, as I think as we discussed when the President traveled to Saudi Arabia a few weeks ago, the President had a long bilateral meeting with the King of Saudi Arabia and the issue of this legislation was not raised. And I think it is an indication of the fact that right now, at least, this legislation is not interfering with our ability to coordinate with the Saudi Arabian government on a range of issues of mutual concern.

But our broader concern is about the potential, unintended consequence that the passage of this legislation would bring about, and that is basically giving other countries an excuse to subject the United States of America to what could just be kangaroo courts in other countries. And it puts the United States in a situation where we spend a lot of time and energy and resources going and defending the United States in foreign courts. That's not a good use of our time. It's also certainly not a good use of our diplomatic capital. These kinds of cases would just serve as an additional irritant in our relations with countries around the world.

So, again, we believe that these kinds of concerns are the kinds of concerns that should be taken into account by every member of Congress as they consider their position on this bill.

Q The families out a statement saying, well, the big difference here -- they're sort of dissecting the arguments that the White House has made, and they said, well, the difference here is that the U.S. doesn't support terrorist

organizations that target civilians. So if this bill is so narrowly tailored to involve just terror attacks on U.S. soil, and you look at the argument that those families are making, is that really such a huge risk that somebody would do something similar? If you're just looking at that specific instance, of targeting civilians on our soil in this case? And obviously Democrats in the Senate don't agree that that risk is --

MR. EARNEST: Well, look, I do understand what you're saying. And, look, I think that the concern is about potential unintended consequences. There are a number of countries around the world that do falsely accuse the United States of engaging in acts of terrorism that result in the death of innocent civilians. There are other countries that publicly make that accusation on a regular basis, and if they now have a precedent for establishing their own method of bringing the United States into court and putting at risk U.S. assets that are held overseas, even as they prosecute those false claims in a kangaroo court, that's not a path that we want to go down.

The other concern, Michelle, is exactly how that system could work. You can imagine a scenario where somebody who's injured or wounded overseas is brought back to the United States for medical treatment and then they die. That could potentially open up the United States or other countries, including our allies, to claims in an American court because that individual died on American soil. And this is the thing. I mean, our court system is such that you don't have to be an American citizen in order to file suit in an American court. I recognize that these are hypotheticals, but they are potential, unintended consequences that are quite serious. And that's the basis of our concern about this bill. The potential, unintended consequences that have and could have a very negative effect on U.S. national security, could put at risk the United States, our assets, and our personnel in countries all around the world.

Ron.

Q So is this just a closed matter again, the whole issue of 9/11? Because obviously you're talking about unintended consequences, and the families are concerned about finally trying to figure out exactly what happened. And you've said before I think on Saudi Arabia that the investigation showed there was no Saudi connection, the 28 pages. Others have said that this is not significant information -- just like the furor about it. So do you say to the families essentially that -- oh, and also, you seem to say that there are some changes to the legislation that Congress didn't consider that might have made it more palatable to the administration. Is there some way to reconcile this whole concern about sovereign immunity and the families concern? Or is this really just the end of it as far as the administration is concerned?

MR. EARNEST: It's certainly not the end of it. There's a lot to unpack there. Let's start by -- there was a commission, an outside -- a commission of experts established outside the government to examine the attacks of 9/11, to take a look at what conditions led up to the attacks, what exactly transpired on that fateful day, and what sort of reforms could be implemented to ensure something like that never happens again. It's that outside group, the 9/11 Commission, that carefully examined all of the available evidence and concluded that there's no evidence to indicate that the Saudi government as an institution supported the 9/11 plotters.

So that's not some sort of government conspiracy -- this is an outside organization, staffed by experts that took a close look at this. And those -- the leaders of that commission themselves reviewed the 28 pages. They have acknowledged that 28 pages included preliminary investigatory materials that they had an opportunity to pursue. And that as a result of reading those 28 pages, they conducted interviews -- not just in the United States but in other countries around the world to follow up on those potential leads.

And despite having read those 28 pages and despite having acted on them by pursuing investigations that that information could point to, they still concluded that the Saudi government as an institution didn't support the 9/11 plotters. So I think there is no denying that that part of it has been exhaustively investigated. I'm not saying this to suggest that somehow that's going to ease the pain of somebody who lost a loved one or several loved ones on 9/11.

Our heart breaks for those people. These are thousands of Americans who walk around every day with a hole in their heart because they lost a loved one on that tragic day. And trying to make sense of that and trying to move on with one's life is something that many of them have been challenged to do, and they've demonstrated tremendous patriotism and heroism as they've moved on with their lives.

And in some cases, we're talking about parents who have had to raise kids on their own. In some cases, we're talking about first-responders who have continued to fight fires and respond to emergencies, even with the memory of their partner in the back of their mind. So there's no denying the heroism of the 9/11 families. And there is no denying the courage that they have shown every single day since 9/11.

But what we're focused on here -- and I think what the families are genuinely focused on as well -- is the national security of the United States and making sure that the United States of America continues to preserve the ability to protect our interests around the globe. They understand that our capacity to do that is critical to preventing terrorist attacks on American soil. So the President's priority is not different than the priority that's been identified by the 9/11 families when it comes to protecting the United States of America and protecting our men and women in uniform and our diplomats as they serve our country around the world.

Q So did I hear you correctly that there were some changes that could have made that could have reconciled this whole concern about sovereign immunity? Or did I -- in terms of the way these bills were written -- or is this just not a reconcilable situation?

MR. EARNEST: Well, I think the reason that we are going to talk to Democrats and Republicans in Congress is to figure out if there is a way to address the serious concerns that are raised by these potential, unintended consequences. I don't know if that's possible at this point, but we certainly are willing to engage in a bipartisan conversation to make that happen if it's possible.

Q On the TSA -- there's been a lot written lately about long lines at airports and people being really inconvenienced. I saw a study that said the morale in Homeland Security is the lowest in the federal government; there's high turnover. The summer season is coming up. And while that's an inconvenience to travelers and all that, how much of a security risk is there now? Is it greater? Is there a concern in the administration that because of this tension on the system, to put it mildly, that there is now a greater concern about security lapses, perhaps, at airports around the country?

MR. EARNEST: Well, you probably should talk to somebody at the TSA to draw a definitive conclusion about that. I think what I would just state is the significant challenge that TSA officers face, which is they don't want to inconvenience people. They know people are just trying to get on their flight and do their business or go home to see their family or go on vacation or whatever it is that they're doing. But they want to make sure that people can engage in that travel safely.

And so there's always going to be a little tension in making sure that we're doing thorough checks and making sure that we are protecting the integrity of the aviation system while also at the same time giving people the freedom to use that aviation system without a whole lot of hassle and inconvenience. And resolving that tension is challenging, and there are a number of creative things that the TSA has tried to do -- the establishment of pre-check, which allows some individuals to go and essentially go through a background check that's conducted by the government so that they can go through an expedited security line. That's one example.

We know that the TSA has been working closely with airports to see if airports can actually commit to using airport personnel to expedite the process. So, Ron, as a reporter, you've had to travel through a lot of airports. It's not uncommon for TSA officers to help people navigate the screening process by loading materials into trays and getting into the right line. So that's not necessarily a core security function so what you could do is the TSA could coordinate with airport staff so that when lines get long or volumes are expected to be high, that it's airport personnel that don't have a security function that can help people manage the security process so that all of the security-

trained people can be involved in the actual screening.

So my point is that there's always going to be a little tension here in the basic function of the TSA. And the TSA, to their credit, has worked hard to try to be creative about developing solutions that would make this process more efficient and not inconvenience travelers as greatly while also adhering to the high security standards that I think we all would demand.

Q Right, but, again, the long lines have revealed that there seems to be staffing problems. There's a high turnover rate; there's low morale. And the question is, to what extent is all of that potentially compromising safety at the airports? Is there a concern in the administration, has there been some focus in trying to make sure -- well, you do this on a daily basis -- but given where we are in the last month or so of this particular phenomenon of these long lines, has there been some targeted effort focused to make sure that this is not causing security problems, beyond the inconvenience?

MR. EARNEST: Even in the face of these significant challenges, the professionals at the TSA are committed to the safety and security of the American traveling public. And they maintain these very high standards because they're concerned about safety, and you're right that this is something that they are reviewing safety standards and security standards regularly, daily, to ensure that those high standards are being met. And they're doing all that even though on average the TSA is now screening about 125,000 more passengers per day. And there has been an effort by the TSA to expedite the processing of the newest class of TSA officers. There has been an effort on the part of TSA to get Congress to approve funds that could be reallocated so that additional overtime pay can be paid to the TSA officers so that they can be paid for working longer hours and therefore try to shorten lines.

So, again, there's a lot of work that's going into trying to be creative about how to not inconvenience travelers unduly while also maintaining the strict safety and security standards that the American people would expect.

Byron.

Q Thanks, Josh. Has the President or the White House been tracking what's happening -- or what happened in Nevada at the Democratic State Convention there? Sanders supporters were reportedly making death threats against the state party chair to the point where the state party actually filed a complaint with the DNC. Does the White House have a reaction? And obviously there's a lot of emotion around this primary process still. Is it time for the President to sort of step in and calm the waters and help unify the party, moving into the final stage?

MR. EARNEST: Well, as it relates to the delegate selection process for individual states, I would refer you to the DNC. They have a very well-established process whereby they review the plans that are put forward by individual states for choosing their delegates to the convention and every state does it differently, and that makes the process a little cumbersome but it's the way that each state retains control over the process for selecting delegates to the Democratic Convention.

But I think at the same time, you've heard the President on a number of occasions talk about how political disputes can never justify an act of violence. And the President talked about this in his speech at the Rutgers commencement ceremony just on Sunday, about the importance of good citizenship, about the importance of focusing on facts and evidence, and how the establishment of our political system was intended to resolve disputes among our citizens to prevent violence from occurring in the first place.

And I think what is true is the expectation that the President has that there will be a strong commitment to that principle of nonviolence. And the way that candidates in both parties address this question publicly is important and I'm confident it's something that people all across the country will carefully watch.

Q Is the White House disturbed by the behavior of not only members of his own party making death threats against the state party chair over what is, essentially, as you characterized it, a political dispute?

MR. EARNEST: Well, I haven't looked at the individual claims that have been made, but I think the President on a number of occasions has spoken out against violence and has certainly said that a political dispute like this can never be justified or used to justify an act of violence or even a threat of violence. And that is a principle that he has championed for a long time and his expectation would be that politicians in both parties, whether they're involved in an election or not, would express their support for that principle.

Q One more on the President's legacy on special interest. Roll Call yesterday reported that a Republican lobbyist is trying to organize other lobbyists on behalf of Hillary Clinton. She's had lobbyist bundlers. Donald Trump has hired some ex--foreign government lobbyists into his campaign. The President banned lobbyists from donating to his campaign and the DNC. No current 2016 campaign has embraced that pledge. Even Bernie Sanders sort of made this a key issue. Is the President worried that his legacy on this issue is being eroded?

MR. EARNEST: Well, Byron, I think the authenticity of the change that President Obama brought to Washington has been confirmed in what you just relayed. And it's an indication of how difficult it is to change our political system, particularly when it comes to confronting entrenched special interests and the President is quite proud of his record of doing that. And the truth is, it's going to be up to the next President to determine exactly how to build on that progress. And presumably there are a variety of ways to do that, and I think that will be part of the debate -- not just through the summer but also into the fall. But these principles of ensuring that citizens retain a voice in their government is something that the President has made a high priority.

John.

Q Over the past week, you've had some pointed words from the podium about Republicans' use of this $100 billion figure in regard to the Iran nuclear deal. I've gone back and asked them about it, and they basically point to the administration's own use of it last summer, back in July, and a few instances from the Treasury Department, from Secretary Kerry, President Obama in an interview with The Atlantic. Where did the administration, when they were initially using that figure before the deal was finalized, where was that coming from?

MR. EARNEST: Well, John, what I can tell you is that there were initial estimates about the amount of money that Iran had in reserves outside of their country that were subject to sanctions. And this is essentially money that Iran was not able to get access to because of the sanctions that we had put in place to compel them to come to the negotiating table. And those sanctions did have the effect of bringing Iran to the negotiating table and ultimately pressuring Iran to sign on the dotted line of an agreement that verifiably prevents them from acquiring a nuclear weapon. That was a genuine success.

Now, what the Secretary of the Treasury and others repeatedly tried to explain is how much money Iran was likely to get access to -- that much of those funds that were held overseas were basically already spoken for in terms of debts that Iran had already sort of -- they had already incurred. And what critics of the deal have suggested is that Iran would get all that money and be flush with cash and then use it for terrorism. And we've said that the critics were vastly exaggerating that risk. That was the essence of the debate at the time is we were trying to explain exactly what would happen here. And they did vastly overstate that risk in a way that they continue to repeat. And they're wrong about it. Ted Cruz just wrote an op-ed in the New York Times repeating this claim. It's not uncommon to come across Republicans spouting off this false claim, and the truth is, what's happened is we actually see officials in Iran saying they didn't get nearly as much sanctions relief as they thought they would.

Around the time of the negotiations, it was actually the Iran Central Bank Governor who came forward and said that they expected that Iran would get $30 billion in sanctions relief. And I think based on the tone and the comments from Iranian officials, they haven't even met them that far. So that's the essence of the way in which Republicans repeatedly misled the American public when talking about the Iran deal or just didn't know what they were talking about.

So it's not just as it relates to sanctions relief where what Republicans said didn't turn out to be true. Many of them,

at the very beginning of this exercise, said that it didn't make sense for the United States and the international community to negotiate with Iran over their nuclear program because they'd never go along with the deal. They were wrong about that.

And many of our critics have suggested that Iran would never make -- take the kind of actions that are consistent with rolling back key aspects of their nuclear program. But yet that's exactly what they did. They reduced their uranium stockpile by 98 percent. They rendered harmless their heavy water reactor. They disconnected thousands of centrifuges.

And Republicans, critics of the deal suggested that the international community would never be able to verify Iran's compliance with the agreement. But, in fact, the nuclear experts at the IAEA -- an organization that's won the Nobel Peace Prize, I might point out -- has verified Iran's compliance with the agreement. So critics of the deal who predicted that we would never be able to verify that Iran was going along with the agreement are wrong, or at least on the wrong side of an argument with internationally renowned nuclear experts.

So the list of concerns that we have here with the way that Republicans have conducted this debate is lengthy and I can certainly understand why Republicans appear quite desperate to try to recapture what credibility they have left.

Q And despite that characterization, isn't it about the money being freed up for Iran to use their other resources towards other programs? I mean, it's the money that the sanctions relief is going towards, these debts that they've already incurred and paying those off, isn't that freeing up another pocket of money they could use? Isn't that kind of the Republicans' point that they've got access now to a broader fund? Or is your point just that they wouldn't have paid off those debts in the first place?

MR. EARNEST: Well, my point is that they weren't paying off those debts, and then when the money was freed, some of them have gone to doing exactly that. So there's no evidence that anybody can marshal that that's exactly -- Republicans cannot demonstrate that what they predicted came true. But I can certainly substantiate the fact, even in the claims made by Iranians themselves who are responsible for managing their economy, they've expressed concern about the fact that they haven't gotten as much sanctions relief as they expected to get. And they acknowledged a much lower level of sanctions relief than what Republicans said was likely to happen -- to say nothing of the many Republicans who I can point to who said that Iran was going to get $150 billion in sanctions relief, a number that was completely unsubstantiated. And then you've got somebody like Congressman Steve Scalise who said that Iran would get hundreds of billions of dollars in sanctions relief. So it appears he might have a little baggage when discussing the truth about the Iran deal.

Q So what's the bottom line? What's the total figure? You said it was far less than $100 billion, but has Treasury come up with an estimate? Or are you relying on what the Iranians have said publicly?

MR. EARNEST: I don't have an assessment to share with you. You certainly can check with the Treasury Department and maybe they'll know.

Q And my final question was, Senators Cornyn, Barrasso, and Mark Kirk -- they wrote a letter to the President yesterday regarding Ben Rhodes, calling on the President to fire him. You said that the President stands by his Deputy National Security Advisor. What's your response to the letter? What's the President's response to the letter?

MR. EARNEST: The publicity stunt that Senator Kirk attempted one week ago today -- I think pretty much everybody ignored it then, and I'm going to ignore it now.

Dave.

Q Josh, thanks. Back on the Zika bill in the House. The White House wasn't just saying that you don't want to offset the money from the Ebola fund, you're saying you don't want to offset the money for Zika from anywhere else

in the budget. In a $4 trillion budget, why are you insisting that there be no offsets for this Zika relief?

MR. EARNEST: Well, this is typically the way, Dave, that Congress has considered emergency appropriations, which is that they, recognizing the existence of an emergency, Congress has not gotten bogged down in political fights related to pay-fors. Demonstrating a sense of urgency, most Congresses, when confronted with a public health emergency, would consult with public health experts and consider carefully what sort of assistance should be provided and they would provide it. And that's what we believe that this Congress should do.

Q On the Ben Rhodes matter, obviously he didn't go to the hearing today to testify like the committee wanted. Can you explain why last week you said this has nothing to do with executive privilege and today Neil Eggleston said, oh, yes, it does have to do with --

MR. EARNEST: No, he didn't. That word does not appear in the letter. And my good friends at the House Government Oversight Committee posted that letter on the website, so you can certainly check it out for yourself. But the White House counsel did not raise that prospect.

Q So why didn't he go?

MR. EARNEST: Because there's longstanding concerns that we have expressed and that previous Presidents have expressed when it comes to declining a request to voluntarily testify based on institutional concerns. The President of the United States should be able to get confidential, candid advice from his top advisors. And this is a principle that basically every President has observed.

I would note that at least one of the individuals who did testify before the House Oversight Committee today served in the previous administration and invoked exactly the same concern -- because he had almost exactly the same title as Mr. Rhodes -- in explaining why he wouldn't testify before Congress. So this is an indication that it's not a partisan matter, but rather a longstanding institutional difference of opinion between Congress and the executive branch.

Q Isn't that asserting executive privilege without saying the words?

MR. EARNEST: No. Executive privilege applies specifically to situations when the President of the United States acts to protect information that is compelled by Congress. This was a specific request for testimony on a voluntary basis. So on one hand, you've got information that Congress is compelling; on the other hand, you've got testimony that was requested. So the principle is different. And that is evident in the letter, so I would encourage you to check it out.

Q If I could overstay my welcome for one more.

MR. EARNEST: You're not overstaying your welcome.

Q The Senate Democrats tomorrow are going to hold what's called a hearing on Chief Judge Garland because there is no nomination hearing yet. Did the White House participate in arranging this in any way? Do you think it's a good idea? And isn't it a clear sign that the nomination just isn't going anywhere?

MR. EARNEST: Well, I did hear that the Judiciary Committee is planning a hearing for tomorrow. And obviously the White House has been coordinating closely with Democrats and Republicans on the committee to try to move that process forward. But as it relates to the individuals who are testifying before the committee tomorrow, I'd refer you to the members of the committee to talk to you about it.

Q Is this a sign that things are just not going well, that this nomination is dead?

MR. EARNEST: No, the fact is Chief Judge Garland has got another six meetings over the course of this week.

He's met with 15 Republicans. He's submitted his questionnaire and members of the Judiciary Committee have posted that questionnaire publicly on their website. So we continue to apply pressure to Republicans. The President did an interview with BuzzFeed just yesterday, talking about why this is a critically important issue. And we're going to continue to raise pressure on Republicans. And all of the publically available data that I've seen indicates that it's not just Democrats and independents who are dissatisfied with the position that many Republican senators are taking, but many Republican voters across the country are expressing concern with the way that Republicans in the Senate are refusing to do their job.

Margaret.

Q Josh, Jack Ma, the founder of Alibaba, was spotted leaving the White House. Can you tell us anything about why he was here?

MR. EARNEST: I'll see if I can get you some more information about what he was doing while he was here. He obviously is somebody who has had an opportunity to interact with the President in the past. He participated in a forum with President Obama at the G20 in Malaysia where they talked about the global economy and the impact that climate change is having on the way that businesses, large and small, around the world are confronting climate change.

But I'll see if we can get you some more information about his visit.

Q Also if it relates in any way to our trip to Asia.

MR. EARNEST: Okay.

Q Also, going back to I guess it's technically called the Justice Against Sponsors of Terrorism Act -- this passed Senate bill, it's not just about Saudi Arabia. It opens up I guess litigation against any other state, which is your concern about sovereign immunity there. From what -- you're saying from the podium, you've said focus on the substance, look at the facts. Are you saying that, in that sense, one of the most emotionally eroded living memories in American history is being used for political purposes and in some ways overshadowing the substance of a bill that you've described as perhaps potentially dangerous to American interests? I mean, are you going that far to say that this one issue is overshadowing all the other ways that this bill could become a problem for the U.S. or other countries?

MR. EARNEST: Well, there's no denying the charged, emotional nature of this issue and why the discussion of this particular legislation could arouse particularly strong feelings. I'm not going to question the motive of the people who may be involved in supporting this bill. I'm just merely pointing out the source of the concerns that we've expressed.

This bill does potentially open up the United States to a range of unintended consequences that would be bad for our national security. It would be bad for our ability to continue to coordinate with our allies, make that even harder, and it could risk -- put at risk the United States, our assets, and maybe even our personnel in countries and courts all around the world.

So that's the source of our concern. This is a concern that we've repeatedly expressed. And that's the reason we oppose the bill. It's not because we question the motives of those who are involved in trying to promote the bill. Our concerns are substantive and relate specifically to the potential of unintended consequences.

Q And not specifically about Saudi Arabia, which is the only country we've discussed here?

MR. EARNEST: Well, I think that's because the advocates of the bill are suggesting that they want to create an opportunity that --

Q -- played it in some way that this is some sort of special treatment or that this is being treated differently because of Saudi Arabia, versus, say, the Supreme Court decision that was just recently upheld regarding suing Iran as a state sponsor of terrorism, which the administration has supported. So can you explain the difference, I guess?

MR. EARNEST: Well, I guess the difference is, is that there is this small class of countries that are confirmed state sponsors of terrorism that are in a separate category from every other country. And, yes, that includes Iran. We do know that Iran uses assets of the state to support terrorism around the world, including terrorism that has claimed the lives of American citizens.

So we do treat Iran differently from every other country. Iran and other countries that are confirmed state sponsors of terrorism are treated differently than every other country, including Saudi Arabia that's not.

Q So you don't see the position to be supportive of the Supreme Court upholding being able to sue Iran and a position opposing this bill because it could compromise sovereign immunity as contradictory in any way?

MR. EARNEST: No, because there is this special exception that does apply to confirmed state sponsors of terrorism, and Iran is one of them.

Q Question for you on -- an amendment from Congressman Thornberry specifically trying to cap the number of NSC officials at 100. It's being suggested that power is too concentrated in the hands of too few located in this building and not other assets of national security establishment. Do you have any comment on that?

MR. EARNEST: Well, a couple observations I guess. I think the first is the President's current National Security Advisor, Susan Rice, has actually undertaken an effort to try to streamline and reform certain functions of the National Security Council that have allowed her to reduce the size of the National Security Council by about I believe 10 percent or so. And I think that's the first thing.

I think the second thing is there's no denying the wide array of significant national security challenges that any President of the United States confronts when they walk into the Oval Office every morning. And ensuring that that President has access to the expertise and advice that he needs to deal with those challenges is an important priority. And the desire of some Republicans to try to limit the ability of the next President to make foreign policy decisions may reflect their lack of confidence in their prospects for the next presidential election.

Kevin.

Q Thanks, Josh. Maybe you covered this. I was out a couple days last week. But transgender Americans as it relates to White House facilities and other government facilities, be that the State Department, elsewhere -- they're able to use the restroom of their gender identity without restriction, and that's always been the way, correct?

MR. EARNEST: I don't know that it's always been that way, but it's certainly been that way in the Obama administration.

Q Okay. Is the President aware of the readiness issues as it relates to the United States military?

MR. EARNEST: Well, Kevin, there certainly are a number of things that we believe that Congress has proposed to do that would have a direct impact on our military readiness. There are a whole range of programs that Congress repeatedly funds that our military leaders say that we don't need, and there are a whole set of national security priorities that our military leaders have said are worthy of an investment from Congress that have been underfunded by the United States Congress.

So there are a number of things that the President and our military leaders believe that we could do that would enhance our readiness, and there are a number of things that Congress shouldn't do that would degrade our

readiness. And so there are concerns about the way that Congress handles its business with respect to the military.

But I can tell you that the President of the United States is quite proud of the finest fighting force that the world has ever known. He has often described his role as Commander-in-Chief and leading the men and women of the United States military as the greatest professional honor of his life. And I think, time and time again, we have seen the heroism and courage and professionalism of the United States military yield significant and enormous benefits to the American people. And that's true when it comes to fighting Ebola. That's true when it comes to rescuing hostages. And that's true when it comes to taking out terrorists. The President is quite proud to lead the United States military.

Q And yet he may veto the defense bill, despite the fact that there are a number of F18s that can't be launched right now, B1 bombers having trouble. I'm just wondering if the President feels like the services deserve more money. And if they deserve more money, what's he doing about it? He's going to veto this bill. It can make it even tougher for them to do the job and the missions that they've been charged with.

MR. EARNEST: Well, Kevin, the President is not vetoing the bill and suggesting that Congress shouldn't pass them any funding. The President is actually going to veto the bill because he believes that Congress should more effectively fund our national security apparatus, including our military, and that there are programs that are worthy of more funding, and more consistent funding.

I believe that Secretary Carter has spoken to this repeatedly, that right now what Congress is proposing to do is to basically just fund the military for the next six months. That doesn't make any sense. That's not a smart way to manage the most effective fighting force in the world, particularly one that we depend on to protect our national security.

So this is an ill-advised piece of legislation. And there are a number of reasons that we oppose it. And the President --if this is passed, it's something that he will veto so that Congress can pass funding at an appropriate level for our United States military to protect our readiness and to protect our country.

Q So while you all squabble back and forth with congressional leaders, what's the message to the women and men who are charged with mission readiness and their job is to protect us all? They need their funding. They need their money.

MR. EARNEST: Yes, they do. I hope that Congress is hearing your message, Kevin.

Q Right. And so you guys have to figure this thing out. Because I get letters and emails from people who say, ask the White House, what are they doing about this? When are they going to put pen to paper and make sure that we're covered and that we're taken care of?

MR. EARNEST: Well, Kevin, it's the responsibility of the United States Congress to fund our government. That includes funding our military. And I'll remind that if people want to actually understand exactly what the President's proposal is, we put forward a budget back in February. And for the first time in 40 years, Republican leaders in Congress refuse to have a hearing to even discuss what the President's Budget Director exactly what our national security funding strategy should be. So it's Republicans who have fallen down on the job. It's Republicans who have refused time and time again to handle their responsibilities consistent with putting our national security first.

They'd much rather play politics and attack the President's EO to prevent discrimination against LGBT Americans, something that has nothing to do with funding our national security priorities, but, for some strange reason, is actually included as a provision in the NDAA bill. That's not a provision that was inserted by Democrats, that was a provision that was inserted by Republicans who are much more interested in playing politics than they are with funding our national security.

Q What's next? What's the solution to the issue? Because every day that goes by, there's another aircraft that

can't be launched, there's another soldier out there that doesn't have what she or he needs.

MR. EARNEST: Yes, and I think that is a very good question for the men and women in the United States Congress who have a responsibility to fund our government and to fund our military. That is a core function of the United States Congress. That is the way that our Founders designed our system of government. And the President has a responsibility to put forward a very specific proposal and he did that. And it's Republicans who refuse to even discuss it with him.

So Republicans are the ones that have to bear the responsibility of figuring out how they're going to use their majority in the House and the Senate that they fought so hard for to make sure they're doing right by our men and women in uniform.

Q Lastly, I'll take this one because I'm not sure if April can make her way back in. The Urban League's 40th State of Black America report is out. Is black America better now than it was when President Obama took office?

MR. EARNEST: There is no denying -- and Mitch McConnell agrees with me on this -- that all of America is better since President Obama took office, and black America is better since President Obama took office. And no matter how -- on almost any measure that I can think of, whether it comes to graduate rates, access to health care, or the strength of our economy and job creation, by every measure, our economy and our country is stronger -- not just for African Americans but for all Americans.

John.

Q Thank you, Josh. Someone who does not have a political agenda or any partisan bones in his body I don't think spoke about the new regulations in the administration. This is Cardinal Robert Sarah, one of the Pope's right hands in the Vatican, speaking at the National Catholic Prayer Breakfast this morning. He said, and I quote, "Should it be not that biological men should use a man's bathroom. It doesn't get any simpler than that." Does the administration have a reaction to criticism of its new orders from a top Vatican official?

MR. EARNEST: I haven't seen his comments.

Yes, ma'am, I'll give you the last one.

Q Thank you, Josh. When the President --

MR. EARNEST: She sat through the whole thing.

Q I had to run -- I'm dealing with Roots over there -- I wanted to ask you about that, too.

MR. EARNEST: I understand. (Laughter.)

Q Thank you, Josh. When the President visits Japan for the G7 meeting next week, will the North Korean nuclear issue be discussed at this meeting? And also I have a second question for you. And what is it the United States final destination of North Korean nuclear issues? Does the President consider before his administration, the end of this year, will there be more attention to the North Korean nuclear issues?

MR. EARNEST: Well, I'm confident that this is an issue that will be discussed at the G7 meeting in Japan. Obviously the world is concerned about the provocations and destabilizing activities of the North Korean regime, and Japan is particularly concerned about the impact that those activities could have on their national security.

The United States believes strongly in our alliance with Japan. The U.S.-Japan alliance is the cornerstone of regional security in Northeast Asia. And the United States has deployed resources and personnel to Japan to assist them in countering the threat that emanates from North Korea.

As it relates to resolving our broader concerns with North Korea's nuclear program, we continue to work with the international community to pressure the North Korean regime, to isolate them further and encourage them to come into compliance with their international obligations. Earlier this year, the United States worked effectively with China at the United Nations to ramp up the pressure that has been placed on the North Korean regime. We put in place sanctions that went farther than they ever have before in isolating that country and targeting certain industries in North Korea that we know generate revenue that's used to invest in their nuclear program.

So those kinds of sanctions would not be possible without the effective cooperation and coordination of the United States and China, and we're going to continue to work with the rest of the international community to make progress in isolating North Korea until they make clear that they're prepared to denuclearize the Korean Peninsula and stop engaging in the kinds of provocative acts that are broadly destabilizing.

Q What is President Obama's final decision for the North Korean nuclear issues before he steps down?

MR. EARNEST: Look, the next step will be up to the North Koreans and it will be up to the North Koreans to decide whether or not they're ready to commit to denuclearizing the Korean Peninsula. Until they do, they're going to continue to face the kind of isolation that they currently suffer from.

Go ahead, April.

Q Thank you. I'm sorry. Please don't be angry. It's hard dealing with two events at one time. One, as you talked about the Urban League, they're talking about an issue -- ACA, focusing on ACA, and hoping that the costs will be cut for health care, the price -- the high prices of health care. What does this administration say in the midst of that report?

MR. EARNEST: Well, I'm glad that you asked that question because it does give me an opportunity to point to the recent study that was published that indicates for the first time the percentage of Americans with health insurance in 2015 exceeded 90 percent.

That's the highest annual measure that's ever been recorded and is another sign of the important progress that our country has made under the Affordable Care Act. One of the goals of the Affordable Care Act was to put downward pressure on the growth in health care costs. And since the Affordable Care Act went into effect, we have seen the slowest growth in health care costs on record. That, again, is another tangible sign of the important benefits of the Affordable Care Act.

Moving forward, as the law continues to be implemented and as more people get access to health care and as more competition is created in individual markets, we're optimistic that we're going to continue to put downward pressure on costs and put outward pressure on expanding coverage to even more Americans.

Q And then on another subject, really fast. You have "Roots" in your next building -- the conversation and airing I guess of the film, parts of the film. Can you explain why this White House for "Roots," this historic movie event that happened decades ago, and the re-airing of it in a new version now? And also, the most recent movie filming, the John Legend movie, the Underground movie. Can you talk to us why these events are happening here?

MR. EARNEST: I think the significance is that this is obviously a film that shaped a generation of Americans views of our country's history and of race relations in this country. And there's been a movement to modernize the film and present an updated version that I think has a lot of people talking and a lot of people considering some issues that are central to the founding of our country. And they're central to our nation's history, and they're central to the impact that race relations has on everyday life in the United States. So these are issues that are worthy of discussion and study and using an opportunity with the presentation of a new film like this, the administration decided to try to capitalize on that opportunity to cultivate and engage in an important discussion.

Q So this is part of the President's effort to keep the dialogue going on race? These movies -- the airing of these

movies from this historic place?

MR. EARNEST: Well, it certainly is an opportunity for people to come together and discuss these issues. And certainly people's interest in a film like this provides an appropriate venue for having those discussions.

Go ahead, Mark.

Q I wasn't aware of this event. Was the President at this screening?

MR. EARNEST: He is not. He is not.

Q One other question. You mentioned the 90 percent with health insurance. Why is it not 100 percent? What's holding up the ACA on that?

MR. EARNEST: Well, part of what's holding it up are Republican governors across the country that are opposing the expansion of Medicaid. And it's unfortunate that we've seen -- that we continue to see millions of Americans be denied access to health care because Republicans in their state don't want to be viewed as implementing, let alone supporting, the health care reform law, championed by President Obama. So that's a -- there are millions of Americans who don't have access to health care for that reason. That certainly is a big chunk of that 10 percent that doesn't have access to health care.

Some of them are -- some of those people are also individuals who have chosen to pay a penalty as opposed to paying for health insurance and we talked a lot last fall and even earlier this spring about why that was not a common-sense financial choice but yet it's a choice that some Americans make.

Thanks, everybody. We'll see you tomorrow.

END
2:48 P.M. EDT

Press Briefing by the Press Secretary Josh Earnest, 4/18/2016

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James S. Brady Press Briefing Room

1:55 P.M. EDT

MR. EARNEST: Good afternoon, everybody. I apologize for the late start today. (Laughter.) Almost. I do not have anything at the top, Kevin, so we can go straight to your questions.

Q Okay, Josh. So I was wondering if the White House had any feedback on how it felt about how it went this morning in the landmark immigration case. Chief Justice Roberts asked questions suggesting he could side with the administration if there were some small changes in the proposed programs; others were more pointed about whether the President had usurped Congress's authority.

MR. EARNEST: Well, Kevin, I think -- and those of you who covered the two Supreme Court cases to consider the constitutionality of the President's health care reform law will remember how unwise it is to try to draw conclusions about the likely decision of the Supreme Court based solely on the questioning of the justices. In fact, I remember that there were a number of legal pundits that emerged with some egg on their face after offering up some rather dire predictions about the administration's argument after watching the questioning, only to see a favorable ruling in the end.

So at this point, I'm going to withhold any prognostications on the part of the administration and just reiterate our continued confidence in the power of the legal argument that the Solicitor General presented to the Court today.

Q Can you speak as to why the President signed off on the U.S. deploying 200 additional troops to Iraq, and to sending Apache helicopters for the first time into the fight against the Islamic State group in Iraq? Is this a short-term increase? Did the Pentagon indicate that was the right number?

MR. EARNEST: Well, I can tell you that Secretary Carter is traveling in the region today; he was in Iraq today meeting with Iraqi officials to discuss these enhancements to our counter-ISIL campaign. All of the work that takes place in Iraq by the United States military is closely coordinated with the Iraqi government and Iraqi forces.

Obviously, Iraq is a sovereign nation, and making decisions like retaking Mosul from ISIL will be decisions that are made by the Iraqi government. What the United States has sought to do at every turn is to support our partners in Iraq as they implement a political strategy to unite the country, but also as they carry out a military strategy to drive ISIL out of those areas of Iraq where they have encroached.

The President's instructions to his national security team have consistently been to look for opportunities to reinforce those elements of our campaign that are showing some progress. And the announcements that Secretary Carter made earlier today are consistent with that instruction from the President, and these enhancements are consistent with recommendations that the President received from his military advisors.

Tim.

Q Could you confirm whether the First Lady and the girls are going to be going on any part of the President's trip?

MR. EARNEST: Tim, as you may have seen, the First Lady will join the President for part of his trip in the UK. But for more details on the travel of the First Family, I'd refer you to the First Lady's Office.

Q And the oil producer talks in Doha fell apart last night. Is there any concern -- is the administration concerned that Saudi Arabia could embark on another effort to gain market share and the oil price would go down and that that would hurt U.S. producers?

MR. EARNEST: Well, Tim, at this point, obviously the United States and our economists pay close attention to fluctuations in the global oil market, and we're obviously aware of the kinds of political efforts that are underway -- or some of the political efforts by oil producers to coordinate their activities to maximize the economic standing of their individual countries.

We're aware of all of that going on. And we're certainly conscious of the fact that it has an impact on the U.S. economy. But at least from here, I wouldn't comment on any decisions made by any individual countries with regard to their oil production activities. I can just tell you that the administration has been very focused on energy security here in the United States. That is part of the strategy that has led us to a situation where the United States is producing significant quantities of both oil and natural gas here domestically in a way that does bring some important stability to our broader economy.

But we've also been focused on a strategy that includes increases in energy efficiency. We certainly have seen important increases in energy efficiency when it comes to cars and trucks that are on the road here in the United States. But we've also been focused on looking for other ways to generate energy, renewable energy like wind and solar.

So those kinds of investments have paid off in a way that's been good for the U.S. economy both in the short run, and stands to only expand its potential economic benefit in the decades ahead.

Q But the last time the Saudis embarked on this and just started opening a tap a couple years ago, it sent the price down, and the U.S. is now producing only at 2009 levels. Are you concerned that this could hurt U.S. jobs?

MR. EARNEST: Well, Tim, again, I don't think I would comment on any individual decisions or even potential decisions to be made by other countries. I'll just note that this is a welcome respite from the first six or seven years when I sat behind this podium and had to answer questions from your colleagues or other news organizations that asked whether or not the United States was concerned about the impact that high oil prices would have on the U.S. economy. So I wouldn't speculate either about what impact low oil prices would have on the U.S. economy, but the tenor of this conversation certainly seems preferable to the tenor of those conversations in earlier years.

Q Just one on the bridge that Russia is building to Crimea. There's some support on both sides. Even in Crimea, there's some at this point hoping that the isolation will be less if the bridge is built. But there's a lot of money -- $3.2 billion. Is this money that President Putin could be spending better elsewhere?

MR. EARNEST: Well, I don't have a lot of information about their development plans, and obviously I wouldn't second-guess any independent decisions that the Russian government is going to make as it relates to infrastructure. I can tell you that the President continues to make a forceful case to President Putin that he should abide by the commitments that he made in the context of the Minsk talks. And I can tell you that President Obama had a conversation with President Putin today on this exact issue. The two leaders spoke this morning, and we'll have a more robust readout of their call later today.

But the United States continues to believe, and President Obama continues to make a forceful case that Russia needs to abide by their commitments. And by doing so, they can begin to relieve some of the isolation that they

have sustained as a result of interfering in the sovereign activities of their neighbors in Ukraine.

Q You say the phone call was mostly on Crimea, or --

MR. EARNEST: The telephone conversation did spend a lot of time focused on the situation in Ukraine. There also was a rather intense discussion, as you'd expect, around the situation in Syria. But like I said, we'll have more details on the phone conversation later today.

Mark.

Q Can you say if President Obama raised the issue of the buzzing of the U.S. warship in the Baltic earlier last week?

MR. EARNEST: I asked this specific question and that did not come up in the call between the two Presidents. As I mentioned yesterday, those kinds of activities are destabilizing, a source of some concern, but they're not particularly unusual. And there is an already well-established channel for expressing our concerns about those kinds of incidents from the U.S. military attaché in Moscow to his Russian military counterpart. Those concerns were raised at that level and were not escalated beyond that.

Q There was another incident over the weekend where a Russian aircraft intercepted a U.S. reconnaissance plane. Has a complaint been lodged by usual channels on that incident?

MR. EARNEST: Well, Mark, I think this is a good illustration of just how these kinds of incidents, while provocative and concerning, are not particularly unusual. And I do not know at this point whether or not specific concerns have been raised about the incident that you just referenced. But it is a good illustration that these kinds of actions are not particularly unusual.

Q Secretary Kerry said last week in an interview that the United States would be within its justification to have fired on those two aircraft that repeatedly buzzed the warship in the Baltic. Did you see those remarks, and did he represent the White House view?

MR. EARNEST: I didn't see those remarks. I think the point that Secretary Kerry was making is that those kinds of actions are provocative. And it's certainly why we encourage the Russians to not engage in those kinds of activities. Abiding by generally accepted international norms, particularly when operating in either international waters or in international airspace, is important. But again, since we have ample opportunities to express our concerns about these kinds of provocative actions to the Russians, it did not necessitate a presidential-level conversation.

April.

Q Josh, I want to go back to a couple things you just said. This phone conversation with President Obama and Putin, how intense was the conversation? You said it was an intense conversation. And what components were the intense pieces?

MR. EARNEST: Well, I don't know that I'm going to get into that much detail. I don't think I used the word "tense."

Q You said "intense."

MR. EARNEST: Intense.

Q So I'm using a piece of "intense." (Laughter.) How tense --

MR. EARNEST: I think that distorts the meaning of what I'm trying to convey.

Q -- not distort. Tell me, how intense was it?

MR. EARNEST: What I'm telling you is that there are important issues for the two leaders to discuss, and they had an opportunity to discuss them at some length this morning. And obviously when we're talking about the situation in Syria, it's rather serious, and there continues to be concern about all of the parties living up to the commitments that they made in the context of the cessation of hostilities.

And obviously we have for years now encouraged President Putin and the Russian government to use the influence that they have with the Assad regime to compel them to act constructively. And more recently that means to live up to the commitments that they made in the context of the cessation of hostilities, and that abiding by that arrangement around the cessation of hostilities is going to be critical to our ability to move forward on the diplomatic track and bring about the kind of political transition that's long overdue inside of Syria.

And President Putin has publicly expressed his view that this kind of political transition is critical to both Russian and U.S. interests in that country and in the broader region. And this is an opportunity where our interests overlap, and it's an opportunity for the President to once again make the case to President Putin that he should use his influence with the Assad regime to live up to the commitments that they've made in the context of the cessation of hostilities.

Unfortunately, we've seen that the cessation of hostilities continues to be fragile and increasingly threatened due to continued violations by the regime. And this was the subject of what I think you could accurately describe as an intense conversation.

Q Was there more consternation that resulted from this meeting, from this phone conversation between the two? Were they at an impasse with the intense conversation?

MR. EARNEST: No, I wouldn't describe it as an impasse. It's not uncommon for them to have these kinds of conversations. And this is an opportunity for them to consult on these important matters once again.

Q And lastly, going back to the Merrick nomination, it's been said now from some members on Capitol Hill that the President did reach out to some members of the Congressional Black Caucus as they were still angry about the fact that -- upset about the fact that a black person or a black female was not nominated. And I know a couple of people, to include Congressman James Clyburn, the President actually reached out to and talked to. Could you talk to us about some of those calls that the President made and the talks that he had with members of the CBC?

MR. EARNEST: Well, I'm not aware of any conversations like that that have occurred recently. The President did address this at some length when he traveled to the University of Chicago a week and a half ago. The President talked about his unparalleled record of appointing people to the federal bench to ensure that that institution reflects the diversity of the country. And we've been through the statistics before about what the President's record looks like. The President has appointed 117 minority judges. That's more than any President in history. Nine African American circuit court judges, which is as many as any other President in history. Twenty-six African American female judges. Thirty-seven Hispanic judges. Twenty judges from the APIA community. All of those are totals that exceed any other President in American history.

In this case, the President made a decision that is consistent with the way that he made this decision in the past, which is, when the President appointed Justice Sotomayor, the first Hispanic to the Supreme Court, he picked the best person for the job. He picked someone of unquestioned integrity, somebody with unquestioned legal credentials, and somebody with a commitment to interpreting the law and not advancing a political agenda. He used

the same criteria to choose Elena Kagan and nominate her to the Supreme Court. And he used that same criteria to choose Merrick Garland.

So that's why we're going to continue to urge the Senate to fulfill their constitutional duty. Obviously, Republicans in the Senate described Chief Judge Garland as a consensus nominee, and we believe that he should be treated accordingly.

Q And last question. You said from that podium that this administration listened to their constituency when it came to the potential nominee. And we had black leaders who submitted the request for an African American or black person or a black woman. Now, Lani Guinier -- I talked to her last week -- she was of a mind that if you had picked an African American woman, she would have a tough year, just like she did in 1993. When you laid out all the requests and looked at the landscape, was that part of the equation -- that if you did nominate an African American woman, you might have gotten the same thing that you were seeing when Clinton nominated Lani Guinier in 1993?

MR. EARNEST: I don't think there was any previous presidential appointment that came to mind. I think in this case, the President was focused on fulfilling his constitutional responsibility. And the President was convinced that the American people would be best served by the President choosing the very best person for the job, and that's exactly what he's done. The President chose somebody, in the form of Chief Judge Garland, who is the chief judge on the second highest court in the land. Chief Judge Garland has more experience on the federal bench than any other Supreme Court nominee in American history.

That's why we've seen Republicans describe him in the past as being a consensus nominee. And just in the last week, we heard Republican Senator Rob Portman, from Ohio, describe Chief Judge Garland as "an impressive guy." You heard Republican Senator Pay Toomey, from Pennsylvania, describe Chief Judge Garland as very, very smart and very knowledgeable. Last week, Senator Flake described Chief Judge Garland as "obviously a man of accomplishment and keen intellect." So many Republicans have reached the same kind of conclusion that President Obama has about the ability of Chief Judge Garland to serve on the Supreme Court with honor and distinction in a lifetime appointment.

And that's the assessment that people make when they set aside politics. It's only when politics intrude that Republicans step forward and say that they're not going to consider anybody that's been appointed by President Obama. They're not doing that because they're concerned with who President Obama appointed. They're doing that because they are in a different political party than President Barack Obama. That intrusion of partisan politics into the Supreme Court process is not good for our country. It's inconsistent with most Americans' understanding of the Constitution. It's also inconsistent with most Americans' understanding of what the Senate's job is.

And that's why I think you have seen some traction around this argument that Republicans are not doing their job. They have failed. They have dropped the ball when it comes to fulfilling their responsibility to consider the appointment that the President has thoughtfully put forward.

I guess one thing that I can tell you is that there are some meetings that Chief Judge Garland will participate in this week. He will do meetings with five different senators over the course of this week. On Tuesday, he'll meet with Senator Debbie Stabenow of Michigan. On Wednesday, Chief Judge Garland will meet with Senators Lindsey Graham and Bill Nelson -- those will be separate meetings. And then on Thursday, Chief Judge Garland -- although it would be interesting if they did it together, I guess. But they will be separate. And then on Thursday, Chief Judge Garland will meet with Senator Menendez and Senator Kaine.

So at the end of this week, Chief Judge Garland will have met with, I believe that will bring the total to 40 United States senators, including 10 Republican United States senators. So he continues to fulfill his responsibility to

engage with members of Congress. These kinds of private meetings have long been a precursor to a more public hearing -- or a public hearing. And this is the case that we're going to continue to make, that when you hear Republicans say that they don't want a hearing, frankly it's because they're concerned that Chief Judge Garland is going to do well in a hearing and they don't want the American people to be left with the impression that this individual deserves a lifetime appointment on the Supreme Court because it's then going to make it harder -- even harder than it already is -- for them to block his nomination.

So we're going to continue to make the case that Republicans in the Senate should do their job, and hopefully they will.

Mary.

Q Back on the 28 pages of the 9/11 report. You said last week that you'd check to see if the President had actually read those pages. I'm just wondering if you've had a chance to get that answer, if he does support declassifying those pages.

MR. EARNEST: I don't know whether or not he's read the 28 pages. Obviously there is a process that's underway at the Office of the Director of National Intelligence to consider those 28 pages and determine how much, if any, of those documents can be declassified and released. There's a well-established process for this, and I'd refer you to Director Clapper's office for an update on where that process stands and how soon a decision about a potential release could be made.

Q What's your response to 9/11 families who feel that, by opposing the Schumer-Cornyn legislation that the administration is siding with Saudi Arabia instead of with the victims?

MR. EARNEST: Well, our concerns about this law are not related to its impact on our relationship with one particular country. In fact, our concern is about an important principle of international law. The whole notion of sovereign immunity is at stake and it is one that has more significant consequences for the United States than any other country.

The concern that we have is simply this: It could put the United States and our taxpayers and our servicemembers and our diplomats at significant risk if countries were -- other countries were to adopt a similar law. Let me give you one example. Obviously, the United States is involved in a wide variety of humanitarian relief efforts in countries around the world at any given time. If somebody decided that they wanted to -- that they were unhappy with the way that those humanitarian relief efforts were being carried out, you can imagine someone in some faraway country would file a lawsuit against the United States for our humanitarian relief efforts.

This, again, could potentially put the United States and our taxpayers at risk. It could also put individual U.S. servicemembers who are often involved in those humanitarian efforts at risk as well. That's why this principle of sovereign immunity is critically important. It allows countries to resolve their differences through diplomacy and not through the courts in one country or the other.

We continue to believe that the concerns that we have with Saudi Arabia can be addressed through diplomacy. Of course, they're an important counterterrorism partner to the United States. There are a variety of areas where we work closely together -- everything from trying to resolve the situation in Syria to degrading and ultimately destroying ISIL, to fighting al-Qaeda in Yemen, or to counter Iran's malign activities in the region. Those are all areas where the United States and Saudi Arabia work effectively together in a way that advances our shared interests. But we surely do not agree on everything. But our differences are differences that can be resolved through diplomacy and don't have to be resolved in a way that opens up the United States to significant potential vulnerability in a whole host of countries around the world.

Q And do you expect that this issue, both the legislation and the 28 pages, will be brought up later this week when the President meets with the King?

MR. EARNEST: Well, I don't know at this point. I don't know that they will necessarily be on the President's agenda. Obviously, there are a lot of important things for us to discuss. I outlined a few of them, particularly as it relates to Iran and ISIL and even the situation in Yemen.

The President convened Saudi Arabia and the other GCC countries at Camp David last May, and at that summit, the President was focused on helping the GCC countries improve their coordination and cooperation so that they can work more effectively together in cooperation to advance their security interests. And the United States can certainly play a helpful role in facilitating that cooperation, both using our expertise, but in some cases, offering our technology and equipment.

So we obviously have a long agenda when we get there. But, look, if this issue were to come up, obviously I think the situation that I have described in terms of the potential consequences of rolling back this core principle of international law is how the President would explain our position to his counterpart.

Q And one question on Zika. If Congress does not go ahead and approve the $1.9 billion in funding that you're asking for, what's plan B, or what comes next? Dr. Fauci, over the weekend, said you would have to pull from other areas to continue for that vaccine development that's underway. Have you started the process to identify what other areas you could draw funding from?

MR. EARNEST: Well, I think you'd have to talk to both Dr. Frieden at CDC and Dr. Fauci at NIH for a detailed answer to that question. I can tell you that what both of them have done as a matter of just being responsible public health professionals is they've been forced to prioritize. And that has meant pulling resources away from some core priorities to focus on this emerging threat.

That's a significant problem, particularly when you consider that there's no good reason that Congress hasn't acted. This is not right now an urgent situation. For the last two months, it's been a situation that's called for congressional action. That's why we put forward a detailed proposal for members of Congress to act on. Instead, Republicans in Congress have done little to nothing to address this issue for the last two months. And the opportunity to get ahead of this potentially serious situation is washing away. And that's a significant problem.

So we've already seen our public health experts do the responsible thing and begin to focus on what resources can be used to address the threat from Zika, but they are insufficient. And we need Congress to fulfill its responsibility to put the public health and well-being of the American people first, and to act on the Zika funding request that we put forward now nearly two months ago.

Suzanne.

Q I want to go back to Saudi Arabia. Would the President veto legislation allowing relatives of the victims of 9/11 who would sue the Saudi government or other foreign entities who were shown to be directly involved in the 9/11 attacks?

MR. EARNEST: Well, Suzanne, given the long list of concerns that I've expressed about rolling back this core principle of international law, it's difficult to imagine a scenario in which the President would sign the bill as it's currently drafted.

Obviously, the President has devoted significant time in office to fighting for the 9/11 families, and fighting for those

who risked their lives to rescue and rebuild after 9/11, particularly at Ground Zero. So the priority that the President places on these issues is well-documented, and what the President believes is that the most effective way for us to advance our interests, particularly as it relates to countering violent extremism and countering terrorist organizations around the world, is for us to use our American military where necessary to protect the American people, but to try to work cooperatively with other countries around the world to advance our shared interests.

And since 9/11, we have seen a genuine focus on the part of the Saudis to countering those who seek to profligate extremist ideology. We recognize, and the Saudis now recognize, just how dangerous that is. And the United States and Saudi Arabia now work together to counter those who seek to advance these ideologies. And we do that in a way that demonstrates the ability of our two nations to cooperate, particularly on issues that are important to the national security of the citizens in both our countries.

Q The Saudis have threatened to sell billions of U.S. assets if the legislation passes. Is the President going to address that?

MR. EARNEST: Again, I don't know that this issue is going to come up in their meetings, in part because I'm confident that the Saudis recognize, just as much as we do, our shared interest in preserving the stability of the global financial system.

Q But the administration -- I mean, what is the response to that threat?

MR. EARNEST: Well, again, I feel confident in telling you that the Saudis recognize the shared interest that the United States and Saudi Arabia have in protecting the stability of the international financial system.

Q Is the administration dismissing the threat?

MR. EARNEST: I think I've been pretty clear in answering your question.

Q On another topic -- the bus explosion in Jerusalem, there's been conflicting reports in terms of an explosion regarding a terrorist threat or if it was something mechanical. Do you have anything?

MR. EARNEST: I don't have any firsthand information about this. Obviously we're aware of those reports, and law enforcement officials in Israel are taking a close look at this, as they should. And I'm confident that they'll take a close look at this and that U.S. officials will stay in touch with them on this matter.

Q And back to immigration. At the Supreme Court today, outside, there were many undocumented immigrants who really wanted to know from the administration what they should do. If the Supreme Court comes back and supports the administration's deferred action programs, knowing that this is something that could be changed or reversed under a Republican administration, whether or not that they should, in fact, come out of the shadows with just months away from potentially facing that kind of risk. Is there advice or guidance that the administration is giving to those people?

MR. EARNEST: Well, at this point we're going to wait and see what the Supreme Court decides. That's what our process -- that's what our legal process dictates. And obviously the U.S. government and the Obama administration has been deeply engaged in that process, and we have made strong arguments before the courts about the wisdom of this approach. We've also made strong arguments about how the approach that President Obama has pursued to use this executive authority to bring greater accountability to our immigration system is consistent with the way that President Reagan and President George H.W. Bush used their executive authority. Both of those Presidents used their executive authority to offer relief to undocumented immigrants, and offered them the opportunity to get a job in the United States. And that was relief that was granted to about 40 percent of the undocumented population in

the United States at the time.

President Obama has used the same authority to do exactly the same kind of thing. That's why we continue to be confident in the persuasiveness of the arguments that we have made before the courts. But at this point, it's unclear exactly what impact this will have on the policy process and in our ability to implement this policy decision that the President and his team have made here. So once we have greater clarity from the Supreme Court, we'll be able to offer clearer guidance to those who are eager to get that relief.

Chip.

Q Josh, you said to ask Director Clapper about the 28 pages, but isn't this a decision that is of such magnitude that it would be decided by the President, himself, eventually?

MR. EARNEST: At this point, this is something that the Office of the Director of National Intelligence is handling consistent with the well-established process for declassifying sensitive national security material.

Q But won't the President make the decision himself eventually?

MR. EARNEST: Not necessarily. This is something that our intelligence community does routinely. And at this point, I would --

Q There's nothing routine about this. I mean, this is a major document. This isn't just another classified document that they have to decide whether to declassify or not.

MR. EARNEST: No, I would acknowledge that there is something -- that this is --

Q Unique --

MR. EARNEST: Well, it's significant because it relates to obviously the biggest terrorist attack that's been carried out on American soil. So it's obviously something that the intelligence community takes quite seriously, but they take all these matters quite seriously. And there's a well-established --

Q Are you going to say the President, himself, may not make this decision?

MR. EARNEST: What I'm saying is that there is a well-established process that the intelligence community has for considering these kinds of questions. And right now that is the process that we're in the middle of.

Q And on the Supreme Court -- do you think -- or does the President think -- and maybe you've addressed this before; I'm not here all the time now -- but does the President think that decisions of this level of importance should be postponed until there are nine members on the Supreme Court?

MR. EARNEST: Well, the President believes that it's the Supreme Court's responsibility to determine how this should be best handled. Obviously it was President Reagan who was pretty outspoken in making the case that these kinds of cases should be handled with the full complement of justices. I'm just looking for the --

Q Does President Obama agree with President Reagan on that?

MR. EARNEST: He most assuredly does. And look, for every day that goes by that the Supreme Court does not have the full complement of justices, the American people are not best served by their legal system. And that is the argument that President Reagan made in urging the United States Senate to act on his nominee to the Supreme

Court. That was action that he was urging them to take in his final year in office. It was an election year. It was President Reagan's final year in office.

That's exactly the situation that we have now. When President Reagan was in office and he made that case, Democrats has the majority in the Senate, and they went along with it. They recognized that they had a constitutional duty to confirm Justice Kennedy to the Supreme Court, and that's what they did. We're simply asking Republicans to do exactly the same thing.

Q Has the President been briefed by Don Verrilli on the Supreme Court case today? Do you know?

MR. EARNEST: I don't know that the President -- he has not been briefed by the Solicitor General, at least not today. But I would anticipate that the President will get briefed by his staff about how the arguments went before the Supreme Court before the end of the day today.

Q And do you know if the President has voiced -- or if anybody has voiced any opinion on the issue of standing, and if that would be a good way to resolve this case for now, since there are only eight justices on the Court?

MR. EARNEST: I didn't listen to the whole argument today, so I don't know how this issue came up in the argument today.

Q It looks like Kennedy is a little iffy on it.

MR. EARNEST: It's hard to tell just based solely on the questioning. There are a lot of assumptions made about the views of the justices, of the Affordable Care Act, based solely on how they questioned the Solicitor General at the time. That proved to be a rather unreliable measure of the -- or unreliable predictor of the eventual outcome.

Q But if they were to throw it out on standing, that would be a major victory for the administration, would it not?

MR. EARNEST: Well, I'm no attorney, but my understanding is, based on the public reporting on this, that, yes, if this is an argument that is thrown out on standing, then it would allow the administration to move forward with implementing this executive action. And we would obviously welcome the ability to do that.

Mark.

Q On Iraq and the deployments there -- 200 additional soldiers doesn't seem like a huge amount in the grand scheme of things, but now the number is back over -- the authorized level is back over 4,000.

MR. EARNEST: That's right.

Q And plus, some of these special operators are going to be going to the battalion level, which Secretary Carter acknowledged puts them closer to actual combat. Isn't this a classic case of mission-creep?

MR. EARNEST: Well, Mark, this is a classic case of the President asking his team to develop ways to intensify those elements of our strategy that have shown some progress. And we know that Iraqi forces fighting ISIL on the ground, in Iraq, have benefitted tremendously from the advice and assistance that they have received from U.S. servicemembers that have accompanied them. And what we have sought to do is to develop a strategy that would allow us to offer more advice and to offer greater assistance. That does not, however, put American servicemembers automatically on the front lines.

I'm not seeking to downplay the significant risk that our servicemembers are taking in Iraq. We've already seen a

couple of U.S. servicemembers killed in Iraq. What they're doing is quite dangerous. That certainly applies to the fighter pilots that have been flying missions over Iraq and in Syria for well over a year now. These are men and women in our military who are putting themselves in harm's way for our national security. We owe them a debt of gratitude. But that is different than the kind of ground combat mission that more than 100,000 U.S. servicemembers had when President Bush sent them into Iraq. The mission that they have now is quite different.

Q But even if it isn't 100,000 men, doesn't it further Americanize a fight that the President himself has said most effectively is fought by local forces on the ground?

MR. EARNEST: That is exactly right. This has to be a fight that is led by local forces. And the decisions that were announced today were announced after Secretary Carter had an opportunity to consult with Iraqi government officials, because Iraqi government officials are going to continue to call the shots here. And they obviously benefit tremendously from the support that they have received from the United States and our coalition partners. That support comes in a variety of forms. And what was announced today were ideas for intensifying that support in a rather tangible way. But it does not change the basic elements of the strategy, which is that this has to be a fight that is led by local forces with the support and assistance of the United States and our coalition partners. And that's exactly what we've done thus far, and that hasn't changed based on the enhancements that were announced today.

Angela.

Q Thanks, Josh. Can you bring me up to speed on the state of play on breaking the logjam on Eric Fanning's nomination to be Army Secretary? As I'm sure you know, Senator Roberts has a hold on that nomination, looking for a promise that the administration pledges to not send any Guantanamo Bay detainees to Fort Leavenworth, Kansas.

MR. EARNEST: I don't have a significant -- I don't have a procedural update to offer from here. Obviously, there is no questioning Mr. Fanning's commitment to serving this country. He is someone of unquestioned integrity and expertise when it comes to the critical functions of the United States Army. And he is a nominee who deserves bipartisan confirmation by the United States Senate, and he's been held up for too long. And it's unfortunate that his nomination and his career in service to this country has been ensnared in political arguments made by one particular senator.

Q Does the administration plan to offer a promise, a pledge to Senator Roberts on that?

MR. EARNEST: Well, I think we've been quite clear about our commitment to closing the prison at Guantanamo Bay and seeking the cooperation with the United States Senate -- even if they're unwilling to help in that effort, the least they can do is remove the unwarranted obstructions that they have erected that have prevented the closing of the prison.

It is hard to imagine that Senator Roberts takes this particularly seriously. You may recall the last time that anybody has talked about Senator Roberts was when he filmed a video of himself crumbling up the President's plan to close the prison at Guantanamo Bay and throwing it in a wastebasket. So maybe he relishes the opportunity to be before the camera, but it's not apparent that he takes this critically important national security issue all that seriously.

Q One follow-up also on the call with Putin. Was that call initiated by the U.S. or by Russia?

MR. EARNEST: I don't know who initiated the phone call today.

Q Do you know the length of time that call lasted?

MR. EARNEST: No, but we'll look into it for you. I don't have all the details.

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Byron.

Q Thanks, Josh. Can you be more specific about the White House position on Saudi threats to sell off U.S. assets if the 9/11 bill passes? You say you don't think Saudi Arabia will follow through with this threat, or that the President will veto this bill so we wouldn't actually see this come to a head. Is the White House concerned about it? How do we interpret your answer earlier?

MR. EARNEST: Well, Byron, I tried to be as clear as I could be. I outlined the significant concerns that the United States has and the administration has with the idea of rolling back this key principle of international law. This question of sovereign immunity is something that protects the ability of the United States to work closely with countries all around the world. And walking back that principle would put the United States, our taxpayers and our servicemembers and diplomats at risk. And putting them into legal jeopardy is not a good idea and something that the President strongly opposes. And that's why he wouldn't sign legislation that would do that.

As it relates to this discussion about the selling of U.S. treasuries, obviously a country with a modern and large economy like Saudi Arabia would not benefit from a destabilized global financial market. And neither would the United States.

Q Would this also impact -- would such action have a significant impact on the U.S. economy? Is that something the White House is worried about?

MR. EARNEST: I think what I'm pointing out is that the Saudi government recognizes that both our countries and our economies benefit from the smooth functioning of the global financial system and it's not in their interest to destabilize it.

Q Can I follow up?

MR. EARNEST: Go ahead, Connie.

Q What's the status of the memorandum of understanding? And does the President have any plan to go to Israel or --

MR. EARNEST: I don't have an update for you on those discussions. I can certainly check with my National Security Council colleagues to see if they can provide you with an update. At this point, I don't have any new international travel to announce, but if the President decides to go to Israel I'm sure all of you will have the opportunity to travel with him.

Q How is he getting along with Netanyahu?

MR. EARNEST: Well, as I mentioned I guess a number of times over the years, the best way to evaluate the relationship between our two countries is not based on the pleasantries that are exchanged in private discussions, but rather on the commitment of the leaders of two countries to, working together and cooperating, to advance the interests of their respective countries. And obviously, President Obama and Prime Minister Netanyahu have been able to work effectively to demonstrate the U.S. rock-solid commitment to Israel's national security. In fact, it was Prime Minister Netanyahu, himself, who indicated that the security cooperation between Israel and the United States under President Obama's leadership was unprecedented. And that's an ongoing commitment that President Obama has made throughout his seven years in office.

Rich.

Q Thanks, Josh. To return to the Saudi-9/11 issue, in a conversation today that David Axelrod and Ben Rhodes had on CNN, Ben Rhodes said that there were people in the government doing their thing -- Saudi government -- where there was insufficient attention to where all this money was going over many years from the government apparatus. If that is the case, shouldn't then there be some holding of responsibility by someone in the Saudi government? And doesn't that underscore those who support this bill and their argument?

MR. EARNEST: Well, Rich, let me start out by saying that Mr. Rhodes is currently the Deputy National Security Advisor, but earlier in his career he worked closely with Lee Hamilton, former Congressman from Indiana, who was the author of the report. And Ben had worked closely with Congressman Hamilton to write that report, so he's got his own detailed knowledge of this particular situation.

Obviously, that report concluded that they were not able to find any evidence that the Saudi government as an institution or that senior Saudi government officials were knowingly supportive of the 9/11 plotters. That's something that's included in the report. That's a report that's been declassified and made available to the public --

Q But it doesn't mention those beneath that, and that's what he's talking about here.

MR. EARNEST: Well, I didn't look at the whole conversation, but I think what he's referring to is something that is included in the 9/11 Commission Report.

More generally, I just want to go back to the fact that our concerns with the way the law is currently written stems from our view that protecting sovereign immunity is more important for the United States than it is for any other country. And walking back from the core international legal principle could have a significant and negative impact on our ability to do business around the world. Even worse, it could put U.S. servicemembers and diplomats into legal jeopardy in other countries' courts.

And that's not going to advance our interests. That's not going to make us safer. It would only make it harder for us to effectively engage and coordinate and cooperate with countries around the world, including Saudi Arabia, who has been helpful in our effort to degrade and ultimately destroy ISIL, to go after al Qaida elements in Yemen, and to counter Iran's malign activities throughout the Middle East.

So this particular principle that we're discussing is not just about our relationship with one country, it's about the United States' relationship and our ability to work with countries all around the world.

Q So ruling out the court system as a venue, what recourse do the 9/11 families have if there's an acknowledgement that there perhaps are some within a foreign government who may be responsible?

MR. EARNEST: Well, Rich, what I can tell you is that the administration has worked aggressively to support the 9/11 families seeking compensation, and we have worked hard to support, and offered our full-throated support, to the rescue workers who risked their lives to rescue innocent Americans and to rebuild at Ground Zero. That's the President's record when it comes to 9/11 and in supporting those who lost loved ones on 9/11.

The legacy of that event is that President Obama has also sought to make protecting the American people his number-one priority. And he's worked with our allies and partners around the globe to counter terrorism, to advance our national security, and to advance our interests. And the truth is, countries like Saudi Arabia -=- a country like Saudi Arabia is a good example. We certainly do not agree with everything that Saudi Arabia does, and there are numerous differences between our two countries. But the fact remains that the United States and Saudi Arabia are able to coordinate effectively to counter terrorism, to combat extremists, to degrade and destroy ISIL, and to advance the security interests of both of our countries.

That's why this kind of cooperation is critically important. It's why the President hosted Saudi Arabia and the other GCC countries at Camp David last spring. And it's why he's traveling to Saudi Arabia this week to meet with the leaders of GCC countries to talk about deepening our cooperation and ensuring that as they work together to provide for their own security that the United States can continue to facilitate improved cooperation among them.

Q Has the President conducted any personal outreach on this bill? Congressional outreach?

MR. EARNEST: I'm not aware of any presidential-level conversations about this particular piece of legislation.

Q And just one more question on the $750 billion. Is it safe to say that you would -- given what you've said on this briefing, that given the concerns that the Saudis might have, what it would do to the world economy and their own economy if they were to unload $750 billion of U.S. assets, that it's essentially a bluff?

MR. EARNEST: What I'm just -- the principle that I've repeatedly stated I'll state one more time, which is the United States certainly believes that Saudi Arabia understands our shared interest in protecting the stability and security of the international financial system. Saudi Arabia is a large economy and they would not benefit from roiling global financial markets.

Cheryl.

Q Thanks, Josh. A budget question. Last Friday, you indicated that the Overseas Contingency Fund shouldn't be used as sort of a slush fund. But Republicans are looking for more defense spending. You're looking, and Democrats are looking for Zika funding, for water funding, those type of things. Is there a deal to be had to increase spending as long as it's both defense and nondefense?

MR. EARNEST: Well, I think, Cheryl, when it comes to protecting the basic public health and well-being of the American people, that shouldn't be the subject of wheeling and dealing. It should be the subject of members of the United States Congress, particularly Republicans, setting aside politics and doing their job. And in this case, the administration, after consulting with our foremost scientists and public health experts, put together a funding proposal and sent it to Congress two months ago.

Congress has not acted on that funding proposal, and instead, our public health professionals have been forced to pull money from other critical functions in order to try to begin the work of preparing for the Zika virus, when the truth is that if Congress had acted as the way you would expect them to, that money would have already been provided and our public health professionals would be farther along in their work to protect the country from the Zika virus, and our state and local partners around the country who will be at the front lines of this would be better prepared to, for example, eradicate mosquito populations, or to target mosquito populations to prevent an outbreak.

We also would see enhanced lab capacity so that people who are seeking to get a Zika test would be able to get the test in the first place, but would also be able to get a prompt response from the lab after they had undergone the test. Neither of those is true right now.

So there is more that we need Congress to do, and there's no reason it should be subject to a negotiation. This is part of the basic responsibility of the United States Congress, which is to take responsible steps, separate from politics, to protect the public health and well-being of the American people. That's what they should do.

Fred.

Q There was release out today that the FBI, the Association of National Police Chiefs and other law enforcement

groups are supporting the Burr-Feinstein legislation on encryption. And that's something that it's reported that the White House is very undecided about it at least. Is there any rethinking on that as to whether the President would sign it if it does come to his desk?

MR. EARNEST: Fred, I have to admit, when you started that question I thought you were going to talk about the extensive law enforcement support for the President's executive actions on immigration. A similar group of law enforcement officials have come out and expressed their strong support for the President's immigration executive action. And despite what the Attorney General of Texas might tell you, the fact is the top law enforcement officials in the state of Texas actually think that what the President wants to do when it comes to our immigration system would actually make communities in Texas safer. But that's just one example, and that's one tangent that's on my mind based on the way that you asked your question.

But, yes, as it relates to encryption, I'm not aware that we've taken a specific position on the legislation that you referred to. Obviously administration officials have been in touch with members who Congress who are interested in this issue. There is expertise that law enforcement and technological experts in the U.S. government can offer as this kind of policy is being carefully considered. The administration has engaged in those conversations in good faith.

What I continue to harbor is deep skepticism that Congress will succeed in writing and passing legislation that would effectively address this complicated policy issue. In some ways, the context of your question is relevant because, when it comes to something like Zika, that should probably be among the easiest things that Congress should have to do to make a decision about making sure that our public health professionals have the money that they need to protect the American people from a virus. That's a pretty straightforward thing.

When it comes to encryption, that's much more complicated. We're talking about a technology that's rapidly changing and questions about deeply held principles related to both national security and privacy. I just happen to be personally skeptical that Congress would succeed in getting something useful done on that when even the simple things, like protecting the American people from Zika, Congress seems unable to do.

Q So your skepticism is not to the substance of the Burr-Feinstein bill, but it's whether Congress could actually get this done?

MR. EARNEST: Well, I think a congressional process that yield a piece of legislation that is both effective in addressing the problem and capable of passing both Republican-led bodies in Congress -- yes, I'm quite skeptical that that will happen.

Q And I have a question on -- last week, the House Freedom Caucus called again for impeachment of the IRS Commissioner. The House Oversight Committee had initially put this idea forward. First, is there a White House response to that? And secondly, does the President have full confidence in the IRS Commissioner?

MR. EARNEST: Of course, he does. It is ridiculous for Republicans in Congress, who seek to gut funding for the IRS -- in some cases, they actually call for the outright abolition of the agency -- to be a fair arbiter of the effectiveness of the IRS Commissioner. The fact is, Mr. Koskinen has an extraordinarily difficult job, and it's made only more difficult because Republicans seek to try to cut the funding of his agency. He is somebody who undertakes that work with a lot of professionalism and seriousness of purpose, and he deserves our gratitude for his good work.

Dave.

Q Josh, there was a GAO report out today that said the VA is still having significant problems fixing -- that veterans

are still waiting long periods of time to get appointments in the health care system and that the Department has not solved the problem. Is the President frustrated at the pace of this?

MR. EARNEST: Well, there is no denying that the problems that the VA has encountered for more than a decade now have been deeply entrenched. And there are critically important reforms that are having a positive impact and we have made important progress in ensuring that our veterans get the benefits that they have so richly earned. That said, there's more work that needs to be done to implement those reforms and to continue to accelerate the progress of those reforms. And that's something that VA Secretary McDonald is intensely focused on. He does that work with the strong support of the President, because President Obama has made this a priority, and we're committed to making sure that we serve our veterans well. And there's more work that needs to be done to make sure that we realize that goal.

Q The administration only has a few months left to tackle this problem. How confident is the White House that you're going to resolve it by the time you leave office?

MR. EARNEST: Well, I think that there's no denying that in the first seven years of the Obama administration, that we have made remarkable progress in improving the service delivery system and drastically reducing the backlog and benefits claims. So that progress has been important. But there's nobody right now that's satisfied. We know that there's a lot more important work to be done. And when you're talking about making sure that the bravest Americans have gotten their due, have gotten what they were promised, that's an important priority. It's certainly one that this President takes very seriously, and he certainly is not going to be satisfied until all that work has gotten done.

John, I'll give you the last one.

Q Thanks, Josh. The President obviously also has a lot of confidence in the Solicitor General who argued the case on behalf of the administration today. Did the President consult with Mr. Verrilli over the arguments that he was going to put forward before the Supreme Court today? And on the back end, did he get a debriefing from Mr. Verrilli about how things went today at the Supreme Court?

MR. EARNEST: I don't know how much conversation that they had prior to the arguments. I can tell you that the President will get a briefing from his staff before the end of the day today on how the arguments went. I don't know that Mr. Verrilli will offer that briefing in person, but it will be an opportunity for the President to hear how the case went.

Obviously, Mr. Verrilli is someone who has been through the wringer here several times and, I think by any assessment, is somebody that has a sterling track record, particularly on the most important cases in representing the federal government before the Supreme Court.

So the President's confidence in Solicitor General Verrilli is quite well earned, and that confidence in Mr. Verrilli and his abilities has paid off -- not just for the President, but for the American people who have enjoyed significant benefits from the Affordable Care Act, for example, as a result of Mr. Verrilli's effective advocacy before the Supreme Court.

Thanks, everybody. We'll see you tomorrow.

END
2:57 P.M. EDT