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MODERN TREATIES OF FRIENDSHIP, COMMERCE AND NAVIGATION

HERMAN WALKER, JR.*

The bilateral "treaty of friendship, commerce and navigation" is one of the most familiar instruments known to diplomatic tradition. The title, commonly used to describe a basic accord fixing the ground-rules governing day-to-day intercourse between two countries, designates the medium *par excellence* through which nations have sought in a general settlement to secure reciprocal respect for their normal interests abroad, according to agreed rules of law.[1]

The precise content of the instrument as treaty-type, and the manner in which that content is treated, has varied from era to era depending on the needs of the time, the usages of the countries involved and the foreign policy objectives in view.[2] In United States practice, however, it has evolved into a comprehensive charter of relations in the domain of private affairs. In the course of that evolution, it has figured repeatedly in the conduct of American foreign relations from the earliest days, and with all manner of nations, beginning with the treaty of Amity and Commerce with France in 1778 and continuing into the present. The number of such treaties concluded by the United States runs well over a hundred.[3] This discussion focuses on the sixteen that have been signed since 1946.[4]

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*First Secretary of Embassy, Foreign Service of the United States, Paris. This article is without official attribution.

1. Leading writers on international law do not seem to have commented extensively on this treaty function. But see Fiore, International Law Codified and Its Legal Sanction 373-74 (Borchard trans., 1918).

2. For a brief discussion of the historical development of treaties of this type (sometimes known as "commercial" treaties, a term which also can refer to instruments of lesser scope), see Culbertson, *Commercial Treaties*, 2 Encyc. Soc. Sci. 24-31 (1930). Summaries of their purposive evolution in United States policy may be found in Setser, *Treaties to Aid American Business Abroad*, 40 Foreign Commerce Weekly 3 (September 11, 1950); *Commercial Treaty Program of the United States*, U.S. Dept. of State Pub. 6565 (1958).

3. The treaty with France, 1778, 8 Stat. 12, T.S. No. 83 was next followed by those with the Netherlands 1782, 8 Stat. 32, T.S. No. 249; Sweden 1783, 8 Stat. 60, T.S. No. 346; and Prussia 1785, 8 Stat. 84, T.S. No. 292 even prior to the Constitutional Convention. A convenient compilation of treaty texts, prepared under Senate auspices, is the four volume Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers (1776-1909 (2 vols.) Malloy ed.; 1910-1923, Redmond ed.; 1923-1937, Trenwith ed.). The Trenwith volume contains a table from which can be readily derived a chronological compilation of treaties of this type, under whatever variant title.

4. *Republic of China*, 1946, 63 Stat. 1299, T.I.A.S. No. 1871; *Italy*, 1948, 63 Stat. 2255, T.I.A.S. No. 1965, (Supplemented by Agreement of Sept. 26, 1951, Sen. Exec. H., 82d Cong., 2d Sess.); *Uruguay*, 1949, (Sen. Exec. D., 81st Con., 2d Sess.); *Ireland*, 1950, 1 U.S. Treaties & Other Int'l Agreements 785, T.I.A.S. No. 2155; *Columbia*, 1951, (Sen. Exec. M., 82d Cong., 1st Sess.,

I. Scope and Content

In United States practice, although "friendship" is attributed an honored place in the title and although the conclusion of a treaty presupposes friendliness and good-will between the signatories, these treaties are not political in character. Rather, they are fundamentally economic and legal. Moreover, though "commerce" and "navigation" complete the title and accurately describe part of their content, their concern nowadays is only secondarily with foreign trade and shipping. They are "commercial" in the broadest sense of that term; and they are above-all treaties of "establishment," concerned with the protection of persons, natural and juridical, and of the property and interests of such persons. They define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprises.

Their current preoccupation with these matters has been especially responsive to the contemporary need for a code of private foreign investment; and their adaptability for use as a vehicle in the forwarding of an investment aim follows from their historical concern with establishment matters. Familiar elements in them stood ready to be amplified and reconditioned to meet contemporary needs and circumstances.[5] The pattern formed by the series of sixteen signed since 1946 is accordingly distinguished in complexion from that formed by the several different series concluded in past eras.[6]

withdrawn from Senate June 30, 1953); *Ethiopia*, 1951, 4 U.S. Treaties & Other Int'l Agreements 2134, T.I.A.S. No. 2864; *Israel*, 1951, 5 U.S. Treaties & Other Int'l Agreements 550, T.I.A.S. No. 2948; *Greece*, 1951, 5 U.S. Treaties & Other Int'l Agreements 1829, T.I.A.S. No. 3057; *Denmark*, 1951, (Sen. Exec. I., 82d Cong., 2d Sess.); *Japan*, 1953, 4 U.S. Treaties & Other Int'l Agreements 2063, T.I.A.S. No. 2863; *Federal Republic of Germany*, 1954, 7 U.S. Treaties & Other Int'l Agreements 1839, T.I.A.S. No. 3593; *Haiti*, 1955, (Sen. Exec. H., 84th Cong., 1st Sess., withdrawn from Senate Aug. 8, 1957); *Iran*, 1955, T.I.A.S. No. 3853; *Nicaragua*, 1956, (Sen. Exec. G., 84th Cong., 2d Sess.); *Netherlands*, 1956, T.I.A.S. No. 3942; *Korea*, 1956, T.I.A.S. No. 3947. The treaties with Ethiopia and Iran represent considerably abridged versions and vary also from the others in that they contain provisions on consular rights. A subject matter usually dealt with in separate conventions, by current United States practice. The Uruguay example also has a variant detail in its title: "Economic Development" in lieu of "Navigation."

5. See Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956).

6. The 12 treaties in the last-preceding series, the period between the two World Wars, beginning with the German treaty of 1923, 44 Stat. 2132, T.S. No. 725, usually carried a number of articles dealing with consuls, consistent with their scheme of devoting the major part of their space to trade and shipping. By contrast, the major part of the significant establishment rights, now usually spread over a dozen articles, was covered in a single article which was given the lead position. *Id.* at art. I.

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Nevertheless, this pattern is at the same time of a kind with its predecessors, and in the same direct line of evolution, having the same broad design and covering generally the same subject-matter. There has taken place merely a shift in internal emphasis away from trade and shipping, and that which is ancillary to trade and shipping, a shift facilitated by the recent development of alternative instruments for dealing with international trade.[7]

Because of their common identification with common objectives all sixteen of the current series show close kinship, but no two of them of course are identical. The several units of the series each reveal numerous variations, especially in their secondary details, owing to having each been negotiated free-will with a different country and having taken account of individual differences in viewpoint and condition. They differ particularly in that, subsequent to the first two (China, 1946 and Italy, 1948) the model form used to initiate negotiations was completely recast in the interest of compactness, greater clarity and legal sufficiency, and completeness of content. Further, the form used in another two of them (Ethiopia, 1951 and Iran, 1955) represents a specially abridged edition.[8] The universality of the program—as witness the geographical spread, the variety in size and circumstance of the countries involved, and the avowed willingness of the United States to treat equally all like-minded countries—demands flexibility along with adherence to a common core of purpose, orientation and basic content.

With the accretion of precedent and experience in framing acceptable norms, the later ones tend towards a greater display of uni-

7. The executive trade-agreement device, originally authorized by the Trade Agreements Act of 1934, 48 Stat. 943, 19 U.S.C. §§ 1351-54 *rev.*, 1948, 62 Stat. 1053, 19 U.S.C. §§ 1360-67. This type of agreement provides a flexible framework within which specific concessions in rates of duty can be reciprocally negotiated, item-by-item. Originally, the negotiating program was bilateral; but since 1947 the negotiations and agreements reached have been principally under the aegis of the multilateral General Agreement on Tariffs and Trade 61(5)(6) Stat. A3, A2054 T.I.A.S. No. 1700. 37 countries, accounting for approximately 80 per cent of the world's international trade, now adhere to the GATT.

8. These abridgements were occasioned, on the one hand, by the lack of any practical need for negotiating certain provisions or elaborations of provisions occurring in the standard form of the treaty that could be regarded as having secondary consequence or as largely irrelevant to relations with the countries concerned and, on the other hand, by the desire to use the treaty as a vehicle for dealing with the essentials of diplomatic and consular status. For synopses of the content of typical recent treaties and comparison with that of the Ethiopia and Iran treaties, see tables in *Commercial Treaties, Hearing before a Subcommittee of the Senate Committee on Foreign Relations*, 83d Cong., 1st Sess., 6-17 (1953); *Commercial Treaties with Iran, Nicaragua, and the Netherlands, Hearing before the Senate Committee on Senate Foreign Relations*, 84th Cong., 2d Sess., 5-9 (1956).

formity; the following synoptical outline of normal content follows the later rather than the earlier examples:

Preamble, general purposes.
Entry, movement and residence of individuals.
Liberty of conscience and communication.
Protection of persons from molestation and police malpractices.
Protection of acquired property.
Standing in the courts.
Right to establish and operate businesses.
Formation and management of corporations.
Non-profit activities.
Acquisition and tenure of property.
Tax treatment.
Administration and exchange controls.
Rules on international trade and customs administration.
Rules governing the state in business.
Treatment of ships and shipping.
Transit of goods and persons.
Reservations, definitions and general provisions.
Settlement of disputes.
Procedural clauses.
Protocol, an appendix of varying length, containing material construing and clarifying the treaty text, and making accommodations to take account of individual situations.[9]

This broad framework allows room for serving a variety of subsidiary interests, for which no other practicable medium may be available, or the regulation of which raises complications not readily overcome by the normal rules of the treaty, or with respect to which the other party to the negotiation may cherish a particular interest. Thus, a detailed scrutiny of signed treaties would show that, in addition to the subject matter outlined above, the treaty also has been used as a vehicle for dealing with a number of special questions, such as: freedom of reporting, social security, commercial arbitration, commercial travelers, marine insurance and restrictive business practices.[10] On the other hand, just as some of these special

9. The Protocol, by serving *inter alia* as a convenient vehicle in attending to special variations or preoccupations of individual countries, reduces the amount of deviation between treaties, with respect to general outline, basic content and array of principles. It also serves as a bulletin board for posting certain tenets of construction which are considered desirable to record formally but which may lead to mischievous inferences of being substantive additions rather than precautionary explanations, if they are integrated into the rule to which they relate.

10. Freedom of reporting and restrictive business practices are examples of particular subjects of interest to the United States on which satisfactory multilateral progress under United Nations auspices has been wanting. See, *e.g.*, on freedom of reporting, *Report of the United States Delegates to the United Nations Conference on Freedom of Information*, U.S. Dept. of State Pub. 3150 (1948); on restrictive business practices, Domke, *The United*

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features are not to be found in earlier examples of the series, so there are missing from the later ones provisions on compulsory military service and the practice of the professions, dropped because of domestic developments.[11]

II. The Rules of Treatment

The attribute these treaties share which gives consistency to their pattern, even more than the similarity of their subject matter, is the way in which that subject-matter is molded into concrete provisions. The considerations determining the character of the rules applicable to the various topics covered are several. In the first place, the protective objects in view require firm rules of law, established on a relatively stable basis. These treaties are normally concluded for an initial period of ten years certain and indefinitely thereafter, unless and until terminated upon the giving of one year's formal notice.[12] Durability requires in turn that the commitments be essentially reasonable. Both this and the long list of subjects covered demand rules framed in terms of principles that remain valid regardless of an unpredictable future. Being occupied with essential principles of equity and fair treatment, their negotiation does not provide an arena for the trading of concessions or the bargaining for an

Nations Draft Convention on Restrictive Business Practices, 4 Int. & Comp. L. Q. 129 (1955). Marine insurance (a post-1952 development) and commercial arbitration illustrate subjects requiring special handling. See, *e.g.,* discussion on marine insurance in *Commercial Treaties, Hearing before a Subcommittee of the Senate Committee on Foreign Relations,* 82d Cong., 2d Sess., 36-37 (1952); and, for arbitration, Walker, *Commercial Arbitration in United States Treaties,* 11 Arb. J. (n.s.) 68 (1956). Social Security exemplifies a subject of practical interest to the other countries rather than to the United States. See, *Analysis of the Social Security System, Hearings before a Subcommittee of the House Committee on Ways and Means,* 83d Cong., 1st Sess., 174-75 (1953).

11. For an interesting explanation, from a mainly European point of view, of some of the factors involved in United States military service policy, see Probst, *International Demarcation of Compulsory Military Service with Special Emphasis on the Swiss-United States Situation,* 45 Geo. L. J. 60 (1956). For the relationship between selective service legislation and treaty provisions on military service, see particularly Petition of Moser, 182 F.2d 734 (2d Cir. 1950), *rev'd sub nom.* Moser v. United States, 341 U.S. 41 (1951); United States v. Rumsa, 212 F.2d 927 (7th Cir. 1954); United States v. Gredzens, 125 F. Supp. 867 (D.C. Minn. 1954); *Ex parte* Blazekovic, 248 F. 327 (D.C. Mich. 1918); Summertime v. Local Board, Div. No. 10, 248 F. 832 (D.C. Mich. 1917); *Ex parte* Larrucea, 249 F. 981 (D.C. Cal. 1917). Domestic policy considerations affecting treaty provisions on the practice of professions are brought out in: *Commercial Treaties, Hearing before a Subcommittee of the Senate Committee on Foreign Relations,* 82d Cong., 2d Sess., 35-40 (1952); *Commercial Treaties, Hearings before a Subcommittee of the Senate Committee on Foreign Relations,* 83d Cong., 1st Sess., 28 (1953).

12. The 1815 treaty with Great Britain, 8 Stat. 228, T.S. No. 110, is still in force, and there are examples only less venerable with other countries, *e.g.,* Columbia, 1846, 9 Stat. 881, T.S. No. 54.

array of tangible *quid pro quos*. Negotiable rule-making, entailing freely accepted limitations upon sovereign liberty of action, cannot therefore exceed in intensity that which nations consider to be compatible with international comity and internal law-making dignity.

The lively debate recently attending the proposed constitutional amendment with which Senator Bricker's name is associated has underscored the weightiness of this consideration. As the treaty of friendship, commerce and navigation is the classic example of an instrument having potential or actual impact on domestic law, a great deal was heard of these treaties during the course of that debate. Opponents of the proposed amendment were fearful lest it frustrate the government's ability effectively to negotiate them in future; proponents contended these fears were ill-founded.[13] But if the concurrence of both sides on their desirability and acceptability as law of the land[14] attests to the judiciousness with which treaty provisions have been fitted into the known fabric of United States law, the issue likewise exemplifies a concern not confined to the United States. Other countries as well scrutinize carefully the way treaty commitments affect their internal law. Accordingly, the successful development of a treaty program of world-wide applicability entails the construction of an equation in which must be reconciled the need for positive, universally tenable rules of law, with the equal need for moderation and a spirit of accommodation within a distinctive framework of basic purpose.

These considerations have led to the extensive use of so-called contingent standards as the cornerstone of rule-making. A contingent standard is, as its name implies, one that defines the treatment provided in relative terms. The specific content of the treatment, at any given point of time and in connection with any given

13. The former view was frequently urged by both private and government witnesses. For a typical general expression thereof see the subcommittee minority report, S. Rep. No. 412, 83d Cong., 1st Sess., 45 (1953). For the latter view, see testimony of Senator John W. Bricker, *Treaties and Executive Agreements, Hearings before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 1 and S.J. Res. 43,* 83d Cong., 1st Sess., 8 (1953), and in *Treaties and Executive Agreements, Hearings before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 1,* 84th Cong., 1st Sess., 297-98 (1955); also testimony of Dr. George A. Finch, *id.* at 506.

14. The Senate roll-call vote, on the question of advice and consent to ratification of a group of five of them at a time when the controversy was at its height, was virtually unanimous in favor, 99 Cong. Rec. 9316-17 (1953). The Congress as a whole contemporaneously displayed a favorable disposition towards these treaties by calling for an acceleration of the program for their negotiation. See Section 7(k) of Mutual Security Act of 1952, 66 Stat. 146, 22 U.S.C. § 1667 (1952), amending Section 516(d) of the 1951 Act (65 Stat. 382). This provision was revised and reenacted by Section 413(b)(2) of the Mutual Security Act of 1954, 68 Stat. 847, 22 U.S.C. § 1933 b(2) (Supp. IV, 1952).

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subject, is determinable not from a reading of the treaty itself, but by reference to an exterior state of law and fact. The objective is to secure non-discrimination, or equality of treatment: a sort of "equal protection of the laws" objective.

There are two principal contingent standards: the "most-favored nation" clause and the "national treatment" clause. The former assures non-discrimination as compared with other aliens or alien things; the latter, as compared with citizens of the country and national things.[15] Which of these clauses is made applicable to a given subject can make a great deal of difference in the strength of the treaty assurance vouch-safed. Under past regimes of extra-territoriality, where aliens enjoyed special status, most-favored-nation treatment often meant privileged treatment and was accordingly a standard sought in preference to national treatment in many situations. But such situations are exceptional in the present era, dominated as it is by ideas of nationalism, self-determination and the sovereign equality of all nations.[16] The most-favored-nation rule can now, therefore, imply or allow the status of alien disability rather than of favor. In applicable situations nowadays, the first-class treatment tends to be national treatment; that which the citizens of the country enjoy. The hallmark of the current treaty program is the advanced degree to which it espouses the rule of national treatment; and the achievement of this standard, in turn, is beset by the obstacles growing out of the nationalism and *etatisme* of the age.

There is also a certain margin for the play of non-contigent standards, or "absolute" rules, in the formulation of treaty provisions. This is rule-making in independent terms, without reference to the treatment given to others. Although non-contingent standards, because of their implication of definiteness might at first blush appear to provide the avenue to provisions of maximum positiveness and efficacy, the utility of the approach is in fact quite limited. The scope of these treaties is such that, to be manageable, their content of rules must be stated essentially in a summary or simple fashion. A

15. As typically defined in the treaties: "The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." Korea treaty, 1956, T.I.A.S. No. 3947, art. XXII, Para. 1. Similarly, *mutatis mutandi,* for most-favored-nation treatment, with the pole of reference being "any third country" in lieu of "such Party" *id.* at para. 2.

16. For the passing of remaining vestiges of classic extraterritoriality, see Young, *The End of American Consular Jurisdiction in Morocco,* 51 Am. J. Int'l L. 402 (1957). For a special-situation modern examples of extra-territorial jurisdiction, see Rouse and Baldwin, *The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement,* 51 Am. J. Int'l L 29 (1957).

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summary contingent rule has definiteness, because its content is measured against a determinable pole of reference. But a summary non-contingent rule may often be considerably less than so, when reduced to language of agreement between nations of unlike faculties of appreciation and different cultural and juridic backgrounds. The need for avoiding rigidity—freezing today's wisdom into tomorrow's folly—can not, in our international tower of Babel be served by the same semantics that have so successfully kept the American Constitution abreast of the times; *raisonnable* is not the "reasonable" of American jurisprudence, nor is our "due process of law" faithfully translatable into a foreign language.

An attempt to construct a treaty primarily in non-contingent terms can prove self-defeating because increases in specificity spawn corresponding increases in reservations. This tends to rob the reference rules of the very definiteness it was their aim to accomplish. You agree to something concrete, but reserve your "public policy" or your "internal legislation." This is for the two-fold reason that prudent governments will wish escapes for future contingencies and will also wish to avoid purporting to attribute to aliens independent rights placing them in a privileged status over citizens of the country. Contingent standards, by contrast, carry built-in automatic equalization and adjustment mechanisms. Therefore, the non-contingent standard generally finds its best utility in a few contexts in which, no contingent standard being adequate, some recognizable body of applicable international law and terms of art has nevertheless evolved;[17] it is also used at times *faute de mieux,* or to suggest a general guide-post of behavior *en principe,* or to solve some special problem.

III. The Choice of Applicable Standard

The varying considerations that govern the choice and cast of the standard or standards applicable, subject to subject, may be illustrated by a few concrete major examples, which will indicate the range of the differences to which treaty provisions need to be adapted.

A. Entry of Individuals.

Being concerned with the "whole man" as it were, these treaties start their rule-making at the beginning—the point at which an individual, a company, a consignment of goods, or a ship, identified

17. It is possible to use international law itself, by name, as a standard in commercial treaties. See Wilson, The International Law Standard in Treaties of the United States 87-105 (1953).

by national ties with one of the signatory countries, appears at the threshold of the other.

As concerns natural persons, rights-of-entry cannot, by definition, be assured on a national treatment basis. Moreover, because of our selective immigration control and the differential national origins quota feature of our immigration law, the United States is not in a position to agree to a most-favored-nation treatment clause. Therefore, the approach devised takes the form of a non-contingent rule which positively assures the reciprocal admission, and indefinite sojourn, of individuals who function in an international commerce or investment capacity.[18] Because it is positive, this commitment is subjected to the reserved right of each country to exclude or expel particular individuals who are deemed undesirable for health, morality or security reasons.

A commitment so framed tends to be a least common denominator, for the entry-control policies of other governments usually do not involve national-origin quotas; and the selection they practice tends to be exercised less at point of entry than at the point of gainful occupation within the country. The problem for them is not necessarily solved by the wording of the entry-clause, as such, but focuses upon the provision dealing with the business and occupational rights of admitted persons, especially as they might affect the national labor market and the petty trades. The United States objective, generally speaking, is to establish the principle of national treatment in this connection.[19] Therefore, the safeguards which the United States side can adequately provide for by careful

18. Present statutory authority for these "treaty trader" and "treaty investor" clauses is contained in Section 101(a)(15)(E) of the Immigration and Nationality Act of 1952, 66 Stat. 168, 8 U.S.C. § 1101 (1952). The former was included in the Immigration Act of 1924 (43 Stat. 155), and the "treaty investor" provision was introduced in the course of the extensive revision of the immigration laws which resulted in the Act of 1952. Hence provisions on treaty investors appear only in treaties concluded since 1952. For comment see Wilson, *"Treaty Merchant" Clauses in Commercial Treaties of the United States,* 44 Am. J. Int'l L. 145 (1950); *"Treaty Investor" Clauses in Commercial Treaties of the United States,* 49 Am. J. Int'l L. 366 (1955).

19. The standard rule is: "Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain . . . within the territories of the other Party. . . ." (Korea treaty, *op. cit. supra* note 15 at art. VII, para. 1 as well as ". . . with respect to engaging in scientific, educational, religious and philanthropic activities . . ." *id.* at art. VIII, para. 2. There is an express reservation allowing alienage restrictions as to "transport, communications, public utilities, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources." *Id.* at art. VII, para. 2. Moreover, the practice of the professions is not included in the recitation of rights for which commitments are undertaken (*e.g.,* Netherlands treaty, 1956, T.I.A.S. No. 3942, Protocol para. 8. See note 11, *supra*).

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framing of the entry-clause[20] must be sometimes paralleled by an understanding regarding the other country's administration of its occupational permit system.[21]

B. Entry of Goods.

The entry of goods is placed under the regime of the traditional most-favored-nation treatment clause, the national treatment clause being patently inapplicable, so long as nations maintain tariffs and other differential regulations upon products of foreign origin. This most-favored-nation clause is now in the unconditional form, and has been since the United States abandoned the cumbersome "conditional" form in 1922-23.[22]

The securing of non-contingent commitments regarding duties (for example, the fixing of rates of duty) is not the function of a general, long-term treaty, but rather of "trade agreements" especially devised for that purpose and subject to revisions on short notice. It is, however, possible to establish certain positive rules with regard to administrative practices; and the treaties have been a vehicle for treating a number of these (for example, public notice of new or changed requirements, so that traders can be informed and forewarned; and procedures whereby the decisions of customs officers can be appealed).[23]

20. By affirmative description, the assured entry right is limited to those falling in a defined international trader or investor category; and the maintenance of occupational restrictions attached to limited visas (*e.g.*, temporary tourist or student visas) is left unambiguous, through insertion of an understanding that: "Nationals of either Party admitted into the territories of the other Party for limited purposes shall not enjoy rights to engage in gainful occupations in contravention of limitations expressly imposed, according to law, as a condition of their admittance." Korea treaty, *op. cit. supra* note 15 at art. XXI, para. 4.

21. *E.g.*, Federal Republic of Germany, 1954, 7 U.S. Treaties & Other Int'l Agreements 1839, T.I.A.S. No. 3593, Protocol para. 8: "With reference to Article VII, paragraph 1, a Party may apply regulations under which alien employees within its territories are required to have employment permits; but, in keeping with the objectives of that paragraph, such regulations shall be administered in a liberal fashion as to nationals of the other Party." Wording of this sort, which emphasizes compliance with procedure without impairment of main substance, is made possible by the circumstance that, as a practical matter, Americans do not typically go abroad to seek work in the kinds of capacity that local occupational restrictions are primarily designed to protect.

22. The unconditional form of the most-favored-nation clause is the usual rule of international practice in commercial matters, *e.g.*, GATT, 1947, 61(5)(6) Stat. A3, A2054, T.I.A.S. No. 1700, art. I. Under it, all advantages and rights accorded any third country accrue automatically, in contrast with the "conditional" regime whereunder such advantages, if accorded in return for a compensation, accrued only on payment of an equivalent compensation. An understanding that the most-favored-nation clauses of the current series of treaties are in principle unconditional is generally set forth in their preambles. For materials illustrating the policy considerations involved

In dealing with trade there are a number of special problems for which a simple most-favored-nation clause does not, in and of itself, provide a solution. Among them are the following, for each of which special provision has been necessary: (1). Quantitative restrictions are often, in current practice, a more important control over imports than the tariff. Countries often administer them through allocations by country of origin; that is, giving named countries fixed allotments rather than opening the total amount to all comers on a competitive, first-come first-served basis. What does most-favored-nation treatment mean in a country allotment situation?[24] (2). State-trading, or the control of imports by a state-controlled monopoly, has come to have an important part in the commercial practices of many countries. The conduct of import trade thus by entity, rather than by rules of generally applicable law concerning rates of duty and amounts under quantitative regulations, escapes the prescriptions of a most-favored-nation clause, which is an objective rule of the game rather than a code of conduct for an entity.[25] (3). In a day when administered controls have been necessitated by balance-of-payments difficulties, and when the controls have to necessarily distinguish between sources of supply according to the respective availabilities of "soft" and "hard" currencies, a simple most-favored-nation rule breaks down. It must be supplemented by specially-drafted provisions which make a realistic adjustment to this phenomenon, in a mutually agreeable manner.[26] (4). Finally, the emergence of international (*e.g.*, the General Agreement on Tariffs and Trade) and regional (*e.g.*, the Benelux and the new Common Market) organizations concerned with trade, have again necessi-

in the shift to the unconditional form, see 1 Foreign Relations of the United States 1923, 121-31 (1938); 2 Foreign Relations of the United States 1924, 183-92 (1939). See also Culbertson, Reciprocity 167-70, 238-79 (1937).

23. *E.g.*, Korea treaty, *op. cit. supra* note 15 at art. XV, para. 1, 2.

24. The rule sought is a pro-rating according to the amount of the commodity supplied historically ("during a previous representative period"). *E.g.*, *id.* at art. XIV, para. 3(b); GATT, *op. cit. supra* note 22 at art. XIII, para. 2(d), second sentence.

25. The rule sought is to oblige state-trading and monopolistic entities to conform in their external purchases and sales to exclusively "commercial considerations," that is, to act without favor or discrimination in keeping with the aim of the most-favored-nation treatment principle. *E.g.*, Korea treaty, *op. cit. supra* note 15 at art. XVII, para. 1; GATT, *op. cit. supra* note 22 at art. XVII, para. 1(b).

26. The solution allows quantitative restrictions to be applied in a manner deviating from the rule of non-discrimination, to the extent they can be rationally justified by state-of-reserves considerations (*e.g.*, the need for closely managing limited holdings of convertible currencies, notably dollars). For wording, see, *e.g.*, Korea treaty, *supra* at art. XIV, para. 7. Compare GATT, *supra* at art. XIV, and Annex J, for a more elaborate attempt to regulate the complex problem posed by exchange difficulties and the accompanying phenomenon of inconvertibility and tight currency controls.

tated the formulation of exceptions to the simple bilateral most-favored-nation rule. These exceptions have been designed, on the one hand, to avoid treaty interference with their proper and successful functioning and, on the other, to assure that essential United States interests will be safeguarded.[27]

C. Entry of Ships.

In the field of international shipping, owing to the evolution of international practice among major shipping powers, it has been possible to espouse the rule of national treatment as the preferred standard to apply to the entry of ships and their cargoes into the ports and harbors of each country.[28] The spreading of this rule through a network of treaties is calculated to build a dam against retrogression to flag discrimination[29] which the United States and other maritime nations struggled hard to overcome during the course of the nineteenth century.[30] The simple national treatment rule even here, however, is not unattended by complications arising from the fact that the United States, in company with other countries, does subsidize its own merchant marine and cannot agree to extend equal subsidies to foreign flag vessels. The solution to this problem has been through careful framing of the scope of the

27. A reservation for a true customs union (*e.g.*, the Benelux) insulating the trade between the members thereof from the ambit of the most-favored-nation clause, is customary. *E.g.*, Korea treaty *supra* at art. XIV, para. 6(c). A reservation to assure that the commitments of the treaty do not interfere with the functioning of the GATT, so long as the United States is party thereto, is also standard at present. *E.g., id.* at art. XXI, para. 3. But the emergence of a new and untried economic integration entity such as the Common Market (Treaty of Rome, signed March 25, 1957, establishing a European Economic Community between France, Germany, Italy and the Benelux countries. Rome, 1957, 51 Am. J. Int'l L. 865 (1957)) poses potential problems for U.S. trade interests for which no simple formula is adequate. For an endeavor to provide prudently for future contingencies in this connection, see Exchange of Notes attached to the Netherlands treaty, T.I.A.S. No. 3942 at 49-52 (1956).

28. For a brief general discussion of navigation provisions in treaties see Hawkins, Commercial Treaties and Agreements: Principles and Practice 34-44 (1951).

29. The term "flag discrimination" refers to the policy of requiring by law or regulation that particular types of cargo or portions of a country's foreign trade be carried by vessels flying the national flag. This policy may be embodied in a variety of restrictive measures, perhaps the most common is the "50-50 law" dividing cargoes equally between national and foreign vessels. The "50-50 law" also may be applied by bilateral agreement between the two contracting parties to divide carriage of the foreign trade equally between the vessels of each. For a brief summary of discriminatory shipping practices affecting the United States merchant marine, see Corter, United States Shipping Policy, 122-26 (1956).

30. For early United States policy, see Setser, The Commercial Reciprocity Policy of the United States 1774-1829 (1937).

national treatment clause, in a manner obviating the need for exceptions or express qualifications.[31]

D. Entry of Capital.

There remains the major question of the entry of investment capital and the establishment of corporations. Here, in distinction to persons, goods and ships, there is no tangible form appearing at the border. The entry of capital and corporations is a more elusive phenomenon that takes concrete form in connection with pursuing a purpose within the country. The "entry" problem, therefore, is very closely interlinked with the rule governing the right of establishing a business or making a lucrative investment: the right of the alien interest to enjoy major participation in the economic life of the country. Because of the present-day importance of the corporate form of doing business, and of the powerful aggregates of capital that can be assembled under the corporate form for investment purposes, the way in which this question is resolved can become one of decisive importance in the negotiation of a treaty.

Historically, treaties were concerned at best only to a limited extent with the rights of corporate enterprise; and the devising of workable rules to deal with them has been an outstanding contribution of the post-1946 treaties.[32] The rule which is in principle sought is that of national treatment. This implies, in effect, the policy of the "open door" for foreign investment. Though this is a policy in line with general American practice since the earliest days, both as to our receptivity toward foreign capital coming here and our attitude toward the movement of American capital abroad, it is one not attributed universal acceptance. The development of bilaterally agreed rules on the subject are accompanied by several special prob-

31. By rule of construction (*i.e.*, the rule of the treaty does not affect the conditions which the Government, in its proprietary capacity, might choose to stipulate in connection with lending or granting its own money), a national law reserving to carriage by national flag vessels of a certain percentage of government-financed cargo, is also saved without express reservation. A case in point is the Act of August 26, 1954 (68 Stat. 832, 46 U.S.C. § 1241 (Supp. IV, 1952)) which amended the Merchant Marine Act, 1936, 49 Stat. 2015 to require that as a general rule at least 50 per cent of foreign aid cargoes shall be carried in privately owned United States flag vessels. An earlier law (Public Resolution 17 (1934) 48 Stat. 500, 15 U.S.C. § 616(a) (1952)) requires that in general 100 per cent of cargoes financed by Export-Import Bank loans be transported in United States flag vessels, but, because of exceptions provided in the law, in practice United States vessels carry approximately 50 per cent of such cargoes. See Gorter, *op. cit. supra* note 29 at 106-08. This legislation is to be distinguished from the "50-50 laws" of certain countries which apply to cargoes for private account.

32. For a discussion of this subject, see Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373 (1956).

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lems. On the United States side, there are two major ones. First, despite the historical liberality of American law toward the foreign investor, there are certain sensitive lines of business, specially affected with a public interest, in which the law or administrative regulation has developed either latent or actual restraints on alien participation. These have been designed to preclude the possibility of alien control (*e.g.*, deposit banking, domestic air transport, radio-communications).[33] However, the legal policies of other countries often manifest like tendencies, so that a consensus normally is easily established concerning a minimum list of activities to be reserved from the national treatment standard as to the right of establishment.

The problem which tends to be peculiar to the United States arises from the prerogatives enjoyed by our states over the admission of out-of-state corporations for domestic business. It is national policy that the treaty power should respect this state prerogative. This restraint on the latitude of the national government to assume national treatment commitments undoubtedly figured among the reasons explaining the lack of provisions on corporations in past United States treaties. The opportunity for pursuing the subject in the post-1946 treaties came with the devising of a special "federal clause," which assimilates the alien corporation to the corporations of sister states.[34] Both are equally "foreign" in jurisprudence generally, and are so considered for treaty purposes. The treaty alien is thereby assured of treatment on a par with the bulk of his actual competitors in interstate and intra-state commerce. In the context of an economy which operates in fact preponderantly on an interstate basis, and enjoys as such constitutional protection against state harrassments, this solution assures a quantum of rights sufficiently

33. See note 19, *supra*, for a typical reservation. Examples of federal statutes thus saved include: the Civil Aeronautics Act of 1938 (52 Stat. 978, 1005, 49 U.S.C. § 401(13), 521(b)(1) (1952)—domestic airlines); the Communications Act of 1934 (48 Stat. 1086, 47 U.S.C. § 310 (1952)—radio broadcasting licenses); the Federal Power Act of 1920 (41 Stat. 1065(d), 16 U.S.C. § 797(e) (1952)—licenses for water power facilities on public lands and navigable streams). The reciprocity requirements of the Mineral Leasing Act of 1920 (41 Stat. 437, 30 U.S.C. § 181 (1952)) involve a special situation and are treated separately in the Protocol. See, *e.g.*, Korea treaty *op. cit. supra* note 15 at Protocol, para. 6. For explanation of the special nature of these requirements, see the discussion of their origin in De Novo, *The Movement for an Aggressive American Oil Policy Abroad*, 1918-1920, 61 Am. Hist. Rev. 854, 870-72 (1956).

34. Typical wording goes: "National treatment accorded under the provisions of the present Treaty to companies of the Republic of Korea shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America." Korea treaty, *supra* at art. XXII, para. 4.

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ample to render it a negotiable one—acceptable alike to the foreign country and the United States Senate. It has made possible the reciprocal provision for national treatment vis-a-vis countries willing to accept the national treatment principle as a matter of their own general policy.

Negotiating compromises have been necessary in the measure that other countries have not been prepared to undertake formal commitments concerning the establishment of alien-controlled investments in their territories. Some countries insist that their national interest requires retention of freedom of action in determining what alien-controlled investments they will permit from time to time in the future. The right of these countries to retain this sovereign right uncommitted must be respected. There is no useful purpose to be served, from the point of view either of the prudent investor or of harmonious international relations, in attempting to use these treaties as a vehicle for forcing countries to agree to allow investments they do not want. The so-called right to "screen" foreign investments is hence recognized explicitly or implicitly in a number of treaties that are considered otherwise satisfactory. There is a great variation in the way this is done, because it is a highly individual affair. The aim is to attain as much clarification of the country's intended policies as may be practicable and, especially, to guarantee duly established investors against subsequent discrimination. The failure to find a welcome as to entry is of much less importance than would be a failure, once having entered and invested in good faith, to be protected against subsequent harsh treatment.

Aside from countries that require retention of general screening prerogatives, there are certain others prepared to accept in general the concept of national treatment, subject to a reservation related to balance-of-payments difficulties. Because of past and current experience with exchange shortage problems, they do not wish to be committed to accept investments likely to engender demands for foreign exchange (*e.g.*, for remittance of earnings) disproportionate to the constructive contribution the investments are calculated to make to visible national production. The consequent screening reservations adopted in some of the treaties are in terms open to a certain latitude of interpretation because of the difficulty of formulating precise criteria by which cause can be objectively correlated to effect.[35] In purport and intent, however, they are limited and

35. See, *e.g.*, Korea treaty *supra* at Protocol, para. 7: "Either Party may impose restrictions on the introduction of foreign capital as may be necessary to protect its monetary reserves as provided in Article XII, para-

qualified, leaving the emphasis on national treatment as the major rule in the treaty text.

However, all the treaties assure national treatment to permitted investments. If there is full or qualified exception to the national treatment rule to allow the screening of an investment at its point of initiation, there is no recognized impairment of the standard as concerns post-initiation treatment. For while practical treaty negotiating objectives must concede the notion of selectivity and differential control on entry of investments, its historical protective role would be lost if it began admitting the legitimacy of discriminating against investments legally present in the territory. There is also a supplementary, cumulative most-favored-nation treatment rule covering all aspects of an investment activity.[36]

E. Acquisition of Interests.

One of the corollaries to the rules concerning the establishment and activities of persons, natural or juridical, is the right to acquire. The underlying right of establishment logically carries with it "necessary and proper" ancillary rights; and the national treatment rule, if recognized for the underlying right, would normally be supposed to carry over to the things ancillary thereto.[37] But a couple of apparent ancillary rights, both describable under the rubric "acquisition" of property, raise particular problems. The subject is therefore handled independently for this reason, as well as for the reason that provision for property acquisition has been traditionally a feature of treaties, whether or not in connection with business or investment, and that acquisition of property does not require physical presence in the country.

The regulation of property tenure figures among the normal prerogatives of the states; and various of the states have in past made plain their desire to restrict alien tenure in one degree or

graph 2." The provision so referred to reads: "Neither Party shall impose exchange restrictions . . . except to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves. . . ." Thus the reservation, though leaving a considerable margin of appreciation as concerns what or what may not be "necessary," is susceptible of being invoked, in any event, only when the country's monetary reserves are in a fragile situation requiring careful management.

36. This means both (a) that most-favored-nation treatment is assured in those exceptional instances where it might be more advantageous than national treatment, and (b) that at least most-favored-nation treatment is assured in situations not covered by the national treatment commitment.

37. For a case applying the famous doctrine of McCulloch v. Maryland, 18 U.S. (4 Wheat.) 316 (1819), in a treaty context, see Jordan v. Tashiro, 278 U.S. 123 (1928).

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another.[38] The development of a viable and acceptable United States treaty policy has therefore had to resolve the dilemma posed by the need for respecting state prerogatives, on the one hand, and, on the other, for obtaining definite reciprocal commitments in effectuation of the international objectives in view. The accommodation devised contains two elements: (1). The first is a reciprocal commitment for national treatment in the acquisition and tenure of such leaseholds as might be necessary to the carrying out of any treaty-authorized purpose (*e.g.*, residence or a factory site). Since appropriately drawn lease arrangements can afford a reasonable degree of security, the indispensable access to property required for the conduct of a treaty-recognized business or investment is thus assured. (2). However, as to tenure of property over and above this and as to acquistion of title in all cases, a so-called "de facto reciprocity" formula is offered. Through this formula, first appearing in the 1937 treaty with Siam,[39] the American abroad is in principle assured national treatment. But this assurance is subjected to the proviso that this quantum of treatment may be withheld to the extent that the laws of the state of his domicle (state of charter, in case of a corporation) contain alien disabilities.[40] The states thus retain their basic legislative freedom, to which is linked the responsibility for deciding what treatment their citizens will obtain in the foreign country. A most-favored-nation rule does not preclude the extension of the national treatment provision contained in one of the

38. For recent surveys of existing State restrictions in this field, which differ in some particulars, see 1 Powell on Real Property 372-404 (1949); McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Calif. L. Rev. 7, 21-24, 59-60 (1947); Blumrosen, *Constitutional Law—Equal Protection—Validity of State Restraints on Alien Ownership of Land*, 51 Mich. L. Rev. 1053, 1055-57 (1953). For relationship of State restrictions to treaty provisions on this subject, see Blythe v. Hinckley, 180 U.S. 333 (1901); Geofroy v. Riggs, 133 U.S. 258 (1890); Hauenstein v. Lynham, 100 U.S. 483 (1879); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

39. 53 Stat. 1731, T.S. No. 940.

40. A typical example of the formula is as follows: "Nationals and companies of the United States of America shall be accorded, within the territories of the Kingdom of the Netherlands, national treatment with respect to acquiring by purchase, lease, or otherwise, and with respect to owning, occupying and using land, buildings and other real property. However, in the case of any such national domiciled in, or any such company 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 the Kingdom of the Netherlands in this respect, the Kingdom of the Netherlands shall not be obligated to accord to such national or company treatment more favorable in this respect than such State, Territory or possession accords to nationals and companies of the Kingdom of the Netherlands." Netherlands Treaty, 1956, T.I.A.S. No. 3942, art. IX, para. 2. In a number of treaties, this formula does not appear, the obligations of the other party being variously framed in a less extensive manner.

mid-nineteenth century treaties that remains still in force.[41]

By contrast, as to personalty, whether tangible or intangible, both national treatment and most-favored-nation treatment are cumulatively provided. But this is subject to a necessary qualification: namely, an exception allowing restraints to be maintained to prevent alien acquisition of shares in enterprises to a degree in conflict with the reservations maintained concerning certain sensitive fields of activity above cited.[42]

The provisions on acquisition also extend to the right to buy into, or to buy up existing domestic corporations, in order to open to the treaty-investor an alternative to operating through the form of a direct branch. Provision for this right and its companion, the right to form a domestic corporation, has occasioned an interesting development in international jurisprudence, in that the giving of treaty protection to the alien-controlled domestic corporation means that the signatory country has assumed an international obligation vis-a-vis one of its own creatures, and has recognized the right of the other signatory to intervene in behalf thereof. In view of what a lerned scholar has ascertained to be the probable state of international law in this respect,[43] this obligation has not been left to implication in the treaties' wording.

F. Protection of Persons and Property.

Probably the most important purpose a treaty is designed to serve—even more than the settling of rules to govern entry, establishment, acquisition, and the conduct of business—is the protection of persons, property and other acquired interests from ill-usage and spoliation. Here, national treatment and most-favored-nation treatment with regard to protection of the laws, access to the courts,[44]

41. Treaty of 1853 with Argentina, 10 Stat. 1009, T.S. No. 4, art. IX. At that epoch, several other treaties, not now in force, signed with countries of the Western Hemisphere contained this rule, *e.g.*, Salvador, 1850, 10 Stat. 891, T.S. No. 308. But the policy of not safeguarding State laws was not extended elsewhere even then. For an account of a contemporary European treaty that had to be renegotiated because the American plenipotentiary had not observed this policy, see 5 Miller, Treaties and Other International Acts of the United States of America 868-69, 878-81, 891-94 (1937), concerning the Treaty of 1850 with Switzerland, 11 Stat. 587, T.S. No. 353.

42. See note 19, *supra*. This exception is to close the technical loophole of allowing aliens to acquire an interest in corporations engaged in reserved "sensitive" activities, by purchasing stock through the national treatment right to acquire personalty.

43. Jones, *Claims on Behalf of Nationals Who Are Shareholders in Foreign Corporations*, 26 Brit. Yr. Bk. Int'l L. 257 (1949) says that "*ex hypothesi*, no state can intervene on behalf of a corporation against its own government."

44. Further on this particular subject, see Wilson, *Access to Courts Provisions in United States Commercial Treaties*, 47 Am. J. Int'l L. 20 (1953).

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and so on, while of course generally provided, are not sufficient.[45] Certain non-contingent principles that immunize the treaty alien and his property from possible vagaries of national law and administration are also needed. This is a reflection of the basic standard of treatment that enlightened international practice in countries owe to their alien guests. Thus, in addition to other rules, it is provided that the treaty alien, in the peaceful pursuit of his lawful occasions, shall enjoy freedom of movement, freedom of conscience, and freedom of communication; that he shall be extended the "most constant security and protection" by the authorities, and not be subject to molestations; and that, if placed in custody, he shall enjoy the right of having his consul immediately notified, be promptly informed of the charges against him, receive a prompt trial with benefit of competent counsel, and be always treated humanely.[46] His property cannot be searched or seized except for due cause and in lawful and reasonable manner.

Most importantly, any sequestration or expropriation must be accompanied by prompt, just and effective compensation: that is, convertible valuta representating the worth of the property, paid expeditiously.[47] This is an especially valuable right in a day when nationalizations, often entailing great losses to the private owners, has tended to become not uncommon. The provision is given force through the use of words that have meaning in international jurisprudence, and by a provision for the submission of otherwise unresolvable disputes to the International Court of Justice (a submission provision which, in fact, applies to all parts of the treaty).[48]

IV. Concluding Remarks

The traditional treaty of friendship, commerce and navigation, which in its recognizable modern form found its most widespread

45. For a general discussion of the national treatment status of aliens under the law in the United States, see Gibson, Aliens and the Law (1940). Basically, a treaty serves to embody in the form of reciprocal commitment the fundamental protections aliens receive as a matter of course under the Constitution and laws of the United States.

46. These matters are given the emphasis of simple assertion, and early mention in the organization of the treaty, *e.g.*, Korea treaty, 1956, T.I.A.S. No. 3947, art. II, para. 2, and art. III, prefaced by a general admonition for equitable treatment at all times. *Id.* at art. I.

47. "Property of nationals and companies of either Party shall not be taken within the territories of the other Party 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. . . ." Korea treaty, *supra* at art. VI, para. 4.

48. This important "compromissory clause" is found in standard form in the Korea treaty *supra* at art. XXIV, para. 2. It is also standard for this provision to be preceded by a consultation clause designed to facilitate the settlement of difficulties before they develop into disputes. *Id.* at para. 1.

use during the nineteenth century and the first third of the present one, has continued to enjoy a place in the diplomacy of the United States in the post-World War II years of international affairs. This is because it affords a ready-made and versatile medium capable of adaptation to present needs, for the satisfaction of which no suitable alternative medium has yet been devised, notwithstanding the latter-day proliferation of multilateral organizations and new techniques for approaching the world's economic problems. The need is present because private persons and business continue to venture abroad—indeed are encouraged to venture themselves and their capital abroad, where they require the protection of their government—in a world divided into independent sovereign states not yet subject to an adequate corpus of international law of recognized applicability to the area of the treaty's major concern. This area has historically been a concern of these treaties: the rights and status of the person, and of his property and enterprise.

The intergovernmental regulation of these rights, by the establishment of reciprocally binding rules of law, requires a certain community of ideals regarding the respect for private property, the dignity of the individual, and the degree to which the foreigner should be allowed to participate in the economic life of the country. It also requires mutual forebearance, and an interest in undertaking formal long-term commitments towards the foreigner, binding as against internal legislative and administrative freedom. The outward limits of any treaty to which the United States subscribes are accordingly set by the extent of the rights it is willing to accord in face of its own state and federal legislation, just as the inner limits are set by what are considered to be the minimal provisions of an efficacious treaty.

The technical tasks presented by a negotiation, though often taxing upon the ingenuity, are solvable when there exists reciprocal willingness on the level of principle in the margin lying between these two limits. The lack of a sufficiently worldwide consensus on this level of principle still seriously clouds the prospects for any satisfactory multilateral code of protection for foreign investment, as is sometimes advocated. Yet at no time in history have Americans had a heavier stake of business and other interests in foreign countries. Meanwhile, the traditional bilateral approach offers the opportunity, in the context of a general regulation of relations commencing with the idea of "friendship," to accomplish step-by-step such progress as is now possible in building international rules of law for the protection of persons and their legitimate interests abroad.

THE POST-WAR COMMERCIAL TREATY PROGRAM OF THE UNITED STATES *

DURING the decade 1946-1956, the United States completed the negotiation of commercial treaties with sixteen countries. These countries, in geographical distribution, size and national circumstance, comprise rather a cross section of the world outside the Soviet bloc. In Asia those represented include Nationalist China, Korea, Japan, Iran and Israel; in Africa, Ethiopia; in Latin America, Colombia, Haiti, Nicaragua and Uruguay; in Europe, Denmark, the Federal Republic of Germany, Greece, Ireland, Italy and the Netherlands.[1] As the Department of State avowedly stands ready to negotiate with every like-minded country, others will undoubtedly be added to the list in due course.

These treaties, more fully known as treaties of "friendship, commerce, and navigation", are long-range instruments of a general type made familiar by international practice of former years. In contradistinction to limited-purpose trade agreements dealing with commerce in the narrow sense, they are designed to establish the ground rules regulating economic intercourse in the broad sense, and they accordingly must reflect a meeting of minds regarding proper international standards of behavior on a variety of subject matters.

* The views expressed here are those of the author only and do not necessarily reflect the position of the Department of State.

1 *China,* 1946 (63 Stat. 1299); *Italy,* 1948 (63 Stat. 2255) supplemented by Agreement of September 26, 1951 (S. Exec. H, 82d Cong., 2d Sess.); *Uruguay,* 1949 (S. Exec. D, 81st Cong., 2d Sess.); *Ireland,* 1950 (1 UST 785); *Colombia,* 1951 (S. Exec. M, 82d Cong., 1st Sess., withdrawn from Senate June 30, 1953); *Ethiopia,* 1951 (4 UST 2134); *Greece,* 1951 (5 UST 1829); *Israel,* 1951 (5 UST 550); *Denmark,* 1951 (S. Exec. I, 82d Cong., 2d Sess.); *Japan,* 1953 (4 UST 2063); *Federal Republic of Germany,* 1954 (TIAS 3593); *Haiti,* 1955 (S. Exec. H, 84th Cong., 1st Sess., withdrawn from Senate, August 8, 1957); *Iran,* 1955 (TIAS 3853); *Nicaragua,* 1956 (S. Exec. G, 84th Cong., 2d Sess.); *Netherlands,* 1956 (TIAS 3942); *Korea,* 1956 (TIAS 3947). The treaties with Ethiopia and Iran represent considerably abridged versions and vary also from the others in that they contain provisions on consular rights, a subject matter usually dealt with in separate conventions in current United States practice.

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Because of the nature of the treaties and the scope of the negotiation effort, the current treaty program of the United States, though little remarked during these ten years of crisis and more spectacular endeavor, is thus one of some magnitude; and its unfolding illustrates the adaptability of a traditional device to present international requirements.

Background and Objectives

The program now under way carries forward one of the oldest continuing diplomatic activities of this nation, reaching back to the Revolutionary War. From 1778 onward, with varying degrees of intensity from era to era, the commercial treaty device has been repeatedly used in the conduct of American foreign relations. In terms and content, the purpose of the treaties has been to promote trade relations and to protect shipping and the citizen and his interests abroad, according to legal principles. Throughout, they have maintained this evident purpose. But historically they have also had other purposes. As suggested by the wording of their full title and preamble, they have been designed to strengthen normal friendly relations between the signatories.[2] Depending on the era in which the treaties were negotiated, they have as well been responsive to varying special motivations. In pre-Constitutional days, for example, they betokened and helped secure recognition of American independence.[3] In the first half of the nineteenth century, the period in which the American clipper became mistress of the seas, they were employed to open foreign ports to American shipping. The conclusion of the treaties with countries of Latin America in this period, through emphasizing the sovereignty and rising importance of those countries and their ties with the United States, served to emphasize the Monroe Doctrine; and in the era of intense power competition for

[2] A typical preamble (e.g., that of the recent Netherlands treaty) recites, as first justification of the treaty: "desirous of strengthening the bonds of peace and friendship traditionally existing between them."

[3] Our first, the Treaty of Amity and Commerce with France, signed on February 6, 1778, was followed on the same day by signature of the Treaty of Alliance. Before the Revolutionary War formally ended, commercial treaties were signed also with the Netherlands (1782) and Sweden (1783); and thereafter also with Prussia (1785), prior to the Constitutional Convention.

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colonies and spheres of influence, they served to support the open-door principle.

Following World War I, special motivations such as these, pertaining to a new-born and then to a rising nation intent upon developing its own economy and establishing its place in the world community, no longer obtained. That war established the United States as a world Power of first rank, a leading international creditor and a major exporter of manufactures. But the normal and evident purposes of promoting commercial intercourse remained, being intensified by the new foreign economic interests of the nation. A new series of negotiations was therefore undertaken during that period, with special emphasis on international trade.[4] The reciprocal trade agreements program which subsequently developed, however, after 1934, provided a more precise and efficacious medium for attaining trade promotion objectives.[5] A new consideration which then emerged, and which lent special impetus to the program following World War II, was the need for encouraging and protecting foreign investment, responsively to the increasing investment interests of American business abroad and to the position the United States has now reached as principal reservoir of investment capital in a world which has become acutely "economic-development" conscious. The pre-existing content of the commercial treaty (now often known as "FCN treaty") was therefore overhauled with a view to improving and strengthening its relevance to investor needs; [6] and the eventuating new edition

[4] This program resulted in the conclusion of treaties with twelve countries, beginning with the Treaty of Friendship, Commerce and Consular Rights with Germany, 1923, and including Austria, Finland, Estonia, Latvia, Norway, Honduras, El Salvador, Poland, Hungary, Siam (Thailand) and Liberia.

[5] The Trade Agreements Act of 1934, so prominently identified with Cordell Hull, as periodically extended and revised. Under this legislation bilateral agreements were concluded with 28 countries, 1934-46, prior to adoption of the policy of conducting trade agreement negotiations principally within the framework of the General Agreement on Tariffs and Trade (GATT) (*q.v., infra*). By contrast only two commercial treaties of the type herein discussed were concluded between 1934 and 1946 (those with Siam and Liberia).

[6] See my article "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice", 5 *American Journal of Comparative Law* 229-247 (1956). See also, e.g.: Vernon G. Setser, "Treaties to Aid American Business Abroad", 40 *Foreign Commerce Weekly* 3-5, 38-39

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of this traditional treaty type has been repeatedly recommended in an authoritative way, in both official and private circles, as a vehicle for building an international "climate" favorable to private investment.[7]

The current program then, in so far as the United States is concerned, has been specially actuated by investment-related motives. This primary investment objective is, however, sought in the context of a larger regulation of bilateral intercourse in the private sector, and in company with the other objectives appertaining to such instruments. The treaty thus retains its familiar outline and scope. There have always been substantial investment elements in treaties of this type because they have always dealt with the protection of the citizen abroad, his property (capital) and his right to engage in business activities (that is, to make and operate investments). Their reworking for investment ends, accordingly, has simply entailed the recasting, elaboration and supplementation of familiar features. Their trade and cultural and shipping elements are also maintained, in perspective; and they remain, too, vehicles for generally strengthening neighborly ties between peoples, though there is no element of political alliance in them. In this way, they afford an ample

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(Sept. 11, 1950); Robert R. Wilson, "Postwar Commercial Treaties of the United States", 43 *American Journal of International Law* 262-287 (1949), "Property-Protection Provisions in United States Commercial Treaties", 45 *ibid.* 83-107 (1951), "Access-to-Courts Provisions in United States Commercial Treaties", 47 *ibid.* 20-48 (1953), and "Natural-Resources Provisions in United States Commercial Treaties", 48 *ibid.* 355-379 (1954).

[7] For example, sec. 516(d) of the Mutual Security Act of 1952 (66 Stat. 146), reënacted and revised in 1954 (68 Stat. 847); House Committee on Foreign Affairs, Subcommittee on Foreign Economic Policy, Report on *The Mutual Security Act and Overseas Private Investment* (83d Cong., 1st Sess., 1953), pp. 26-29; President's Materials Policy Commission, *Resources for Freedom* (H. Doc. 527, 82d Cong., 2d Sess.), vol. I, p. 68; Department of Commerce, *A Study of Factors Limiting American Private Foreign Investment* (Summary of Preliminary Findings and Recommendations, July 1953), p. 31; Commission on Foreign Economic Policy ("Randall Commission"), *Report to the President and the Congress* (January 1954), p. 17; Resolution of the Board of Directors of the National Association of Manufacturers, quoted in the House Committee Report, p. 26; Chamber of Commerce of the United States, *What the National Chamber Stands for in World Affairs* (June 1952), pp. 11, 13-14; National Foreign Trade Council, various *Final Declarations* of their annual New York conventions—e.g., that of 1950, pp. 16-17.

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framework within which can be harmonized the views and interests of both the United States and each other country; the latter may not be, and often is not, animated by quite the same desires and needs in negotiation as the United States.

In sum, they are multi-purpose treaties, if anything even more so now than in the past. They seek to deal with the whole citizen, in his person and his property, who has lawful concerns in another country: his rights of entry and residence; his personal freedoms, such as liberty of conscience and due process of law; his rights to legal benefits and recourse to the courts in pursuit and defense of his interests; his rights to establish and conduct business enterprises, to engage in both lucrative and nonprofit activities; his right to acquire, possess and dispose of property, and to receive a high standard of respect for his property; the rules of financial policy, as represented by taxes and exchange regulations, to which he is subject. They now deal alike with juridical persons (companies). They deal also with the various aspects of the international movement of goods and ships, and with such miscellaneous matters as the behavior of state-controlled business enterprises, the letting of government contracts and concessions, and restrictive business practices.

The Relative Rôle of Commercial Treaties

Because these treaties cut across or impinge upon fields of interest of other international agreements, and of multilateral conferences and organizations, the question therefore arises of their consonance with, and their purposiveness in light of, the ever-growing complex of international agreements and organizations. Where does this essentially traditionalist bilateral approach fit in the pattern of multilateralism and specialized arrangements that has evolved with the growing complexity of international society?

The principal existing multilateral conventions involving the United States, which have a large world-wide participation and which deal with topics also covered in the commercial treaties, are the International Monetary Fund, the General Agreement on Tariffs and Trade (the GATT), and the Paris Industrial Property Convention. The first of these is involved in the exchange-control article of the commercial

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treaty; and the relationship of the two may be very briefly summarized as follows. The stipulated objective of the Fund is to eliminate governmental restrictions on international payments for "current transactions", particularly those affecting the flow of international trade; and according to the Fund Articles of Agreement (Article VI, section 3), each member specifically retains virtually complete freedom of action with respect to capital transfers.[8] The primary objective of the treaty, on the other hand, is to provide for the servicing of investor—as distinguished from trading—needs and requirements.[9] It therefore supplements the Fund by establishing agreement on matters with respect to which the Fund leaves an area of discretion; it does this interstitially, and the integrity of the Fund is safeguarded by a reservation preserving all obligations a country may have to that organ.[10]

As to relationship with the GATT, the treaty does not deal with specific tariff and quota concessions, which it is the primary purpose of the GATT to attack. But it does repeat certain general rules of behavior contained in the GATT; and here again, as in the case of the International Monetary Fund, possible conflict between the treaty and the GATT is avoided by a reservation expressly making the lat-

[8] Text in Annex A, *Final Act and Related Documents* of the United Nations Monetary and Financial Conference at Bretton Woods (Washington, 1944). See also statement of purposes of the Fund, as set forth in Article I of the Agreement, clauses (ii) and (iv).

[9] This objective is indicated by the key wording of the treaty's exchange-control article (e.g., Article XII, par. 3, of Netherlands treaty): "If either Party imposes exchange restrictions in accordance with paragraph 2 of the present Article, 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, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party, of: (a) the compensation referred to in Article VI, paragraph 4, (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 to the extent feasible, giving consideration to special needs for other transactions."

[10] E.g., Article XII, par. 2, second sentence, of the treaty with the Netherlands: "It is understood that the provisions of the present Article do not alter the obligations either Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a Party to impose such particular restrictions." This wording is carefully chosen to permit both the treaty and the Fund to operate side by side, so long as the former does not actually interfere with the latter.

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ter prevail.[11] Despite the subordination of the treaty thus provided, however, the treaty is calculated to serve at least three practical purposes. First, especially as the GATT still operates on a provisional basis, the treaty provides a basic agreement to fall back on if, for any reason, the GATT should cease to be in effect between the treaty signatories. Second, it provides now such a basic agreement with respect to those countries which are not party to the GATT (for example, Ethiopia, Ireland, Israel). Third, the treaty seeks to supplement the GATT by making bilateral advances with respect to certain matters on which multilateral agreement has not proved possible in the GATT. Examples are the treaty rule concerning nondiscrimination in the furnishing of government services; and the so-called "30-day" or "en route" rule, which provides a certain period of grace between the time new trade restrictions are promulgated and their going into effect.[12]

In the case of industrial property, the treaty merely reaffirms the national-treatment rule contained in the international convention; and no problem of conflict or variance arises. Mention should also be made of the treaty's coverage of commercial arbitration, a subject dealt with in the Geneva Protocol of 1923 on the enforcement of arbitration contracts

[11] As exemplified by the Netherlands treaty, the paralleling materials are in Articles XIV, par. 1 (most-favored-nation treatment as to customs duties), pars. 2-4 (nondiscriminatory administration of prohibitions and restrictions affecting imports or exports), and par. 6 (exception for balance-of-payments difficulties); XV, par. 1 (public notice and equitable administration of new customs regulations), par. 2 (appeals and penalties, in customs administration) and par. 3 (marking requirements); XVI, par. 1 (internal treatment of imported goods); XVII, par. 1 (operations of state-trading entities), par. 2 (a) (purchase of government supplies); XXI (c) (transit of goods); and certain customary exceptions in Article XXII. The clause providing for cross-relationship between the two instruments is paragraph 4 of Article XXII: "The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted under the General Agreement on Tariffs and Trade during such time as such Party is a contracting party to the General Agreement. Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement."

[12] The former—e.g., Article XVII, par. 2 (c), of the Netherlands treaty—has been generally accepted in the treaties signed to date; but the latter (e.g., Article XV, par. 2, second sentence, of Japan treaty) has been omitted from some of them (e.g., those with Ireland, Israel and Germany) and is in the Netherlands treaty in modified form.

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and the Geneva Convention of 1927 on the enforcement of arbitration awards.[13] These instruments have been adhered to by many European countries, but not by the United States and most other non-European countries. The treaty approaches this subject in a way which is consistent with that of the Geneva instruments and which adherents and non-adherents to those instruments alike can accept. In effect, the treaty affords a bilateral medium through which the general objectives sought in the Geneva instruments are being subscribed to by additional countries.[14] Finally, there is in process of formation a multilateral organization dealing with shipping.[15]

In the domain of bilateral agreements, the principal type in United States practice covering subject matter also included in the commercial treaty is the convention for the avoidance of double taxation with respect to taxes on income, and for the mutual protection of revenue, more briefly known as the double-tax convention.[16] This convention is a detailed

[13] Texts may be found, for example, in *International Yearbook on Civil and Commercial Arbitration,* vol. I, pp. 239-43 (1928).

[14] The unique form of the provision as it appears in the Netherlands treaty suggests this result: "In conformity with subparagraphs (1) and (2) hereof, awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party. (1) As regards recognition and enforcement in the United States of America, such awards shall be entitled in any court in any State thereof only to the same measure of recognition and enforcement as awards rendered in other States thereof. (2) As regards enforcement in the Kingdom of the Netherlands, such awards shall be dealt with in the same way as awards as referred to in the Convention on the execution of foreign arbitral awards concluded at Geneva on September 26, 1927." An arbitration provision is missing from the treaties with Uruguay and Ethiopia. For an account of this subject, see my article "Commercial Arbitration Provisions in United States Treaties", 11 *Arbitration Journal* (new series) 68-84 (1956).

[15] Convention on the Intergovernmental Maritime Consultative Organization, signed at Geneva March 6, 1948 (S. Ex. L, 80th Cong., 2d Sess.).

[16] Such conventions had entered into force with 19 countries by April 1, 1957 and in addition one convention, that with Austria, was awaiting ratification. For discussion of the program, see: E. Roy Gilpin and H. Gilmer Wells, "International Double Taxation of Income: Its Problems and Remedies", 28 *Taxes* 9-32 (1950); Burton W. Kanter, "United States Income Tax Treaty Program", 7 *National Tax Journal* 69-88 (1954); and address by Eldon P. King, Director, International Tax Relations Division, Internal Revenue Service, Department of the Treasury, "The Income Tax Conventions with Germany and Japan, and Prospective Conventions with Latin America", de-

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technical instrument concerned with which country will tax, or not tax, income that is potentially subject to taxation by both, and with measures of coöperation between the taxing authorities of the two signatories: that is, with jurisdiction and the system and basis of taxation. The commercial treaty, on the other hand, is concerned broadly with the principle of nondiscrimination in the levy and collection of taxes, whatever be the system; and thus the two instruments supplement and reinforce one another. In the one connection in which the treaty covers a double-tax subject,[17] it provides an elementary rule of equity to rely upon in those instances in which a double-tax convention is not in force between the signatories. Necessary cross-relationship is provided through a reservation assuring that the more general instrument, the treaty, cannot interfere with the specific arrangements that may be made in the more specialized instrument, the double-tax convention.

The commercial treaty, finally, can impinge to a degree upon other types of agreements which other countries make among themselves, such as, for example, conventions on *assistance judiciare* or agreements relating to social security benefits. But negotiating experience so far has not revealed any dissonances which on this account require substantial adjustments in, or reservations to, the affected commercial treaty provisions normally favored by the United States when it enters negotiation (aside from normal reservations for recognized territorial trade preferences).[18]

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livered before the International Fiscal Association, New York, May 6, 1955. A parallel series of conventions deals with the avoidance of double taxation with respect to estates (inheritance); and their relationship to the commercial treaties is the same. Thirteen such conventions were in force on April 1, 1957. (The numbers in force on January 1, 1958 were, respectively, 20 and 13.)

17 This provision (e.g., Article XI, par. 4, of Netherlands treaty) assures that a company of one party will be taxable in the other only on the business it does in the latter, rather than on the basis of its "world income" as might be possible under the national-treatment clause.

18 The exchange of notes appended to the Netherlands treaty—dealing with the problem of harmonizing the strict most-favored-nation rules of the treaty with the preferences that might develop among countries participating in a future European integration arrangement—and the Commonwealth preference reservation in Article XX, par. 3 (b), of the Irish treaty—just as the customary United States reservations for its preferential trading arrangements with Cuba

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A recitation of actually operative international agreements, multilateral and bilateral, then reveals: first, that the commercial treaty serves a definite practical purpose in those cases when it is dealing with the same subject as other agreements; and, second, that only a fraction of its content is concerned with or duplicates things otherwise regulated by interstate agreements of concern to the United States. This second fact—namely, that the commercial treaty provides the only vehicle so far devised and demonstrably capable of utilization for treating an important range of subject matter—provides the major explanation and justification for its active use in the conduct of foreign policy of the United States. To start with, it fills a void conspicuously left by the persistent lack of any successful multilateral agreement, either piecemeal or frontal, on the ground rules which should govern in the foreign investment process: the treatment of the alien entrepreneur, his enterprise and his property. Indeed, past experience strongly suggests that multilateral endeavors in this area are foredoomed to failure, under present circumstances, owing to the lack of any sufficiently elevated international consensus or community of interest concerning the degree to which and conditions under which the alien should be welcomed to participate in a nation's economic life; and that, accordingly, the bilateral country-by-country approach is apparently as yet the only feasible one.

Scope of the Treaties

Topics in addition to exchange control, trade and taxation, on which progress has been recorded in the commercial treaties over the past ten years, include those listed below. These, together with the provisions mentioned above, summarize the general content and purposes of the treaties.

Companies.[19] The general standard of national treatment —that is, nondiscrimination as between the alien and the citi-

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and the Philippines—illustrate the typical kinds of adjustments that sometimes have to be made to allow for the international commitments of a party to the commercial treaty.

19 For a fuller discussion, see my "Provisions on Companies in United States Commercial Treaties", 50 *American Journal of International Law* 373-93 (1956).

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zen—has in principle been normal for many years in United States treaties (as well as those of many other countries), in so far as natural persons are concerned. However, prior to World War II, the same was not true of juridical entities. These were in practice either ignored, or else dealt with in only a limited or restricted way,[20] or else assured only of most-favored-nation treatment. But in the current series of treaties, a comprehensive endeavor is made to extend the same liberal standard to companies and the activities of companies. This outstandingly important advance over previous international practice has obvious pertinence to the value of these treaties for investment purposes, in view of the predominant way in which foreign investment is made in modern times through the corporate device. The right of corporations to engage in business on a national-treatment basis may be said to constitute the heart of the treaty as an investment instrument.[21]

Beyond this, the treaties represent a perhaps overdue response to the need for crystallization of internationally recognized rules concerning the status and rights of corporations, whether or not in the investment setting. The treaty provisions on companies are accordingly not confined to investment corporations, but extend to juridical entities generally. Thus express provision is made for the nonprofit entity, and its activities, a subject toward which past international treaty practice has tended to manifest even greater reserve than toward the business corporation.[22] Again, on the subject of

20 See, e.g., the reservation which was included in all the treaties of the inter-war period: "The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territories, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such Party as expressed in its National, State, or Provincial laws." Article XII, second par., of 1923 treaty with Germany.

21 This is basically set forth in Article VII, par. 1, of the Netherlands treaty: "Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity."

22 Treaties of various nations have tended to limit such company provisions as they have contained to corporations organized for business purposes. The United States policy of including also nonprofit entities began, however, with the German treaty of 1923. See Article XII, first paragraph, thereof.

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juridical status of entities, these treaties have sponsored a return to the "classical" theory: that is, that the mere fact of lawful creation in either country shall *ipso facto* be sufficient to endow the entity with lawful being and recognition in the other, without any additional tests, such as where it maintains its seat, the nationality of its ownership or direction, the character of its aims or otherwise.[23] The contribution which the current treaties make in this connection is pointed up by the debate and confusion which have marked the subject of the proper tests applicable to the recognition of juridical personality of foreign entities,[24] and by the great extent to which the simple classical test has been departed from in international practice, over the last half century.[25] The resolution attained has been made possible by the clear distinction maintained, in the treaty's provisions, between the civil and the functional capacities of companies.[26] Cognately, provision has been made for the free privilege of the nondomesticated foreign company, which is not engaged in business in the other country, to sue and be sued in the courts of the latter.[27] On the other hand, provision is also made for "piercing the corporate veil", in order to assure protection of the real parties-in-interest lying behind the corporate façade, in certain instances in which the corporate entity has a nationality different from that of such parties and hence

23 For example, see wording of Article XXIII, par. 3, of the Netherlands treaty: "As used in the present Treaty, the term 'companies' means corporations, partnerships, companies, foundations, associations, and other legal entities or juridical persons, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."

24 E.g., the observation of Sigmund Timberg that, as to a recognized test, "in the corporate field, we find confusion and uncertainty." "Corporate Fictions", 46 *Columbia Law Review* 533, 572 (1946).

25 The United States treaties of the inter-war period, for example, required as a condition precedent to recognition that the company maintain a "central office" in the country of its creation and pursue no aims in the host country contrary to the laws thereof. Article XII, German treaty of 1923.

26 That is, logically the mere acknowledgment of the fact of being of an entity need not be qualified when the purposes for which qualifications are desired can be adequately served by appropriately wording the provisions dealing with the operation of the entity within the country.

27 E.g., Article V, par. 1, second sentence, Netherlands treaty.

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not technically entitled to claim protection from the country of which the latter are nationals.[28]

Property Protection. The extent to which the institution of private property has of late come under question or attack has underscored the need for reaffirming and reinforcing traditional international law regarding the protection which a government owes to the property of the alien.[29] In addition to providing generally for " the most constant protection and security " and prohibiting unreasonable searches and seizures,[30] the treaties therefore introduce injunctions against arbitrary impairments of established interests [31] and give greater definition to the obligation to pay just compensation for property expropriated or otherwise taken. The formula evolved in connection with the latter, in view of its importance, warrants quotation:

> Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public interest, 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 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.[32]

Moreover, a protocol has been devised to assure that, when the affected property belongs to a juridical entity which itself, because of its nationality, is not entitled to treaty protection (for example, it is chartered under the laws of a third

28 For example, an American corporation is assured the right to organize and control a subsidiary under the laws of the other country; and such subsidiary, although having the nationality of the latter, rather than United States nationality, is given treaty rights which the United States is enitled to espouse.

29 The great difficulty, apparently, of achieving such a result in a multilateral forum at present is illustrated by the silence or ambiguities regarding obligation to pay compensation in event of expropriation manifested by such documents as: General Assembly, United Nations, Resolution 626 (Seventh Assembly 1952) regarding resources; Article 12 of the abortive Havana Charter of 1948 for an International Trade Organization (see William Diebold, " The End of the ITO ", *Princeton Essays in International Finance* No. 16, 1952, pp. 18-19) and the projected United Nations Covenant on Human Rights.

30 Netherlands treaty, Article VI, pars. 1 and 2.

31 *Ibid.*, par. 3.

32 *Ibid.*, par. 4.

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country), the obligation to pay compensation nevertheless holds as to such persons entitled to treaty protection as may ultimately hold interests in the entity, to the extent of their interest. This provision reads as follows:

> The provisions of Article VI, paragraph 4, providing for the payment of compensation shall extend to *interests held directly or indirectly* by nationals and companies of either Party in property which is taken within the territories of the other Party.[33] (Italics supplied)

Waiver of Sovereign Immunity. The commercial treaties, beginning with the Italian treaty in 1948, have been a vehicle through which the United States government has espoused the restrictive theory of sovereign immunity, to the extent set forth as follows:

> No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, to the extent that it engages in commercial, industrial, shipping or other business activities within the territories of the other 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.[34]

This reflected a shift in United States policy which had been in the making for some time, tracing back conceptually to the Court of Claims Act of 1853 and the Tucker Act of 1887, through the Admiralty Acts of the 1920's and the Tort Claims Act of 1946.[35] The practical purpose, from the treaty standpoint, was to narrow the range of competitive inequality between private and state-owned business enterprise. After this clause had appeared in several treaties, the shift culminated in the so-called Tate letter of May 19, 1952, in which the Department of State announced that it would thereafter favor the restrictive theory as to immunity claims advanced

[33] *Ibid.*, Protocol, par. 6. [34] *Ibid.*, Article XVIII, par. 2.

[35] Respectively, 10 Stat. 612; 24 Stat. 505; 46 U.S.C., chs. 20 and 22; and 28 U.S.C., ch. 171. The basis for the treaty rule had been fairly well laid by 1948 by the approach taken by the courts to immunity claims of foreign government commercial corporations. See "Sovereign Immunity for Commercial Instrumentalities of Foreign Governments", 58 *Yale Law Journal* 177 *et seq.* (1948).

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on behalf of any foreign government.[36] Thus, finally, the United States joined the camp of the continental nations which had earlier abandoned the "classical" theory of sovereign immunity.

Human Rights. These treaties in the broad sense have always been concerned in a major way with human rights—the respect and protection owed by each member of the international community to the stranger within its gates. Indeed, provisions on the rights of persons—so-called "establishment" provisions—commonly form the first sections of such treaties.[37] The current treaties have proceeded with obtaining confirmation of basic principles in this area of affairs, at a time when the United Nations continues to encounter frustration in its pursuit of a generally acceptable universal convention on human rights. The treaties do not, of course, share the latter project's ambition to provide a charter for all individuals, including the protection of citizens against their own government, but are limited to the duties that nations owe to the alien. Moreover, they are confined to matters of more or less traditional treaty concern, to the exclusion of the sociological dispositions of national laws and traditions.

In addition to providing for the protection of the alien's property, already alluded to, the treaties provide for: the protection of his person against molestations; his right to equal protection of the laws; his right, if arrested, to humane treatment, to communicate with his consul, to be informed promptly of the accusations against him, to a prompt trial, to ample opportunity to prepare his defense, and to the services of counsel of his choice; his liberty of movement and residence; his freedom of conscience and his right to worship,

[36] Letter from the Acting Legal Adviser to the Attorney General, Department of State *Bulletin*, June 23, 1952, pp. 984-85. The special significance of the State Department's views results from the fact that the judiciary tends to seek guidance from the political branch when a question of this kind arises. On this point see concurring opinion of Justice Frankfurter in *Republic of Mexico v. Hoffman* 324 U. S. 30, 38 (1945).

[37] If the titles normally given to these treaties were more fully spelled out, they could suitably be termed treaties of "friendship, establishment, investment, commerce and navigation". The rights of persons covered in the establishment provisions extend, of course, to such matters as engaging in business and occupations, and the protection of their property.

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either publicly or privately, according to his own faith; his right freely to communicate with others; and his right to engage in both gainful and nonprofit work.[38]

Freedom of Information. Cognately, the treaties since 1948 have normally contained a provision assuring the right without interference to gather and report the news, more exactly "to gather and to transmit material for dissemination to the public abroad". Here again these instruments have been used as vehicles for attaining in principle an objective concerning which a multilateral effort, under United Nations auspices, was unable to agree on a generally acceptable convention.[39] This further illustrates the resiliency and adaptability of the traditional commercial treaty to the needs of its time; and also the potentiality it holds for achieving step by step, in the quiet atmosphere of patient and amicable bilateral discussions, a variety of objectives which have not proved attainable through more spectacular or ambitious conventional media.

Settlement of Disputes. The inclusion, beginning with the China treaty of 1946, of an unqualified provision for the submission of otherwise unresolvable disputes to the International Court of Justice for adjudication is a landmark in the treaty policy of the United States. These treaties represent for the first time the unreserved acceptance by the United States of an international tribunal's jurisdiction, in a major and systematic manner, as to future disputes.[40] Prior to the signing of the first of these treaties, the Senate had adopted the Connally resolution through which the United States accepted the optional clause of the Court Statute, subject to

[38] These matters are covered, in the Netherlands treaty, mainly in Articles II, par. 2; III, both pars.; V, par. 1; VII, par. 1; and VIII, par. 2.

[39] See *Report* of United States Delegates to the United Nations Conference on Freedom of Information (Geneva, 1948) (Department of State Publication 3150); Robert R. Wilson, "International Law and Proposed Freedom of Information", 39 *American Journal of International Law* 790-93 (1945).

[40] There was a precedent in the International Civil Aviation Convention of 1944. See memorandum submitted by the Department of State in justification of the court clause in the first of the current series, the China treaty of 1946, in *Hearing before a Subcommittee of the Committee on Foreign Relations . . . 80th Congress, 2d Session, on a Treaty . . . [with] China,* April 26, 1948, pp. 29-30. The normal wording of the clause may be found in the Netherlands treaty, Article XXV, par. 2.

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certain reservations.[41] The type of controversies potentially arising over the interpretation or application of the terms of a bilateral commercial treaty would appear to be altogether proper for reference to an international court, without raising the kinds of questions that occasioned the Connally reservations. The standard form of compromissary clause now used in the commercial treaties, however, leaves open the precise procedure to be followed in referring a dispute.

Miscellaneous. In concluding the recitation of the subject matter of the treaties, mention should be made of a provision which has been designed to curb restrictive business practices (" cartels "), another topic on which multilateral efforts to find a viable consensus among nations has proved unsuccessful.[42] This provision of the treaty is a modest and imprecise statement, being in terms of an agreement on a point of view, rather than an exact legal rule, and being considerably short of an impracticable endeavor to export the Sherman Antitrust Act.[43] Finally, it may be noted that a navigation article reaffirms a liberal régime of treatment to be applied to international shipping. The rules set forth reflect the practices which have historically been developed by leading maritime nations, and are designed to curb ultranationalistic or protectionist tendencies, of which there is considerable evidence, in the shipping field. On the multilateral front, in comparison, there is in process of creation an Intergovernmental Maritime Consultative Organization (as a specialized agency in relationship with the United Nations),[44] designed to provide an international forum for the

41 Sen. Res. 196, August 2, 1946. The reservations were for (a) disputes which might be entrusted to another tribunal, (b) disputes concerning matters essentially within the domestic jurisdiction of the United States, and (c) disputes arising under multilateral treaty except under certain conditions.

42 See, e.g., Martin Domke, "The United Nations Draft Convention on Restrictive Business Practices ", *International and Comparative Law Quarterly,* January 1955, pp. 129-40.

43 The provision is missing from the treaties with China, Ethiopia, Iran and the Netherlands. The normal wording may be found, for example, in Article XVIII, paragraph 1, of the Japan treaty of 1953. It expresses disapproval of restrictive practices that have harmful effects on international trade, calls upon the parties to consult about any such practices, and commits each to undertake such corrective action as it might deem appropriate.

44 *Supra,* note 15. The ratification of the United States was deposited on August 17, 1950.

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airing of shipping problems but which does not purport, as does the treaty, to impose explicit obligations as to the treatment any country will grant to another's vessels. The value of reconfirming traditional rules through treaty is pointed up by the fact that the various differences of interest among nations has led to great delays in arriving at the adherences necessary to the coming into force of the IMCO Convention (drafted at an international conference in 1948), even though by definition the Organization is to be only "consultative and advisory".[45]

Nature and Limitations of the Treaties

The treaties deal with the subjects within their purview in language of simple elementary principle, of a constitution-like character. Their avoidance of detail and of statute-like elaboration and specificity is in keeping with their essential character. Being comprehensive instruments, cutting across a wide range of interests, they must correspondingly be fashioned with broad strokes, if they are to be at all manageable. Being designed to serve as a basic charter of relations for a long period of years, they must be confined to fundamentals so framed as to preserve their validity over the vicissitudes and changing conditions of an indefinite future. Predominantly, therefore, the norms of treatment set forth are of a contingent character, permitting an endlessly flexible adaptation of content within the integument of a governing legal principle. These norms are mainly national treatment or most-favored-nation treatment, or both, as the case may be.[46] In the establishment provisions—those dealing with the rights of persons and enterprises—the former is normally sought, as being obviously much the stronger of the two; for a country is not in general likely to accord any aliens better treatment than it accords its own nationals, whereas the most-favored

[45] Article 2 of the Convention. By the terms of Article 60, the Convention will come into force when adhered to by 21 countries of which 7 must each have at least 1,000,000 tons of shipping, a number still short of attainment as of April 1, 1957, and the Convention was not in force on January 1, 1958.

[46] In certain very fundamental matters (e.g., freedom of conscience, compensation for expropriated property) these norms are passed, in order to assure the treaty alien a basic minimum protection regardless of the treatment others might receive.

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nation standard allows any amount of discrimination against aliens as a class.

In this characteristic of the treaties lie both their strength and their weakness. On the one hand, the essential moderation and reasonableness of constructing a dike against discrimination, of attending to first things first without purporting further to circumscribe or prescribe either country's legislative policy, make the negotiation and conclusion of the treaties possible as a practical matter. Governments can with prudence undertake long-term commitments of a foundation character, but may not be at all prepared to freeze their freedom of action and judgment regarding the details of legislative and internal policy, especially over so broad an area as is covered by a commercial treaty.[47] On the other hand, nondiscrimination may of itself fall considerably short of creating conditions prerequisite to investment and trade, for the legal system and policies of a country may be quite inhibitory without being at all discriminatory. This truism has led, for example, to the development of the trade agreement device, now expanded into the GATT,[48] to effectuate progress in the

[47] The moderation of the treaties, and their avoidance of interference with domestic policy except to the extent of assuring the alien a basic measure of protection on a reciprocal bilateral basis, in conformity with international usage, undoubtedly account for the tolerant regard which many proponents of the so-called Bricker Amendment aparently hold for these treaties, notwithstanding that they create obligations with respect to many matters over which the several states exercise legislative authority. The roll-call vote by which the Senate gave its advice and consent to ratification of a group of five of these treaties, on July 21, 1953, at the height of the controversy over the Amendment, was 86 yeas to 1 nay (*Congressional Record* for that date, p. 9623). Senator Bricker has testified that the Amendment is not in his judgment calculated to interfere with the conclusion of such treaties (*Hearing before the Senate Judiciary Subcommittee on S.J. Res. 1 and S.J. Res. 43,* 1953, p. 8; *Hearing before Senate Judiciary Subcommittee on S.J. Res. 1,* 1955, pp. 297-98); and similarly Dr. George Finch, a leading expert witness in favor of the Amendment, has challenged the opposition's fears lest the Amendment make impossible the conclusion of such treaties in future (1955 *Hearing,* p. 506).

[48] The General Agreement on Tariffs and Trade, concluded at Geneva in 1947, to which 37 countries are now party. For text, with proposed revisions, see Department of State brochure of March 1955; and for a brief explanatory account, Department of State Publication 5813, April 1955. It is in force generally through a "Protocol of Provisional Application". Its status in the United States is that of an executive agreement, on authority derived from the Trade Agreements Act; and Congress has so far taken the position, in the domestic controversy over the GATT, that it neither approves nor

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absolute lowering of duty rates and the general level of barriers to international trade. But so far there has not evolved any feasible device for accomplishing results in the field of investment comparable with those sought through the trade agreement—GATT mechanism in the field of trade.

The principal criticisms which might accordingly be directed at the treaties concern their failures to provide stronger or more specific rules, especially as regards the investor. A list would include the following: (1) The extent to which particular treaties recognize "screening", that is, a signatory's reserved right to determine whether particular investments by foreigners will be allowed (a departure from that aspect of the national-treatment principle which assures the treaty alien a right equally with the citizen to initiate an investment).[49] (2) Failure to require that no established interest of any kind may be impaired by government action except upon payment of prompt, just and effective compensation.[50] (3) Failure to prohibit the nationalization of private industry or, at least, to require that there may be no expropriation until after the compensation has been agreed upon and paid.[51] (4) Absence of specific commitments regarding

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disapproves it. There is projected an Organization for Trade Cooperation (OTC), to provide a regular international machinery for administering the GATT; and United States participation in this Organization will require congressional authorization.

49 The National Foreign Trade Council objected to the Ethiopia treaty, for example, because of its acknowledgment of the screening right (Letter to the Senate Committee on Foreign Relations, reproduced on p. 21 of the *Hearing* on that and other commercial treaties held before the Subcommittee of that Committee, May 9, 1952). Screening is without prejudice, of course, to the important treaty principle of national treatment for enterprises after their initiation.

50 See, for example, the suggestion of National Foreign Trade Council, *ibid.*, p. 22. The treaty rule parallels the United States federal constitutional requirement as to "property taken". The greater obligations entailed by a commitment to pay for impairment of any established interest would surpass present federal law and practice (e.g., with regard to "consequential damages"). Further, see Department of State memorandum, *ibid.*, p. 28, in reply to the Council's suggestion.

51 The treaty does not attempt to outlaw any expropriation, but merely to regulate the manner and consequences of an expropriation; and it is doubtful whether an attempt to forbid expropriation would be considered a tenable restraint on sovereignty. A prior-payment commitment, for its part, would preclude the federal "declaration of taking" procedure.

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the entry of foreign technical personnel, and of clearer rights for American accountants and other professional categories.[52] (5) Insufficiently categorical guarantees regarding the remittance of earnings and the repatriation of capital.[53] (6) Lack of precision and advance in the rule regarding the awarding of government contracts and concessions.[54]

These and other possible shortcomings, which may be found to exist notwithstanding that the current treaty series is probably the most far-reaching and affirmative that has yet been extensively negotiated by any country, are ascribable to several causes which on the whole would appear to be unavoidable, at least under present circumstances. One cause, the comprehensive nature of treaties of this type, has already been mentioned. A second would lie in the intractability of certain of the subject matters: that is, the bafflement encountered in attempting to draw up exact rules that would be realistic and susceptible of practicable application over a future period. This would be true, in part at least, of items (5) and (6) listed above, lacking some kind of viable joint administrative machinery yet to be invented. A third cause lies in the fact that, as these treaties are negotiated through the free-will consent of sovereign nations, and by the very nature of the case represent self-agreed limitations on each country's freedom of action, they are perforce confined to reasonable commitments which governments can prudently see their way clear to assuming as a matter of enlightened self-interest. Governments can hardly be expected to be

52 Federal law prior to 1952 authorized treaty provision for special entry privileges only for international traders, but in that year an additional category was provided for the principal investor. See 101(a) (15) E (i) (ii) of the Immigration and Nationality Act of 1952. See Robert R. Wilson, "Treaty-Investor Clauses in Commercial Treaties of the United States", 49 *American Journal of International Law* 366-70 (1955). At the time the Act was under consideration, a spokesman for the National Foreign Trade Council recommended the inclusion of a clause also on technical personnel, but Congress did not accept it. *Joint Hearings before the Subcommittees on the Judiciary . . . 82d Cong., 1st Sess. . . . on Bills to Revise the Laws Relating to Immigration,* etc., 1951, pp. 314 *et seq.*

53 The treaty stipulates only a rather imprecise "reasonable provision" in the light of the exchange stringency situation. *Supra,* note 9.

54 The treaty rule—Article XVII, par. 2(b), of Netherlands treaty, for example—provides only for "fair and equitable treatment, as compared with that accorded" to third countries.

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eager to bind themselves to rigid or special-privilege engagements to the alien when there is no necessity for their doing so. A corollary to the doctrine of sovereign equality of nations, moreover, is that the treaties must be mutual in their provisions, with the consequence that they can in general contain only such commitments as the United States itself is prepared to undertake.[55]

Treaties of the type here under discussion do not entail bargaining for concessions. Rather, they deal with matters of right principle, to which both signatories are willing to subscribe formally; and they can in the large serve only to define and reduce to stable international engagement an existing state of national policies rather than to create new policy. A country, therefore, which is persuaded that it must particularly retain control over the extent to which aliens may be allowed to acquire economic influence within its boundaries is not likely to be prepared to waive its "screening" rights in favor of the open door, even with respect to the ordinary run of commercial and industrial activities regarding which the United States advocates a "no-screening" rule in its standard treaty proposals. Other countries, while admitting that there should be competitive equality between the alien and the citizen in initiating investments, and thus agreeing in principle with the open-door approach, may nevertheless nurture fears lest the unregulated entry of foreign capital during times when they are very short of dollar exchange might allow certain investments to be made which will create demands for remissions of earnings out of proportion to the net contributions such investments make to the national economy.[56] On the other hand, reservations to the

[55] Special adjustments, however, have to be made to care for the federal system, as regards the meaning of "national treatment" as applied to companies—e.g., Netherlands treaty, Article XXIII, par. 4 (a)—for which there is usually no equivalent on behalf of the other country. See also the special provision regarding ownership of real property likewise occasioned by the United States federal system, included in a number of the treaties (Article IX, par. 2, Netherlands treaty), the only firm right which the United States is prepared to accord being with regard to leasehold rights as to property needed for treaty-authorized purposes (*ibid.*, Article IX, par. 1).

[56] Certain balance-of-payments reservations are accordingly found, relative to the introduction of capital, in the treaties with Denmark (Protocol, par. 7); Japan (Protocol, par. 6); Germany (Protocol, par. 16); and the Netherlands (Protocol, par. 14).

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national-treatment rule as regards the initiation of an investment must also be maintained with respect to certain sensitive areas of business activity (for example, deposit banking) because of the alien disabilities which are present in state or federal law or administrative regulation on the United States side.[57] Similarly, shortcomings of the nature of those listed as (2), (3) and (4) above, even were they correctible with the consent of foreign countries, are necessitated by the inability of the United States to go further than the treaties actually provide, either because stronger rules would pass the bounds of established law and practice or because the federal government is unwilling to use the treaty power to override conflicting state legislation, actual or potential, in the premises.

Conclusion

Perhaps as time goes on, ways may be found for remedying or narrowing some flaws which may be said to persist in the treaty structure, even after ten years of extensive and varied negotiating experience and of experimentation with ways of making these instruments more effective. Certainly a comparison of successive texts appearing during the ten years, especially those completed during the first half of that period, will reveal evidence of a continuing effort to improve their content over that of the China treaty of 1946—which set the pattern for the series after World War II. For example, since that pioneering instrument, there has been a thorough reorganization and restatement of the provisions, with a view to better clarity and conciseness, fewer ambiguities and qualifications. The rights of corporations to engage in the normal run of business activities, on a national-treatment basis, have been defined in more legally sufficient terms; [58] and formulae have been devised for viably protecting those categories of enterprise which because of their sensitive nature (for example, deposit banking, as above mentioned) are as a matter of

[57] Examples in the federal jurisdiction: 16 U.S.C. 797(e) (hydroelectric licenses); 46 U.S.C. 19, 252, 802, 1151(c), 1159, 1171, 1244(c) (shipping operations); 47 U.S.C. 310 (radio licenses); 49 U.S.C. 401 (13), 521(b) (1) (domestic airlines).

[58] In the China treaty, the firm legal commitment was most-favored-nation treatment, accompanied by a general policy objective of "adhering generally to the principle of national treatment . . . in conformity with the applicable laws and regulations." Article III, par. 3.

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course excepted from the operation of the national-treatment clause applicable to other businesses.[59] Greater definition has been given to the rights of arrested persons; there have been added a clause to provide for the right of free communication and a paragraph regarding social security benefits; and rights with regard to legal aid and the *cautio judicatum solvi* have been spelled out. The rule with regard to expropriations has been amplified; and certain provisions to deal to an extent with the phenomenon of the state as entrepreneur have been devised. The provisions on exchange controls and commercial arbitration have been recast into more realistic and effective terms; greater attention has been given to management's right to employ essential personnel without government interference; and it was also during this period that a provision on restrictive business practices was introduced.

But there are limits on the lengths to which treaties can be carried; indeed, only three innovations of significance (saving, of course, minor improvements, clarifications and negotiated adjustments) have appeared in those signed since 1951; and none since the treaty of 1953 with Japan.[60] Since the negotiating prototype thus has perhaps attained its inner growth for the time being, subject always to further perfections in detail suggested by additional study and experience, prospects for progress in the immediate future perhaps lie more in the direction of an increase in the treaty network

[59] The provision developed to this effect, which had its origin in a general injunction against impairing established interests originally included in the Uruguay treaty of 1949 (Article IV), and in a special provision regarding banking in the Colombia treaty (Protocol, par. 5), first apeared in the treaty of 1953 with Japan: "However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which were owned or controlled by nationals and companies of the other Party." Article VII, par. 2.

[60] The provision mentioned in the preceding note; the clause on visa rights for investors, first authorized by Congress in 1952; and a special provision regarding a free market as to marine insurance (e.g., Article XV, par. 5, Netherlands treaty). On the other hand, two provisions previously carried were abandoned: the article regarding exemption from compulsory military service (which last appeared in the 1950 treaty with Ireland); and a provision regarding the practice of professions (excluded by Senate reservation from the treaties signed in 1951 and 1953, and thereafter omitted in compliance with the Senate's views).

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numerically than in basic improvements in the content of the typical product. But what rate of progress might be expected in completing negotiations with additional countries is impossible to predict. These treaties, unspectacular and seemingly simple in their terms though they be, cut across the interests of all ministries of a government and potentially pose many problems requiring careful study by any government contemplating a negotiation. In awaiting attention, they must compete with an unprecedented welter of demands, critical and otherwise, upon the time and energy of governments, in the present state of world affairs. They must do so, moreover, in a day when their making has apparently lost, perhaps temporarily, the popularity it previously enjoyed; [61] and when their underlying individual-initiative premises are singularly under question in many quarters.

In the circumstances, the record of accomplishment of the treaty program to date, compared for example with that of similar programs conducted in past periods,[62] is by no means unimpressive. This is so in terms both of the number of treaties brought to signature and of their contribution to the formulation of an enlightened body of law and practice regarding the treatment of the alien and his legitimate interests. They vary greatly among themselves in detail, as befits instruments individually and consensually negotiated, but together they form a pattern bonded by a common core of viewpoint and purpose. It is this, rather than the mere fact of sixteen individual treaties, which gives them cumulatively their larger significance.

HERMAN WALKER, JR.

PARIS, FRANCE

61 Whereas, prior to World War II, there were many examples of treaties of this general type in the practice of many countries, the United States appears to be the only country which has systematically sought such treaties during the past ten years.

62 In the two decades between the two World Wars, the United States concluded such treaties with twelve countries. For a comparable decade of treaty activity, it is necessary to go back to the 1850's, when something over a dozen such treaties were concluded, including some of lesser scope than the full-length prototype of the day.

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Launching the U.S. Postwar FCN Treaty Program

The negotiation of FCN treaties dates from the very founding of the republic. The War of Independence severed the legal ties between the United States of America and the British Empire and placed the new nation outside the imperial trading system. Aware that the United States would need new trading partners to purchase its surplus commodities and to provide it with manufactured goods, the Continental Congress in 1776 authorized the preparation of a model FCN treaty for use in negotiations with the major European powers.[1] In July of that year, it adopted a Declaration of Independence in order to provide a legal basis for other nations to treat with the new republic.[2] The earliest FCN treaties thus were intended to obtain recognition of U.S. independence and to establish trade and maritime relations with the powers of Europe.[3]

The first FCN treaty was signed with France in 1778,[4] on the same day that the United States concluded its treaty of alliance with that country.[5] The FCN treaty was signed first and thus it became the first treaty concluded in the history of the United States.[6] During the War of Independence, the United States also

1. The early history of the FCN treaties is sketched in Doron S. Ben-Atar, *The Origins of Jeffersonian Commercial Policy and Diplomacy* (New York: St. Martin's Press, 1993).

2. David Armitage, *The Declaration of Independence: A Global History* (Cambridge, MA: Harvard University Press, 2007), pages 35–36.

3. Department of State, Office of Public Affairs, *Commercial Treaty Program of the United States* (Washington, DC: Government Printing Office, 1952), NARA, Record Group 59, Department of State File No. 611.004/3-453.

4. February 6, 1778, 8 Stat. 12, T.S. No. 83.

5. Department of State, Office of Public Affairs, *Commercial Treaty Program of the United States* (Washington, DC: Government Printing Office, 1952), NARA, Record Group 59, Department of State File No. 611.004/3-453.

6. John Bassett Moore, *The Principles of American Diplomacy* (New York: Harper and Brothers, 1918), page 12.

concluded FCN treaties with the Netherlands in 1782[7] and with Sweden in 1783.[8] Following the end of the war, Congress established a commission comprising John Adams, Benjamin Franklin, and Thomas Jefferson to negotiate additional FCN treaties. From 1778 until the second term of the Truman administration, the United States would negotiate some 130 such treaties.[9]

Although the initial series of FCN treaties was directed at establishing U.S. relations with Europe, during the antebellum period the United States undertook to negotiate FCN treaties with the newly independent Latin American countries.[10] FCN treaties concluded before the Civil War, however, were not limited to Europe and Latin America. For example, a leading object of Caleb Cushing's mission to China in 1844 was to conclude an FCN treaty with that country.[11] In the first half of the nineteenth century, the United States placed particular importance on the navigation provisions of the treaties, which gained access to foreign ports for U.S. vessels and which protected the right of U.S. vessels to engage in neutral trade with belligerent countries.[12]

In the years following the Civil War, the pace of negotiations slowed. Industrialization in the United States reduced the need to import manufactured goods, while the construction of a transcontinental railroad allowed U.S. producers to concentrate on serving a large domestic market. The United States maintained high tariffs to protect American industry against foreign competition and de-emphasized the promotion of international trade. After World War I, however, the growing U.S. industrial surplus created a need for new markets. Thus, after that war, trade emerged as by far the most important element of the FCN treaties.[13] By the mid-1920s, the United States was engaged in highly productive

7. Treaty of Amity and Commerce, United States-Netherlands, signed October 8, 1782, 8 Stat. 32, T.S. No. 249.

8. Treaty of Amity and Commerce, United States-Sweden, signed April 3, 1783, 8 Stat. 60, T.S. No. 346.

9. Herman Walker Jr., "Provisions on Companies in United States Commercial Treaties," 50 *American Journal of International Law* 373, 374 n. 4 (1956). According to Walker, this estimate was published by the Department of State in 1952. For a brief survey of U.S. FCN treaty practice, *see* Eric V. Youngquist, "United States Commercial Treaties: Their Role in Foreign Economic Policy," 2 *Studies in Law and Economic Development* 72 (1967).

10. Memorandum from Winthrop Brown dated February 13, 1950, NARA, Record Group 59, Department of State File No. 611.004/3-850.

11. Department of State, Office of Public Affairs, *Commercial Treaty Program of the United States* (Washington, DC: Government Printing Office, 1952), NARA, Record Group 59, Department of State File No. 611.004/3-453.

12. Ibid. On the navigation provisions generally, *see* Don C. Piper, "Navigation Provisions in the United States Commercial Treaties," 11 *American Journal of Comparative Law* 184 (1962); Harry C. Hawkins, *Commercial Treaties & Agreements: Principles & Practice* (New York: Rinehart, 1951), pages 34–44.

13. Department of State, Office of Public Affairs, *Commercial Treaty Program of the United States* (Washington, DC: Government Printing Office, 1952), NARA, Record Group 59, Department of State File No. 611.004/3-453.

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negotiations with several countries in Central America and Europe. It concluded FCN treaties with Germany[14] in 1923, Estonia[15] in 1925, El Salvador[16] in 1926, Honduras[17] in 1927, and Austria,[18] Latvia,[19] and Norway[20] in 1928. The Great Depression and the embrace of autarkic economic policies throughout the world created an inhospitable environment for negotiations[21] and no further treaties were concluded until the mid-1930s. Ultimately, 12 treaties were concluded during the interwar period.[22]

With the trade provisions growing in importance, the United States during the 1920s incorporated into the treaties a clause requiring unconditional most-favored-nation (MFN) treatment with respect to trade.[23] An unconditional MFN treatment clause requires a country to extend to the other treaty party treatment that is at least as favorable as the treatment that the country extends to any other country. Thus, if an importing country lowers the tariff on a particular product imported from a particular exporting country, it must lower the tariff on that same product imported from any other exporting country to which it has promised unconditional MFN treatment. The clause that had appeared in prior treaties was a reciprocal MFN treatment clause. Under that clause, a country was obligated to extend MFN treatment to other treaty parties only if they reciprocated toward that country. An unconditional MFN treatment clause thus leads to a more rapid liberalization of trade because all trade concessions made by a country

14. Treaty of Friendship, Commerce and Consular Rights, United States-Germany, December 8, 1923, 44 Stat. 2132, T.S. No. 725. The treaty with Germany formed the model for those concluded over the ensuing 15 years.

15. Treaty of Friendship, Commerce and Consular Rights, United States-Estonia, signed December 23, 1925, 44 Stat. 2379, T.S. No. 736.

16. Treaty of Friendship, Commerce and Consular Rights, United States-El Salvador, signed February 22, 1926, 46 Stat. 2817, T.S. No. 827.

17. Treaty of Friendship, Commerce and Consular Rights, United States-Honduras, signed December 7, 1927, 45 Stat. 2618, T.S. No. 764.

18. Treaty of Friendship, Commerce and Consular Rights, United States-Austria, signed June 19, 1928, 47 Stat. 1876, T.S. No. 838.

19. Treaty of Friendship, Commerce and Consular Rights, United States-Latvia, signed April 20, 1928, 45 Stat. 2641, T.S. No. 765.

20. Treaty of Friendship, Commerce and Consular Rights, United States-Norway, signed June 5, 1928, 47 Stat. 2135, T.S. No. 852.

21. These policies are described in more detail in Jeffrey A. Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (New York: W.W. Norton, 2006).

22. *Commercial Treaties*, Hearing Before a Subcommittee of the Committee on Foreign Relations, 82d Cong. 2d Sess. (1952), page 3.

23. The history and rationale of this change are described in William B. Kelly Jr., "Antecedents of Present Commercial Policy," in William B. Kelly, Jr., ed., *Studies in United States Commercial Policy* (Chapel Hill: University of North Carolina Press, 1963).

are immediately generalized to all treaty parties with which that country has an unconditional MFN treatment obligation, even if those parties do not provide the same concession in return.[24]

The FCN treaties were not sufficient in themselves to open markets to U.S. exports because they did not reduce tariffs, instead promising only nondiscriminatory treatment. Most of the FCN treaty provisions addressed other aspects of trade, such as the treatment of merchants in the territory of the host state.

Because tariffs were taxes and could be reduced only by an act of Congress, efforts by the State Department to negotiate reductions in tariffs were impeded by the Department's inability to ensure that Congress would enact legislation to implement any reductions to which the United States might agree during negotiations.[25] To remedy this situation, in 1934, Secretary of State Cordell Hull persuaded Congress to enact the Reciprocal Trade Agreements Act (RTAA), which authorized the State Department to conclude treaties that reduced tariffs by as much as 50 percent without further approval from Congress. Although the State Department continued to conclude FCN treaties, much of its effort shifted to the negotiation of trade agreements under the 1934 legislation. In the three years after the RTAA was enacted, the State Department concluded 15 trade agreements under the act.[26] By contrast, it concluded only three FCN treaties during the entirety of the Roosevelt Administration—with Finland[27] in 1934, Siam (now Thailand)[28] in 1937, and Liberia[29] in 1938.

World War II reduced commercial affairs "to a bare minimum,"[30] and the United States suspended the negotiation of FCN treaties during the war years, even when negotiations were already in progress. For example, the negotiation of an FCN treaty with India ended abruptly when the State Department received a

24. As Lloyd Gardner notes, the United States sought more rapid liberalization of trade because its enhanced productive capacity following World War I demanded larger export markets. Lloyd C. Gardner, *Economic Aspects of New Deal Diplomacy* (Madison: University of Wisconsin Press, 1964), page 40.

25. David A. Lake, *Power, Protection, and Free Trade: International Sources of US Commercial Strategy 1887–1939* (Ithaca, NY: Cornell University Press, 1989), page 204.

26. John M. Rothgeb Jr., *U.S. Trade Policy: Balancing Economic Dreams and Political Realities* (Washington, DC: Congressional Quarterly Press 2001), page 47.

27. Treaty of Friendship, Commerce and Consular Rights, United States-Finland, signed February 13, 1934, 49 Stat. 2659, T.S. No. 868.

28. Treaty of Friendship, Commerce and Navigation, United States-Siam, signed November 13, 1937, 53 Stat. 1731, T.S. No. 940.

29. Treaty of Friendship, Commerce and Navigation, United States-Liberia, signed August 8, 1938, 54 Stat. 1739, T.S. No. 956.

30. Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: W. W. Norton, 1969), page 17.

NEGOTIATING AN FCN TREATY WITH IRAN

The Truman administration submitted a draft FCN treaty to Iran informally in February 1948, but no negotiations resulted.[112] Two years later, the U.S. embassy believed that the time might be right to make another approach, but again no negotiations occurred,[113] largely because of Iranian objections to the provision requiring national treatment with respect to the right to establish investment.[114]

By summer of 1954, however, circumstances had created inducements for both parties to negotiate a treaty. The Iranian government was seeking increased treaty protection for Iranians living in the United States. In particular, Iran was concerned about Iranian businessmen in the United States who did not have immigration status to remain in the country.[115] U.S. oil companies were seeking greater protection for their investment in Iran,[116] particularly in the wake of the nationalization of the Anglo-Iranian Oil Company in 1951. Although the United Kingdom had suggested that all that would be necessary for the oil companies would be an investment protection treaty, the United States believed that to suggest a treaty limited to investment protection would offend the Iranian government.[117] Rather, the United States wished to propose an FCN treaty that would provide Iranians with improvements in their personal status in the United States, while also protecting U.S. investment in Iran.[118]

Recalling that the Iranian government had paid "scant attention" to the standard draft treaty presented in 1948, the State Department decided to propose a shortened version of the FCN treaty similar to that concluded with Ethiopia in 1951. Notably, the abridged version did not require national treatment with respect to the establishment of investment.[119] The "essential nucleus" of the treaty was the provisions requiring compensation for expropriation and national treatment of American business enterprises once established. The State Department believed that the provision on expropriation combined with the compromissory clause providing for adjudication of disputes by the International Court of Justice "should afford valuable assurances to the American oil companies and other

112. Telegram dated June 4, 1950, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/6-450.

113. Instruction dated June 22, 1954, from the Department of State to the U.S. embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.884/6-2254.

114. Instruction dated July 23, 1954, from the Department of State to the U.S. embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.884/7-2354.

115. Instruction dated June 22, 1954, from the Department of State to the U.S. embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.884/6-2254.

116. Ibid.

117. Ibid.

118. Ibid.

119. Ibid.

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American investors."[120] The immediate reaction of the Iranian ambassador when he saw the proposed treaty was that the abridged version "might be much more workable than the extremely detailed version which had been discussed with his Government some years ago."[121]

After reviewing the proposed treaty, the Iranian government was chiefly concerned with certain provisions that would have to be extended to the Soviet Union or other Iron Curtain countries under treaties with those countries granting them MFN treatment.[122] For example, Iran feared that the exchange controls provision would grant certain non-American investments priority in obtaining foreign exchange.[123] The possible extension of treaty benefits to the Soviet Union was not Iran's only concern, however. Iran also bristled at a treaty provision requiring a "modern standard of justice," a provision that did not appear in other U.S. FCN treaties and that could be interpreted as casting aspersions on the Iranian legal system.[124]

Iran soon proposed a number of changes, many of them related to concerns about the Soviet Union and its satellites. Iran feared that economic penetration by such countries could threaten its national independence, a fear that the State Department acknowledged to be legitimate.[125] For example, Iran wanted language in the Preamble indicating that the provisions of the treaty had been agreed on a reciprocal basis. Such language would provide grounds for refusing to extend similar rights to the Soviet Union under an MFN treaty obligation. Iran also proposed limiting treaty protection to privately-owned companies, thereby preventing Soviet enterprises from claiming protection. At the same time, however, Iran wanted a secret exchange of letters deeming all Iranian companies operating within the United States to fall within treaty protection, even if entirely financed by the Iranian government.[126]

120. Instruction dated July 23, 1954, from the Department of State to the U.S. embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.884/7-2354.

121. Memorandum headed "Message of Condolence from the Shah," dated September 8, 1954, NARA, Record Group 59, Department of State File No. 611.884/9-854.

122. Telegram dated September 15, 1954, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/9-1554.

123. Telegram dated October 2, 1954, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/10-254.

124. Telegram dated September 15, 1954, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/9-1554; Despatch dated October 16, 1954, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/10-1654.

125. Statement of Thorsten V. Karlijarvi, *Commercial Treaty with Iran, Nicaragua and The Netherlands*, Hearing Before the Committee on Foreign Relations, July 3, 1956, 84th Cong. 2d Sess.(1956).

126. Despatch dated October 16, 1954, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/10-1654.

Some of Iran's proposed changes were directed not at denying benefits to the Soviet Union but at weakening treaty protection for U.S. nationals and companies. For example, Iran proposed that the prohibition on unreasonable or discriminatory measures be rephrased as a prohibition on unlawful or discriminatory measures. Iran also proposed rephrasing the expropriation provision to eliminate protection for "interests in property," apparently with the goal of excluding U.S. interests in the international oil consortium from treaty protection.[127] Iran had two objections to the provision on exchange controls. First, it wanted to retain sole discretion to determine whether exchange controls were warranted.[128] Second, it did not wish to make foreign exchange available to facilitate "hot money" transfers.[129] Finally, Iran wanted to delete from the compromissory clause language conferring jurisdiction on the Court to decide disputes involving the "application" of the treaty.[130]

The State Department was sympathetic to Iran's concern about MFN treatment, but to accomplish the same goal suggested alternative language referring to reciprocity.[131] The United States also agreed to place the right of entry for traders and investors on an MFN basis, in order to address Iranian concerns about Soviet penetration.[132] Regarding the concern about "hot money," the State Department explained that reasonable restrictions on capital to avoid a serious outflow of "hot money" in the form of scarce foreign exchange would not violate the exchange controls article.[133]

Otherwise, however, the United States largely objected to Iran's proposals. For example, the State Department replied that a secret exchange of letters was out of the question, both on policy grounds and because Article 102 of the U.N. Charter prohibited secret agreements.[134] U.S. negotiators noted that changing "unreasonable" to "unlawful" would destroy the effect of the provision.[135] They said that the expropriation provision was one of the most important in the treaty and that any substantial

127. Ibid.

128. Ibid.

129. Ibid.

130. Ibid.

131. Telegram dated November 1, 1954, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/11-154.

132. Memorandum headed "FCN Treaty with Iran," dated June 14, 1955, NARA, Record Group 59, Department of State File No. 611.884/6-1455.

133. Instruction dated November 10, 1954, from the Department of State to the U.S. embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.884/11-1054; Despatch dated October 16, 1954, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/10-1654.

134. Telegram dated December 18, 1954, from the Department of State to the U.S. embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.884/12-1854.

135. Telegram dated November 13, 1954, from the Department of State to the U.S. embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.884/11-1354.

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change would be very difficult for the United States to accept.[136] They noted that indirect investment contributed to Iran's development and thus the treaty should encourage it.[137] They argued that language giving each party sole discretion to determine whether to impose exchange controls was unnecessary because a party's determination would be presumed correct in the first instance, and the U.S. negotiators doubted that a dispute under the provision would arise in any event.[138] They reminded the Iranian negotiators that Iran had agreed on numerous prior occasions to compromissory clauses covering disputes relating to the application of a treaty.[139]

In December, the embassy reported that the Iranian negotiators had been highly receptive to the U.S. comments and had endeavored to accommodate U.S. views wherever possible. The embassy then expressed concern that the Department's negative reaction to so many of Iran's proposals was creating the impression that the United States was prepared to conclude a treaty only on its terms.[140] The Department held firm, however, and ultimately prevailed on each of these investment-related issues. The United States nevertheless did agree to some modifications to its proposed draft. For example, the treaty omits the provision regarding the right to utilize specialized personnel for internal purposes.

The treaty was signed on August 15, 1955.[141] Among its provisions was language terminating a 1928 treaty under which Iranian courts applied U.S. law to certain cases involving U.S. nationals.[142] In this way, the United States surrendered the last vestige of extraterritoriality in Iran.[143] The State Department noted that treaty provisions requiring prompt payment of just compensation for expropriated property and the submission of treaty disputes to the International Court of Justice represented "almost a complete reversal of the Iranian position in the [Anglo-Iranian expropriation] controversy and may repair much of the damage resulting from that dispute."[144]

136. Ibid.

137. Ibid.

138. Telegram dated January 14, 1955, from the Department of State to the U.S. embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.884/1-455.

139. Telegram dated November 12, 1954, from the Department of State to the U.S. embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.884/11-1254.

140. Telegram dated November 27, 1954, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/11-2754; Telegram dated December 17, 1954, from the U.S. embassy in Tehran to the Department of State, NARA, Record Group 59, Department of State File No. 611.884/12-1754.

141. Treaty of Amity, Economic Relations and Consular Rights, entered into force June 16, 1957, 8 UST 899, TIAS 3853, 284 UNTS 93.

142. Iran FCN treaty, Article XXII.

143. Memorandum headed "FCN Treaty with Iran," dated June 14, 1955, NARA, Record Group 59, Department of State File No. 611.884/6-1455.

144. *Current Economic Developments*, June 21, 1955, page 11, NARA, Record Group 59, Department of State Lot Files.

HERMAN WALKER, JR.

Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice

THE CURRENT United States interest in treaties for the encouragement and protection of foreign investment weds two national policies of long standing. Treaties in support of American citizens and their interests abroad, in line with the prevailing international needs and usages of each era, have been a normal and repeatedly used feature of American diplomacy since the days of the War of Independence. Concurrently, the Republic has from its earliest years favored the free international movement of private capital. This was true when it was an undeveloped, capital-deficient ex-colony; it remains true now that it has become a world power and reservoir of capital, able to help satisfy the investment requirements of others. Then, to the great benefit of its own economic growth, it embodied in its legal system principles favorable to foreign capital;[1] now through treaty negotiations it seeks to project similar principles onto the international plane, a consummation responsive alike to its own economic position and to the contemporary urge for accelerated economic development being manifested by the members of the world community.[2]

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[1] Alexander Hamilton in his celebrated *Report on Manufactures*, an analytical set of recommendations addressed to the first Congress in 1790, had urged such a policy in the following words:

"It is not impossible that there may be persons disposed to look with a jealous eye on the introduction of foreign capital as if it were an instrument to deprive our own citizens of the profits of our own industry. But perhaps there never could be a more unreasonable jealousy. Instead of being viewed as a rival, it ought to be considered as a most valuable auxiliary; conducing to put in motion a greater quantity of productive labor and a greater portion of useful enterprise than could exist without it. . . . [E]very farthing of foreign capital . . . is a precious acquisition." (Taussig, ed., State Papers and Speeches on the Tariff, Harvard 1892, pp. 39–40).

[2] For a recent authoritative exposition of this view, see section entitled "Promoting the International Flow of Goods and Capital" in the President's Economic Report transmitted January 24, 1956 (H. Doc. 280, 84th Cong., 2d sess.), carried in the Department of State Bulletin, vol. XXXIV, pp. 253–57.

Annex 85

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I

Treaties for investment purposes deal with the basic legal conditions which influence the degree to which potential investors are willing to venture their capital in undertakings in a foreign land. They aim, on a joint consensual basis, to establish or confirm in the potential host country a governmental policy of equity and hospitality to the foreign investor. This means, above all, assurance that the enterprise and property of the alien will be respected and that he will be accorded equal protection of the laws alike with citizens of the country. This fundamental idea, then, is the raw material from which the variegated content of the treaties is elaborated.

The principal vehicle advocated by the United States Government thus to deal by agreement with the ground rules affecting investment is the bilateral treaty of friendship, commerce, and navigation—"FCN treaty" or "commercial treaty" for short. In the last ten years, such treaties have been signed with 15 countries,[3] and others are in course of negotiation. The FCN treaty-type became the chosen instrument presumably because it afforded a ready-made framework into which the desired provisions could conveniently be fitted, and because past experience had demonstrated its negotiability. The diplomatic *desiderata* of precedent and tested practicability favored it.

This type of treaty is an instrument widely used by nations over the years to provide the juridical basis for their economic intercourse and to strengthen ties of good neighborliness in their everyday relations. It acquired in time a familiar and distinctive form and character, as a normal medium through which to provide extensively for the rights of each country's citizens, their property and other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping. Around this central theme, this treaty-type has repeatedly proved its

[3] *China*, 1946 (63 Stat. pt. 2, 1299); *Italy*, 1948 (63 Stat. pt. 2, 2255) supplemented by Agreement of September 26, 1951, S. Exec. H, 82d Cong., 2d Sess.); *Ireland*, 1950 (1 UST 785); *Colombia*, 1951 (S. Exec. M, 82d Cong., 1st Sess., withdrawn from Senate, June 30, 1953); *Greece*, 1951 (TIAS 3057); *Israel*, 1951 (5 UST, pt. 1, 550); *Denmark*, 1951 (S. Exec. I, 82d Cong., 2d Sess.); *Japan*, 1953 (4 UST, pt. 2, 2063); *Federal Republic of Germany*, 1954 (S. Exec. E, 84th Cong., 1st Sess.); *Haiti*, 1955 (S. Exec. H, 84th Cong., 1st Sess.); *Nicaragua*, 1956 (S. Exec. G, 84th Cong., 2d Sess); *Netherlands*, 1956 (S. Exec. H, 84th Cong., 2d Sess); Uruguay, 1949 (S. Exec. D, 81st Cong., 2d Sess.); *Ethiopia*, 1951 (4 UST, pt. 2, 2134); and *Iran* (S. Exec. E, 84th Cong. 2d Sess). These treaties fall into three patterns. Those succeeding the China and Italy treaties reflect an extensive reorganization and condensation of the content. The Ethiopia and Iran treaties represent a further abridgment of this material, and add provisions on diplomatic and consular rights. All are substantially similar, however, with regard to the points discussed in this article, except as otherwise noted and except that the Ethiopia and Iran treaties lack some of the refinements found in the others. They all bear the same title, except that in the Uruguay case the term "economic development" occurs, and "amity and economic relations" in the case of Ethiopia and Iran.

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flexibility and its adaptability to the varying needs of different eras. Its history of use by the United States antedates the Constitution. Our first treaty, in fact, was a Treaty of Amity and Commerce, concluded in 1778 with France,[4] as part of the arrangement which brought that country into our Revolutionary War as an ally. Numerous other examples followed, with countries of all conditions and locations, and with varying emphases and motivations, depending on the circumstances of the day.[5]

In more recent times, following World War I, such treaties were designed especially to promote international trade; and they afforded the medium through which this country embraced the unconditional form of the most-favored-nation clause. But latterly, since the enactment of the reciprocal Trade Agreements Act in 1934, other conventional tools of a special sort have been fashioned and employed to serve trade promotion and regulation: the bilateral trade agreement and now the GATT (the General Agreement on Tariffs and Trade).[6] With the consequent decrease of emphasis on the FCN treaty's role in international trade, the instrument lay ready to hand following World War II to be retooled to fit the newly-crystallized investment need.[7] This retooling did not mean abandonment of the old; the treaty remains one of commerce and navigation, *inter alia*. It meant rather a shift in orientation and internal balance, with the refinement, building up, and supplementing of familiar features especially pertinent to investor requirements. How this has been done may be described as follows.

[4] Others of the pre-Constitution era included those with the Netherlands (1782), Sweden (1783), and Prussia (1785).

[5] A recent publication mentions the figure "more than 130," counting those of smaller scope and size (Department of State Fact Sheet entitled "Commercial Treaty Program of the United States," March 1952, p. 3). For the various purposes historically served by these treaties, see *ibid* and Setser, "Treaties to Aid American Business Abroad," XL Foreign Commerce Weekly (U.S. Dept of Commerce, Sept. 11, 1950), pp. 3 *et seq.*

[6] Originally negotiated at Geneva, 1947, and now adhered to by 35 countries. The present text, with pending revisions, was published in a State Department pamphlet under date of March, 1955; and a summary explanation in Department of State Publication 5813, April, 1955.

[7] The change in the country's international capital position did not, of course, suddenly occur at this point of time. Even before the first World War, when the United States was the world's leading creditor nation, American investments abroad were growing, especially beginning about 1900. The graph of its creditor status between the two Wars, moreover, was uneven, there being periods in the 30's and early 40's when the net capital flow was markedly inward; and considerable foreign investment continues still to be made here. For the evolution of the United States position, see Lewis, America's Stake in International Investments (Brookings, 1948); Sammons, "International Investment Position of the United States," XVIII Foreign Commerce Weekly (January 27, 1945) 5–7; Pizer and Cutler, "International Investments and Earnings," Survey of Current Business (U.S. Department of Commerce), August 1955, pp. 10–20. See also, e.g., the summaries in Young, The International Economy (3rd ed. 1951) 497–502; and the OEEC Report on International Investment (Paris, 1950) 13–28.

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II

"Investment" may be summarily defined as the joining of an investor (a person) and capital (property) into a gainful enterprise (a business activity). FCN treaties traditionally have contained so-called establishment provisions dealing more or less with these three elements: the right of citizens of each country to establish and carry on business activities within the other and to receive due protection there for their persons and property. The range of activities covered, though originally tending to be confined primarily to international trade and that which was relevant or incidental thereto, came in time to cut across commerce and industry generally. Moreover, the basic rule to govern the conduct of such activities has long since been settled, in United States treaty practice, as "national treatment": that is, equality of treatment as between the alien and the citizen of the country. The former thus is entitled freely to carry on his chosen business under conditions of non-discrimination, and to enjoy the same legal opportunity to succeed and prosper on his merits as is allowed citizens of the country. It has become settled, also, that he and his property shall receive not only equal protection, but also a certain minimum degree of protection, as under international law, regardless of a Government's possible lapses with respect to its own citizens.

In respect of the range of covered activities and the quality of the protection vouchsafed, therefore, past treaties have contained the ingredients of an investment policy. The same has not been so, however, in respect of the persons for whom rights were provided, as these treaties were concerned with "citizens" or "nationals," and were concerned with corporations not at all or only to a minor degree. This attitude of reserve toward corporations was manifested in the treaties of the inter-War period, as follows:

> "The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territories, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such Party as expressed in its National, State, or Provincial laws."[8]

This deficiency was a most serious one from the investment viewpoint, since international investment in modern times is predominantly by corporate, rather than individual enterprise. The first task in developing a

[8] E.g., Article XII, Treaty of Friendship, Commerce and Consular Rights with Germany, 1923. U.S. treaty policy regarding corporations is discussed in the author's article "Provisions on Companies in United States Commercial Treaties," 50 Am. Jour. Int. Law, 373–93 (1956).

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treaty pattern after the late War, consequently, was to devise ways of providing adequately for the rights of corporations. This posed a special problem for the United States: namely, how in the reciprocal context of an FCN treaty to formulate commitments which would be meaningful while at the same time avoiding interference with the constitutional prerogatives of the several States of the Union over the admission and regulation of foreign corporations.[9] But it so happens that a corporation is "foreign" in any given State by virtue of having been chartered in another, any other, jurisdiction; and a corporation of a sister State is "foreign" equally with one of a foreign country. The solution found, accordingly, was an interpretative clause which for treaty purposes simply assimilates the corporations of the other Party, in any State of the Union, to those of other States of the Union.[10]

With this interpretative formula, the way was open to deal with corporations as fully as with individuals; and this has been done by extending to corporations, in measure equally with natural persons, the benefits of the national treatment and other rules of the treaty, in all situations pertinent to corporations. But so to provide for corporations of each Party in the territories of the other is still insufficient; investors choose to operate abroad not only through branches of corporations of their own country, but also very frequently through subsidiaries chartered under the laws of the foreign country where operations are conducted. Systematic treatment, therefore, required the introduction of provisions to cover this situation, a step representing something of a departure from traditional treaty concepts. Normally and classically, a country extends diplomatic protection abroad for objects which are, and because they are, juridically identified with it—e.g., for individuals who are its nationals, for entities which owe their existence to its laws, for ships which fly its flag. Here however, treaty protection is gained for entities not so identified; the "corporate veil is pierced" for the purpose of making economic interest, rather than legal relationship, the justification and the basis for protection.[11]

[9] This constitutional principle was settled by the Supreme Court in Paul v. Virginia, 8 Wall. 168 (1868); and the treaty-making problem it posed was alluded to in Hearing before the Committee on Foreign Relations U.S. Senate, 68th Cong., 1st Sess. on Treaty of Commerce and Consular Rights with Germany, January 25, 1924, p. 21.

[10] E.g., Article XXII, paragraph 4, of the 1953 treaty with Japan. This formula is only superficially nonreciprocal, as it in fact equates the alien corporation to the bulk of its competitors in interstate business.

[11] To this extent, the treaty may be said to reflect what has been called an "enterprise" theory. See, e.g., Kronstein, "The Nationality of International Enterprise," 52 Columbia Law Review 983 *et seq.* (1952). Compare the axiom propounded by Jones "*ex hypothesi*, no state can intervene on behalf of a corporation against its own government," "Claims on

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With corporations suitably fitted into the framework of the establishment provisions, the foundation for an investment treaty was laid; and there remained to complete the conversion process by revising and filling in the content of that framework. Partly this involved the restatement of existing provisions; partly, the addition of new material. In the treaties of the inter-War period, the group most recently concluded prior to those of the current program, the main rules bearing on the establishment, conduct, and protection of enterprise, had for the most part comprised a single article[12] out of the approximately thirty articles to which those treaties tended to run. The amplification and supplementation of this material, together with compression and pruning of the remaining material, has eventuated in a text in which investment-related provisions constitute upwards of half the total.[13]

In the treaties of the 20's and 30's, the rights of entry of individuals had been subjected to a sweeping immigration laws exception. Now, however, firm rights are provided for the entry and indefinite sojourn of international traders and principal investors.[14] Though equal provision for subordinate investor-enterprise employees is not yet possible owing to lack of statutory authority, such personnel is to an extent provided for, in that management is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from "percentile" restrictions and the like; and of accountants, engineers and so on, for special internal audits and surveys, without regard for local professional licencing requirements.[15]

Behalf of Nationals Who are Shareholders in Foreign Corporations," 26 Br. YB of Int. Law, (1949) 225, 257. For two recent discussions relative to the same subject, see M. Domke, "Piercing the Corporate Veil in the Law of Economic Warfare," Wisconsin L. R. (January 1955) 77; R. Berger, " 'Disregarding the Corporate Entity' for Stockholders' Benefit," 55 Columbia L. R. (1955) 808.

[12] E.g., Article I of the treaty of 1923 with Germany.

[13] For example, the subject of consular rights was detached, and, in the treaties following that with Italy in 1948 (note 3, *supra*), a condensed statement of the navigation provisions was developed.

[14] E.g., Article I, paragraph 1, of the 1953 treaty with Japan. The visa provision for "traders" has been in all since the 1946 treaty with China; but that for "investors" became possible only with enactment of the Immigration and Nationality Act of 1952 (Sec. 101 (a) (15) (E) (ii)). See Robert R. Wilson "Treaty-Investor Clauses in Commercial Treaties of the United States," 49 A.J.I.L. (1955) 366–70.

[15] E.g., Article VIII, paragraph 1, of the 1953 treaty with Japan:

"Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of

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The rule regarding freedom of access to the courts has been clarified and expanded, notably by the incorporation of: a national treatment standard; a clause to prevent the frustration of this right through domestication or registration requirements, in the case of companies; [16] an agreement that the *cautio judicatum solvi* shall not be exacted in any discriminatory manner;[17] and a provision supporting arbitration as a method of settling private controversies, where the parties have contracted to adopt that procedure.[18]

The usual provisions regarding the protection and security of property have been given more definite content by amplification of the concept of the "just compensation" required in the event of expropriation or other taking.[19] Article VI, paragraph 3, of the treaty with Japan, for example, reads:

"Property of nationals and companies of either Party shall not be taken within the territories of the other Party 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."

In addition, a provision has been developed to provide in general that expropriations and sequestrations, should they occur, shall be implemented in a non-discriminatory manner (so as, for example, to preclude

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the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories."

The second part of this provision appeared for the first time in the 1949 treaty with Uruguay.

[16] *Idem*, Article IV, paragraph 1:

"Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without registration or similar requirements."

[17] *Idem*, Protocol paragraph 1.

[18] *Idem*, Article IV, paragraph 2. This subject is discussed in the author's article "Commercial Arbitration in United States Treaties," in 2 *Arbitration Journal* (1956) 68 *et seq.*

[19] The twelve treaties of the 20's and 30's spoke simply of "just" compensation, given through "due process". In the China treaty of 1946, the statement was expanded to "prompt, just and effective," and this in turn evolved into the wording above-quoted beginning with the treaties signed in 1951.

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an unequal selection of enterprises for nationalization).[20] Moreover, to account for the possibility of injurious governmental harassments short of expropriation or sequestration, there is included a general injunction against "unreasonable or discriminatory" impairments of vested interests.[21]

The basic principle of national treatment with respect to engaging in business activities and doing the things necessary or incidental thereto, which forms the heart of the treaty as an investment instrument, has been elaborated to mention the various juridical forms under which an activity can be conducted; to emphasize the owners' prerogatives of control and management; and to assure that also the enterprise, qua enterprise, will receive the stipulated treatment.[22] Attention, furthermore, has been paid to providing some kind of rule with respect to areas of activity which, because of their sensitive nature (e.g. deposit banking, domestic air transport), are in principle excepted from the national treatment commitments applicable to the normal run of commercial and industrial activity. To such areas, the minimum rule of most-favored-nation treatment is extended, so that each Party is obligated to grant treatment at least as favorable as that enjoyed by other aliens.[23] In addition, in recognition of the fact that the exceptions may not always be, and often are not invoked in practice, a qualification to this exception has been introduced, so as to restore the benefits of the national treatment standard to

[20] E.g., Article VI, paragraph 4, second sentence of treaty with Japan:

"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 3 of the present Article. Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control."

This provision first appeared in the treaty of 1948 with Italy.

[21] *Idem*, Article V, paragraph 1. This provision first appeared in the treaty of 1949 with Uruguay.

[22] *Idem*, Article VII, paragraph 1:

"Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party."

[23] *Idem*, Article VII, paragraph 4.

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any enterprise which has at one time, as by act of grace, actually been allowed to enter upon operations in the excepted area.[24] That is, either Party may prohibit or limit alien entry into an excepted field of activity; but if, nevertheless, entry has been in fact permitted, the enterprise in question is protected against later discriminations.

Since the sweeping national treatment rule is not feasible, or else is not adequate, in the matters of real property tenure and of taxation, special articles have been needed for those subjects—the first because of inhibitions laid on treaty-making by certain State laws, and the second because of the highly technical nature of the subject-matter and the desirability of having a self-contained rule, independent of the manner and degree to which the national treatment standard might be applicable to engaging in activities. The present treaties continue the practice, followed since 1911,[25] of assuring equality to the treaty alien with respect to leaseholds of property needed in the United States for treaty-sanctioned activities. As to the rights of the American in the other country, some provide merely the same rule, *mutatis mutandis*;[26] but in others the right is enlarged, to assure full national treatment as to all manner of acquiring and holding real property generally, whether by ownership, lease, or otherwise.[27] Mutuality is restored in such instances by a formula which reserves to the other country the right correspondingly to reduce this quantum of treatment in the case of American nationals domiciled in, or corporations chartered by, any State of the Union which maintains alien disabilities in its land laws. Further, there have been added mutual national treatment provisions with respect to acquisition and ownership of securities and other personal property;[28] the protection of patents and industrial property generally;[29] and the right to dispose of property of every kind, both real and personal.[30]

In the field of taxation, the cumulative standards of both national

[24] *Idem*, Article VII, paragraph 2, second sentence:

"However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party."

[25] Treaty of Commerce and Navigation of that year with Japan, Article I, first paragraph.

[26] E.g., treaty of 1953 with Japan, Article IX, paragraph 1.

[27] E.g., treaty of 1948 with Italy, Article VII, paragraph 1(b); treaty of 1956 with the Netherlands, Article IX, paragraph 2.

[28] E.g., treaty of 1953 with Japan, Article IX, paragraph 2. The present stage of evolution of this provision was first reached in the treaty of 1950 with Ireland (Article VII, paragraph 2).

[29] E.g., Article X, treaty of 1953 with Japan.

[30] *Idem*, Article IX, paragraph 4.

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treatment and most-favored-nation treatment are in principle maintained, in language suited to the requirements of orderly tax administration.[31] Moreover, the principle is made subject to certain exceptions, for example, double-tax conventions and special tax concessions granted only on a reciprocity basis. On the other hand, a stipulation has been added to the effect that a company of one Party doing business in the other shall be taxable by the latter, not on the basis of the company's "world income" as might be permissible under the national treatment rule, but only in respect of such part of its business as is conducted therein.[32]

Among the new provisions added to the instrument is an article on exchange controls,[33] a subject of considerable contemporary importance to businessmen. The drafting of a treaty rule, however, is complicated not only by the comparative intractability of the subject, but also because neither of the normal treaty standards of national or most-favored-nation treatment is adequate or realistic to the regulation of international currency movements in periods of exchange stringency. A further special factor relevant to the making of bilateral agreement is the existence of the International Monetary Fund, having a recognized competence and responsibility in the field. The treaty rule, by appropriate language, accordingly acknowledges the paramountcy of this organism, which is especially charged with freeing the channels of trade and "current" (as distinguished from "capital") transactions; and centers its attention on laying down principles to govern the policies of each Party in servicing investor requirements, especially the remission of earnings and the transfer of capital, to the extent that their Fund commitments and their monetary reserves situation allows them latitude.

Another new area to which attention is given is the phenomenon of the state-in-business. In this connection, a provision is included for the waiver of claims to sovereign immunity on the part of state-owned commercial enterprises that have occasion to do business abroad.[34] Con-

[31] *Idem*, Article XI, paragraph 1–3. The rule is stated in terms of comparative "burdensomeness".

[32] *Idem*, Article XI, paragraph 4.

[33] *Idem*, Article XII. The core provision (paragraph 3) reads:

". . . 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, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party, of: (a) the compensation referred to in Article VI, paragraph 3, 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 . . ."

[34] *Idem*, Article XVIII, paragraph ?:

"No enterprise of either Party, including corporations, associations, and government

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versely, a provision has been developed to assure that if a state-owned enterprise engages in a commercial activity, within its own country, in competition with an established private enterprise of the other Party, it shall not avail itself of any subventions or other special privileges that would give it an unfair competitive advantage.[35] This provision, being experimental and outside the national treatment context, is necessarily cautious, in view of the absence of any generally acknowledged guideposts. Thirdly, an adaptation of the most-favored-nation principle has been introduced to regulate the awarding of government concessions and contracts,[36] a literal most-favored-nation clause not being compatible with the realities of contract or concession-letting, and a national treatment clause not being compatible with national policy.

The various arrangements of special concern to investors are in turn, in company with all the other arrangements of the treaty, given added force by provision for submission of otherwise unresolvable disputes over interpretation or application of the treaty's terms, to the International Court of Justice for adjudication.[37] The unreserved acceptance of this jurisdiction for the ultimate determination of treaty rights and obligations, on an impartial legal basis, may perhaps be said to rank in significance with the systematic provision for corporation rights, in signalling the outstanding advances which current treaty policy has effected over that prevailing in previous years.

III

In classifying the instrumentality which has been chosen by the United States Government jointly with like-minded governments of other countries to forward investment objectives, two characteristics stand out. First, the FCN treaty is not a special-interest vehicle, but rather one into which investor requirements, with scarcely an express reference to "investment," are fitted as integral parts of a larger regulation of private affairs in international relations. Such a treaty is concerned with the

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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 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."

This provision first occurs in the 1948 treaty with Italy (Article XXIV, paragraph 6).

[35] This provision first appeared in the 1948 treaty with Italy (Protocol, paragraph 2). It is missing from those with Colombia, Japan, Germany, Ethiopia, and Haiti.

[36] E.g., treaty of 1953 with Japan, Article XVII, paragraph 2. The rule is in terms of "fair and equitable treatment as compared with that accorded to the nationals, companies and commerce of any third country."

[37] *Idem*, Article XXIV, paragraph 2.

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rights and interests abroad of all citizens, as well as with a much ampler cross-section of foreign commerce and business than is discoverable within the definition of "investment." Secondly, the instrument is negotiated on a bilateral, rather than a multilateral, basis. It has been at times suggested that a different approach be used: a multilateral convention, or special agreements confined to "investment" as such. The advantages ascribed to these alternatives would be that a multilateral convention is calculated to bring sooner universal results through a single negotiation among a large number of countries; and that a special-purpose agreement, for its part, would be speedier because it would allow the negotiations to concentrate on a single subject-matter to the exclusion of extraneous complications.

Experience, however, does not give much ground for hope that a generally acceptable multilateral investment convention, containing a body of provisions satisfactory from the investor viewpoint, is attainable under present circumstances. Each of the at least three major projects for multilateral conventions of an investment nature, which have been undertaken over the last quarter century, has been attended by failure. First was the conference on the treatment of foreigners, convoked at Paris in 1929 under the auspices of the League of Nations after careful preparations.[38] The sessions of this conference ended without accord and with little real prospect that resumed sessions, indefinitely postponed by the onset of the Great Depression, would prove substantially more fruitful. Second was the section on Economic Development and Reconstruction in the Charter for an International Trade Organization. Here, under pressure to settle trade problems, the conference delegates reached a draft agreement also on investment, but at the cost of compromises and deficiencies that rendered the result markedly short of satisfactory;[39] and this Charter has now been abandoned in favor of an instrument confined exclusively to commercial matters, the General Agreement on Tariffs and Trade, the subject on which a viable meeting of minds proved possible owing to the existence of a community of reciprocal interests in the pro-

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[38] League of Nations doc. C. 97. M.23. 1930. II reports the proceedings of the conference, and C. 174. M.53. 1928. II. 14, the draft text of a convention, with explanations, which was before it for consideration. For a brief appraisal of the outcome, see Potter, "International Legislation on the Treatment of Foreigners," 24 Am. J. Int. Law (1930) 748–51; for a more detailed account, Cutler, "The Treatment of Foreigners in Relation to the Draft Convention and Conference of 1929," 27 *ibid.* (1933) 224–46.

[39] Final Act and Related Documents of the United Nations Conference on Trade and Employment (Havana, 1948), especially Article 12. On businessmen's objections to the Charter's investment section, see Diebold, The End of the I.T.O. (Princeton, Essays in International Finance, No. 16, October 1952), pp. 18–19.

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motion of international trade. Third was the 1948 inter-American conference at Bogota, which attempted a general economic agreement. The eventuating draft was vitiated by exceptions and, after a renewed attempt at the Pan-American Union in Washington in 1949 to reconcile differences, the project was dropped.[40]

The cause of these failures would seem to be an inherent one. An investment convention, to be worth-while, must embody firm reassurances to the alien, to private capital, and to private business. Since multilateral undertakings tend to a least-common-denominator position, an effective investment document presupposes a high level of international consensus concerning the sanctity of private property, the advantages of private enterprise, and the acceptability of alien participation in the country's economy; it presupposes also a shared incentive to encourage and protect the foreigner and his capital. This basic international community of attitude, will, and interest patently is nonexistent in the present state of affairs, and its development is not aided by the fact that investment questions are susceptible of being regarded as touching upon sensitive issues of domestic sovereignty, internal economic policy, and national political philosophy.

Even to the extent that an adequate avowed consensus can be found *en principe*, many persistent divergences arise over details, owing to variances in national legal systems and in the provisions of legislation. Whether such details be great or small in significance, their number can accumulate into a massive total in connection with a far-reaching instrument of multiple aspects such as an investment convention, in the setting of a large and variegated gathering.[41] All must somehow be reconciled before the objective of exact texts can be reached; the process of reconciliation can be virtually interminable, and the end, if not frustration, can as likely be an array of compromises, reservations, and equivocations tantamount

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[40] For text see "Economic Agreement of Bogota" (9th Int. Conf. of American States) issued by the Pan American Union (Washington, 1948); and for an indication of the divergencies which finally prevented consummation of the agreement, see report of the Special Commission on Reservations concerning the Economic Agreement of Bogota (Pan American Union, Washington, July 13, 1949, Spanish original).

[41] The difficulty faced in finding general accord on a single small segment of a total investment agreement is illuminated, for example, in Professor Nussbaum's analysis of experience with the Geneva instruments of 1923 and 1927 on commercial arbitration, "Treaties on Commercial Arbitration," 56 Harvard L.R. (1942) 219 *et seq*. Similarly, as to the problem of an acceptable rule on the nationality of corporations, see 1927 Report of the League of Nations Committee of Experts on the "Nationality of Commercial Corporations and their Diplomatic Protection," 22 Am Jour. Int. Law, Spec. Supp. (1928) 171, 177–78; and Voelkel, "A Comparative-Study of the Laws of Latin America Governing Foreign Business Corporations," 14 Tulane L. R. (1939) 42, 68–70.

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to frustration. The reaching of satisfactory results is not helped by the phenomenon that a country which may be quite willing to profess sympathy for the foreign private investor, and may indeed in practice actually accord him fair treatment, may nevertheless be less than eager to bind itself internationally to do so, whether because of domestic political complications or otherwise. Finally, what a country may be willing to undertake on a selective bilateral basis may be considerably different from the engagements it is prepared to assume indiscriminately vis-à-vis all the world.

The production attained so far in the current FCN treaty program of the United States Government, under which this government has consistently over the past ten years stood ready and desirous of negotiating with each and every like-minded country at the latter's convenience, may be taken to betoken the difficulties implicit in multilateralism in the field of investment. The total to date is signed treaties with fifteen scattered countries, a number of them not yet in force. While they are all of a type, and are all interlinked by a common bond of principle and foundation substance, they are otherwise rather kaleidoscopic in variety—in their superstructural content, their reservations and exceptions, their organization, style and wording, their shades of emphasis, their date of signature, the rate and duration of their negotiation, and the time required to effectuate ratification.[42] Each of these instruments reflects presumably a mutually satisfactory regulation of paired interests and bilateral relationships. But it is not easy to visualize just how they might be amalgamated into a composite unit which would reflect an equally satisfactory fusing of plurilateral relationships and an equally viable pooling of multiple interests. On a single important investment question, national treatment for business enterprise, for example, the whole is conspicuously less than the sum of its parts, owing to the variations in the exceptions and the approach to "screening";[43] and the variations

[42] For range of conspicuous difference compare, for example, the voluminous China treaty of 1946 with the compact Ethiopia treaty of 1951; the German treaty of 1954, which contains a Protocol with 24 paragraphs of clarification and adjustment, with the Greek treaty of 1951, which has none, but which in turn is quite differently organized from others of its contemporaries. The total time required, from the first steps to signature, has ranged from 18 months to 8 years, in the case of the fifteen treaties so far completed since 1946; the Irish treaty of 1950 came into force within eight months of signature, but the Uruguay treaty of 1949 is still unperfected. A detailed tabulation of all the variances, treaty from treaty, aside from those of an inconsequential verbal character, would require more space than the present article occupies.

[43] By this is meant the qualifications which are placed on the extent to which national treatment is assured with respect to initiating an investment in ordinary commercial and industrial enterprises, an objective sought wherever possible in the U.S. treaty proposals.

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otherwise in content suggest that what appeals to one country does not necessarily appeal to another. It is not easy to visualize, either, how a collective negotiation, bracketed within the Procrustean confines of a scheduled conference, could bid to produce equal results among the countries concerned, much less among the far larger number of countries which would be expected to participate.

Conversely, these treaties illustrate also the feasibilities of bilateralism: the case-by-case approach, marked by flexibility in timing, in length of deliberation, and in the peripheral adjustments needed to take account of individual national circumstances and to achieve an agreeable balance of reciprocal advantage. They likewise illustrate the feasibility of the broad-gauged FCN treaty, as compared with the specialized, uni-purpose "investment" agreement. The former has an accordion-like quality. It can be of variable scope; and, so long as it contains the basic investment-interest content, it can be shortened or lengthened to suit the desires and needs of each country. That none of the treaties so far signed actually has been pared down to its investment hard-core, or anywhere near so, evidently signifies that countries willing to entertain the subject are very apt to choose to do so in the framework of a comprehensive settlement of their relations with the United States.

An FCN treaty in its fully realized form is a house of many mansions, concerned with all citizens and their interests, great and small, and whether or not of an economic nature; it is implicitly concerned also, in a major way, with the intangibles of good will between nations in their everyday relations. Although the United States may now in general be motivated primarily by investment considerations in seeking such treaties, the other side may share this motivation only to a secondary extent. For example, the preambles to the treaties with Japan and Germany, in summarizing the general purposes in view, list the promotion of commercial intercourse ahead of the encouragement of investment, and the treaty with Ethiopia lays particular stress on peace, friendship, and good diplomatic relations. Again, while conclusion of a treaty means perforce that both sides concur on the mutual desirability of investment provisions, in the case of a country having little or no capital to export the

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The treaties with Ethiopia and Iran, for example, altogether lack a national treatment rule concerning this phase of the investment process; the rule in the treaty with China is an imprecise "adhering generally to the principle" (Art. III, par. 3), in the case of corporate investments; the treaty with Ireland contains a reservation for that country's Control of Manufactures Act (Art. VI, par. 4 and the Minute of Interpretation applicable thereto); and those with Denmark, Japan, Germany, and the Netherlands in their respective Protocols contain limited reservations framed in balance-of-payments terms.

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legal rights vouchsafed investors can appear on their face to constitute a lopsided bargain unless balanced by rights utilizable in actual practice by that country's own citizens. Provisions on such matters as visa rights for merchants, and rights for citizens of humble station to work in the common occupations and enjoy workmen's compensation and social security benefits, can thus assume material significance in the process of reaching a meeting of minds on purely "investment" questions.

Difficulty, moreover, is encountered in trying to identify only certain provisions as "investment provisions" and segregate them into a separate, self-contained packet. The building and operation of a motor factory by a big corporation clearly is "investment" in its major "economic development" connotation; but how can and why should treaty protection be written that does not cover also, at the other end of the business scale, the individual entrepreneur engaged in a sales activity? Investors, *inter alia*, are interested in treaty provisions regarding lawful protection for their rights, and access to the courts of justice, familiar subject-matter for FCN treaties; but why should the benefits of such provisions be confined to only those persons classed as "investors," even assuming that an acceptable treaty definition of "investor" could be devised? Fundamental personal rights, such as freedom of conscience and humane treatment from policemen and jailors, do not fall under the "investment" heading; but can the investor be considered properly protected unless such traditional FCN treaty rights are assured him? Even the navigation and trade provisions of the treaty, for that matter, are not without an investment bearing. On the one hand, trade and shipping entail capital outlays ("investment") and, on the other, investors going into a foreign country usually have an interest in importing equipment and supplies and in utilizing maritime transportation.

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. This is by no means to say that special agreements dealing with fragments of the investment complex do not have their place. In fact, the United States has underway programs for the negotiation of at least two kinds of such special-purpose agreements. One is the double-tax convention, which deals specifically with the highly important subject of taxation, in a detailed and technical way which is impracticable in a

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general treaty of the FCN type.[44] The other is the so-called investment guaranty agreement, an arrangement of a derivative administrative character designed to protect the interests of the United States Government when acting as insurer under the "investment guaranty" program provided for in a recent Act of Congress.[45] Neither is designed to replace or substitute for the general FCN treaty; each, rather, reinforces and supplements the other.

IV

The factors which cause foreign investments to be made or not to be made are varied and numerous, and include those of a political, economic, social, and environmental nature which are beyond the reach of treaties. A treaty is a legal instrument, dealing with rules of law; in turn, the extent to which a treaty can practicably deal even with legal conditions is limited. It can purport to assure that a country's laws and regulations will be nondiscriminatory in content and even-handed in their administration; but this is no guarantee that the legal regime, even though scrupulously nondiscriminatory, will in its details appear tolerable or attractive in the eyes of the entrepreneur who alone can decide whether capital will actually be ventured. A forbidding tax may be no less forbidding because it falls on everyone alike.

Limitations on the possibilities of the treaty device would appear to follow implicitly also from the idea of sovereign equality of nations, which governs interstate relations in the modern era. Treaties cannot be

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[44] Conventions for the avoidance of double taxation with respect to taxes on income have been concluded with 18 countries so far ("List of Treaties and Other Agreements Concluded between the United States of America and Other Countries Relating to Double Taxation," Department of State, Office of Legal Adviser, March 15, 1956). For discussion of the program, see, e.g., Gilpin and Wells, "International Double Taxation of Income: Its Problems and Remedies," 28 Taxes (C.C.H., Chicago) (1950) 9–32; Kanter, "United States Income Tax Treaty Program," 7 National Tax Jour. (1954) 69–88; and address by Eldon King (Dir., Internat'l Tax Relations Division, IRS, United States Treasury Department), "The Income Tax Conventions with Germany and Japan, and Prospective Conventions with Latin America," delivered before the International Fiscal Association, New York, May 6, 1955.

[45] The present statutory provision, which stems from the Marshall Plan legislation of 1948, is sec. 413(b) of the Mutual Security Act of 1954 (P.L. 665, 83rd Cong.), and provides for insurance against convertibility or expropriation risks, or both, upon payment of a stipulated premium, for qualified new American investments approved by both Governments. As of May 1, 1956, the necessary covering agreements had been made with 26 countries as to both types of insurance, and with 4 others as to convertibility insurance only. As of that date, approximately $106,000,000 of insurance was outstanding under the program. Information on the program may be found in the "Investment Insurance Manual" issued by the Foreign Operations Administration (Washington, Oct. 1954); and in a recent staff report of the House Committee on Foreign Affairs (Investment and Informational Media Guaranties and the Mutual Security Program, Committee Print, May 1, 1956).

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negotiated faster than each country is of a mind to negotiate; nor can they be negotiated at all except as each feels that its national interests will thereby be served. The eventuating agreements, being free-will, must consequently be reciprocal and innocent of special privilege. It is therefore hardly to be expected that another nation will wish to bind itself more tightly than the United States conversely is willing to be bound, at both federal and state levels; at least, unless persuasive and acceptable *quid pro quos* are given. But whether extraneous bargaining power (such as government loans, grants, tariff concessions) may feasibly be used to obtain treaty commitments is quite doubtful. Insofar as unilateral guarantees were sought, going beyond the norm of national treatment, the spectre of extraterritoriality would arise; and there at least would be an implication that commitments which the United States did not consider fit and proper to assume, for its part, were nonetheless fit and proper for someone else. Such a course, in any event, would suggest that the rules which ought to prevail are not matters of right principle in the common good, as should be the premise of an investment arrangement, but are rather mere matters of private advantage and profit, suited to the haggling of the market place. It would presuppose, finally, that the national security considerations and other high policy purposes now actuating United States programs for assisting other nations should be subordinated to the objective of inducing them to accept American private capital.

In sum, the limits of an investment treaty are set by the degree to which the United States is willing to bind its own domestic policy and to waive the alien disabilities actually or potentially present in federal and state statutes. Thus, for example, such a strong investor-interest provision as one forbidding nationalization of private enterprise, or stipulating that expropriation may occur only if the compensation has been agreed upon and paid in advance, is not possible so long as the United States is unprepared to undertake such a predetermined restriction upon its own power of eminent domain. Further limits, in turn, are set in each case by the reservations which the foreign country concerned deems requisite for reasons of its own public policy, a circumstance which accounts in considerable measure for the variations among the several treaties so far signed. Their array of differences in the approach to "screening," for example, reflects the differing degrees to which different countries may insist that the "open door" principle, traditionally favored by the United States, be qualified by retention of the government's right to determine the acceptability of foreign investments on a case-by-case basis.

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The treaties developed for promotion and protection of foreign investment thus remain, despite the many improvements effected in them as compared with earlier treaties, essentially moderate in their content and purport. However, moderation is not synonymous with ineffectiveness. 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 his property. When this exists, the foundation exists; and perhaps the most effective role which treaties are capable of playing is in the laying of a sound and stable foundation. This fundamental role consists partly, but only partly, in the legal commitments which the document contains. Equally it consists in the general attitude which a country's willingness to assume these formal engagements signifies. These treaties are above all treaties of "friendship," as their title indicates; and their conclusion is evidence of a friendly disposition, an intangible which may be quite as important to the investor as the letter of his legal rights.

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Herman Walker, 83, Professor And U.S. Foreign Officer, Dies

By **WOLFGANG SAXON** MAY 13, 1994

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Herman Walker Jr., a former Foreign Service officer and emeritus professor of history, economics and political science at SUNY College at New Paltz, N.Y., died on Sunday at the New Paltz Nursing Home. A resident of New Paltz, he was 83.

He had been ill for a long time, said his wife, Evelyn Acomb Walker, an emiritus professor of history at New Paltz.

A native of Nashville, Dr. Walker graduated Phi Beta Kappa from Duke University, where he received his Ph.D. in 1937. He also studied at the University of Paris and received a master's degree from Harvard University.

He worked as an economist and legislative analyst for the Department of Agriculture. In World War II he served in the Army Air Force and the Office of Strategic Services. Negotiated Friendship Treaty

From 1946 until his retirement from the Federal Government in 1962 he was successively a treaty adviser to the Department of State, First Secretary in the United States Embassy in Paris, vice chairman of the United States delegation to the General Agreement on Tariffs and Trade conference in Geneva, and chairman of the Trade Agreements Commission.

In those years he helped shape the format for the Friendship, Commerce and Navigation Treaty adopted by the United States after World War II. He also played a

role in negotiating political and economic treaties with France and other countries.

After leaving Government service, Dr. Walker taught at Duke and at George Washington University until he moved to New Paltz State College in 1965 as chairman of the division of history and political economy. From 1969 until he reached emeritus status in 1977 he was chairman of the department of economics and political science.

In addition to his wife, Dr. Walker is survived by a son from his previous marriage to the late Betty Friemel Walker, Steven F. Walker of Highland Park, N.J.; and a sister, Martha Summer of Bradenton, Fla.

A version of this obituary; biography appears in print on May 13, 1994, on Page B00008 of the National edition with the headline: Herman Walker, 83, Professor And U.S. Foreign Officer, Dies.

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Office Memorandum — UNITED STATES GOVERNMENT

H — Assistant Secretary for Congressional Relations
JAN 4 1952
Department of State

TO : H - Mr. McFall

DATE: December 29, 1951

FROM : E - Mr. Thorp

SUBJECT: Early Senate Consideration of Commercial Treaties Signed During 1951.

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During the past year, the U. S. has signed treaties of friendship, commerce and navigation with Colombia (April 26), Greece (August 3), Israel (August 23) and Denmark (October 1); a treaty of amity and economic relations with Ethiopia (September 7); and an agreement with Italy supplementing the treaty of friendship, commerce and navigation of 1948 (September 26). Two of these instruments have already been transmitted to the Senate: those with, respectively, Colombia (Executive M) and Israel (Executive R), 82d Congress 1st session. The Report and Message on the Ethiopia treaty is now ready to be sent to the Secretary and White House for transmittal; and it is expected that the other three will very shortly be ready for transmittal.

These six instruments were all negotiated in connection with the Department's program of extending and modernizing the treaty protection of American citizens, corporations, capital, trade and shipping abroad, with special emphasis on establishing conditions favorable to private investment. The importance attached to keeping this program moving forward suggests the eminent desirability of Senate action on these six instruments during the 1952 session. It seems likely that this result might most probably be accomplished if the Foreign Relations Committee were able to schedule them for relatively early consideration, before the Senate becomes preoccupied with other items on its agenda or with pressure for adjournment. The major treaties of this group are of a type which has already been given Senate consideration and approval in connection with its advice and consent to the ratification of the treaty of friendship, commerce and navigation of 1948 with Italy (Executive E, 80th Congress, 2nd session), the treaty of friendship, commerce and economic development of 1949 with Uruguay (Executive D, 81st Congress, 2nd session), and the treaty of friendship, commerce and navigation of 1950 with Ireland (Executive H, 81st Congress, 2nd session). It is not believed that any of them is controversial, or that consideration of them is likely to impose a great burden on the Committee. I should therefore appreciate your seeing what can be done to have them expediently schedmled for action.

611.004/12-2951

DC/R Apr 31

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COMMERCIAL TREATIES WITH IRAN, NICARAGUA, AND THE NETHERLANDS

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

EIGHTY-FOURTH CONGRESS

SECOND SESSION

ON

Executive E, 84th Congress, 2d session

A TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS WITH IRAN

Executive G, 84th Congress, 2d session

A TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION WITH THE REPUBLIC OF NICARAGUA

AND

Executive H, 84th Congress, 2d session

A TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION WITH THE KINGDOM OF THE NETHERLANDS

JULY 3, 1956

Printed for the use of the Committee on Foreign Relations

UNITED STATES
GOVERNMENT PRINTING OFFICE
80068 WASHINGTON : 1956

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Thorsten V. Kalijarvi, Deputy Assistant Secretary of State for Economic Affairs, accompanied by Vernon G. Setser, Chief, Commercial Treaties Branch, and John J. Czyzak, Assistant to the Legal Adviser, Department of State 1

Annex 88

COMMERCIAL TREATIES WITH IRAN, NICARAGUA, AND THE NETHERLANDS

TUESDAY, JULY 3, 1956

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D. C.

The committee met, pursuant to call, at 10:30 a. m., in the committee room, United States Capitol Building, Senator Walter F. George (chairman) presiding.

Present: Senators George (chairman), Fulbright, Sparkman, Mansfield, Smith of New Jersey, Langer, Knowland, and Aiken.

The CHAIRMAN. We will hear you now, Mr. Kalijarvi on the 3 commercial treaties and ask you if you can combine your statement on the 3, pointing out such differences as may exist.

Mr. KALIJARVI. Mr. Chairman, I have a short prepared statement, a little over 2 pages, and I think perhaps it will be better for me to read it. I will just summarize the position of all three treaties.

The CHAIRMAN. All right, sir.

STATEMENT OF THORSTEN V. KALIJARVI, DEPUTY ASSISTANT SECRETARY OF STATE FOR ECONOMIC AFFAIRS, ACCOMPANIED BY VERNON G. SETSER, CHIEF, COMMERCIAL TREATIES BRANCH, AND JOHN J. CZYZAK, ASSISTANT TO THE LEGAL ADVISER, DEPARTMENT OF STATE

Mr. KALIJARVI. First of all, the Department appreciates very much the committee making a place on its crowded calendar for these three agreements which we feel are very important.

I am appearing before the committee in support of three treaties of friendship, commerce, and navigation—with the Netherlands, Nicaragua, and Iran. These treaties are similar to others considered by the committee during the past several years, particularly treaties with Germany, Japan, Denmark, Greece, Israel, and Ethiopia. They deal with the customary subjects, such as the right to carry on business, protection of persons and property, nondiscriminatory treatment of trade and shipping and, in the case of the Iran treaty, consular rights and privileges.

The 3 treaties now before the committee bring to 15 the total number of the same general type that have been negotiated during the present program, which was initiated at the end of the Second World War. This program is now being carried forward in accordance with the directions of the Congress as expressed in section 413 of the Mutual Security Act of 1954 (Public Law 665, 83d Cong., 1st sess.), which repeats as to general substance a provision of the 1952 act. This section provides that the President "shall accelerate a program

of negotiating treaties for commerce and trade * * * which shall include provisions to encourage and facilitate the flow of private investment to nations participating in programs under this act."

Although the principal immediate incentive in the netotiation of these treaties, is the desire to help create conditions favorable to foreign private investment, the treaties have a broader purpose which is to establish a general legal framework for the maintenance of economic and other relations between the parties to the treaties. A particularly desirable effect of the treaties, from the United States point of view, is to strengthen the hands of the Government for the protection of the interests of American citizens abroad in many fields of activity.

The three treaties now under consideration are of the traditional type, based upon existing precedents; they contain no innovations raising problems of reconciliation with domestic law. They differ somewhat among themselves and from other treaties negotiated in the past. The principal variations, which result from necessary adjustments to meet negotiating problems, are described in the reports of the Secretary of State that are printed with the treaty texts.

Senator KNOWLAND. Might I interrupt just a moment here?

EQUAL TREATMENT FOR AMERICAN CITIZENS

Is there anything in any of these treaties that would permit discrimination against any American citizen because of race, creed, or color?

Mr. KALIJARVI. Are you referring to religion?

Senator KNOWLAND. Religion, or anything else. In other words, are all American citizens treated as American citizens? The issue has been raised in certain agreements negotiated some years ago with a Middle Eastern country. It was not negotiated during this administration. I do want to know if all American citizens are treated equally, regardless of what their race, creed, or color may be, under these treaties.

Mr. KALIJARVI. Yes, it is my understanding they are.

I have with me Mr. Setser, who has negotiated these agreements before, and he can answer fully in that respect.

Mr. SETSER. There is nothing on that score, there is no distinction between American citizens on any ground.

Senator MANSFIELD. There is no Dharan clause?

Mr. SETSER. No, no.

Senator KNOWLAND. That question will arise in future treaties that come before us, so I trust the Department will have that in mind.

Mr. KALIJARVI. Yes, sir.

The treaties with Nicaragua and the Netherlands resemble very closely the Treaty of Friendship, Commerce, and Navigation with the Federal Republic of Germany, which was considered and approved by this committee and the Senate last session.

PROVISIONS OF IRAN TREATY

The treaty with Iran, on the other hand, differs appreciably from the Netherlands and Nicaragua instruments both as to form and substance. It is an abridged and simplified version of the treaty type, but incorporates, nevertheless, the substance of most of the protective provisions of the longer treaties. It does not deal with

rights of entry and establishment of foreign-owned enterprises, but assures in the same way as the longer treaties nondiscriminatory treatment of such enterprises once they are established.

The omission of entry provisions in this case came about because of the fear on the part of Iranian officials that to specify entry rights in any treaty would facilitate economic penetration by neighboring countries that would create a danger to national independence—a fear for which we could not deny there may be some basis.

The Iran treaty, as indicated by its title, deals also with consular privileges and immunities, a subject not included in most of the treaties of the present series. The Iran treaty is very similar to the Treaty of Amity and Economic Relations with Ethiopia, signed September 7, 1951, approved by the Senate July 21, 1954, and now in force.

SCOPE AND BENEFITS OF THE TREATIES

There are now represented in the network of treaties so far concluded under this program countries in nearly every major region of the world: South and Central America; Western, Southern, and Southeastern Europe; the Near East; Africa; Central Asia, and the Far East. This means that through these treaties we have secured a rather widespread acceptance by governments many of the basic concepts of free enterprise, of equality of competitive opportunity for the businessman, of private property rights, including the right to just compensation in case of expropriation by the State, of humane treatment of the alien and his interests in all respects.

While the principles incorporated in these treaties may seem basic and commonplace to us, that is not the case in many parts of the world. Therefore, negotiation of treaties of friendship, commerce, and navigation is seldom easy. We hope and believe that this group of treaties, into which we have put a great deal of effort, together with those like them that have been considered here before, can make at least a modest contribution to the development of the rule of law and of fair treatment of the foreigner and his enterprise, and thereby to an improvement in the general welfare of our own country and of the other parties to the treaties.

Senator SMITH. How long do these treaties last, Mr. Kalijarvi?

Mr. KALIJARVI. They run 10 years, subject to denunciation on a year's notice, and they will run, unless denounced——

Senator SMITH. For 10 years?

Mr. KALIJARVI. Yes.

With the committee or the chairman's permission, it might be desirable to insert into the record at this point a list of the agreements that have been entered into of this type since World War II; and there are also treaties concluded before 1920; treaties concluded between 1920 and 1940, because there is a long, distinguished history of these agreements.

We also have submitted to the committee staff a tabular statement indexing the provisions of the Netherland's and Iran treaties, as well as the Nicaraguan one, against the Treaty of Japan, approved in 1953; with the chairman's permission, we would like to insert that in the record at this point.

The CHAIRMAN. Very well.

(List of treaties of friendship, commerce, and navigation and tabular comparison are as follows:)

LIST OF TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION

TREATIES SIGNED SINCE WORLD WAR II

China—Treaty of friendship, commerce, and navigation signed at Nanking November 4, 1946 (entered into force Nov. 30, 1948).
Colombia—Treaty of friendship, commerce, and navigation signed at Washington April 26, 1951 (not in force).
Denmark—Treaty of friendship, commerce, and navigation signed at Copenhagen October 1, 1951 (not in force).
Ethiopia—Treaty of amity and economic relations signed at Addis Ababa September 7, 1951 (entered into force Oct. 8, 1953).
Finland—Protocol modifying the treaty of friendship, commerce, and consular rights (1934) signed at Washington December 4, 1952 (entered into force Sept. 24, 1953).
Germany—Agreement concerning application of the treaty of friendship, commerce, and consular rights (1923) signed at Vonn June 3, 1953 (entered into force Oct. 22, 1954).
Treaty of friendship, commerce, and navigation signed at Washington October 29, 1954 (will enter into force July 14, 1956).
Greece—Treaty of friendship, commerce, and navigation signed at Athens August 3, 1951 (entered into force Oct. 13, 1954).
Haiti—Treaty of friendship, commerce and navigation signed at Port-au-Prince March 3, 1955 (not in force).
Iran—Treaty of amity, economic relations, and consular rights signed at Tehran August 15, 1955 (not in force).
Ireland—Treaty of friendship, commerce, and navigation signed at Dublin January 21, 1950 (entered into force Sept. 14, 1950).
Israel—Treaty of friendship, commerce, and navigation signed at Washington August 23, 1951 (entered into force Apr. 3, 1954).
Italy—Treaty of friendship, commerce, and navigation signed at Rome February 2, 1948 (entered into force July 26, 1949).
Agreement supplementing the treaty of friendship, commerce, and navigation (1948), signed at Washington September 26, 1951 (not in force).
Japan—Treaty of friendship, commerce, and navigation signed at Tokyo April 2, 1953 (entered into force Oct. 30, 1953).
Netherlands—Treaty of friendship, commerce, and navigation signed at The Hague March 27, 1956 (not in force).
Nicaragua—Treaty of friendship, commerce, and navigation signed at Managua January 21, 1956 (not in force).
Uruguay—Treaty of friendship, commerce, and economic development signed at Montevideo November 23, 1949 (not in force).

TREATIES CONCLUDED 1920–40

Austria—Treaty of friendship, commerce, and consular rights signed at Vienna June 19, 1928.
El Salvador—Treaty of friendship, commerce, and consular rights signed at San Salvador February 22, 1926.
Estonia—Treaty of friendship, commerce, and consular rights signed at Washington December 23, 1925.
Finland—Treaty of friendship, commerce, and consular rights signed at Washington February 13, 1934.
Germany—Treaty of friendship, commerce, and consular rights signed at Washington December 8, 1923.
Honduras—Treaty of friendship, commerce, and consular rights signed at Tegucigalpa December 7, 1927.
Iraq—Treaty of commerce and navigation signed at Baghdad December 3, 1938.
Latvia—Treaty of friendship, commerce, and consular rights signed at Riga April 20, 1928.
Liberia—Treaty of friendship, commerce, and navigation signed at Monrovia August 8, 1938.
Norway—Treaty of friendship, commerce, and consular rights signed at Washington June 5, 1928.
Thailand—Treaty of friendship, commerce, and navigation signed at Bangkok November 13, 1937.

Turkey—Treaty of commerce and navigation signed at Ankara October 1, 1929. Treaty of establishment and sojourn signed at Ankara October 28, 1931.

TREATIES CONCLUDED BEFORE 1920

Argentina—Treaty of friendship, commerce, and navigation signed at San Jose July 27, 1853.
Belgium—Treaty of commerce and navigation signed at Washington March 8, 1875.
Bolivia—Treaty of peace, friendship, commerce, and navigation signed at La Paz May 13, 1858.
Borneo—Convention of amity, commerce, and navigation signed at Brunei June 28, 1950.
Colombia—Treaty of peace, amity, navigation, and commerce signed at Bogota December 12, 1846.
Costa Rica—Treaty of friendship, commerce, and navigation signed at Washington July 10, 1851.
Denmark—Convention of friendship, commerce, and navigation signed at Washington April 26, 1826.
France—Convention of navigation and commerce signed at Washington June 24, 1822.
Morocco—Treaty of peace and friendship signed at Meknes September 16, 1836.
Muscat—Treaty of amity and commerce signed at Muscat September 21, 1833.
Netherlands—Convention of commerce and navigation signed at Washington August 26, 1852.
Paraguay—Treaty of friendship, commerce, and navigation signed at Asuncion February 4, 1859.
Spain—Treaty of friendship and general relations signed at Madrid July 3, 1902.
Switzerland—Convention of friendship, commerce, and extradition signed at Bern November 25, 1850.
United Kingdom—Convention to regulate commerce and navigation signed at London July 3, 1815.
Yugoslavia—Treaty of commerce and navigation signed at Belgrade October 14 1881.

TABULAR COMPARISON

This table indexes the provisions of the pending treaties of friendship, commerce, and navigation with the Netherlands and Nicaragua and the treaty of amity and economic relations with Iran against comparable provisions in the like treaty of 1953 with Japan (Executive O, 83d Cong., 1st sess.), which received Senate approval July 21, 1953. Where the pending treaty lacks a comparable provision, however, or in some instances where another treaty affords a readier basis for comparison, cross-reference is made to an approved treaty with some other country.

This table is not intended to be interpretative, but is designed as an aid to the comparative analysis of the texts, by indicating where provisions dealing with the same subject matter in a similar, but not necessarily identical, manner may be found. Noteworthy variances between compared passages are shown by the notation "cf." or by parenthetical comments; but no effort is made to indicate minor differences.

Proposed treaties			Approved treaty, Japan
Netherlands Treaty	Nicaragua Treaty	Iran Treaty	
Art. I, par. 1	Art. I	Art. IV, par. 1	No identical provision (however, cf. art. V, par. 1).
Art. II, par. 2	Art. XIX, par. 1	Art. X, par. 1	Art. XIX, par. 1.
Art. II, par. 1	Art. II, par. 1	Art. II, par. 1. (Cf. Art. VI, par. 1, Ethiopia treaty.)	Art. I, par. 1.
Art. II, par. 2	Art. II, par. 3	No comparable provision.	No comparable provision (art. II, par. 2, German treaty).
Art. II, par. 3	Art. II, par. 2	Art. II, par. 2	Art. I, par. 2.
Art. II, par. 4	Art. II, par. 4	Art. II, par. 3	Art. I, par. 3.
Art. III, par. 1 (adds national and most-favored-nation treatment).	Art. III, par. 1	Art. II, par. 4 (less reference to international law standard).	Art. II, par. 1.

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Proposed treaties			Approved treaty, Japan
Netherlands Treaty	Nicaragua Treaty	Iran Treaty	
Art. III, par. 2	Art. III, par. 2	Art. II, par. 4 (with certain variations).	Art. II, par. 2.
Art. IV, par. 1	Art. IV, par. 1	No comparable provision.	Art. III, par. 1.
Art. IV, par. 2 (provides for less extensive coverage than Japan treaty).	Art. IV, par. 2	do	Art. III, par. 2.
Art. V, par. 1	Art. V, par. 1	Art. III, par. 2	Art. IV, par. 1.
Art. V, par. 2 (provisions somewhat more specific than in Japan Treaty).	Art. V, par. 2	Art. III, par. 3 (more general than in Japan treaty).	Art. IV, par. 2.
Art. VI, par. 1	Art. VI, par. 1	Art. IV, par. 2 (adds international law standard).	Art. VI, par. 1.
Art. VI, par. 2	Art. VI, par. 2	Art. IV, par. 3	Art. VI, par. 2.
Art. VI, par. 3	Art. VI, par. 3	Art. IV, par. 1 (somewhat broader than in Japan treaty; cf. art. VIII, par. 1, Ethiopia treaty).	Art. V, par. 1.
Art. VI, par. 4	Art. VI, par. 4	Art. IV, par. 2	Art. VI, par. 3.
Art. VI, par. 5	Art. VI, par. 5	No comparable provision.	Art. VI, par. 4.
Art. VII, par. 1	Art. VII, par. 1	No comparable provision. (Cf. art. IV, par. 4.)	Art. VII, par. 1.
Art. VII, par. 2 (differs somewhat from Japan treaty; cf. art. VII, par. 2, Germany treaty).	Art. VII, par. 2 (differs somewhat from Japan treaty; cf. art. VII, par. 2, Germany treaty).	do	Art. VII, par. 2.
Art. VII, par. 3	Art. VII, par. 3	No comparable provision.	Art. VII, par. 3.
Art. VII, par. 4	Art. VII, par. 4	do	Art. VII, par. 4.
Art. VIII, par. 1	Art. VIII, par. 1 (includes exception for employee nationality laws).	Art. IV, par. 4 (limited provision).	Art. VIII, par. 1.
Art. VIII, par. 2	Art. VIII, par. 2	Art. II, par. 2 (c) (limited provision).	Art. VIII, par. 3.
Art. IX, par. 1 (limited to treatment of Netherlands nationals in United States.)	Art. IX, par. 1	Art. V, par. 1 (most-favored nation instead of national treatment).	Art. IX, par. 1.
Art. IX, par. 2 (accords United States nationals national treatment), subject to reciprocity. (Cf. art. IX, par. 2, Israel treaty).	No comparable provision. (Cf. art. IX, par. 1.)	No comparable provision. (Cf. art. V, par. 1).	No comparable provision. (Cf. art. IX, par. 1).
Art. IX, par. 3	Art. IX, par. 3	Art. V, par. 1 (b) (not subject to national or most-favored-nation treatment).	Art. IX, par. 2.
Art. IX, par. 4 (adds national treatment as to acquisition certain property; cf. art. VII, par. 1, Ireland treaty).	Art. IX, par. 2	No comparable provision. (Cf. art. V, par. 1).	Art. IX, par. 3.
Art. IX, par. 5 (second sentence regarding rights of companies is new).	Art. IX, par. 4	Art. V, par. 1 (c) (less national treatment rule).	Art. IX, par. 4.
Art. X, par. 1	Art. X, par. 1	Art. V, par. 2 ("Effective protection" in place national and most-favored nation treatment).	Article X.
Art. X, par. 2	Art. X, par. 2	No comparable provision.	No comparable provision. (See art. X, par. 2, Germany treaty.)
Art. XI, par. 1	Art. XI, par. 1	Art. VI, par. 1	Art. XI, par. 1.
Art. XI, par. 2	Art. XI, par. 2	No comparable provision	Art. XI, par. 2.
Art. XI, par. 3	Art. XI, par. 3	Art. VI, par. 1	Art. XI, par. 3.
Art. XI, par. 4	Art. XI, par. 4	Art. VI, par. 3 (simpler provision, limited to companies; see art. X, par. 3, Ethiopia treaty)	Art. XI, par. 4.
Art. XI, par. 5	Art. XI, par. 5	Art. VI, par. 2	Art. XI, par. 5.
Art. XII, par. 1	Art. XII, par. 1	No comparable provision.	Art. XII, par. 1.
Art. XII, par. 2	Art. XII, par. 2	Art. VII, par. 1	Art. XII, par. 2.

Proposed treaties			Approved treaty, Japan
Netherlands Treaty	Nicaragua Treaty	Iran Treaty	
Art. XII, par. 3	Art. XII, par. 3	Art. VII, par. 2	Art. XII, par. 3.
Art. XII, par. 4	Art. XII, par. 4	Art. VII, par. 3	Art. XII, par. 4.
Art. XII, par. 5	Art. XII, par. 5	No comparable provision. (Cf. Ethiopia treaty, art. XI.)	Art. XII, par. 5.
Art. XII, par. 6	No comparable provision.	No comparable provision.	No comparable provision. (See art. XII, par. 6, Germany treaty.)
Art. XIII	Art. XIII	do	Art. XIII.
Art. XIV, par. 1	Art. XIV, par. 1	Art. VIII, par. 1	Art. XIV, par. 1.
Art. XIV, par. 2	Art. XIV, par. 2	Art. VIII, par. 2	Art. XIV, par. 2.
Art. XIV, par. 3	Art. XIV, par. 3	Art. VIII, par. 3	Art. XIV, par. 3.
Art. XIV, par. 4	Art. XIV, par. 4	Art. VIII, par. 4	Art. XIV, par. 4.
Art. XIV, par. 5	Art. XIV, par. 5	No comparable provision. (Cf. art. XII, Ethiopia treaty.)	Art. XIV, par. 5.
Art. XIV, par. 6	No comparable provision.	Art. VIII, par. 5 (generally comparable in substance; see art. XII, par. 5, Ethiopia treaty).	Art. XIV, par. 7.
Art. XV, par. 1 ("reasonable time" in place of 30-day or "enroute" rule; cf. art. XV, par. 1, Germany treaty).	Art. XV, par. 1	Art. IX, par. 1 (a) (c). (Abbreviated rule; see art. XII, par. 1, Ethiopia treaty).	Art. XV, par. 1.
Art. XV, par. 2	Art. XV, par. 2	Art. IX, par 1 (d) (abbreviated rule).	Art. XV, par. 2.
Art. XV, par. 3	Art. XV, par. 2, 2d sentence.	Art. IX, par. 1 (e)	Art. XV, par. 2, 2d sentence.
Art. XV, par. 4	No comparable provision.	No comparable provision.	No comparable provision. (See Art. XV, par. 3, Germany treaty.)
Art. XV, par. 5	Art. XVII, par. 3	Art. IX, par. 3	Art. XV, par. 3, (adds "subject to provisions of art. XII").
Art. XVI, par. 1	Art. XVI, par. 1	No comparable provision.	Art. XVI, par. 1.
Art. XVI, par. 2	Art. XVI, par. 2	do	Art. XVI, par. 2.
Art. XVII, par. 1	Art. XVII, par. 1	Art. XI, par. 1	Art. XVII, par. 1
Art. XVII, par. 2	Art. XVII, par. 2	Art. XI, par. 2	Art. XVII, par. 2.
No comparable provision.	Art. XVIII, par. 1	No comparable provision.	Art. XVIII, par. 1.
Art. XVIII, par. 1	Art. XVIII, par. 2 (clause at end is new).	Art. XI, par. 3	No comparable provision. (See art. XVIII, par. 2, Israel treaty.)
Art. XVIII, par. 2	Art. XVIII, par. 3	Art. XI, par. 4	Art. XVIII, par. 2.
Art. XIX, par. 1	Art. XIX, par. 2	Art. X, par. 2	Art. XIX, par. 2.
Art. XIX, par. 2. (See art. XXII (f) for "fisheries" exception.)	Art. XIX, par. 3	Art. X, par. 3	Art. XIX, par. 3, 6 (added provision on admission foreign vessels on reciprocity basis).
Art. XIX, pars. 3, 4 (added provision on transportation to or from port).	Art. XIX, par. 4	Art. X, par. 4	Art. XIX, par. 4.
Art. XIX, par. 5. (More specific provisions on vessels in distress; see art. XXI, Germany treaty.)	Art. XIX, par. 5 (abbreviated provision; see art. XIX, par. 5, Denmark treaty).	Art. X, par. 5. (Same as Nicaragua treaty.)	Art. XIX, par. 5.
Art. XIX, par. 6 (broader exception for war vessels).	Art. XIX, par. 6	Art. X, par. 6	Art. XIX, par. 7.
Art. XX, par. 1	No comparable provision.	No comparable provision.	No comparable provision. (See art. XXII, par. 1, Germany treaty.)
Art. XX, par. 2	do	do	No comparable provision. (See art. XXII, par. 2, Germany treaty.)
Art. XXI	Art. XX	do	Art. XX.
Art. XXII, par. 1	Art. XXI, par. 1, Art. XIV, par. 6 (a).	Art. VIII, par. 6 (a); art. XX, par. 1 (less provision on companies; see art. XVI, par. 1, Ethiopia treaty).	Art. XXI, par. 1, art. XIV, par. 6 (a).
Art. XXII, par. 2 (adds reservation for Netherlands).	Art. XXI, par 2, 4 (adds reservation for Nicaragua).	Art. XX, par. 3	Art. XXI, par. 2.

Proposed treaties			Approved treaty, Japan
Netherlands Treaty	Nicaragua Treaty	Iran Treaty	
Art. XXII, par. 3	Art. XIV, par. 6 (b, c)	Art. VIII, par. 6 (b, c)	Art. XIV, par. 6 (b, c).
Art. XXII, par. 4	Art. XXI, par. 3	Art. VIII, par. 6, concluding sentence.	Art. XXI, par. 3.
Art. XXII, par. 5	Art. XXI, par. 5	No comparable provision.	Art. XXI, par. 4.
Art. XXII, par. 6	Art. VIII, par. 2, concluding sentence.	Art. XX, par. 2	Art. XXI, par. 5.
Art. XXIII, par. 1	Art. XXII, par. 1	No comparable provision.	Art. XXII, par. 1.
Art. XXIII, par. 2	Art. XXII, par. 2	do	Art. XXII, par. 2.
Art. XXIII, par. 3	Art. XXII, par. 3	Art. III, par. 1	Art. XXII, par. 3.
Art. XXIII, par. 4 (added material regarding treatment United States companies in Netherlands).	Art. XXII, par. 4	No comparable provision.	Art. XXII, par. 4.
Art. XXIV (added provision regarding Netherlands colonies).	Art. XXIII	Art. XXIII	Art. XXIII. (See Denmark treaty, art. XXIII.)
Art. XXV, par. 1	Art. XXIV, par. 1	Art. XXI, par. 1	Art. XXIV, par. 1.
Art. XXV, par. 2	Art. XXIV, par. 2	Art. XXI, par. 2	Art. XXIV, par. 2.
Art. XXVI	No comparable provision (no existing agreements to be terminated).	Art. XXII	No comparable provision (no existing agreements to be terminated).
Art. XXVII	Art. XXV	Art. XXIII	Art. XXV.
No comparable provision	Art. X, par. 3 (adds "through normal commercial channels").	No comparable provision.	Art. V, par. 1, concluding clause.
Do	Art. XVI, par. 3	do	No comparable provision. (See art. XVI, par. 3, Colombia treaty withdrawn before Senate action.)
		Art. XII. (Cf. art. III, par. 1, Ethiopia treaty.)	
		Art. XIII, par. 1. (Cf. art. III, Ethiopia treaty.)	
		Art. XIII, par. 2. (See art. III, par. 2, Ethiopia treaty.)	
		Art. XIV, par. 1. (See art. IV, par. 1, Ethiopia treaty, also art. XIV, par. 1, United Kingdom Consular Convention, TIAS 2494.)	
		Art. XIV, par. 2. (See art. IV, par. 2, Ethiopia treaty, also art. XIV, par. 2, United Kingdom Consular Convention.)	
		Art. XIV, par. 3. (See art. IV, par. 3, Ethiopia treaty.)	
		Art. XV, par. 1. (Cf. art. VII, par. 1, United Kingdom Consular Convention.)	
		Art. XV, par. 2. (Cf. art. XII, par. 1, United Kingdom Consular Convention; also art. IV, par. 4, Ethiopia treaty.)	
		Art. XVI, par. 1. (See art. V, par. 1, Ethiopia treaty; cf, also art. XIII, United Kingdom Consular Convention.)	
		Art. XVI, par. 2. (See art. V, par. 2, Ethiopia treaty.)	
		Art. XVI, par. 3. (See art. V, par. 3, Ethiopia treaty.)	

Proposed treaties			Approved treaty, Japan
Netherlands Treaty	Nicaragua Treaty	Iran Treaty	
		Art. XVII. (Cf. art. IV, par. 2, and art. V, par. 4, Ethiopia treaty.) Art. XVIII. (Cf. art. III, par. 2, Ethiopia treaty; also art. X, XI, United Kingdom Consular Convention.) Art. XIX. (Cf. art. XV, United Kingdom ConsularConvention).	
Protocol, par. 1	No comparable provision.	No comparable provision.	No comparable provision. (See Protocol, par. 1, Germany treaty.)
Protocol, par. 2	Protocol, par. 1	Art. XX, par. 4	No comparable provision. (See Protocol, par. 2, Germany treaty.)
Protocol, par 3 (new)	No comparable provision.	No comparable provision.	No comparablep rovision.
Protocol, par. 4. (Second sentence is new).	do	do	No comparable provision. (See Protocol, par. 4, Germany treaty).
Protocol, par. 5	Protocol, par. 2	do	Protocol, par. 1.
Protocol, par. 6	Protocol, par. 4	No comparable provision. (Cf. art. IV, par. 2.)	Protocol, par. 2.
Protocol, par. 7 (new)	No comparable provision.	No comparable provision.	No comparable provision.
Protocol, par. 8	do	No comparable provision. (Cf. art. II, par. 2.)	Senate reservation relating to art VIII, par. 2.
Protocol, par. 9	do	No comparable provision.	No comparable provision. (Cf. Protocol, par. 10, Germany treaty.)
Protocol, par. 10 (new)	do	do	No comparable provision.
Protocol, par. 11	do	do	No comparable provision. (Cf. Protocol, par. 3, Denmark treaty.)
Protocol, par. 12	do	do	No comparable provision (See Minutes, ad art. XI, Denmark treaty.)
Protocol, par. 13	do	do	No comparable provision. (Cf. Protocol, par. 14, Germany treaty.)
Protocol, par. 14 (adds reference to "speculative financial operation").	do	do	Protocol, par. 6.
Protocol, par. 15	do	do	Protocol, par. 10.
Protocol, par. 16	Protocol, par. 7	do	Protocol, par. 11.
Protocol, par. 17	No comparable provision.	do	No comparable provision. (See Protocol, par. 20, Germany treaty.)
Protocol, par. 18 (new)	do	do	No comparable provision.
Protocol, par. 19	Protocol, par. 8	Art. XX, par. 3	Protocol, par. 12.
Protocol, par. 20	Protocol, par. 9	No comparable provision.	Protocol, par. 13 (adds reservation for Japan).
No comparable provision	Protocol, par. 3	do	No comparable provision. (Cf. art. IV, par. 2, second sentence.)
No comparable provision. (Cf. protocol, par. 10).	Protocol, par. 5	do	Protocol, par. 4.
No comparable provision	Protocol, par. 6	do	Protocol, par. 3.
Exchange of notes regarding European integration (new).	No comparable provision.	do	No comparable provision.

Senator KNOWLAND. I notice in your statement that:

They contain no innovations raising problems of reconciliation with domestic law.

Just for the record, I would like to ask whether there is anything in these treaties that would permit or allow, for instance, professional practice within the States or anything within the customary State laws, with which Americans must comply in order to practice professionally medicine, dentistry, or law, as the case may be?

Mr. KALIJARVI. No; there is nothing. That situation was met some years ago, and we appreciate very much the committee's concern on that point.

TREATY WITH HAITI NOT CONSIDERED

The CHAIRMAN. I think it might be well to call attention to the fact that the committee is not taking up, today at least, the treaty with Haiti.

Mr. KALIJARVI. That is correct.

The CHAIRMAN. For reasons which you understand, but which I think could be stated to the committee:

There is opposition to that treaty because of the omission of the clause relating to freedom of worship and conscience. There are objections filed with the State Department by the National Council of Churches of Christ in the United States, the National Association of Evangelicals, and the Baptist Joint Committee on Public Affairs. I might say that there are numerous letters from religious organizations objecting to the Haitian treaty simply because of the omission. All these other treaties do contain a guaranty of complete religious freedom in each of these countries.

Mr. KALIJARVI. That is right.

Senator FULBRIGHT. Of Americans in that country.

The CHAIRMAN. That is right; yes.

Mr. KALIJARVI. Yes. We have nothing to offer because our Constitution guarantees religious freedom.

The CHAIRMAN. Any further questions?

Senator LANGER. Do these treaties differ substantially from those that we had under William Jennings Bryan, Secretary of State?

Mr. KALIJARVI. There has been a modernization and streamlining of the agreements, Senator, since the Second World War.

Senator LANGER. I understand. Are they very similar to those under Woodrow Wilson?

Mr. KALIJARVI. They are basically the same. There are substantial elaborations in them of investments and other experiences that we have had since that time that give additional protection and rights to the Americans abroad.

TREATY ENFORCEMENT

Senator LANGER. For example, Mexico appropriated the oil lands.

Mr. KALIJARVI. You mean under its 1917 constitutional provision?

Senator LANGER. Yes.

Mr. KALIJARVI. I am informed we had no such treaty with Mexico at the time.

Senator LANGER. If you had had a treaty with Mexico, would it have been a violation?

Mr. KALIJARVI. Yes, with the treaties as drawn up at the present time.

Senator LANGER. What could you have done about it?

Mr. KALIJARVI. We could have made representations to the Mexican Government, we could have attempted to secure compensation through such means and instruments as are available to us—the international courts, diplomatic means, and otherwise.

Senator LANGER. Supposing, for example, the treaty with Nicaragua is violated—not denounced but violated—what can you do about it?

Mr. KALIJARVI. We have a claim against the Nicaraguan Government.

Senator LANGER. And you try that, would you, in Nicaraguan courts?

Mr. KALIJARVI. Well, presumably the first position to be taken would be a representation to the Nicaraguan Government pointing out the difference between the action proposed or contemplated and the agreement. If the Nicaraguan Government went ahead in spite of that, then presumably we would continue our representations and seek for an adjudication then in an international tribunal. I would assume that the company would attempt, if the corporation were located there, would attempt to exhaust the remedies available to it in the domestic courts, but if a government, say, in Nicaragua, proceeded to nationalize, the chances are that the courts would furnish little or no relief and the Government of the United States would have to intercede in behalf of its nationals.

MEMORANDUM OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK

The CHAIRMAN. I will have to go, and before going, I wish to put into the record and call your attention to it especially, Mr. Kalijarvi, and the State Department, a very thoughtful memorandum filed with the committee by the New York City Bar Association on the treaty with Iran. It is not objecting to the treaty, but they do ask certain pertinent questions which I think the State Department should answer and put into the record so that we may reply to the city bar association.

Mr. KALIJARVI. Yes, sir.

The CHAIRMAN. In it, they raise certain questions for the future, and ask why provision should not be inserted concerning enforcibility of arbitration awards, along the lines contained in the German treaty.

It might not be that you would answer all of those to the complete satisfaction of the bar association, but I think that should be put into the record.

(The statement referred to and the comments of the Department of State are as follows:)

JUNE 25, 1956.

DEAR SENATOR GEORGE: The committee on foreign law of the Association of the Bar of the City of New York engaged in a careful analysis of certain of the provisions of two recently signed commercial treaties between the United States and Haiti and Iran respectively.

I enclose two copies of the comments embodying this work of the committee, which it is felt may be of interest and assistance to you and the Committee on Foreign Relations.

Yours sincerely,

JAMES N. HYDE,
Chairman, Committee on Foreign Law, 1956–57.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON FOREIGN LAW, COMMENTS ON THE TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND THE RÉPUBLIC OF HAITI, OF MARCH 3, 1955, AND IRAN, OF AUGUST 15, 1955

The committee on foreign law of the Association of the Bar of the City of New York has, at its meetings in 1955–56, engaged in an analysis of certain of the provisions of the two recently signed commercial treaties with Haiti and Iran. These comments are limited to those provisions which apply to subjects with which the members of the committee feel qualified, on the basis of professional experience, to express an informed opinion.

These two treaties were negotiated in pursuance of the Department of State's program of drafting up-to-date and comprehensive commercial treaties with as many nations as practicable, with the aim of affording as much encouragement and protection to the carrying on of trade with, and participation in investments in, the countries involved. Such treaties are in the interest of American commercial and investing interests, although since treaties with sovereign nations are involved, they are necessarily cast in a reciprocal form. To that end a so-called model draft treaty was prepared by the Department some years ago, and continuously improved on the basis of experience in recent treaty negotiations. The various treaties concluded to date fall into a definite pattern, rather than each being negotiated on a completely ad hoc basis. There are, nevertheless, variances in the exact language of the provisions of the two treaties with Haiti and Iran, some of which may be of significance, and which will be commented on herein.

The comments which follow are not intended so much as specific criticisms of the particular treaty as it has been negotiated, or in any way as an indication that the committee opposes their ratification by the Senate. Their primary purpose is to be of constructive assistance to the State Department in negotiating further treaties of the same type, as well as (if deemed necessary) negotiating protocols or interpretory letters with regard to the particular treaties under consideration.

1. Provisions concerning access to courts

The Haitian and Iranian treaties contain provisions in articles V (1) and III (2) respectively (which, except for rather minor textual differences, follow closely the provisions of the draft treaty) guaranteeing, on a mutual basis the right of nationals and companies of either party to free access to the courts and administrative agencies of the other, on both a national and a more-favored-nation basis. A protocol to the Haitian treaty provides that the term "access" to courts includes legal aid and security for costs and judgment. No such protocol has been made in connection with the Iranian treaty, and, unless there are local circumstances peculiar to Iran and to procedures in that country's courts, with which the committee is not familiar, it is felt that the precedent set in the case of the Haitian treaty should be followed in the case of the Iranian treaty.

It has been also suggested that it would be appropriate in this connection to include provisions in commercial treaties for the reciprocal rendering of judicial assistance, for instance, in the taking of depositions. In the absence of such a treaty provision, American practicing lawyers have run into serious practical difficulties in obtaining testimony abroad, in such form as can be used in American courts. However, international judicial assistance is the subject of legislation now before Congress, which would appoint a commission to examine the entire problem and, it is hoped, draft a model treaty or protocol to existing treaties, which, taking the complexities of the problem into account, will provide a means for improving the situation on a reciprocal basis. It appears unlikely that the State Department will participate in the negotiation of provisions in general commercial treaties covering this subject until the proposed commission has submitted its recommendations. The committee, therefore, does not make any suggestions at this time in regard to the desirability of including provisions in this regard in the Haitian and Iranian treaties, except to point out that there is a need for treaty arrangements in the field, which should be negotiated, either in connection with commercial treaties, or in special treaties in the field of reciprocal judicial assistance.

A somewhat similar problem exists in connection with the reciprocal enforcement of foreign judgments, although the committee feels that, here, conventions should be negotiated only with countries whose judicial systems and standards are such that we would have confidence in the fairness of judgments rendered by that country's courts.

2. Enforcement of arbitration awards

Both the Haitian and Iranian treaties contain provisions concerning arbitration (art. V (2) and III (3) respectively). The language in the Haitian treaty is that of the so-called draft treaty, that the Iranian treaty is brief and more general. The provisions of both treaties concerning the enforceability of awards are couched in the negative (i. e., an award entered in a proceeding shall not be denied enforcement because of the alienage of one or more of the arbitrators, etc.) instead of the positive, as in the case of the treaty with West Germany of October 29, 1954 (art. VI (2)) where such awards are declared conclusive and enforceable (subject to certain qualifications). The committee prefers the provision contained in the West German treaty especially in the case of treaties with more important trading nations.

3. Consular protection of the rights of nationals

Both treaties contain provisions (Haiti art. III; Iran art. II (4)) which are intended to insure protection to citizens of the countries involved, in case of their arrest by the authorities of the other. The provisions in the Iranian treaty are couched in somewhat more general terms than in the case of the Haitain treaty. Thus it is provided that on demand of the arrested national, his diplomatic or consular representative is to be notified without unnecessary delay and that such representative have full opportunity to safeguard the interests of the arrested national (which would seem to be a good provision). The corresponding provision in the Haitian treaty (which follows the model treaty in this regard) requires that the consul be notified immediately which is preferable. However the Iranian treaty does add a desirable guarantee that the disposition of the case be prompt and impartial. Article XIX, dealing with the powers of consuls, also authorizes the consul to arrange for legal assistance. Unfortunately the sections of the Iranian treaty (arts. XII–XIX) which apply to consular rights are not quite as extensive as some of our recent consular conventions (e. g., with Costa Rica) which specifically guarantee, for example, the right of private access by the consul to the arrested national, nor does the treaty require the government to notify the consul of the detention of a national of the country he represents, the consul's rights depending solely on a prior "demand" on the part of the arrested national. The authorities of the receiving state before whom the consul may assist his nationals are not defined, so as to include the authorities of local political subdivisions (a possible loophole), and it is suggested that in addition the treaty should explicitly empower a consul to confer in his official capacity with all authorities of the receiving state concerning any criminal or civil proceedings to which one of his nationals is a party.

While the committee does not believe, on the basis of the above comparison of the Iranian treaty with other commercial and consular treaties to which the United States is a party, that this particular treaty entirely lacks teeth, so to speak, in affording protection to United States citizens (indeed some of the language is an improvement over comparable provisions in other treaties), it does believe that, except where local conditions in Iran or elsewhere, such as the lack of capable lawyers, suggest otherwise, the more specific provisions found in the other recent treaties are generally to be preferred, and that, if possible, a protocol be negotiated to cover the point of requiring the government to notify the consul whenever one of his nationals is detained.

4. Provisions with regard to taxation

There is a serious question as to the advisability of including provisions with regard to taxation in commercial treaties, other, perhaps, than a general pledge of national and most favored treatment. Tax laws and regulations throughout the world are complicated and technical. It should be the policy of the United States to negotiate specific bilateral conventions to avoid double taxation with as many countries as possible. Eighteen such conventions have been ratified through March 30, 1955. This approach is preferable to the rather broad language usually found in commercial treaties, and as is found in both the Haitian and Iranian treaties.

Subject to the above general comment, it is noted that inevitably there is somewhat of an inconsistency between the provisions of both treaties, which in effect ban more burdensome taxes than those borne by nationals of other countries and the simultaneous existence of treaties against double taxation which involve concessions to some countries and not others.

In article VI (3) of the Iranian treaty it is provided that "companies" (why not individuals or partnerships?) are not, in the territory of the other country

to be subject to taxes on any income or capital not attributable to operations or investment within such territory. This is all right as far as it goes, but the question of when earnings are attributable to one country rather than another is quite often the exact point at issue in any particular controversy, and the treaty does not provide any solution. Would some form of agreed arbitration of such a question be an acceptable answer to the problem?

5. Consular provisions

The treaty with Iran contains (articles XII to XIX) provisions concerning the powers and immunities of consuls, which are often found in separate consular conventions rather than in a general commercial treaty.

It is believed that these provisions are relatively standard in the light of current and accepted international practice. They provide for the qualified immunity of consular premises, exemptions from customs duties, tax exemption of official premises and official compensation, lack of jurisdcition of the receiving state over the consul's official acts and documents, and the right of a consul to communicate with his fellow nationals.

However, the consul's immunity from taxation is not absolute, and he is subject to taxation on income from sources in the receiving state, other than official compensation, on the ownership or occupation of immovable property, and on the passing of property at death, nor do any exemptions apply if the consul is a national of or a lawfully authorized immigrant in the receiving state.

It has been suggested (a) that a consul be wholly free of taxation in the receiving state, and that the exceptions referred to above are illogical, and (b) that there is no reason why a consul should not, in the absence of a violation of the general national interest of the sending state, be amenable to process from, and his files subject to production before, the courts of the receiving state. It is strongly suggested that such a modification of current practice, along with a requirement that the consul officially represent the nationals of the sending state in legal proceedings in the receiving state involving the status (e. g., marriage, divorce) of such nationals, would greatly simplify the proof of many official acts of foreign governments and generally modernize cumbersome problems of jurisdiction in international transactions. The committee feels that, whatever merit there may be to these suggestions. they should be embodied in a general renegotiation of consular conventions, and not in the particular treaty with Iran which the committee is considering.

6. Provisions with regard to ownership of property

Both treaties contain broad provisions dealing with the right to acquire property of various types in the territories of the other party, and for the protection of those rights. But, because of the broad sweep of the language, which means that the phraseology is, necessarily, imprecise. there are always loopholes through which the foreigner's rights, which are seemingly so broadly protected, may be eroded. On the other hand, the committee recognizes the difficulties of more precise drafting in this field, and the fact that, in a controversy, especially where national feelings are aroused, broad provisions may be as effective to protect the interests of investors abroad, at least as a foundation for diplomatic representations.

There are many differences in detail between the two treaties. In particular, the Iranian treaty has been drafted in more general terms than the Haitian treaty, which follows more closely the language of the model draft treaty. It will serve no useful purpose to review these differences in detail, other than to point out the following:

(*a*) The Haitian treaty (art. IX) guarantees to nationals and companies of the other party the right to national treatment in leasing and occupying real property, and national and most-favored-nation treatment in regard to purchasing or otherwise acquiring interests in personal property, subject to restrictions on alien ownership in certain fields such as banking and exploration of natural resources. The Iranian treaty (art. V (1)) guarantees the right to lease, for suitable periods of time, real property needed for residence purposes or the conduct of activities under the treaty, together with the right to purchase and dispose of personal property. In addition, most-favored-nation treatment is assured (possibly as a qualification in the broad sweep of the previous guaranties).

(*b*) In regard to inventions and trademarks the Iranian treaty (art. V (2)) guarantees, upon compliance with applicable laws concerning registration, etc. effective protection to nationals and companies of the other party in their exclusive use thereof. The Haitian treaty (art. X) promises national and most-favored-nation treatment in these matters.

(c) So far as the rights to establish a business or to make an investment are concerned, the Haitian treaty (art. VII) follows closely the provisions of the model treaty, which generally speaking are favored by the committee. National and most-favored-nation treatment is pledged, although certain rights are reserved to limit the rights of aliens generally in certain fields. The comparable provision of the Iranian treaty is far briefer and more limited. There is no guaranty of the right to establish an enterprise. However, once nationals or companies of the other party are permitted to establish an enterprise, they are to be freely permitted to conduct their activities in the host country "upon terms no less favorable than other enterprises of whatever nationality engaged in similar activities," including a guaranty of the right to continued control and management of such enterprises. The committee feels that the omission in the case of Iran of the right to establish a business, as in the "model" treaty upon which the Haitian and other recent treaties are based, is a serious defect, although there may be good reasons for such omission with which it is not familiar.

(d) There is a further omission in the Iranian treaty, which the committee feels should be corrected in a protocol. The provisions with respect to conducting a business refer to nationals and companies of the other country. No provision is made to protect the rights of companies organized under local laws, in which nations or companies of the other country have a controlling interest. In the Haitian treaty, this right of investment in local companies is specifically recognized in article VII, and both national and most-favored-nation treatment is guaranteed to such controlled enterprises. Further, in connection with the guarantee against expropriation of property without full and effective compensation, which is found in both treaties, a protocol to the Haitian treaty specifically provides that such provision extends to interests held directly or indirectly in property taken within the territory of the host state.

(e) Again, in connection with the right of individuals to enter the country in order to engage in business, the provisions of the model treaty (and of the Haitian treaty) are more definite than, and preferable to, those of the Iranian treaty. The right of entry in order to carry on trade and to develop or direct an enterprise in which such persons (or their employers) have invested is guaranteed by Article II of the Haitian treaty (as supplemented by protocol). In the case of Iran (art. II (1) most-favored-nation treatment only is promosed, and there is no provision with regard to the rights of employees of traders or investors to enter the country. Here again, Iran seems to have reserved to itself the right to exclude American businesses from its territory (although, to be sure, once admitted, it does agree to furnish a certain amount of protection).

(f) Both treaties contain provisions against expropriation or other taking of property, except for a public use, and only upon prompt payment of full and effective compensation. In this regard, the committee, while in agreement that these provisions of the treaty do accord with enlightened legal principles, and (within necessary limitations as to the effectiveness of treaties) that they afford considerable protection to United States investments in Haiti and Iran, believes that definitions of the words "property" and "taken" might be included, possibly by way of a supplemental protocol, which would—

(1) Conform the definition of "property" to that in the postwar treaties of peace, so as to cover all types of property, including intangibles (cf. art. 78 par. 9 (c) of the peace treaty with Italy); and

(2) Broaden the definition of "taking" so as to include measures which, though falling just short of a seizure of the full title to the property, effectively deprive its owner of the use and enjoyment thereof, for example, the appointment of a custodian.

7. Provisions with regard to waiver of sovereign immunity and state trading

The provision in the Haitian and Iranian treaties dealing with sovereign immunity are identical in the two treaties and reproduce the provisions in the model draft treaty. It reads as follows (Haiti, art. XVIII (2); Iran, art. XI (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."

The principle embodied in this provision is in accord with forward looking legal principles. It of course is consistent with the position taken in the famous Tate letter of 1952 (26 Department of State Bulletin 984). It does not attempt a

solution of the thorny problem of distinguishing on the facts of a given situation whether a particular activity of the state is an act jure gestionis or jure imperii. It will still be for the courts to decide whether for example purchasing shoes for the Army is a business or governmental activity. As none of the many attempts to define the distinction has been wholly successful, it is probably therefore best to leave the matter for judicial interpretation. Given the terms of the treaty, it may be expected that immunity will not be granted except in very clear cases of activities of purely governmental character.

One difficulty is however posed by the Iranian treaty when one compares the above-quoted provisions in article XI with article XV (2), which reads:

"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 improvements by which the premises are benefited."

Assume that the Iranian Government establishes a Government aviation company which operates both commercial and governmental services, i. e. combines the functions of, let us say, both Pan American and Military Air Transport Service. The company is a Government agency or instrumentality owned or controlled by the Iranian Government within the meaning of article XI (4) of the treaty with Iran. The company does engage in commercial activities within the United States. Under article XI (4) its property, including lands and buildings, is subject to taxation. But suppose one of these buildings is used exclusively for governmental purposes within the meaning of article XV (2); it would then, under that article be immune from taxation. The difficulty is that article XI is fundamentally based on ownership and the nature of the owner's activities, while article XV (2) is based on the use to which the property is devoted. The conflict between the two provisions is accentuated by the fact that article XV refers to situations in which the state is either the legal or equitable owner, which would seem to embrace various types of arrangements used for Government agencies and instrumentalities whether or not utilizing the corporate form.

In future treaties this inconsistency should be eliminated by drafting which would make it clear that the principle of article XI (4) prevails over that of article XV (2). In other words, if the agency or instrumentality does engage in business, all its property is subject to taxation even though some of it be used for strictly governmental purposes. It would also be advisable in redrafting the text of article XV (2) and article XI (4), to make clear whether property which under the former article is immune from taxation, is also immune from execution.

Both treaties (Haiti art. XVII, and Iran, art. XI (1) (2)) also contain provisions which are designed to insure, so far as can be, competitive equality between the private enterprises owned by nationals or companies of one country, on the one hand, and government-owned or controlled enterprises of the host country, on the other. The committee approves the purpose of these provisions, which follow the model draft treaty. It does suggest that the phrase "in accordance with customary business practice" which qualifies the promise of an "adequate opportunity to compete for participation in purchases and sales by or to government controlled enterprises or monopolies" be eliminated, because, in many areas of the world, such practices may well have the effect, if they are not deliberately so designed, of discriminating against foreign enterprises. It is also noted that, in the case of Iran, there is no guarantee of competitive equality in the award of concessions.

The Iranian treaty also contains a paragraph (art. XI (3)) not found in the Haitian treaty, based on art. XVIII (2) of the model draft treaty, which pledges in quite general terms, and subject to several qualifications, conditions of competitive equality between publicly owned or controlled trading or manufacturing enterprises, of the host country, and privately owned and controlled enterprises of nationals and companies of the other country. It is doubtful how far this protection applies to locally organized companies controlled by a foreign investor.

8. Provisions with regard to the exercise of liberal professions

While it is recognized that it is within a country's jurisdiction to enact rules and regulations for the general admission to liberal professions, it should also be noted that a too-restrictive exercise of a country's prerogative in this field may impede the flow of international trade and investments.

Closer attention should be given to the drafting of pertinent clauses in the treaties, i. e. article VIII (1) of the treaty with Haiti, and article IV (4) last sen-

tence of the treaty with Iran. The committee observes, as to the main inadequacies of the language of the respective clauses, the following:

It is too narrow to mention only "accountants and other technical experts," as is the case in the treaty with Haiti. To be sure, the treaty with Iran lists some professions such as attorneys, but also omits architects, engineers, or scientists. An atomic physicist, a geologist, or an agricultural specialist may oppose being classified as "technical expert."

The duration for which such experts are retained does not seem to be a controlling factor. There is no reason why an American company may not engage permanently overseas auditors for its overseas operations. Therefore the criterion in article VII of the Haiti treaty, that the employment shall be on a temporary basis, is not satisfactory.

Whether the expert is engaged to make reports or for some other purpose, does not appear to be so important. He would not be engaged unless his work were intended to benefit the operations of the persons by whom he was retained. It is important, however, that the foreign expert who is not admitted to practice in the foreign country emphasizes this fact and the restrictions to which he is subject, just as the American counsellor at law in Paris will clearly indicate "not admitted to the bar of Paris."

The language in the Haiti treaty (identical in this respect with that of article VIII of the treaty with West Germany), is too confined in that the expert must be retained either "by nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories." More often than not such experts will be engaged for the purpose of reporting on the possible acquisition of a future financial interest in such territory.

The committee, in summary, believes that a treaty clause permitting the employment of experts of one's own choice and nationality regardless of qualifications in such foreign country is highly desirable and important, but that its precise wording merits careful consideration.

Willis L. M. Reese, Chairman; Paul O. Bleecker; Peter Borie; Martin Domke; Phanor J. Eder; Austin T. Foster; Philip C. Jessup; Doris Jonas; Austin A. Laber; Andre Maximov; Charles P. Noyes; F. E. Oppenheimer; Albert J. Parreno; Howard R. Patch, Jr.; Otto C. Sommerich; Robert F. Weissenstein.

QUESTIONS RAISED BY NEW YORK CITY BAR ASSOCIATION MEMORANDUM ON THE TREATY WITH IRAN

1. The Bar Association of the City of New York, in the attached comments on the Haitian and Iranian treaties (the Haitian treaty is not being considered), points out the desirability of including in future treaties provisions for the reciprocal rendering of judicial assistance, for instance, in the taking of depositions. Would you give your views on this proposal?

2. The bar association favors a provision concerning the enforceability of arbitration awards along the lines contained in the German treaty (art. VI (2)). The provisions in the three treaties now being considered are more general, except for the Dutch treaty which contains a different provision relating to State courts. Why was it not feasible to use the German model provision in this regard?

3. The bar association points out that the consular provisions of the Iranian treaty are not quite as extensive as recent consular conventions and suggests that a protocol be negotiated to cover the point of requiring the Government to notify the counsel whenever one of his nationals is detained. Would you comment on this suggestion?

4. The bar association points out that the Iranian treaty contains a provision to the effect that companies of one nation, are not, in the territory of the other country to be subject to taxes on any income or capital not attributable to operations or investments within such territory. The question of when earnings are attributable to one country rather than another is often the exact point at issue in any particular controversy. "Would some form of agreed arbitration of such a question be an acceptable answer to the problem?" the association asks.

5. The bar association makes a number of suggestions concerning the provisions on ownership of property in the Iranian treaty. It considers the lack of guarantee of the right to establish an enterprise a serious defect. There is no provision to protect the rights of companies organized under local laws, in which nations or

companies of the other country have a controlling interest and this, the bar association feels should be corrected in a protocol. There is no provision with regard to the rights of employees of traders or investors to enter the country. And finally, the association suggests that the words "property" and "taken" should be defined in a supplemental protocol in accordance with their suggestion. (See p. 7.) What are your views on these comments and suggestions?

6. The association points out an alleged inconsistence between two provisions of the Iranian treaty on state trading. One provision states that no government enterprise in the nature of a business activity shall claim or enjoy tax immunity not enjoyed by private enterprises. The other states that government lands and buildings of one nation situated in the other and used for governmental purposes are immune from taxes. The association avers that these two provisions can work against each other and suggests that in future treaties this inconsistence be eliminated by making clear that the first provision prevails over the second one. It also suggests that the phrase "in accordance with customary business practice" in art. XI (1) (2), which qualifies the promise of an "adequate opportunity to compete for participation in purchases and sales by or to government controlled enterprises or monopolies" be eliminated. What are your views on these two suggestions?

7. With regard to the exercise of the liberal professions, the bar feels that it is too narrow to mention only "attorneys, agents, accountants, and other technical experts, executive personnel, interpreters and other specialized employees of their choice." Is it feasible to broaden this provision?

Response of the Department of State to the Questions Raised by the Bar Association of the City of New York

Generally, the Department finds the comments of the committee on foreign law of the Bar Association of the city of New York to be constructive and cogent. The officers immediately concerned with the negotiation of commercial treaties have the various suggestions under study with a view to utilizing them insofar as practicable in connection with future negotiations. Because of the necessity of exercising extreme care in matters relating to treaty provisions, it is not possible to give comprehensive and final answers to the above questions at the present time. Brief answers follow for each of the questions, however.

1. Judicial assistance is a subject with which the United States has had little experience as far as regulation by treaty is concerned. It would appear to be difficult to deal with it without encountering problems in Federal-State relations. Possibly the New York City Bar Association could propose specific provisions adapted for use in bilateral treaties.

2. The Department is in full agreement with the bar association's view that the arbitration provision in the German treaty constitutes a desirable model for treaties with the principal commercial states. That provision does not differ greatly in essential substance from the provision in the Netherlands treaty. The German model was before the Netherlands negotiators, but they preferred the form that appears in the Netherlands treaty. The provision in the Iran treaty was drafted in a very simplified form, in keeping with the general style of that treaty.

3. The consular provisions were included in the treaty with Iran for the reason that it was not considered feasible at this time to negotiate a detailed consular convention. Hence the provisions are less extensive than those in regular consular conventions. It was thought that, in view of the vast number of local jurisdictions in the United States and of the difficulty of keeping local officers informed as to treaty provisions, it would be entirely proper to make it a responsibility of the alien to request the authorities to notify his consul.

4. It is thought that the establishment of the general rule that companies should not be subject to taxes on income or capital not attributable to operations or investments within the territories of the taxing country is about all that's feasible in a general treaty of the type of that with Iran. More detailed rules as to the attribution of income, etc., are in the field of treaties for the avoidance of double taxation. Any significant tax controversy arising between the United States and Iran could, however, be adjudicated or otherwise dealt with under the provisions of article XXI.

5. It is agreed that it would be desirable to have in the Iran treaty a guaranty of the right to establish an enterprise, but it was not obtainable in this case for reasons that have been indicated elsewhere. We think that the rights of companies organized under the laws of one country but controlled by nationals and companies of the other are protected by article IV, paragraph 4 of the Iran treaty. The business of such a company would be an "enterprise which nationals and

companies of either high contracting party are permitted to establish or acquire" within the meaning of that paragraph. The right of employees of traders or investors to enter the country is dealt with on a most-favored-nation basis in article II, paragraph 1, and article XX, paragraph 4. That good definitions of "property" and "taken" would be helpful is admitted, and consideration should perhaps be given to developing them. In the light of experience, however, it is difficult to formulate a definition which would not have the effect of narrowing the scope of the treaty standard sought.

6. Consideration will be given to clarifying in future treaties the provisions relating to Government enterprises engaged in business activities. The reasons for suggesting the elimination of "in accordance with customary business practice" from article XI, paragraph 1, are not fully understood. Without some such qualification as the phrase establishes, "adequate opportunity" might be interpreted so broadly that serious difficulties might be created for governmental agencies in this country. The intent of the whole of this paragraph is to require to the fullest extent practicable governments to follow the principles and practices of the market place.

7. Consideration of a revision of the list of specialist personnel for which freedom of employment is provided, as in article IV, paragraph 4 of the Iran treaty, could well be undertaken. The itemization is only for illustrative purposes, however, all classes of specialists being covered by the concluding class "specialized employees." In any broadening of the provision, care would have to be exercised to avoid conflict with the established policy of the Senate of preventing any overriding of State laws restricting the practice of professions by aliens.

The CHAIRMAN. Senator Fulbright will take over the chair now, as I must leave.

Senator SMITH. I have some questions here I would like to ask of Mr. Kalijarvi and have him answer, which the staff has prepared.

Senator FULBRIGHT. I would suggest you do ask them now, if you care to, as it will take but a few minutes.

Senator SMITH. Very well.

Mr. Kalijarvi, here are some general questions we are asking for the record.

EFFECT ON DOMESTIC LEGISLATION

1. In the past, the committee has been concerned with questions of the practice of professions, of copyright, and of social security.

Is there any provision in the three treaties of the type to which the committee has attached reservations in the past?

Mr. KALIJARVI. The answer is no. On the professional and copyright matters, they have been negotiated with the committee's considerations or concern in mind, and there are no objectionable provisions that we know of in these agreements on those points.

Senator SMITH. Second. To what extent will provisions of these treaties affect Federal or State laws?

Mr. KALIJARVI. There will be a relationship, of course, but the conflict of laws which have been concerning us in the past we think has been reduced to a minimum in these agreements, and there is no basic inconsistency between the agreements and Federal and State laws.

THE SIMPLIFIED FORM OF TREATY

Senator SMITH. Three. At the time the Senate considered the treaty of amity and economic relations with Ethiopia, the committee was concerned lest the simple form of that treaty might become a precedent for others. It was assumed that the form was specially designed for Ethiopia. However, the Secretary of State's letter on the Iran treaty states that the treaty resembles most nearly the Ethiopian treaty. Is there a tendency toward usage of the less specific form of commercial treaties?

Mr. KALIJARVI. I think there has been a change in respect to the approach to these problems, especially as concerns the underdeveloped countries where the negotiating of the longer provisions, that is the treaties of friendship, commerce and navigation, and consular arrangements is extremely difficult, and there is under contemplation negotiation with some countries that is quite similar, Senator, to both the Ethiopian and Iranian treaties.

Senator SMITH. Then, we are moving on toward a simpler form with the underdeveloped countries.

Mr. KALIJARVI. That is right.

QUESTIONS ON THE IRAN TREATY

Senator SMITH. There are some special questions that I would like to ask for the record.

Has Iran ratified the treaty?

Mr. KALIJARVI. No, it has not.

Senator SMITH. Two. The Secretary of State's letter states that this treaty includes certain provisions normally found in consular conventions. Is it intended to negotiate a consular convention at a later date?

Mr. KALIJARVI. That is correct; a more detailed Consular Convention might be negotiated at a later date. It is thought, however, that the consular provision in this treaty will take care of our needs in that respect in Iran for some time.

Mr. SMITH. Three. The letter also points out that the commitments in article IV relate largely to the assurance of nondiscriminatory treatment once business enterprises have been established and do not deal with rights of entry and establishment.

Could you explain the significance of this more fully?

Mr. KALIJARVI. Well, there is a broader provision that we seek to get into our agreements, and under normal circumstances—well, I shouldn't say "normal circumstances," but with most countries we are able to provide for no screening of American enterprise as it comes in. This is the best provision that we can get with a country such as Iran, where we guarantee that the Americans, once they are in, will not be discriminated against.

The omission of entry provisions in this case came about because of the fear on the part of Iranian officials that to specify entry rights in any treaty would facilitate economic penetration by neighboring countries that would create a danger to national independence.

Senator SMITH. You testified about that a little bit earlier.

Mr. KALIJARVI. Yes.

Senator SMITH. Now, four: Article II, paragraph 2, provides that the nationals of one party in the territory of the other party 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.

Do those "applicable legal provisions" encompass State laws in the United States?

Mr. KALIJARVI. Yes; they do.

Senator SMITH. So much for Iran.

QUESTIONS ON NICARAGUAN TREATY

Now, the next is in regard to the treaty with Nicaragua.

One. Has Nicaragua ratified this treaty?

Mr KALIJARVI. No.

Senator SMITH. Two. Is the social security and workmen's compensation provision (art. IV) consistent with past practice in these treaties?

Mr. KALIJARVI. Yes, I am informed they are.

Senator SMITH. Three. Article VI, paragraph 4, limits the right to expropriate property to—

public purposes and reasons of social utility as defined by law.

What does "social utility" mean?

Mr. KALIJARVI. May I turn to Mr. Setser on that point, please?

Mr. SETSER. Senator, it has been customary in all of these treaties to specify in similar language that expropriation is only for public purposes, and the intent was to specify in this one that there should be a public object in any taking of private property.

Senator SMITH. Well, this says "public purposes and reasons of social utility."

Mr. SETSER. It was simply an additional suggestion in this case by Nicaraguan authorities. We don't think they had any other object than simply to express in their own language the idea of expropriation for public purpose.

Senator MANSFIELD. Mr. Chairman, might I suggest to the Senator from New Jersey that the State Department be requested to spell out what they mean by "social utility" and give us the definition of that term.

Senator SMITH. That is what the question was, "What does 'social utility' mean?"

Your suggestion is that they be asked to spell that out.

Senator MANSFIELD. Yes, they could supply a memorandum on it.

Senator FULBRIGHT. For incorporation in the record, do that, please.

(The information referred to is as follows:)

THE TAKING OF PROPERTY FOR PUBLIC PURPOSES

The introduction of the phrase "and reasons of social utility as defined by law" in the clause relating to expropriation in article VI, paragraph 4, of the Nicaragua treaty came about in the following manner. This treaty is based upon a draft supplied by the Department of State, and we used, of course, concepts and terms familiar to us. Some of our terms and concepts may not be familiar to officials in other countries, and they sometimes like to substitute for our terms, language that more nearly corresponds to that used in their own country. In this case, the Nicaraguan negotiator proposed the additional phrase quoted above, presumably because it would make the language of the treaty clause very similar to that in the property protection provision (art, 58) of the Nicaraguan Constitution. We believe there is no significant difference between the phrase "for a public purpose" as understood in this country and the phrase "for reasons of social utility" as understood in Nicaragua. In both the United States and Nicaragua, the right of eminent domain extends to any property the taking of which the constitutional authorities find to be necessary in the public interest. The significant part of the provision in question is, of course, that part which prescribes that property may not be taken, whatever the purpose, without prompt and just compensation.

Senator SMITH. Four. Is the reservation of rights in article VII, paragraph 2, a customary clause in these treaties?

Mr. SETSER. The question is—is the list of exceptions customary?
Senator SMITH. The reservation of rights in article VII.
Mr. SETSER. It is considered necessary to assure that there will be no conflict in the treaties with the Federal and State laws in a number of respects.
Senator SMITH. And, number five: Does article XX, pledging the parties to cooperate in the interchange of technical and scientific knowledge with a view to improving living standards, commit the United States to do anything in addition to what it does now? Would it, in the absence of a technical assistance program?
Mr. KALIJARVI. I would think not.
Senator SMITH. Six. Are articles XI, paragraph 5, and article XIV, paragraph 6 (c), designed along with article XXI, paragraph 4, to facilitate Nicaraguan participation in a Central American economic union?
Mr. KALIJARVI. Would you repeat those?
Senator SMITH. The question is: Are these articles designed to facilitate Nicaraguan participation in a Central American economic union?
Mr. KALIJARVI. Yes.
Senator SMITH. That is their purpose?
Mr. KALIJARVI. That is right.
Senator SMITH. Seven. Does the provision defining "coffee," article XVI (3), affect United States domestic laws?
Mr. KALIJARVI. This is designed to conform to our law.
Senator SMITH. Designed to conform with our law?
Mr. KALIJARVI. Yes.
Senator SMITH. Thank you. That is all for Nicaragua.

QUESTION ON THE NETHERLANDS TREATY

Now, Mr. Chairman, I have questions on the Netherlands treaty.
Number one: Has the Netherlands ratified this treaty?
Mr. KALIJARVI. No.
Senator SMITH. Two. The exchange of notes, in effect, provides that at such time as an agreement of European ecohomic unity is reached, the Netherlands need not accord national or most-favored-nation treatment to the United States and its nationals. Are we, in effect, thereby, providing special inducements to the Netherlands to assist in the development of closer European economic unity at the expense of benefits to United States citizens?
Mr. KALIJARVI. May I ask Mr. Setser to answer that question, please?
Mr. SETSER. The principal purpose of the exchange of notes is to permit or to relieve the Netherlands Government from according the United States most-favored-nation treatment principally in trade matters, when such privileges would create difficulties for a program of European integration, but it provides also that the United States might withdraw similarly from the Netherlands equivalent concessions, so that it is reciprocal in its terms. It is designed, of course, to facilitate Netherlands participation in European economic organizations.
Senator SMITH. We are protected by being permitted to withdraw similar privileges if they withdraw them?
Mr. SETSER. That is right.

STATUS OF RATIFICATIONS

Senator FULBRIGHT. Would the Senator yield for a question?

Senator SMITH. Yes.

Senator FULBRIGHT. Why must we always ratify first? In all three cases they are waiting on us. Why don't they ratify them?

Mr. KALIJARVI. I don't think we must necessarily ratify first, Mr. Chairman.

Senator FULBRIGHT. That seems to be the pattern. Why don't they go ahead or, put it the other way, why must we ratify first?

Mr. SETSER. In the case of Iran, a bill for approval of the treaty is before the Iranian Senate. It is still in session. It has not been acted upon yet. There was no indication that they are awaiting action by the United States Senate.

The Netherlands treaty has been laid before the States General, but they have not proceeded to action on it yet, but again we do not think there was any desire to delay, awaiting action by the United States.

Senator SMITH. That is the situation, though, as the chairman points out, in all three treaties. You said they haven't acted, we are expected to act first.

Mr. KALIJARVI. May I make this observation here: I don't know of any concerted or intentional delay until we shall have ratified. We are confronted by the desire to get these argeements approved before the Congress adjourns.

Senator SMITH. Did we initiate most of these agreements?

Mr. KALIJARVI. Yes, most of these agreements we initiated.

Senator SMITH. It is to our interest then to get them approved and to get the other countries to approve them also?

Mr. KALIJARVI. That is right.

OTHER PROVISIONS OF NICARAGUAN TREATY

Senator SMITH. The third question: The provisions concerning the rights to hold real property in this treaty are broader and more detailed than any since 1951. They provide that nationals of either party may acquire real property in the other, subject, however, to State and Territorial laws. If a State or territory accords a Dutch national or company less favorable treatment than its own residents in this matter, can the Netherlands accord a resident of that State less favorable treatment in the Netherlands? Has this formerly been used? Is it expected to be used in future treaties of this nature?

Mr. KALIJARVI. I am informed that it goes back before the war, Senator.

Senator SMITH. You mean that this is an old provision?

Mr. KALIJARVI. An old provision.

Senator SMITH. You mean before the war, in a Netherlands treaty, it doesn't apply to others, this is a Netherlands treaty?

Mr. KALIJARVI. We have had it in other treaties—not with the Netherlands. A provision somewhat similar to it was included in a treaty with Siam in 1937, and it is a provision we incorporate whenever we can.

Senator SMITH. The fourth question: The broadened provision concerning commercial arbitration provides that awards made thereunder shall be entitled in any court in any State of the United States to the same measure of recognition and enforcement as awards rendered in

other States of the United States. Will this provision require any change in any State laws?

Mr. KALIJARVI. I would think not.

Senator SMITH. This is No. 5: has the restrictive business practice provision been omitted in this treaty?

Mr. KALIJARVI. May I ask Mr. Setser to answer that, with respect to business practices and provisions.

Mr. SETSER. The Netherlands Government found those provisions unacceptable because their attitude toward the formation of cartels and the control of restrictive business practices is different from ours, and they did not wish to commit themselves on the subject.

Senator SMITH. You don't consider that a matter of any serious concern?

Mr. SETSER. We would like to obtain acceptance of the same policies that we follow in this country, but we cannot always obtain it, and in the case of the Netherlands, that is one of the cases where we could not obtain it.

Senator SMITH. Mr. Chairman, that completes the series of questions that the staff thought we ought to have replies to, in the record.

Senator FULBRIGHT. Any further questions?

(No response.)

Thank you very much. Mr. Kalijarvi.

Do you have anything further to add?

Mr. KALIJARVI. No.

Mr. MARCY. Senator, this should go in the record along with the action of the committee on these treaties.

Senator FULBRIGHT. This letter from the American Arbitration Association shall be made a part of the record.

(Letter from American Arbitration Association to the chairman of the Committee on Foreign Relations under date of June 22, 1956, is as follows:)

AMERICAN ARBITRATION ASSOCIATION,
New York, N. Y., June 22, 1956.

Hon. WALTER F. GEORGE,
Chairman, Committee on Foreign Relations,
United States Senate,
Washington, D. C.

MY DEAR SENATOR: The Committee on Foreign Relations will soon consider the treaties of friendship, commerce, and navigation between the United States and Haiti of March 3, 1955, and with the Netherlands of March 27, 1956.

These treaties embody, as a number of other commercial treaties have, a provision which will facilitate the reciprocal enforcement of arbitration agreements and of arbitral awards in trade controversies between nationals of the respective countries.

The State Department is to be highly commended for its contribution to the advancement and use of trade arbitration, by embodying the important provision in bilateral commercial treaties. We also note that when the enforcement of foreign awards against Americans is being sought in any State of the Union, the law prevailing in the respective State has to be observed. The application of State arbitration laws is thereby safeguarded.

This association has been dealing with foreign-trade arbitration, in the interest of the American business community for more than 30 years. We sincerely believe that the provision on reciprocal enforcement of arbitration agreements and awards protects American interests in the settlement of foreign-trade disputes. We therefore recommend a favorable consideration of the treaties with Haiti and the Netherlands.

Very sincerely yours,

SYLVAN GOTSHAL, *President.*

(Whereupon, the committee proceeded to the consideration of other matters.)

COMMERCIAL TREATIES

HEARING

BEFORE A

SUBCOMMITTEE OF THE
COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

EIGHTY-SECOND CONGRESS

SECOND SESSION

ON

TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND COLOMBIA, ISRAEL, ETHIOPIA, ITALY, DENMARK, AND GREECE

EXECUTIVES M AND R, EIGHTY-SECOND CONGRESS, FIRST SESSION, AND EXECUTIVES F, H, I, AND J, EIGHTY-SECOND CONGRESS, SECOND SESSION

MAY 9, 1952

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COMMERCIAL TREATIES

FRIDAY, MAY 9, 1952

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
SUBCOMMITTEE ON COMMERCIAL TREATIES
AND CONSULAR CONVENTIONS,
Washington, D. C.

The subcommittee met, pursuant to notice, in the committee hearing room, United States Capitol, at 10 a. m., Senator John Sparkman (chairman of the subcommittee) presiding.

Present: Senators Sparkman (chairman of the subcommittee) and Hickenlooper.

Senator SPARKMAN. Let the committee come to order, please.

The members of this subcommittee, in addition to myself, are Senator Fulbright, who is out of town, and Senator Hickenlooper.

The chairman of the Committee on Foreign Relations, Senator Connally, has asked this subcommittee to consider six treaties of friendship, commerce and navigation, now pending before the committee. The treaties now before us are the following:

Executive M (82d Cong., 1st sess.), treaty of friendship, commerce, and navigation with Colombia;

Executive R (82d Cong., 1st sess.), treaty of friendship, commerce, and navigation with Israel;

Executive F (82d Cong., 2d sess.), treaty of amity and economic relations with Ethiopia);

Executive H (82d Cong., 2d sess.), agreement supplementing treaty of friendship, commerce, and navigation with Italy;

Executive I (82d Cong., 2d sess.), treaty of friendship, commerce, and navigation with Denmark; and

Executive J (82d Cong., 2d sess.), treaty of friendship, commerce, and navigation with Greece.

I propose, if it is agreeable to the subcommittee, to ask representatives of the Department of State first to direct their comments to the six commercial treaties and then to the two consular conventions.

In recent years the Senate has given its advice and consent to treaties of friendship, commerce, and navigation with Italy in 1948, Uruguay, 1949, and Ireland, 1950. These postwar treaties are part of the program that the Department of State has been carying on over a period of years seeking to modernize treaties with a number of countries with whom earlier treaties were negotiated in the nineteenth century.

The Department of State, in a recent publication, has described these treaties as—

> a charter of the American citizen's rights when he is in a foreign country. They assure him for the most part the fundamental personal liberties that he enjoys in this country. They pledge constant protection and security for his person and property. They allow him to engage in the normal run of business pursuits, whether by himself or in association with others, and in general assure to him the privileges necessary to carry on his business effectively.

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The first witness this morning will be Mr. Harold Linder, Deputy Assistant Secretary of State for Economic Affairs. Mr. Linder, will you proceed, please, sir, in your own way?

STATEMENT OF HAROLD F. LINDER, DEPUTY ASSISTANT SECRETARY OF STATE FOR ECONOMIC AFFAIRS, DEPARTMENT OF STATE

Mr. LINDER. Senator, the treaties with Colombia, Greece, Israel, Ethiopia, and Denmark which are now before you bring to nine the number of treaties of this general type which have been signed on behalf of the United States since the war. You will recall that the first two treaties of this series, those with China and Italy, were considered by the committee in 1948 and those with Uruguay and Ireland 2 years later, and that those treaties were approved by the Senate. The treaty with Italy has now been supplemented by an agreement, also before you, designed to bring it abreast of developments reflected in the more recent ones.

SIMILARITIES AND DIFFERENCES BETWEEN THE COMMERCIAL TREATIES

While there are differences among these nine treaties, fundamentally they are alike. The treaties with Columbia, Denmark, and Israel follow closely the treaty with Uruguary, which in turn was a restated form of the one with Italy. The treaty with Greece is also based on the Uruguary model, but with changes in matters of form. The treaty with Ethiopia is a specially adapted version of the document negotiated with the other countries, involving considerable abridgment of the usual provisions and the addition of articles on diplomatic and consular officers no longer usual in this type of treaty. All these treaties also reflect differences of varying extent in matters of detail, both as a result of new or improved provisions which have been developed from time to time by the Department of State, with counsel, of course, from other agencies and as a result of the adjustments that inevitably occur during the give-and-take of negotiation. For example, the basic establishment provisions have been extensively restated in the treaty with Israel, additional provisions on shipping are included in the Greek treaty, and a provision regarding the use of the term "coffee" has been added to the treaty with Colombia. But the general objectives remain the same and, with the departures that may be noted in the case of Ethipoia, all the treaties go about realizing these objectives in essentially the same way.

The more notable differences in the several treaties now before you, both as among themselves and as compared with those previously approved by the Senate, are summarized in the report of the Secretary of State attached in each case to the President's message of transmittal. I want to submit now, for the convenience of the committee, copies of a tabular comparison which indicates in greater detail the similarities and differences of these instruments on a provision-by-provision basis. In my opening remarks I shall not attempt to repeat or elaborate on that information, leaving the discussion of details to be guided by the questions the committee might have. To assist in providing specific information about particu-

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lar provisions, I have with me two officers of the Department who have been immediately responsible for the technical aspects of these treaties.

I have these exhibits.

Senator SPARKMAN. They will be received and made a part of the committee files.

(The exhibits referred to were received and made a part of the committee file.)

Senator SPARKMAN. It was not your idea to have these printed in the record, but simply to be made exhibits?

Mr. LINDER. That is correct.

COMMERCIAL TREATY PROGRAM

The commercial treaty program is the oldest continuing economic program of our Government. It dates back to the beginning of our national independence and has been kept up, with minor interruptions, ever since. As a rule the first treaty concluded with a foreign country has tended to be a treaty of friendship, commerce, and navigation, which sets the framework in which our economic relations can be conducted on a stable basis for the future. The instrument aims at establishing the rule of law in our everyday relations with the country concerned, at protecting our citizens and their property in the foreign country, at promoting our trade, and at reducing discriminations against our shipping. An idea of the enduring character of these treaties may be gained from the fact that the treaty with Denmark now before you is to replace a treaty negotiated with that country in 1826 and the treaty with Colombia will take the place of one signed in 1846.

MODERN PHASES OF THE TREATY PROGRAM

While this is a traditional program with a history of over a century and a half, its modern phase dates from the years immediately after the First World War. At that time, a broadened and revitalized program devoted particularly to the expansion of our foreign trade was developed under the direction of Secretary Charles Evans Hughes. Negotiations were carried on extensively until the outbreak of World War II, resulting in the conclusion of treaties with 12 countries.

While the current program is a continuation of that instituted under Secretary Hughes, remaining similar in fundamentals to what has gone before, the present program reflects new emphasis occasioned by problems which have taken on increased importance in recent years. The consular provisions have been detached in the interest of more effective treatment of each subject matter. The form and content of the treaty has been expanded and revamped; and the pace of negotiation has accelerated. In this connection it may be noted that in the first 6 years after the end of World War I three treaties were concluded. In the same length of time after World War II nine treaties have been signed, although the commitments contained in the current treaties tend to be more far-reaching, and the general international climate is less sympathetic to the free-enterprise premises on which these treaties are based. Moreover, as you will recognize,

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governments all over the world are constantly preoccupied with pressing and critical problems—not exactly an atmosphere conducive to negotiations of agreements of the type now before you.

EMPHASIS ON ENCOURAGING PRIVATE INVESTMENT ABROAD THROUGH GREATER PROTECTION OF THE INVESTOR

Perhaps the most important respect in which the current treaties differ from those of the twenties and thirties is in the greatly increased emphasis on the encouragement of American private investment abroad, by the expansion and strengthening of provisions relating to the protection of the investor and his interests. This development, of course, reflects the process of continuous adjustment to the needs and conditions of the era in which negotiation takes place. The United States came out of the war with a greatly expanded industrial machine and, alone among the major nations of the world, with a surplus of private capital available for export. To encourage the investment of this capital in the production of goods and services abroad was a matter of importance to our domestic economy and to economic development and world prosperity generally. Apart from these purely economic considerations, moreover, foreign investment can strengthen the common defense and promote the prevalence of ideas of individual liberty and individual initiative under law.

The basic aim of these new provisions has been to safeguard the investor against the nonbusiness hazards of foreign operations, an objective emphasized by the Congress in the Act for International Development of 1950. There is no intent here, of course, to shield the investor from the economic risks to which venture capital is subject, a matter which cannot and should not be reached through international agreement. However, there are grave hazards of a nonbusiness nature which have become characteristic in overseas business operations since the war. They assume many forms: Inequitable tax statutes, confiscatory expropriation laws, rigid employment controls, special favors to State-owned businesses, drastic exchange restrictions, and other discriminations against foreign capital. Taken together, they can be a formidable obstacle to the American investor, for they impair from the very start the prospect of fair competition and a reasonable profit. Yet these hazards are not infrequently legal rather than economic, and they can be checked to a substantial extent by treaties which establish mutually agreed standards of treatment for the citizens and enterprises of one country within the territories of another.

RIGHTS OF CORPORATIONS RECOGNIZED

Perhaps the most striking advance of the postwar treaties over earlier treaties is the cognizance taken of the widespread use of the corporate form of business organization in present-day economic affairs. In the treaties antedating World War II American corporations were specifically assured only small protection against possible discriminatory treatment in foreign countries. In the postwar treaties, however, corporations are accorded essentially the same treaty rights as individuals in such vital matters as the right to do business, taxation on a nondiscriminatory basis, the acquisition and enjoyment of real and personal property, and the application of exchange controls.

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Furthermore, the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the other country and controlling and managing the affairs of such local companies. The legal reason inhibiting a more extensive provision for corporations in earlier treaties (namely, the reserved rights of the states as to the admission of foreign corporations) has been solved in the current treaties by a formula which equates the alien corporation to other out-of-state corporations, rather than to the domestic corporation, for purposes of "national treatment" in the United States.

PROBLEMS ARISING OUT OF STATE OWNERSHIP OF ECONOMIC ENTERPRISES

Another significant feature of the postwar treaties of interest to the prospective investor is the body of provisions which deals with problems arising from the state ownership of economic enterprise. There is a growing tendency abroad for the real competitor of private business to be the government itself. The Department of State has, accordingly, endeavored to work out treaty provisions designed to reduce the hazards of unfair competition from state-controlled businesses. These clauses provide assurances of most-favored-nation treatment in the conduct of state-trading operations and in the awarding of government contracts and concessions. They also establish broadened rules governing the carrying out of nationalization programs. There are as well newly developed provisions, found first in the 1948 treaty with Italy, to assure American private business concerns which must compete with foreign state-owned concerns the same economic favors that the latter received from their government, and to assure that state-owned commercial enterprises of the one country engaged in business in the other country will not be immune from taxation, suit, or other normal liabilities by reason of their public character.

PROVISION ON EXCHANGE CONTROL

Another important development in the post-World War II treaties is the provision on exchange controls. The formulation of such a provision poses difficulties. Many foreign countries have a genuine need to protect their limited foreign-exchange reserves in order to insure that the highest-priority needs of their economy are met. At the same time, there is a real need for liberal provisions on withdrawals of earnings that will afford a proper protection to investors. We have sought to achieve a fair balance between the two factors.

OLDER PROVISIONS REVISED

In addition to the innovations introduced to better the climate for investment, substantial improvements have been introduced in provisions of longer standing. The rules on expropriation of property have been worked out in more detail; more explicit assurances have been formulated on basic personal freedoms and protection for the individual; and clauses have been added on freedom of communication and of reporting. Provisions on commercial arbitration and the employment of technical personnel have been added; and traditional

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provisions for nondiscriminatory treatment of shipping have been strengthened.

The continuing process of revamping of the standard provisions has benefited these treaties as a whole, both as to content and language. What we hope constantly to achieve is stronger articles, fewer exceptions and, above all, a document which can give the American citizen who goes abroad, whether for business, pleasure, livelihood, or study, a firm and clear body of rights and privileges.

MUTUALITY OF RIGHTS ACCORDED BY THE TREATIES

So far I have spoken mainly about the rights these treaties assure and the protection they give to American citizens and businesses in foreign countries. However, these treaties are not one-sided. They are drawn up in mutual terms, in keeping with their character as freely negotiated instruments between friendly sovereign equals. Rights assured to Americans in foreign countries are assured in equivalent measure to foreigners in this country. In undertaking treaty commitments that would formally confirm to foreigners a substantial body of rights in the United States, the Department of State has exercised great care to frame provisions that would be in conformity with Federal law. The exception is that article VII of the supplementary agreement with Italy provides for the development of arrangements not provided for by existing Federal statute regarding totalization of social-security benefits. Furthermore, where the subject matter covers fields in which the States have a paramount interest, such as the formation and regulation of corporations and the ownership of property, the treaty provisions have been worked out with the same careful regard for the States' prerogatives and policies that has traditionally characterized agreements of this type.

LIMITATIONS AND OBJECTIVES OF THE TREATIES

These documents are concerned primarily with legal conditions and with the effect such conditions may have on economic activities carried on across international boundaries. While they are comprehensive documents, they are not able to remove all legal impediments to investment, owing both to the inherent nature of such a treaty and the complexity of present-day economic affairs. While these treaties are concerned with everyday matters, they are not exclusively economic in nature or purpose; they are also, and perhaps above all, treaties of friendship. Their objectives are the normal objectives of friendship between nations: to protect the foreigner, to maintain good order in everyday affairs, to encourage mutually beneficial relations, to strengthen the rule of law in the dealings of one nation with another. They are practical expressions of good faith and good neighborliness as much as they are legal contracts. Their worth rests as much on their equity and reasonableness as on the number and scope of the privileges they specify; and their spirit, which goes beyond the limits and wording of the treaties themselves, is in every way as important as the letter of the undertakings they actually make.

The Department of State for many reasons regards these treaties as an important element in promoting our national interests and build-

ing a stronger economy within the free world through the traditional American means of private enterprise; and it is most gratified that your committee is finding time from a very crowded calendar to give them its study and attention.

Thank you, Mr. Chairman.

Senator SPARKMAN. Thank you, Mr. Linder.

ENCOURAGEMENT OF PRIVATE INVESTMENT

Now let me ask you a few questions pertaining to this. You are familiar with the provision in the proposed Mutual Security Act of 1952, written in by the House in the following language—or, rather, reported out by the House committee; the House has not acted on it yet (reading):

> The Department of State shall accelerate a program of negotiating commercial and tax treaties or other arrangements where more suitable or expeditious, which shall include provisions to encourage and facilitate the flow of private investment to countries participating under this Act.

Are these proposed treaties which we have before us now designed to accomplish this purpose?

Mr. LINDER. I think without question, Mr. Chairman, they provide a climate in which private investment can flow. They do not guarantee private investment, but I think it is fair to say that without such treaties certain impediments exist which would retard the flow of investments, and to that extent I think they stimulate them.

Senator SPARKMAN. You think they represent a step forward?

Mr. LINDER. Very definitely.

Senator SPARKMAN. What is the effect of the unconditional most-favored-nation clauses in these treaties?

MOST-FAVORED-NATION CLAUSES AND "NATIONAL TREATMENT"

Mr. LINDER. Well, I have referred to both most-favored-nation clauses and I have also referred to the expression "national treatment." The most-favored-nation clause guarantees to us that we shall receive equivalent treatment to any treatment accorded to any other nation. "National treatment" insures that our own nationals or corporations will receive treatment equal to the treatment accorded to the nationals of the country with which we have the treaty.

Senator SPARKMAN. That is, their nationals in this country?

Mr. LINDER. No; their nationals in their own country.

Senator SPARKMAN. I see; so as to make uniform national treatment.

Mr. LINDER. That is correct.

Senator SPARKMAN. Let me ask you, do some of the treaties contain the most-favored-nation clause and others contain the national-treatment clause?

Mr. LINDER. I think it is fair to say that all treaties contain both. There are times when the most-favored-nation clause is more important than the national-treatment clause, because the country with whom we have the treaty may have accorded rights to other foreigners which are better than the rights they have accorded to their own nationals. On the other hand, there are times when the national-treatment clause is more important, because rights accorded to the nationals of that country may not have been accorded thus far to any

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other foreigner; and, therefore, we strive to get in that case national treatment.

Senator SPARKMAN. And you have worked in these treaties to get the mst favored position for our nationals?

Mr. LINDER. We have, sir.

PROTECTION AGAINST NATIONALIZATION

Senator SPARKMAN. Do these treaties give Americans any protection in the case of nationalization of properties affected with American interest?

Mr. LINDER. I think they give a great deal of protection, Mr. Chairman. The basic rule, of course, is that if there is to be nationalization—and we do not feel that we can negotiate a treaty which would deny another government the right to nationalize property—there must be for the American interest prompt, just, and effective compensation.

In addition to that, there must be national treatment or most-favored-nation treatment, whichever is the better from our point of view. In other words, they cannot nationalize us when they do not nationalize other industries engaged, or other businesses engaged, in the same type of business. They can't pick us out so that we become discriminated against.

These standards of as good treatment as their own nationals get, or as good treatment as the national of any other country gets, are not enough. In addition to that, we go back to our basic thing: That there must be full compensation, and that it must be prompt and just and effective, and that it must also contain provisions which will permit the conversion of that compensation from a local currency back into dollars; and, further, in addition to that, we have taken the position—I think most effectively—that countries that propose nationalization must have planned the thing sufficiently so that they are able to meet the conditions of our treaties. They can't just say they are going to nationalize without making provision in advance for that nationalization, without knowing where the money is going to come from, how they are going to nationalize, what the criteria of "just compensation" are going to be; and, in other words, just decide that they are going to nationalize.

TAXATION PROVISIONS

Senator SPARKMAN. Do these treaties give protection to Americans and American corporations against discriminatory treatment with respect to taxation?

Mr. LINDER. These are not tax treaties; that is to say, they do not provide for——

Senator SPARKMAN. I understood in your direct statement you did include some reference to taxation.

Mr. LINDER. They do include a guaranty that we will not be taxed in any country, and no American corporation will be taxed, beyond the activities of that corporation within the country. That is to say, if a large American corporation has a subsidiary operating in a foreign country, the only thing the foreign country can tax is the business that is conducted within its territory. To that extent the answer surely is "Yes."

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Furthermore, we do have provisions which will insure that we will not be taxed, or our corporations will not be taxed, beyond the tax that is enacted by that government and affects its own nationals, and also we have the guaranties with respect to most-favored nation.

Senator SPARKMAN. In other words, those provisions apply to the matters of taxation as well as they do to anything else?

Mr. LINDER. They do.

REFERENCES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE

Senator SPARKMAN. Some of these conventions refer to the General Agreement on Tariffs and Trade. Do these references imply in any way to congressional approval of that?

Mr. LINDER. They do not, sir; but I would like to answer, if I may, sir, for the record, that statement a little bit more carefully by reading an excerpt from a letter which we addressed to Senator Millikin in respect to this point. Our letter read:

> The purpose of this kind of provision is not to obtain Senate approval of the general agreement. Its purpose is simply to clarify the relationship between the treaty and the General Agreement on Tariffs and Trade, where the two instruments exist side by side, so as to obviate possible confusion concerning the international rights and obligations of a country which is party to both instruments. The provision is thus in the interests of orderly treaty procedure. Being framed in the form and style of a reservation, to provide for a contingency, it does not in any way bind the United States as to participation or nonparticipation in the General Agreement on Tariffs and Trade.
>
> The Senate has already given advice and consent to ratification of two treaties containing a nearly identical clause which also refers to the charter for an international trade organization (Treaty of Friendship, Commerce, and Economic Development with Uruguay, signed November 23, 1949, 81st Cong., 2d sess. * * * and Treaty of Friendship, Commerce, and Navigation with Ireland, signed January 21, 1950). * * * We do not consider that Senate action on these treaties constitutes approval by the Senate of the General Agreement on Tariffs and Trade.

REFERENCES TO COPYRIGHT MATTERS

Senator SPARKMAN. Are there any provisions in these treaties, or any one of them, that affect the copyright laws?

Mr. LINDER. No; there are not.

Senator SPARKMAN. The copyright laws of the United States?

Mr. LINDER. I do not think there are.

Senator SPARKMAN. I believe we have had a letter from the State Department with reference to that, have we not? It might be well to incorporate that in the record at this point.

There will be placed in the record at this point an exchange of letters between Mr. Arthur Fisher, Register of Copyrights of the Library of Congress, and Mr. Adrian S. Fisher, Legal Adviser to the Department of State, under dates of April 23 and May 6, 1952.

COPYRIGHT OFFICE,
THE LIBRARY OF CONGRESS,
Washington 25, D. C., April 23, 1952.

Mr. ADRIAN S. FISHER,
Legal Adviser, Department of State, Washington 25, D. C.

DEAR MR. FISHER: There are presently pending before the Senate Foreign Relations Committee treaties of friendship, commerce, and navigation with Colombia, Greece, Israel, Ethiopia, Italy, and Denmark, similar to those ratified within the past few years with Uruguay and Ireland. In connection with these latter two treaties, there appeared in the report of the Senate Foreign Relations

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Committee a statement to the effect that neither treaty touched on any question of copyright.

In view of the fact that the six pending treaties have provisions similar to those embodied in the treaties relating to Uruguay and Ireland, it would seem to follow that the pending treaties also do not relate in any manner to questions of copyright. Kindly advise me whether or not my understanding is correct in this respect.

Sincerely yours,

ARTHUR FISHER,
Register of Copyrights.

DEPARTMENT OF STATE,
Washington, May 6, 1952.

Mr. ARTHUR FISHER,
Register of Copyrights, Copyright Office, The Library of Congress.

MY DEAR MR. FISHER: Reference is made to your letter of April 23, 1952, in which you request confirmation of your understanding that certain treaties which are presently pending before the Senate Foreign Relations Committee do not relate in any manner to questions of copyright.

You are advised that your understanding in this respect is correct and that the treaties of friendship, commerce, and navigation with Colombia, Denmark, Greece, and Israel, the treaty of amity and economic relations with Ethiopia, and the agreement supplementing the treaty of friendship, commerce, and navigation with Italy do not relate to copyright matters.

Sincerely yours,

JACK B. TATE,
Acting Legal Adviser.

Senator SPARKMAN. Mr. Linder, in a statement that has been submitted in letter form from the National Foreign Trade Council a suggestion is made for a broader investment clause. Are you familiar with that?

Mr. LINDER. Sir, I saw the letter just as I came in. I really have not had an opportunity to study it.

Senator SPARKMAN. He starts out discussing it on page 5 and continues on page 6. I wonder if you could discuss that and tell us why the State Department has not been able to get this broad coverage.

Mr. LINDER. Mr. Chairman, I am a little loath to discuss it because I have given it only the most superficial reading.

CONVERTIBILITY IN EVENT OF NATIONALIZATION

Senator SPARKMAN. I wonder if I might ask this question, that might at least show it a little more clearly on the record. As I understand, these treaties provide for convertibility in the event of nationalization or taking over.

Mr. LINDER. They do, sir.

Senator SPARKMAN. They provide first for compensation, and that that compensation shall be in dollars rather than in the currency of the country, for the amount that was originally invested in the company. The Foreign Trade Council, as I understand it, recommends that the entire amount that has gone in, the earnings that have been plowed back in, should be covered also.

Mr. LINDER. We think they are covered.

Senator SPARKMAN. You think they are covered by these treaties?

Mr. LINDER. I think they are. As I understand, the way this treaty would be interpreted in case of an expropriation is that this specific clause does not in any way impair just compensation, and just compensation and equitable compensation must be in terms of the value which then exists.

Senator SPARKMAN. The question was raised as to ambiguity in the provision. The Foreign Trade Council particularly points out a qualifying phrase "which they have supplied." The contention of the Foreign Trade Council is that this might be held to apply only to the amount of capital originally supplied, and that it would not cover the investments that had been plowed back.

Now, is it your interpretation that it does cover the reasonable value of the entire capital structure?

Mr. LINDER. Yes, sir; that is my interpretation, and I am sure, while I didn't take an active part in the negotiation of any one of these, that that is clearly understood on the part of each signatory to any of our treaties. I don't think it would make any sense whatever to talk only in terms of an original investment. W. R. Grace & Co. made an investment in Chile 120 years ago, or certainly a long, long number of years ago, and there may have been an accumulation of earnings in that company over a very long period of time. Surely if that property were to be expropriated by the Chilean Government the original investment could not in any sense be regarded as a just and equitable standard for compensation. What must be determined is the value of the property as it exists at the time it is expropriated, and while, as I say, I have a certain reluctance to discuss this in detail (*a*) because I am not a lawyer and (*b*) because I have not read carefully the comment of the Foreign Trade Council, I feel reasonably certain of my ground in stating as I have, that it does cover the investment, as it exists at the time of expropriation.

Mr. HERMAN WALKER, Jr. (Office of Assistant Secretary of State for Economic Affairs). We have a specific clause on expropriation which says:

> 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 the expropriation for determining and effecting such compensation.

Senator SPARKMAN. Now let us go one step further. That is as far as compensation. I wonder if you can point out the clause relating to convertability at the same time.

Mr. LINDER. The clause in the treaty with Colombia, for example, Mr. Chairman, is article XII, section 3. That says—

> If either party imposes exchange restrictions in accordance with paragraph 3 above—

which permits certain types of exchange restrictions necessary to preserve the economy of the country—

> 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, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other party, of: (a) the compensation referred to in article VI, paragraph 3, of the present treaty—

the one to which I have previously made reference—

> (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.

This is subsidiary to that, and it guarantees where there is a multiple rate of exchange. If you would like me to read that, I can go on.

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Senator SPARKMAN. Where does this phrase to which the Council points occur?

Mr. WALKER. It is in a different paragraph, sir.

Senator SPARKMAN. I wonder if you could read that sentence. It is hard to tell, when words are just lifted out of context such as this.

Mr. WALKER (reading):

Neither party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied; nor shall either party unreasonably impede nationals and companies of the other party from obtaining on equitable terms the capital, skills, arts and technology it needs for its economic development.

Mr. LINDER. I am informed, sir, that that is supplemental to and in no way restricts or limits the broad basis for compensation which we have just been discussing.

Senator SPARKMAN. Then it is your opinion that the objection raised with reference to that matter by the National Foreign Trade Council is not justified?

Mr. LINDER. Sir, I would say absolutely, except that I have not read every word of the National Foreign Trade Council's letter. I just received it as I came into this room. I would say categorically, with only the reservation that if I find our Legal Adviser has any reservation, he will communicate it to the committee.

Senator SPARKMAN. I wonder if it might not be well simply to have the Legal Department address a letter to us to be put in the record on that question.

Mr. LINDER. We will be happy to do it, sir.

(The following information was subsequently furnished:)

MAY 21, 1952.

Hon. JOHN J. SPARKMAN,
Committee on Foreign Relations, United States Senate.

MY DEAR SENATOR SPARKMAN: I refer to the hearing held by your subcommittee, May 9, on the pending commercial treaties and to the question raised during the course thereof concerning what these treaties provide as to compensation for property which is expropriated, with particular reference to the effect of article VIII of the treaty with Greece. The Legal Adviser's Office has prepared a brief statement, enclosed herewith, which confirms the opinion I expressed in this matter. I offer the Legal Adviser's statement for inclusion at an appropriate place in the record, in order that there not be the slightest doubt about the correct answer to this important question.

Sincerely yours,

HAROLD F. LINDER,
Deputy Assistant Secretary for Economic Affairs.

Enclosure.

STATEMENT OF THE OFFICE OF THE LEGAL ADVISER—MAY 16, 1952

Article VIII of the treaty with Greece, and the similar provision of the other treaties before the subcommittee, is entirely independent of, and in no way modifies, the provisions of article VII, paragraph 3, and comparable provisions of the other treaties, which establishes the rule of compensation applicable when property is expropriated through nationalization or otherwise. Article VII, paragraph 3, of the treaty with Greece states the governing rule in all cases of expropriation, that compensation shall be payable on the basis of the full value of the property taken, at the time of the taking. 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; if the value of the initial investment were greater than the value at the time of taking, a country is obliged only to provide compensation for the value at the time of taking.

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Senator SPARKMAN. I may say that at the end of Mr. Linder's testimony I will insert in the record, if there is not objection, the letter from the National Foreign Trade Council, Inc., addressed to me on May 8.

Senator HICKENLOOPER. Can we identify, at least for my benefit, Mr. Chairman, the National Foreign Trade Council? Of what is it composed?

Mr. LINDER. I prefer to have Mr. Vernon describe it, if I may.

Mr. VERNON. The National Foreign Trade Council is an organization which has been in the field of promoting foreign trade and international investment for rather a long time. I would say they are probably "the" organization in the field at this moment in the United States.

Senator SPARKMAN. It is a well-known and reputable organization?

Mr. VERNON. Well-known and reputable, and its membership looks like a glossary of Standard & Poor's.

Senator HICKENLOOPER. Throughout the United States?

Mr. VERNON That's right.

Senator SPARKMAN. Senator Hickenlooper, do you want to ask Mr. Linder some questions?

We have had Mr. Linder's statement, which was a prepared statement. You have a copy of it there in your file, and I addressed these questions to him.

Senator HICKENLOOPER. There is one line of questioning I would like to address, probably two or three questions, to Mr. Linder. Did you ask Mr. Linder all of these questions?.

Senator SPARKMAN. Yes.

RELATIONSHIP OF TREATIES TO GATT

SENATOR HICKENLOOPER. I am sorry to ask you to repeat, Mr. Linder, but I would like to know, especially, do any of these conventions in any way, and under any circumstances, according to your interpretation and the Department's interpretation, involve us in the General Agreement on Tariffs and Trade?

Mr. LINDER. They do not, sir. I introduced and read, in order to be sure that we were quite explicit about is, a statement which is quoted from a letter which we addressed to Senator Milliken very recently—as a matter of fact, a couple of months ago, the last day of February. If you would like me to do so, I shall be very glad to read that to you again.

Senator SPARKMAN. I may say, Senator Hickenlooper, that we have a letter from the State Department signed by Mr. John M. Leddy, Director, Office of Economic Defense and Trade Policy, in which he brings out the same point, and says (reading):

* * * it does not in any way bind the United States as to participation or nonparticipation in the General Agreement on Tariffs and Trade.

Mr. LINDER. Senator, would you prefer that I read this statement?

Senator HICKENLOOPER. If you have already put it in the record, there is no use in putting it in again. Is it already in the record?

Mr. LINDER. I have read it carefully and we will be glad to provide it for the record.

Senator HICKENLOOPER. If you have already read it in the record, there is no use in repeating it here.

Senator SPARKMAN. Without objection, we will also put this letter in the record, which is to the committee in answer to this particular inquiry.

(The communication is as follows:)

DEPARTMENT OF STATE,
Washington, February 29, 1952.

Mr. CARL MARCY,
Staff Associate, Committee on Foreign Relations,
United States Senate.

DEAR MR. MARCY: This is in response to your inquiry, during our recent telephone conversation, as to what is the Department's view of the provision referring to the General Agreement on Tariffs and Trade in the Treaties of Friendship, Commerce, and Navigation with Denmark (art. XXI, par. 3), Greece (art. XII, par. 4), Israel (art. XXI, par. 3) and Ethiopia (art. XII, par. 6), all of which are now pending before the Senate.

The purpose of this kind of provision is not to obtain Senate approval of the general agreement. Its purpose is simply to clarify the relationship between the treaty and the General Agreement on Tariffs and Trade, where the two instruments exist side by side, so as to obviate possible confusion concerning the international rights and obligations of a country which is party to both instruments. The provision is thus in the interests of orderly treaty procedure. Being framed in the form and style of a reservation, to provide for a contingency, it does not in any way bind the United States as to participation or nonparticipation in the General Agreement on Tariffs and Trade.

The Senate has already given advice and consent to ratification of two treaties containing a nearly identical clause which also refers to the charter for an international trade organization (Treaty of Friendship, Commerce, and Economic Development with Uruguay, signed November 23, 1949, 81st Cong., 2d sess., Senate Executive D, art. XVIII, par. 3; and Treaty of Friendship, Commerce, and Navigation with Ireland, signed January 21, 1950 (TIAS 2155), art. XX, par. 2). We do not consider that Senate action on these treaties constitutes approval by the Senate of the General Agreement on Tariffs and Trade.

Sincerely yours,

JOHN M. LEDDY,
Director, Office of Economic Defense and Trade Policy.

(The following additional information was subsequently supplied:)

DEPARTMENT OF STATE,
Washington, May 21, 1952.

Hon. JOHN J. SPARKMAN,
Committee on Foreign Relations,
United States Senate.

MY DEAR SENATOR SPARKMAN: I understand that inquiry has been made as to whether the previous statement of the Department of State, with reference to the significance of the provision concerning the General Agreement on Tariffs and Trade, in the various commercial treaties pending before the committee, is applicable specifically to the treaty of friendship, commerce, and navigation with Denmark. The answer is in the affirmative. The additional material found in article XXI, paragraph 3, of that treaty was included for a purely technical reason; namely, to provide for the situation in which Denmark, though not a member of the General Agreement on Tariffs and Trade, was experiencing balance-of-payments difficulties. The additional material is comparable with the additional protocol attached to the treaty of friendship, commerce, and economic development with Uruguay.

As Mr. Linder stated in his testimony before the committee, the Department believes that the provision in the treaty with Denmark does not commit the United States as to participation or nonparticipation in the General Agreement on Tariffs and Trade and that Senate approval of this treaty cannot be regarded as constituting Senate approval of the general agreement.

Sincerely yours,

RAYMOND VERNON,
Acting Director, Office of Economic Defense and Trade Policy.

Senator HICKENLOOPER. The whole burden of my question is, are we backing into that by some involved interpretive provision in any

of these trade treaties which would put us in a position where we have committed ourselves to the General Agreement on Tariffs and Trade?

Mr. LINDER. The answer to that is, "No, sir."

GENERAL PURPOSE OF THE TREATIES

Senator HICKENLOOPER. The general purpose of these treaties, as of all the other treaties of friendship, commerce, and so forth of a similar type, I take it, is to guarantee and assure equality of treatment of Americans, American nationals, on a reciprocal basis, that is, reciprocating equitable and fair treatment. These treaties contain certain specified safeguards which the respective nations agree to enforce so far as the activity of the American nationals are concerned in business and trade and so on.

Mr. LINDER. And travel. That is correct.

Senator HICKENLOOPER. That is my understanding of the purpose of the treaties.

NEW FEATURE IN ITALIAN PROTOCOL RELATING TO SOCIAL-SECURITY BENEFITS

Is there anything unusual that you could say in any way differentiates these particular treaties which are before us today in specific provisions from the general provisions of the treaties already in force, historically in force, between the United States and other nations?

Mr. LINDER. I think there is only one.

Senator HICKENLOOPER. I mean, are there any innovations?

Mr. LINDER. Yes. I think there is one in respect of the protocol which we are asking your approval on with Italy, and that exception I alluded to in my statement, and if I may quote it again I would say that article VII of the supplementary agreement with Italy provides for the development of arrangements not provided for by Federal statute regarding totalization of social-security benefits.

I have here for submission a memorandum from the Federal Security Agency which sets that forth more completely than I am able to do. It is a technical problem, but in essence it provides for a consideration by each of the countries of the social-security benefits earned by any national within his own country. In other words, if an Italian had worked in Italy for 10 years and worked in the United States for 15 years there is an adjustment made so that he in effect gets the benefit, in calculating the payments due him by each country under social security, for his years of work in Italy as well as his years of work here, and vice versa. That is the only provision that I believe differs substantially, except for improvements and tightening up both in language and in substance that is the natural result of, we hope, competent negotiation.

Senator HICKENLOOPER. What is the explanation or the justification of that provision, in view of the fact that manifestly at least now, and we assume for a long time in the future—at least now, and probably will be in the future—greatly in excess of the social-security benefits in any other country, so that someone, for instance from Italy, could come over here and work for 15 or 20 years and go

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back to Italy and retire very nicely on those benefits, with the tie-in under the Italian system.

Mr. LINDER. I think, sir, that there has been a general movement all over the industrial world, particularly in Western Europe, to insure that workers who for one reason or other migrate from one country to another are not penalized, and in effect their social security is guaranteed. I think that this is an attempt—I believe it is an attempt—to do the same kind of thing with respect to anybody who comes to this country, or any American who works abroad.

Senator HICKENLOOPER. I merely raise the suggestion that it may be an attempt to internationalize social security.

Mr. LINDER. The Italians do not get the benefits on our scale for the period during which they worked in Italy.

Senator HICKENLOOPER. I would assume not.

Mr. LINDER. They get some sort of combination of the two which has been worked out with each country paying a pro rata share. As I say, sir, in respect of the technical aspects of this, I would like to make available to the committee this statement prepared by the Federal Security Agency.

Senator SPARKMAN. Without objection, we will insert that in the record at this point.

(The statement referred to is as follows:)

STATEMENT PREPARED BY THE FEDERAL SECURITY AGENCY UNDER DATE OF FEBRUARY 14, 1952—EXPLANATION OF THE SOCIAL-SECURITY PROVISIONS (ART. VII) OF THE UNITED STATES-ITALIAN SUPPLEMENTARY AGREEMENT, SIGNED ON SEPTEMBER 20, 1951

At present workers who have some coverage under the old-age and survivors insurance systems of more than one country may suffer losses in their benefit rights. In some cases the individuals involved may fail to meet the eligibility requirements of one or both systems because of gaps in their employment records, and thus no benefits at all may be payable. In order to eliminate these losses, various European countries have entered into agreements with each other in order to protect the benefit rights of workers who have employment in more than one country. The countries with which Italy has already concluded treaties include Belgium, France, and Switzerland. The United States thus far has no international agreement in operation.

While no figures are available on the extent of the movement of workers between the United States and Italy, it seems likely that the number of workers with coverage under the insurance systems of both countries is small. Nevertheless, coordination of the two systems to take care of these cases seems desirable, in order to prevent the hardship which may sometimes occur in the absence of coordination. As the number of cases will not be large, the total administrative burden should not be great.

Article VII of the supplementary agreement provides authority for coordinating social-insurance systems. Following are the major provisions of article VII:

(1) The language of the agreement would authorize the immediate coordination only of the "principal old-age and survivors insurance system" of each country. The coordination could later be extended to special old-age and survivors insurance systems or to insurance systems providing protection against permanent disability.

(2) Service time under both systems would be combined and counted for determining eligibility for benefits under each system.

(3) Service which has already been credited under both systems, if any, would not be included in any combining of employment periods.

(4) Benefits based on combined service would be reduced to take account of the fact that all of the worker's service is counted under each program. This would be done by reducing each benefit amount by the ratio which the period of time spent under the other system bears to the total period of time spent under both systems.

(5) An individual might elect whether or not the coordination provisions shall apply to him.

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(6) The agreement provides that if the Maintenance of Migrants' Pension Rights Convention of 1935 is adopted by both countries, the convention shall supersede any inconsistent provisions in the agreement. (The 1935 convention includes provisions establishing multilateral social-insurance coordination among the countries adopting that convention.)

While the agreement indicates that each system is to base benefits on combined periods of service, it does not specify how such benefit amounts are to be computed. It is contemplated that a method would be used which would not require a crediting under one system of wages received under the other, but only a crediting of service periods. By so doing, the administrative difficulties involved in such problems as the conversion of Italian currency into American, and the reverse, would be avoided.

The basic framework of the coordination is established in the agreement. Precedents already exist for this type of coordination, and we believe that no serious difficulties would be encountered in effectuating the agreement. Each country would bear whatever increased costs would arise under its system as a result of additional payments resulting from the agreement. While we have not been able to make cost estimates, because figures on workers with coverage under both systems are not available, we believe that the additional costs will be small.

The Federal Security Agency favors the coordination provisions contained in section VII of the agreement.

PROTECTION OF AMERICAN BUSINESSMEN IN MOROCCO

Senator HICKENLOOPER. I want to get back, Mr. Linder, if you know anything about this particular matter—it may not be in your bailiwick over there—to a matter which has been before this committee repeatedly in the past. It directly involves a treaty of commerce, trade, and friendship, and has been the occasion for two rather positive positions taken not only by this committee but by the Congress, and which according to my view, which may not be wrong, have been not only ignored but flouted by the Department. That is the Moroccan situation and what apparently has moved this Congress to consider that our American citizens in Morocco have not received the guaranteed equality of treatment under the existing treaty with Morocco. As I say, that may be wrong; I don't know. But it has been sufficiently presented so that it has been the occasion of two actions by this committee and two actions by the Congress on that line. But the situation has not seemed to be improved any.

Are you familiar with that Moroccan situation?

Mr. LINDER. I am not familiar with it, sir. Maybe Mr. Vernon can speak to that.

Mr. VERNON. I think so.

Right at the moment, sir, as you no doubt know, that issue is before the International Court of Justice.

Senator HICKENLOOPER. Yes. And may I say that in my unschooled and probably inadequate opinion, it has no business before the International Court of Justice at all. I have had a little superficial examination of that, and at least in the absence of further proof I do not think it ever had any business being taken to the International Court of Justice, and I don't think we had any business joining in that matter in the Court of Justice. I mean, I just wanted to make my position clear so we will know from what standpoint we are arguing.

Mr. VERNON. Let me give just for a moment or two some of the considerations which led us to conclude that it was not easy to determine just what the rights of the Americans were. The American rights in Morocco accumulated out of a whole series of treaties going back to the eighteenth century. That is when the earliest one was.

Some of the rights depend upon such a complicated issue as the following: Whether, if we have most-favored-nation rights, and if as a result of the most-favored-nation right we get a right which was expressly given to another country, such as England, and then the treaty by which England acquired certain rights is abrogated, do we continue to have the rights which we acquired indirectly through the most-favored-nation treatment, notwithstanding the abrogation of the U. K. treaty with Morocco.

There was also a problem of whether and to what extent custom and usage would give us a right which was not expressly stated in a treaty.

I sat down with our lawyers trying to trace back the effect of the accumulation of these principles upon our rights and came away with the very certain conviction, which was shared by anyone who had to go into this in detail, that at a minimum one could say our rights were complex and far from crystal clear.

We were also concerned that whatever the rights may have been as a result of these longer standing treaties, whether in fact recent agreements under the aegis of the Economic Cooperation Act modified them.

The result was a legal jumble complicated by the fact that it could be interpreted not in terms of domestic law but in terms of the rather more obscure provisions of international law.

In those circumstances we felt, and I think there is room for honest difference of judgment on this, that the best possible approach was to try to get a clarification from the International Court of Justice.

FACTORS IN THE FRENCH MOROCCAN SITUATION

Senator HICKENLOOPER. Our treaty was with Morocco, where the violations were alleged.

Mr. VERNON. That is correct.

Senator HICKENLOOPER. And France took it into the International Court.

Mr. VERNON. On behalf of Morocco. France has a relationship with Morocco which we have recognized by treaty, taking over the responsibility for Morocco's foreign relations; therefore she was within her rights, acting on behalf of Morocco and herself, to bring the suit.

Senator HICKENLOOPER. Nevertheless we have found, on two or three occasions, that the treaty has been violated a number of times. Isn't that true?

Mr. VERNON. I hesitate to rely on my judgment on this, or on my memory on this, because really the jumble of both fact and law is involved. One thing is clear, that a lot of things the Moroccans and French have done have not been right in equity or any abstract concept of justice that you might want to think of, and we have not by any means been happy about the treatment in certain respects that the Americans have received in Morocco. There is no question about that.

Senator HICKENLOOPER. May I ask you this: Have the Moroccans themselves ever refused to comply with the treaty, under their own steam? In other words, aren't the Moroccans perfectly willing to carry out the treaty, but the fact is the French, through their activities there, prevent the Moroccans from carrying out the treaty and the

French superimpose special advantages to French people in Morocco in trade and otherwise which are not given to American citizens?

Mr. VERNON. That is an awfully difficult one to answer.

This is one of the reasons why it is so difficult to answer: I use this as an illustration rather than the whole group. The currency in which the French Moroccan trade is conducted is the French franc. The Moroccans may be perhaps willing that in imports into Morocco there should be no discrimination against dollars, but in a sense it is not their ox that is gored. The currency that is used for trading in the area is the French franc, and runs on the French franc by reason of, let us say, open imports into the French Moroccan area, and the resulting weakness in the French franc because of the loss of dollars, is a problem which hits France and not Morocco.

I suppose it is true to say that Morocco would be happy if the French permitted all the expenditures of French dollars that would be involved in free imports into Morocco, but I expect it is also true to say that their willingness to permit that is not a reflection of their willingness to extend us favors which France would not be willing to extend us, but rather a knowledge that it does not cost them anything to extend them to us.

Senator HICKENLOOPER. I understand there are some propositions in currency exchange which any country will have to meet equally, and should if there is equality of treatment, but it is the unusual and extraordinary export and import license system and the penalties which are put on American goods and American trade there which are not imposed upon the French, and all those things, which are practical inhibitions and coercive things against Americans operating in Morocco, and treatment which is not accorded with the same severity to the French and perhaps one or two others with French favor.

Mr. VERNON. That is true, sir, and the reverse is true also, that there are areas in which Americans can do things that Frenchmen can't do. That is why in the first instance you have a large American colony trading in Morocco. There are certain products which the Americans may import freely which a Frenchman is prohibited from importing freely.

Senator HICKENLOOPER. Do the French prohibit the Frenchmen from importing them, or do the Moroccans?

Mr. VERNON. The French. That sounds rather curious, but the answer is simply this——

Senator HICKENLOOPER. Why should we be criticized for operating in an area we are privileged to operate in when the French could raise the restrictions and the French could operate in the same area if they wanted to, when it is within their control.

Mr. VERNON. That is true, sir, and what this reflects is the fact that there has been a recognition of American rights, which is the reason in the first instance why Americans are living there and trading there. In some situations the result has been that the French, in recognition of these special treaty rights, have permitted Americans to import a large list of products provided that the Americans found the exchange in some way or another, but have prohibited Frenchmen from importing the same products because they knew perfectly well the exchange the French would use would have to come out, directly or indirectly, of the French reserves in Paris.

Senator HICKENLOOPER. I merely mention the matter. It is not before this committee this morning, but I mention it wondering, after we do get into these treaties of friendship, just how they protect the rights of Americans that are actually guaranteed under the treaty before us. It is a question of where flow the benefits, and I would hope that they would be equitable and give equal benefits to nations that we treat with and, by the same token, that we would be utterly zealous in seeing that American nationals receive their full rights under the treaties we make.

I do not have any more questions.

Senator SPARKMAN. Thank you very much. You will stay here, Mr. Linder, I assume.

Mr. LINDER. If you want me to I will be here.

POSITION OF THE NATIONAL FOREIGN TRADE COUNCIL

Senator SPARKMAN. It might be well to stay. I do not know whether some other questions will come up. It probably will not take very long. I suggest the letter from the National Foreign Trade Council, Inc., under date of May 8, 1952, appear in the record at this point and that it be followed by any comments which the Department of State may wish to submit:

NATIONAL FOREIGN TRADE COUNCIL, INC.,
New York 6, N. Y., May 8, 1952.

Hon. JOHN J. SPARKMAN,
United States Senate,
Senate Office Building, Washington, D. C.

DEAR SIR: The National Foreign Trade Council has been advised that you have been appointed by the chairman of the Senate Foreign Relations Committee, chairman of a subcommittee to take testimony and make recommendation relative to the consent and advice to be given in respect of treaties heretofore signed on behalf of the United States with certain other countries. The treaties concerning which we wish to comment are:

Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of Colombia
Treaty of Friendship, Commerce, and Navigation between the United States and Denmark
Treaty of Amity and Economic Relations with Ethiopia
Treaty of Friendship, Commerce, and Navigation between the United States and Greece
Treaty of Friendship, Commerce, and Navigation with Israel
Agreement with Italy supplementing the Treaty of Friendship, Commerce, and Navigation of 1948

We have been advised further that you have designated Friday morning, May 9, 1952, as the time for hearings in this connection. We regret that it appears to be impossible for us to arrange for a witness to be present and testify at that time and in lieu thereof we are respectfully submitting in this communication our views in connection with these treaties.

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND THE REPUBLIC OF COLOMBIA

Under date of October 9, 1951, we wrote Hon. Tom Connally, chairman of the Foreign Relations Committee, giving our views relative to the treaty with Colombia. For your ready reference, we attach hereto a copy of this letter.

The only additional comment which we would like to make with regard to this treaty is to make reference to the paragraphs in this letter entitled, respectively, "The Investment Clause" and "The Restrictive Business Practice Clause." Our views with respect to the investment clause and the restrictive business practice clause are the result of study since October 9, 1951, and were therefore not covered in our letter to Senator Connally.

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TREATY OF AMITY AND ECONOMIC RELATIONS WITH ETHIOPIA

We respectfully urge that the Senate shall not give its favorable advice and consent to the above-entitled treaty. Our reasons for taking this position in respect of this treaty are as follows:

It is apparent from the content and phraseology of this treaty that the obstacles to mutual understanding on several phases of commercial relations were not overcome. In fact, it seems doubtful whether, at the present stage of Ethiopia's economic development, any satisfying mutual convictions, or common ground for stipulations regarding private investment, can be found. Moreover, a recent canvass of representative members of the council has not developed any expression of positive interest in potential investment in that country. Therefore, it seems undesirable to dilute the pattern of our bilateral treaties by resorting in this case to such weak phrases as—

"reasonable opportunity for the investment of capital, and for the establishment of appropriate commercial, industrial, or other enterprises * * *" or "nationals or companies * * * which are permitted to establish or acquire enterprises * * *."

The objections to the second clause of article VIII (1) and to the second sentence of article VIII (4), are contained in the investment clause section.

While there are other features in this treaty which might prove of practical interest to American business, the aggregate advantage would not seem to outweight the disadvantage of establishing an undesirable precedent in our treaty writing, at this juncture.

Since the objectionable weakness of this treaty is confined practically, to paragraphs 1, 4, and 5 of article VIII, the Senate might consider giving its advice and consent to the ratification of this treaty, with a reservation deleting paragraph 4 of article VIII in its entirety and the words "are permitted to" from the second line paragraph 5 article VIII, and amending article VIII (1) in accordance with the suggested provisions set forth in the section of this letter entitled "The Investment Clause."

AGREEMENT SUPPLEMENTING THE TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION OF FEBRUARY 2, 1948, BETWEEN THE UNITED STATES AND THE ITALIAN REPUBLIC

We respectfully urge that the Senate give its favorable advice and consent to the above entitled agreement or treaty subject, however, to the following comment:

Article I of this pending agreement or treaty appears to be a somewhat watered-down version of the investment clause hereinafter dealt with. It is our belief that the comment in the paragraphs dealing with this matter would apply to article I of this supplemental Italian treaty.

We also call attention to the fact that article XVIII (3) of the Italian treaty of February 2, 1948, is the restrictive business practice clause hereinafter dealt with. It may be that if your committee is favorably disposed toward the recommendation contained in the memorandum attached to this letter entitled "Restrictive Business Practice Clauses in Proposed Treaties with Denmark, Greece, Israel, and Colombia" you would deem it appropriate in connection with the ratification of the supplemental agreement to request the modification of article XVIII (3) of the original treaty.

TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND DENMARK, GREECE AND ISRAEL

We respectfully urge that the favorable advice and consent of the Senate be given to the above-captioned three treaties of friendship, commerce, and navigation, subject, however, to the comment contained in our letter of October 9, 1951, dealing with the treaty with Colombia insofar as said comment applies to these treaties and subject further to the comments hereinafter contained relative to the investment clause and the restrictive business practice clause.

THE INVESTMENT CLAUSE

The clause referred to by this caption is article VI of the treaty with Denmark, article VIII of the treaty with Greece, and article VI (4) of the treaty with Israel. The clause in the treaty with Denmark is less complete than the corresponding clauses of the other two treaties.

Reference is also made to the fact that the substance of this clause is contained in article I of the agreement supplementing the Italian treaty. A corresponding

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clause is also to be found in the 1949 treaty with Uruguay (art. IV), the 1950 treaty with Ireland (art. V) and the 1951 treaty with Colombia (art. VI (4)).

For ready reference we quote as follows the clause as it appears in the treaty with Greece:

"ARTICLE VIII

"Neither party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied; nor shall either party unreasonably impede nationals and companies of the other party from obtaining on equitable terms the capital, skills, arts and technology needed for economic development."

This provision is a version of a provision of the Bogota agreement which has never been submitted to the Senate for ratification. The Habana charter of the International Trade Organization also contained a similar provision but this likewise has never received approval of the Senate.

The treaty committee of the National Foreign Trade Council has pointed out to us that this clause prohibits only "unreasonable or discriminatory measures * * *" which impair acquired rights and that the implication in the clause is that by measures which are neither unreasonable nor discriminatory the Government of one party to the treaty may properly impair within its territory the acquired rights of nationals of the other party to the treaty.

In our opinion, the importance of the defect in this clause as pointed out above is emphasized by recent developments in Iran. The Government of that country, because it apparently believed nationalization to be desirable as a national policy, enacted legislation to nullify the Government's contract with the Anglo-Iranian Oil Co. and thereby impaired, in fact actually destroyed, important acquired rights of that company in Iran.

A second dangerous implication in the phraseology employed is based upon the qualifying phrase "which they have supplied." As applied to capital, it suggests that only as to the amount of capital originally "supplied" by remittance of foreign funds, would the stipulations of this article provide any security. Historically, American direct investment has grown tremendously not only from funds remitted for investment, but by reinvestment of earnings within the foreign country. There should be no ambiguity or misunderstanding on the point that the investor's interests are to be protected as well in respect of this "plow-back" as in respect of the original "remitted" capital. That this is not an academic issue is clear from the discussions in progress with the Government of Brazil regarding the service of American investments in that country. Unfortunately, we have no modern commercial treaty with that nation; but if we had one reading as does the Bogota stipulation quoted above, it would be a very precarious assurance of equitable treatment.

In view of what are felt to be deficiencies in clarity of this article, we respectfully urge that the investment clause as it appears in pending treaties now under consideration by the United States Senate be so amended as to give additional protection to rights acquired by American nationals in foreign countries. If the government of a foreign country having a treaty of friendship, commerce, and navigation with the United States of the post World War II type takes property of an American national for public purposes, it must pay due compensation with respect thereof. It is urged for your consideration that if the government of a foreign country takes the measures which would destroy or impair the rights or interests of an American national irrespective of the purposes underlying such destruction or impairment, corresponding payment should be made.

If the first part of the investment clause could be so modified as to read: "Neither party shall take measures that would impair the rights or interests within its territories of nationals and companies of the other party except on payment of prompt, adequate, and effective compensation" we feel that a desirable result would be accomplished.

We also feel that the balance of article VIII of the treaty with Greece, reading: "* * * nor shall either party unreasonably impede nationals and companies of the other party from obtaining on equitable terms the capital, skills, arts, and technology needed for economic development."
should be deleted in its entirety. It is to be assumed that it would be the United States which would be inhibited by this language from unreasonably impeding nationals and companies of the other party from obtaining on equitable terms

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the capital skills, etc., referred to. It seems to us that the meaning of the phrases "unreasonably impede" and "equitable terms" are so obscure and the implications thereof so broad as to make the inclusion of such a provision in a treaty entirely inappropriate and undesirable from the point of view of the United States. This language or a modification thereof is contained in the treaties with Colombia (art. VI–4), Israel (art. VI–4), Ethiopia (art. VIII–4) and Italy (art. I of the supplemental treaty with Italy). It does not appear in the treaty with Denmark.

THE RESTRICTIVE BUSINESS PRACTICE CLAUSE

The restrictive business practice clause to which we refer has, we believe, been incorporated substantially without change in all of the post World War II treaties of friendship, commerce, and navigation commencing with the 1948 treaty with Italy and it reads (treaty with Denmark, art. XVIII–1) as follows:

"1. The two parties agree that business practices which restrain competition, limit access to markets or foster monpolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises may have harmful effects upon commerce between their respective territories. Accordinlgy each party agrees upon the request of the other party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects."

The National Foreign Trade Council believes firmly in the principles of private enterprise and business conducted on a competitive basis. Until recently it had viewed the restrictive business practice clause as being merely a condemnation of practices contrary to the letter and spirit of existing American law.

More recent study of this provision and particularly of the second sentence has caused us to revise our ideas. At the present time, taking into consideration the fact that treaties duly entered into become under the Constitution the supreme law of the land, and bearing in mind the delicate relationship established by the Constitution between the powers of Congress and the powers of the Executive, we have come to have real apprehension that this clause as now drafted may result in transferring to the executive branch of our Government certain powers heretofore reserved to Congress.

Attached hereto please find a memorandum dealing with this subject in some detail which we believe will be of interest to your committee.

Respectfully submitted.

WILLIAM S. SWINGLE, *President.*

RESTRICTIVE BUSINESS PRACTICE CLAUSES IN PROPOSED TREATIES WITH DENMARK, GREECE, ISRAEL, AND COLOMBIA

Article XVIII–1 of the proposed treaty of friendship, commerce, and navigation with the Kingdom of Denmark, now under consideration by the Committee on Foreign Relations of the Senate of the United States, contains a provision designed to eliminate harmful effects upon commerce between the United States and Denmark arising from business practices which restrain competition, limit access to markets or foster monopolistic control as follows: [1]

"ARTICLE XVIII

"1. The two parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement, or other arrangement among such enterprises may have harmful effects upon commerce between their respective territories. Accordingly, each party agrees upon the request of the other party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects."

The second sentence of the provision quoted above gives cause for particular concern in that it would bind the United States "to take such measures as it deems appropriate with a view to eliminating such harmful effects." There is at least room for the construction that each party commits itself to enact measures which will eliminate the harmful effects of restraints on competition, leaving

[1] A counterpart of this clause appears in the proposed treaties with Greece (art. XIV), Israel (art. XVIII), and Colombia (art. XVIII).

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only to the discretion of the parties the choice of the measure or measures which will be appropriate for this purpose. Since a treaty constitutes the supreme law of the land,[2] it may certainly be argued that the United States could be held liable before an international tribunal should it fail to take some measure or measures, whether by act of Congress or by executive action, to carry out the mandate of the treaty with Denmark.[3]

Presumably, the consultation agreed to under article XVIII–1 would take place with the executive branch of our Government[4] and the executive branch, rather than Congress, would be directed to take "such measures as it deems appropriate with a view to eliminating such harmful effects." Thus read, it may be argued that the provision in question would result in a surrender by Congress to the executive branch of our Government of a portion of its powers regulating our foreign commerce which is now entrusted to Congress under article II of the United States Constitution. Following this line of argument to its logical conclusion, it seems clear that the Executive would not be required to seek congressional approval of measures which it deemed appropriate to the extent that such measures were within the general power of the Executive to carry into effect. For example, the administration could through the Office of International Trade impose export restrictions, thus forcing industry to abandon or change any practice which had been a subject of complaint.

Again, following this line of argument, the executive branch in fulfilling the obligations assumed under the proposed treaty, would not in any way be limited by the existing antitrust laws of the United States,[5] but in fact the executive branch would be committed to take such measures as it might deem appropriate with a view to eliminating harmful effects from "business practices which restrain competition, limit access to markets, or foster monopolistic control * * *" whether or not such practices in a particular case were in violation of the antitrust laws of the United States. In effect, therefore, the executive branch of the Government would be committed to different criteria from the existing criteria applicable to American enterprises at home or abroad.

If a treaty were not involved, there is little question but that it would be unconstitutional for Congress to delegate its antitrust powers in the manner contemplated.[6] However, a treaty made under the authority of the United States becomes the supreme law of the land[7] and there is support for the proposition that that which Congress may not do under the Constitution, i. e., the delegation of its power to regulate commerce, may still be accomplished pursuant to a treaty entered into "under the authority of the United States."[8]

The full import of the congressional surrender of power over foreign commerce which is inherent in article XVIII (1) of the proposed treaty is perhaps more pointedly revealed by the potential impact of this article on existing legislation. There are in effect today a number of laws enacted by Congress which grant some form of antitrust exemption to activities affecting our foreign commerce which might be construed to be restrictive practices within the meaning of article XVIII (1). For example, the Capper-Volstead Act[9] permits persons engaged in the production of agricultural products to market such products in interstate and foreign commerce by means of marketing agencies in common. Let us suppose the Government of Denmark were to make the contention that agreements establishing such collective marketing agencies pursuant to the Capper-Volstead Act were adversely restricting trade between the United States and Denmark. Under article XVIII (1) the executive branch of our Government, according to the argument stated above, would be obligated to take measures to eliminate the harmful effects of such restrictive practices, including, if desired, the withdrawal of approvals previously extended to the collective marketing agreements. Since the provisions of the treaty supersede the laws of Congress previously enacted,[10] the Executive action would overrule the prior congressional determination that

[2] United States Constitution, art. VI.
[3] Hackworth, Digest of International Law, vol. V, p. 164 et seq.; Preuss, Proceedings of the American Society of International Law, Washington, D. C., April, 1951, p. 82, 98–99.
[4] The Executive has exclusive supervision of international relations—*U. S.* v. *Curtiss-Wright Export Corporation* (299 U. S. 304, 81 L. Ed. 255 (1936)); *U. S.* v. *Carrollo* (30 F. Supp. 3 (D. C. Mo. 1939)); *U. S.* v. *Bereno* (60 F. Supp. 520 (D. C. Md. 1943)).
[5] *Ware* v. *Hylton* (3 Dall. 199, 1 L. Ed. 568 (U. S. 1796)).
[6] *Panama Refining Company* v. *Ryan* (293 U. S. 388, 79 L. Ed. 446 (1935)).
[7] United States Constitution, art. VI.
[8] *Missouri* v. *Holland* (252 U. S. 416, 430–435 (1920)); *U. S.* v. *Curtiss-Wright Export Corporation*, supra, note 3.
[9] Act of February 18, 1922, ch. 57, 42 Stat. 388; 7 U. S. C., secs. 291, 292.
[10] *Ware* v. *Hylton* (3 Dall. 199, 1 L. Ed. 568 (U. S. 1796)).

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such collective marketing agreements were not harmful to our foreign commerce and should be permitted by law.[11]

If, on the other hand, it is not intended to interfere with the power of Congress to regulate our foreign commerce or to open the way to the nullification of the congressional enactments described above (and there is no indication of a contrary intent), article XVIII (1) should be amended so as to eliminate any question on this score. For that purpose revision along the following lines is suggested:

"Accordingly each party agrees upon the request of the other party to consult with respect to any such practices and to take such measuers as it deems appropriate with a view to eliminating such harmful effects: *Provided, however,* That in order to accomplish the aforesaid purposes the United States of America shall be obligated to take only measures heretofore or hereafter enacted by Congress."

While existing treaties of friendship, commerce, and navigation with Italy (art. XVIII) and Ireland (art. XVIII (1)) contain similar "restrictive business practice" provision,[12] it is not too late to prevent a more widespread use of the clause as originally drafted. The amendment suggested above may, as a matter of first impression, appear to be too one-sided in favor of the United States. However, the United States is the only country in the world, with the possible exception of France, where a treaty can become a part of the supreme law of the land without the necessity of implementing laws enacted by the legislative body.[13] It seems necessary, therefore, by specific reference in the treaty clause to make it clear that the measures to be adopted by the United States must be those which are enacted by Congress.

OCTOBER 9, 1951.

Hon. TOM CONNALLY,
Chairman, Foreign Relations Committee,
United States Senate, Washington, D. C.

DEAR SIR: The National Foreign Trade Council, on the basis of a report from its treaty committee, has reviewed the provisions of the Treaty of Friendhip, Commerce and Navigation between the United States and the Republic of Colom bia executed April 26, 1951, which is now before the Senate Foreign Relations Committee and desires respectfully to urge that the Senate give its advice and consent thereto as provided by the Constitution. The National Foreign Trade Council feels that the State Department should be commended for its activity in negotiating a treaty of freindship, commerce and navigation the provisions of which are in general along lines meeting in a substantial manner the views of the members of the council.

On the assumption that provisions of the treaty with Colombia will serve as a model for corresponding provisions in other treaties to be negotiated, the council's treaty committee has formulated as to certain provisions thereof the following suggestions the adoption of which it is believed would be desirable:

Article III, paragraph 1, and article VI, paragraph 1.—The words "In no case less than that required by international law" should be added at the end of each of these paragraphs. This phrase has appeared in most other commercial treaties to which the United States is a party and in the judgment of your committee is

[11] Other examples of existing laws which permit some form of exemption from our antitrust laws to activities affecting our foreign commerce are:
(1) Shipping Act of 1916 (act of September 7, 1916, ch. 451, 39 Stat. 728, as amended; 46 U. S. C., secs. 801, 812, 814, 815) permits rate agreements between common carriers by water.
(2) Webb Export Trade Associations Act (act of Apr. 10, 1918, ch. 50, 40 Stat. 516; 15 U. S. C., secs. 61–65) permits export-trade associations.
(3) Merchant Marine Act of 1920 (act of June 5, 1920, ch. 250, 41 Stat. 988; 46 U. S. C., sec. 861), permits an association of marine insurance companies for the purpose of apportioning risks.
(4) Civil Aeronautics Act of 1938 (act of June 23, 1938, ch. 601, 52 Stat. 977; 49 U. S. C., secs. 488, 489, 491, 492, 647, 648) permits rate agreements and pooling or apportioning earnings, laws, traffic, service, or equipment.
(5) Interstate Commerce Act (act of Feb. 4, 1887, ch. 104, 24 Stat. 739, as amended; 49 U. S. C., secs. 5, 5a, 20a, 213, 228, 327) permits rate and pooling agreements between common carriers.
(6) Fishing Cooperative Marketing Act (act of June 25, 1934, ch. 742, 48 Stat. 1213; 51 U. S. C., secs. 521, 522) permits persons engaged in the fishery industry to enter into contracts and agreements providing for marketing agencies in common.

[12] See also agreements for economic cooperation with Italy, France, Denmark, occupied Germany (French and British zones), Greece, Iceland, Ireland, Belgium, Netherlands, Luxemburg, Norway, Sweden, United Kingdom, Thailand, Trieste, and Turkey.

[13] Holman, International Proposals Affecting So-Called Human Rights, Law and Contemporary Problems, vol. 14, No. 3 (1949), p. 487.

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important in that it suggests what we believe to be a significant principle, namely, that international law does require governments to give protection of the person and the property of nationals of another country.

Article III, paragraph 2.—The words "of his choice" should be added at the end of this paragraph. This paragraph indicates that a national of one country accused of crime in the other country may enjoy the right, among others, of obtaining "the services of competent counsel." Obviously he should have the right to sleet such counsel.

Article VII, paragraph 1, and article VIII, paragraph 1.—The proposal of the National Foreign Trade Council Committee on Insurance relating to the specific inclusion of "insurance" in the enumerated enterprises entitled to national or most-favored-nation treatment should be approved and accepted. The insurance committee advised that specific reference to insurance not having been made in existing treaties with some countries, the State Department has been unable to make adequate representations on behalf of American companies doing business in such countries when discriminatory laws or practices were adopted and enforced.

Article IX, paragraph 4.—Neither the use of the words "particular types of activity" nor the reference to article VIII, paragraph 1 is clear. It is recommended that this paragraph be clarified.

Article X.—This article does not but should deal with copyrights as well as trademarks, etc. (It was recommended that, if Colombia is not a member of the International Conference for the Protection of Industrial Property, it should become a member.)

Article XIV.—It is suggested that a new paragraph, reading as follows, be added to follow paragraph 2 of this article:

"Neither party shall impose any prohibition or restriction or discriminatory tax preventing or hindering the importer or exporter of goods of either country from obtaining insurance on such goods in transit in companies of their own choice."

Article XXVI, paragraph 4.—This paragraph provides for terminating on 1 year's written notice the provisions of paragraph 1 of article XIV assuring most-favored-nation treatment as to customs duties and other related matters. It therefore avoids the necessity of denouncing the entire treaty because of a change in policy affecting customs duties which might be inconsistent with the relevant treaty provision. The treaty committee believes that the freedom of action thus granted to both parties is desirable and should be commended.

The committee would also take this opportunity to refer again to the need for treaty provisions specifically assuring American enterprises operating abroad the right to secure entry for and utilize the services of American nationals in administrative, technical, and confidential capacities. This subject was discussed in a letter to Senator Connally from the council, dated April 23, 1951, as well as in a letter to the former chairman, Senator Vandenbrerg, dated June 1, 1948.

Very truly yours,

(Signed) ROBERT F. LOREE,
Chairman, National Foreign Trade Council.

(Communications of the Department of State relative to the foregoing letter from the National Foreign Trade Council:)

MAY 15, 1952.

Hon. JOHN J. SPARKMAN,
Committee on Foreign Relations,
United States Senate.

MY DEAR SENATOR SPARKMAN: There is enclosed herewith a memorandum concerning the pending Treaty of Amity and Economic Relations with Ethiopia, as requested during the course of hearings before your subcommittee last Friday, May 9, in light of the objection expressed by Mr. Swingle, president of the National Foreign Trade Council, in his letter of May 8 to you. The memorandum has been prepared for the record.

Comments regarding the points raised in Mr. Swingle's letter with reference to certain clauses in the pending treaties with Colombia, Denmark, Greece, and Israel and the supplementary agreement with Italy, will be forwarded separately.

Sincerely yours,

HAROLD F. LINDER,
Acting Assistant Secretary for Economic Affairs.

Enclosure: Memorandum with attachment.

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MEMORANDUM

There follow the State Department's comments upon the letter of May 8, 1952, from Mr. Swingle, president of the National Foreign Trade Council, to Senator Sparkman, regarding the pending treaty of Amity and Economic Relations with Ethiopia.

The State Department considers the treaty with Ethiopia to be an outstandingly good one, in all the circumstances, and particularly urges its approval. It contains provisions of great value (1) to our diplomatic and consular establishments in Ethiopia, certain of which, as indicated in one of the exchanges of notes attached to the treaty, go beyond what the Ethiopian Government is normally prepared to grant; (2) to our citizens in Ethiopia, the exchange of notes regarding the special rights of Americans before Ethiopian justice being especially noteworthy; and (3) to the growth of our trade and the development of other American interests in Ethiopia. As the first treaty of the sort that Ethiopia has concluded with any nation since the war, it may be regarded as having considerable political significance.

The objection of the National Foreign Trade Council to this treaty seems to be based principally or entirely on the ground that it does not go far enough in obligating Ethiopia to receive American investment. However, this lack of commitment concerning the entry of investment capital was not, as suggested in Mr. Swingle's letter, a failure to overcome an obstacle to mutual understanding. On the contrary, it was evident that, in Ethiopia's existing circumstances, Ethiopia could not be expected to undertake treaty limitations upon her right to regulate the entry of foreign investment. No benefit was to be gained from attempting in this treaty to force Ethiopia to accept American investment, especially as no American would likely wish to venture his capital in Ethiopia anyhow except with the express sanction of the Ethiopian Government. The treaty does, of course, contain valuable assurances, of the sort normally sought in one of these treaties, concerning the protection of investments which are actually made now or hereafter in Ethiopia.

The State Department does not regard this treaty as at all "diluting the pattern of our bilateral treaties," as suggested in Mr. Swingle's letter. It is specially designed for a country like Ethiopia; not for a country of Western Europe. It is to be judged by its many positive accomplishments in relation to Ethiopia rather than by its omissions. As it stands, it is a stronger treaty than most nations commonly make with one another. It represents a great advance over our existing commercial treaty (that of 1914) with Ethiopia, and should serve well until Ethiopia reaches the stage of being able to enter into a still more ambitious treaty.

DEPARTMENT OF STATE,
Washington, May 16, 1952.

Hon. JOHN J. SPARKMAN,
Committee on Foreign Relations,
United States Senate.

MY DEAR SENATOR SPARKMAN: There is enclosed a memorandum, as requested during the course of the hearing held by your subcommittee on Friday, May 9, concerning questions raised by Mr. Swingle, president of the National Foreign Trade Council, in his letter of May 8 to you with reference to the pending treaties of friendship, commerce, and navigation with Colombia, Denmark, Greece, and Israel and the supplementary agreement with Italy. A memorandum concerning the National Foreign Trade Council's views on the treaty with Ethiopia has been sent under separate cover.

This Department gives most careful consideration to the suggestions which the Foreign Trade Council offers from time to time with a view to making the treaties a more effective instrument of American foreign policy. However, as will appear from the attached memorandum, we are unable to concur in the advisability of the changes which the council now proposes be made in the several instruments pending before the committee. Agreement on these treaties has been reached after lengthy and often difficult negotiations conducted at the instance of the United States Government and on the basis of United States proposals; and it would not appear advantageous to risk reopening negotiations for the purpose of securing nonessential changes, especially in clauses already appearing in hitherto approved treaties. None of the changes suggested by the council

appears necessary, and at least one appears to be contrary to the interests of the United States.

If there are any further materials you might require, please do not hesitate to call on us, for we are most anxious to be of whatever assistance we can in facilitating the committee's consideration of these treaties.

Sincerely yours,

HAROLD F. LINDER,
Acting Assistant Secretary for Economic Affairs.

MEMORANDUM

There follow comments of the State Department on the two points raised in the letter of May 8 from Mr. Swingle, president of the National Foreign Trade Council, concerning the pending treaties of friendship, commerce, and navigation with Colombia, Denmark, Greece and Israel, and the supplementary agreement with Italy.

So-called investment clause.—The quoted provision, as found in article VIII of the treaty with Greece, is one of the least of many clauses relating to investment in the treaty. It first occurred, in a larger form, in the 1949 treaty of friendship, commerce, and economic development, with Uruguay (art. IV), heretofore approved by the Senate; and it was not then criticized by the National Foreign Trade Council in the letter which it sent to the Senate, recommending approval of the Uruguay treaty (letter to Senator Connally, from Mr. Thomas, then president of the organization, dated March 6, 1950). The Uruguay version, however, contained one passage which has been abandoned in the current treaties, in light of further study and in response to a particular objection subsequently raised by the National Foreign Trade Council: namely, a stipulation that neither party should "without appropriate reason deny opportunities and facilities for the investment of capital by nationals and companies of the other party."

The State Department does not agree with the objections or the recommendation contained in the National Foreign Trade Council's letter.

The National Foreign Trade Council recommendation, as set forth in bottom of page 6 of its letter, is that the treaty rule requiring prompt, just, and effective payment of compensation for expropriated property, including interests in property (as, art. VII, par. 3, of the Greek treaty), be extended to require compensation in the event of any "measures that would impair the rights or interests" of any kind which nationals of one country may have in the other. This Department does not believe that this recommendation represents a commitment which the United States could, for its part, undertake. This is for the reason that such a provision would appear to require compensation in circumstances in which the United States Government does not under the Constitution and laws of the United States pay compensation. While the United States, of course, pays compensation for property and property interests which it takes, it does not pay compensation for all "losses" which Government action may cause. For example, the Federal Government does not pay compensation for so-called "consequential damages" occasioned by a condemnation of property, notwithstanding that the condemnation may cause the private owner considerable losses in the nature of consequential damages. There is no obligation upon the United States Government to compensate a distiller for the loss of business brought on by a prohibition law; nor a utility company for the economic consequences of the formation of a Government-supported rural electrification system; nor individuals or business concerns for the loss of prospective profits resulting from price control laws. There are many other instances of Government-caused losses, or alleged losses, which the United States Government under the Constitution and laws declines to make good. The State Department cannot recommend a treaty provision which would go beyond established United States policy in this connection and grant foreign nationals more favorable treatment than citizens receive in the United States.

The Department of State recognizes the limitations of the provision represented by article VIII of the Greek treaty. However, it is believed to serve a useful purpose in that it affords one more ground, in addition to all the other grounds set forth in the treaty, for contesting foreign actions which appear to be injurious to American interests. A given measure of a foreign government might, for example, be fully consistent with the national treatment or most-favored-nation treatment rules of the treaty, and also short of expropriation, but yet arbitrary and unreasonable as it affected some vested American interest in the country concerned. In that event, the only treaty ground for protest might be general

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language such as found in articles I and VIII of the Greek treaty. It remains, however, that the real protection of an American investment abroad rests for the most part on the more specific provisions of the treaty; the clause in question does not qualify these more specific provisions, but is merely something additional.

The concluding passage of the provision (relative to impediments on the outflow of investment capital, as quoted on the top of page 7 of the letter in reference) is not phrased in a way to create a source of embarrassment to the United States. The commitment is merely not unreasonably to impede the outflow of free enterprise investment capital. There is no undertaking positively to encourage the outflow of capital or to supply any capital. All commitments in the treaty are, on the other hand, subject to a broad national security reservation. This passage, therefore, would appear to be a moderate assertion of this Government's favorable attitude toward the private investment process which it is among the major aims of the treaty as a whole to foster and protect.

Restrictive business practices clause.—This clause, which has appeared in several previously approved treaties, is designed to enlist the cooperation of foreign governments in the congressionally approved efforts of this Government to reduce and remove the adverse effects of cartels and other restrictive practices on international trade.

It will be observed that the clause is not self-executing, and it is also cautiously worded otherwise. The commitments are (1) to consult, i. e., to hold discussions, and (2) to take such action as each party deems appropriate, in its own discretion and in its own way, with a view to eliminating the harmful effects of defined practices on international trade. While the holding of consultations would be an executive function, any action that the United States might see fit to take would be the normal combination of congressional, executive, and judicial action that exists apart from the treaty. The clause has, furthermore, been drafted in such manner as to avoid conflict with the Webb-Pomerene Act and the other enactments which represent exceptions to the basic antitrust law of the United States. The clause is not regarded as creating new substantive antitrust law or new procedures of antitrust enforcement in the United States.

It may be stated categorically that the restrictive business practices clause is not in any way designed to enhance executive power or to alter established congressional-executive-judicial relationships in the formulation and execution of antitrust policy. In the State Department's view, the Executive would be bound, in carrying out the clause, to proceed in conformity with statutes duly enacted by the Congress; and there is no intent to authorize the contrary. A proviso spelling out the internal processes by which the United States acts is therefore unnecessary; it would also appear to be inappropriate in an international instrument, since it is not the concern of a foreign government.

(The following additional comments of the National Foreign Trade Council were subsequently received and incorporated in the record:)

NATIONAL FOREIGN TRADE COUNCIL, INC.,
New York 6, N. Y., May 12, 1952.

Hon. JOHN J. SPARKMAN,
United States Senate,
Senate Office Building, Washington, D. C.

DEAR SIR: * * *

With reference to article VII of the supplementary treaty with Italy we enclose a memorandum in relation to the social security benefits under the laws of the two countries. We believe this may be helpful to your committee in the study of this provision.

Very truly yours,

WILLIAM S. SWINGLE, *President.*

MEMORANDUM ON ARTICLE VII OF THE SUPPLEMENTARY TREATY WITH ITALY

Article VII of the proposed Italian agreement provides for combining coverage under the social-security systems of the two countries in accordance with certain broad principles which do not spell out any of the details of how such a combining provision would operate in actual practice. For some time we have been trying to ascertain whether or not the Federal Security Agency has developed any concrete plans for implementing the agreement if and when it is ratified. Our efforts in this direction have been unproductive. Without such information, it is impossible

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to evaluate the effect of the proposed agreement on our domestic social-security program.

The following example will illustrate the type of questions in connection with any such proposal. Assume that an Italian workman enters the United States after 15 years of coverage under the Italian social-security law. He obtains employment in the United States and dies, leaving a widow and children, after working for only 1 year in employment covered by the Social Security Act. Ordinarily, in order for his widow and children to be eligible for survivor benefits, the wage earner must have had insured employment in 6 of the 13 quarters preceding his death. Would the employment under the Italian scheme be considered in determining the eligibility of the widow and children under the United States Social Security Act? If survivor payments are to be made under both laws, how would the proportion of the respective payments be determined?

It seems to us that it is almost impossible to develop a fair and equitable arrangement for combining coverage under United States and foreign social-security schemes which are so radically different in their concepts. Lacking any information as to how the proposed agreement would be implemented, however, makes it extremely difficult at this stage to do more than raise these questions and to insist on complete information as to the types of cases in which the agreement would be applicable and the mechanics which would be employed in its operation.

It should also be noted that this is a precedent-setting agreement, since the President's message states, "Another provision incorporated for the first time in an agreement to which the United States is a party is that contained in article VII." This raises the question as to whether or not it is the policy of the United States to extend this type of agreement to other countries. This fact alone should warrant the Senate Foreign Relations Committee making careful and exhaustive investigation into the possible implications of such agreements for our domestic social-security program.

EXPLANATION OF HOW THE UNITED STATES-ITALIAN TREATY MIGHT OPERATE IN CERTAIN TYPES OF CASES—MAY 15, 1952

The provisions of the United States-Italian agreement establish the general method of coordinating benefits which is to be used. The following is a brief explanation prepared by the Social Security Administration as to how benefit coordination might be brought about as regards the old-age and survivors insurance benefits of the two countries.

There would be eligibility for coordination only if (1) the worker had at least 3 years of employment after 1937 under each system, and (2) the worker gains insured status under one or both programs by reason of the combination of periods of service.

When there is eligibility for coordination, the worker, or his surviving dependents, may elect whether or not to have the coordination provisions apply. If coordination is elected, the workers' combined service periods would be used in determining his benefit rights, or those of his survivors, under each system.

Each system would use combined periods of service in determining eligibility for benefits. Each system would use its own qualifying requirements in determining who could receive benefits. While each system would determine benefit amounts on the basis of combined service, it would not be necessary to transfer information about the level of earnings—transfers of records of service would be sufficient.

After the initial benefit computation on the basis of combined service, each system would reduce the benefit according to the relative amounts of service under the two systems.

Attached are appendix I, giving the insured status requirements of the two programs, and appendix II, giving illustrations of cases which might arise under coordination. While the illustrations go into some detail in describing the benefits payable under the United States system, they present only in rough outline enough information about the benefits payable under the Italian system to show how the basic principles would operate.

The illustrative cases in appendix II are organized according to the insured status of the worker before and after the totalization of his periods of service under the two systems. There are nine possible types of cases which may arise, based on the effect of the coordination upon the worker's insured status. The following table shows these nine categories of cases:

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	Country in which worker has insured status		Date benefits under coordination could first be paid, under our proposals
	Before coordination	After coordination	
First	Neither	Neither	Never.
Second	do	Italy	July 1963.
Third	do	United States	July 1957.
Fourth	do	Both countries	Do.
Fifth	Italy	Italy	Never.
Sixth	do	Both countries	July 1957.
Seventh	United States	United States	Never.
Eighth	do	Both countries	Effective date of agreement.
Ninth	Both countries	do	Never.

As shown in the table above, group eight cases are the only cases in which benefits can be paid as soon as the coordination becomes effective. The earliest date for the beginning of benefit payments in any of the other groups of cases is July 1957. The reason why these benefit payments cannot be made earlier is explained for each type of case in appendix II, under "Comments."

Appendix II contains illustrations of cases which might arise in each of the groups in which there might be eligibility for benefits under coordination.

The coordination plan is not expected to affect in any substantial manner the actuarial status of the insurance system. While it is not possible to estimate the cost of coordination to either the Italian or the United States system, it is expected that, since only a very few cases will be affected, the cost will be negligible. Whatever small additional expenditures may be involved would be justified in view of the contributions paid on behalf of the persons affected, who now contribute to the United States system but do not work long enough to draw benefits.

Appendix I.—Insured Status Requirements of the Italian and United States Programs as of May 7, 1952

Insured status requirements of United States program

Individual dies, or reaches age 65, in—	Number of years of service which will meet the requirements of the United States system—Dies, or reaches age 65	
	January through June	July through December
1953 or earlier	1½	1½
1954	1½	1¾
1955	2	2¼
1956	2½	2¾
1957	3	3¼
1958	3½	3¾
1959	4	4¼
1960	4½	4¾
1961	5	5¼
1962	5½	5¾
1963	6	6¼
1964	6½	6¾
1965	7	7¼
1966	7½	7¾
1967	8	8¼
1968	8½	8¾
1969	9	9¼
1970	9½	9¾
1971 or later	10	10

Also, a worker who has worked under the United States system for roughly 1½ years out of the 3 years immediately preceding his death may be insured on the basis of such employment for some types of survivorship protection. The children under age 18, and the widow caring for such children, may qualify under this last 3-year provision.

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INSURED STATUS REQUIREMENTS OF ITALIAN PROGRAM

For old-age benefits under the Italian system, the insured status requirement is taken as being 15 years of coverage. The Italian insured status requirement for survivor benefits is taken as being a total of 5 years of coverage, with the additional requirement that 1 year's coverage must have been in the 5 years immediately preceding death. These requirements follow the general approach of the actual, more detailed provisions of the Italian system. (It will be noted that the "recency" test of the Italian program for survivorship protection is an additional requirement which must be met, while the recency test of the United States system is an alternative method of meeting the insured status requirements of the program.)

APPENDIX II.—ILLUSTRATIVE CASES SHOWING OPERATION OF COORDINATION UNDER UNITED STATES-ITALIAN TREATY

Group 2. Not insured under either system without coordination; insured under the Italian system with coordination:

B works for 3 years, from 1950 through 1952, under the United States system. He works for 4 years, from 1960 through 1963, under the Italian system. He dies in July 1966.

Without coordination, B cannot of course meet the length of service requirement of either system. With coordination his 7 years of combined service are sufficient to meet the length of service requirement of the Italian program but not of the United States program. (As shown in the preceding table 7¾ years would be required under the United States system; the alternative requirement for limited survivorship protection, as noted, would be 1½ years of employment during the 3 years immediately preceding his death.)

With coordination, the benefits for B's survivors under the Italian system would first be computed based on the 7 years of service under the two systems. They would then be reduced to four-sevenths of this amount, as four-sevenths of B's service was under the Italian system.

Comment.—It might be noted that there could be no cases in group 2 until after June 1963, and then only in survivor cases. Group 2 cases could never arise before July 1963 because a worker who meets the 3-year qualifying requirements would also be able to meet the United States insured status requirement which applied before that date. There could be no retirement cases in group 1 even after the middle of 1963, as anyone meeting the Italian length of service requirement could also meet that of the United States system. There could be some survivor cases after June 1964, as after that date the survivorship requirements of the Italian system would be more liberal in some ways than those of the United States system.

Group 3. Not insured under either system without totalization; insured under the United States system, but not the Italian system, with totalization:

C works under the Italian system for 6 years, from 1944 to 1949. He works under the United States system for 6 years, from 1956 through 1961. He reaches age 65 and retires in January 1966.

As the length of service requirement under the United States system is 7½ years for an individual reaching age 65 in January 1966 C is not insured under the United States system without coordination. He is not of course insured under the Italian system without coordination. With coordination the 12 years of combined service would still not meet the Italian requirement of 15 years, but would meet the United States requirement.

It is assumed that C received wages of $200 per month while under the United States system, and that he had a wife age 65 or over when he retired. The amount of his monthly old-age benefits under the United States system based upon totalized service would be $40 under the initial computation, and his wife's benefit would be $20. The 1951 new start would be used in computing his average monthly wage and benefit amount in the computation. As C's Italian service is before 1951 it has no effect on the computation of the average monthly wage, as periods before 1951 were not used in the computation.

C's benefit and that of his wife are then reduced to one-half of the amount as originally computed, as one-half of his total service was under the United States system. The reduced monthly benefit for C is $20, and his wife's benefit is $10. These amounts would be paid under the United States system.

Comment.—The Social Security Administration proposed that when the new start is used in determining the average monthly wage, under the United States system, the benefit reduction under the United States system should be based on

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the relative amounts of service after January 1, 1951, unless insured status depends on the use of Italian service before January 1, 1951, in which case the reduction would be based on the relative lengths of service periods after January 1, 1937. As C's insured status does depend upon Italian service before 1951 the reduction in this case is based on the total service under the two systems after January 1, 1937.

Group 3 cases could not arise before the middle of 1957, as a worker with the required 3 years of service under the United States system would meet the insured status requirements of the program until that date. After that date there would be both retirement and survivor cases falling in group 3.

Group 4. Not insured under either system without coordination; insured under both systems with coordination:

D works for 4 years, from 1952 through 1955, under the United States system. He works for 4 years, from 1956 through 1959, under the Italian system. He dies in January 1960.

Without coordination, D cannot meet the insured status requirements of either system. (As shown in the table, the United States requirement for a worker who dies in January 1960 would be 4½ years.) With coordination, D would meet the insured status requirements of both programs.

The benefits for D's survivors under the Italian system would first be computed based on the combined 8 years of service under the two systems. They would then be reduced to one-half of this amount, as one-half of D's service was under the Italian system.

It is assumed that D received wages of $200 per month while under the United States system, and that he was survived by a widow and two children under age 18. The amount of the monthly benefits based on combined service would be, under the initial computation: widow, $44.30; first child, $36.90; second child, $36.90. The 1951 "new start" would of course be used in computing his average monthly wage in the computation. The benefit amounts would then be reduced to one-half of the amounts as originally computed, as one-half of D's total service was under the United States system. The reduced benefits, as payable to D's survivors, would be: widow, $22.20; first child, $18.50; second child, $18.50.

Comment.—Group 4 cases could not arise before the middle of 1957. (As in group 3 cases, a worker with the required 3 years of service under the United States system would meet the insured status requirements of this program until that date.) After June 1957, both retirement and survivor cases could arise in group 4.

Group 6. Insured under Italian system only without coordination; insured under both systems with coordination:

F works under the Italian system for 20 years, from 1951 through 1970. He works under the United States system for 7 years, from 1971 through 1977. He reaches age 65 and retires in January 1978.

F meets the Italian length of service requirements without coordination. He does not meet the United States requirement (10 years for workers reaching age 65 after 1970) without coordination, but does meet the United States requirements with coordination.

Without coordination, F would qualify for benefits under the Italian system based on 17 years of service. With coordination, he would qualify for benefits computed on the combined total of 24 years of service and then reduced to seventeen twenty-fourths of this amount, as seventeen twenty-fourths of F's service was under the Italian system.

It is assumed that F received wages of $200 per month while under the United States system, and that he had a wife aged 65 or over when he retired. The amount of the monthly benefits based on combined service would be, under the initial computation: F's own benefit, $65; his wife's benefit, $32.50. The benefit amounts would then be reduced to seven twenty-fourths of the amount as originally computed, as seven twenty-fourths of F's total service was under the United States system. The amounts of the reduced benefits would be: F's own benefit, $19; his wife's benefit, $950. These are the benefits which would be paid under the United States system.

Comment.—Group 6 cases could not arise until July 1957, when the insured status requirements of the United States system first exceed 3 years. After that date, both survivor and retirement cases could fall in this group.

Group 8. Insured under United States system only without coordination; insured under both systems with coordination:

H works under the Italiam system for 10 years, from 1937 through 1946. He works under the United States system for 6 years, from 1947 through 1952. He reaches age 65 and retires in January 1953.

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Even without coordination, H is insured under the United States system, as the length of service requirement for a worker who retires in January 1953 is but 1½ years of service. With coordination, his combined total of 16 years of service enables him to also meet the Italian requirements.

With coordination, F would qualify for benefits under the Italian system computed on the combined total of 16 years of service, and then reduced to ten-sixteenths of this amount, as ten-sixteenths of H's service was under the Italian system.

It is assumed that H received wages of $200 per month while under the United States system, and that he had a wife aged 65 or over when he retired. The amounts of the monthly benefits based on combined service would be, under the initial computation: H's own benefit, $65; his wife's benefit, $32.50. This computation would be based on the 1951 "new start," and H's average monthly wage would be based on his wages in 1951 and 1952.

In this case, there would be no reduction in the benefit amounts as originally computed, if our suggestions are adopted. As H did not depend on Italian service before 1951 for insured status, the reduction, if any, would be based on the relative service periods after 1950. However, as there is no Italian service after 1950 in this case, there would be no benefit reduction.

Comment.—This group of cases is of particular interest, as it is the only type of case, under our proposals, in which benefits could be paid under coordination before the middle of 1957. Thus, for the first few years under the agreement, the only benefits payable by reason of the coordination would be those payable under the Italian system.

In the case of H the amounts of the benefits payable under the United States system were not affected. However, the benefits payable under the United States system in group 8 cases will ordinarily be lowered if there was Italian service after 1950, or if the worker's insured status depends on Italian service before 1951.

Senator SPARKMAN. Mr. Roy Leifflen?

Mr. LEIFFLEN. Yes, sir.

Senator SPARKMAN. Will you come around, Mr. Leifflen?

For the record, will you give your name and the capacity in which you appear, to the reporter?

STATEMENT OF ROY LEIFFLEN, REPRESENTING THE ASSOCIATION OF MARINE UNDERWRITERS OF THE UNITED STATES

SAFEGUARDS AGAINST DISCRIMINATION IN MARINE INSURANCE ADVOCATED

Mr. LEIFFLEN. My name is Roy Leifflen, and I am appearing as counsel for the Association of Marine Underwriters of the United States, which is an organization comprised of 35 of the leading insurance companies engaged in the marine-insurance business in this country. I have a prepared statement in support of the position of the American marine underwriters, that the United States should, in treaties of commerce and friendship, provide adequate safeguards against the growing prevalence of discrimination in the field of marine insurance which prevents American marine-insurance companies from competing for the marine insurance on imports and exports.

In connection with the treaties under consideration today, insofar as we know, only Colombia and Italy have discriminatory laws or practices, but we are primarily interested in setting a pattern because it seems to us it is far better to include a prohibition against discrimination in a commercial treaty rather than to wait until a country enacts discriminatory laws or regulations and then attempts by diplomatic negotiation to have them abrogated.

I have already submitted copies of my statement, Senator, but I will be glad to read it if you wish.

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Senator SPARKMAN. It is not necessary at all. The statement will be printed in full in the record.

(The statement of Mr. Roy Leifflen is as follows:)

STATEMENT ON BEHALF OF THE ASSOCIATION OF MARINE UNDERWRITERS OF THE UNITED STATES

This statement is submitted in support of the position of American marine underwriters that the United States should in treaties of commerce and friendship provide adequate safeguards against the growing prevalence of discrimination in the field of marine insurance which prevents American marine insurance companies from competing for the marine insurance on imports and exports.

At the outset we wish to emphasize that the American marine insurance market believes firmly in the principle of free competition in marine insurance and seeks only the right to compete for the marine insurance.

The problem of discrimination, which is largely a development of the postwar period, and which threatens the development of international trade itself, has become a subject of international concern, both on the private and political level.

Private insurance interests in the Western Hemisphere have in the course of three hemispheric conferences recognized the importance of eliminating such practices. At the First Hemispheric Conference, held in New York City in 1946, a resolution was presented by the Chilean delegation relative to the "Guarantee of freedom to private enterprise in the insurance field." The resolution was approved and its principle reaffirmed in the Second Hemispheric Conference held in Mexico City in 1948 and in the Third Hemispheric Conference, held in Santiago, Chilea, in October 1950.

Similarly, the proposed charter of the International Trade Organization, provides:

"ART. 53. The members recognize that certain services such as transportation, telecommunications, insurance and banking, are substantial elements of international trade, and that any restrictive business practices in relation to them have harmful effects similar to those described in par. 1 of Art. 46."

Last year the International Chamber of Commerce presented the question before the Transport and Communications Commission of the United Nations Social and Economic Council. That Commission passed Resolution 12 by a vote of 10 to 3 (Russia, Poland, and Byelorussia voting against) which recognized that discriminatory measures against marine insurance may interfere with the free flow of international trade and recommended a study of the situation by the Social and Economic Council. This resolution was approved by the Council in July.

The International Union of Marine Underwriters, having among its membership the marine insurance associations of nearly all the free countries of the world, likewise passed a resolution condemning such practices at its annual meeting held in September of last year in Switzerland.

It is submitted therefore that there is abundant evidence of the serious proportions which these practices have reached, and it is felt that the United States should take a realistic approach to the problem in negotiating future treaties of commerce and friendship.

In addition to conforming to current international opinion evidenced by the foregoing, such action would conform to congressional policy that a strong American marine insurance market is essential to the national economy and defense of this country. The House Committee on Merchant Marine and Fisheries recently stated:

"The Congress has several times in the past forcefully stated its position with regard to fostering the growth of the American marine insurance market" (H. Rept. 220, 81st Cong., 1st sess., on H. R. 1340).

The committee was referring to the principle, first enunciated in the declaration of policy of the Merchant Marine Act of 1920 and more recently in the Merchant Ships Sales Act of 1946 (Public Law 371, 79th Cong., act of March 8, 1946), that:

"It is necessary for the national security and development and maintenance of the domestic and the export and import foreign commerce of the United States that the United States have an efficient and adequate American owned merchant marine * * * supplemented by efficient American owned facilities for shipbuilding and ship repair, marine insurance, and other auxiliary services."

The Congress has consistently recognized that a strong American marine insurance industry can only exist in an atmosphere of free international competi-

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tion. Legislation dealing with marine insurance has never sought to protect American marine insurance industry from foreign competition but to place it in a position to compete on equal terms internationally. The action requested herein is similarly designed to preserve that free international competition which Congress has recognized is essential to a strong marine insurance industry.

Discrimination in marine insurance in its several forms, including laws, regulations, taxes and duties, has either directly or indirectly required marine insurance on imports and exports to and from foreign countries to be placed in the national markets, thus effectively preventing American companies not admitted to do business in the foreign country from competing for the business, as well as preventing the importer and exporter from selecting the most advantageous and economic insurance, and in many cases, causing delay, uncertainty, and confusion.

In protected marine insurance markets higher rates are usually charged because there is no international competition. The added expense is, of course, passed directly to the ultimate consumer of the goods. Similarly, the delay, uncertainty, and confusion directly inhibit the flow of goods in international trade.

The treaties of friendship and commerce with Colombia, Israel, and Denmark (art. XIV, subsec. 3), Ethiopia (art. XIII, subsec. 2), Greece (art. XVII, subsec. 1) provide:

"Nationals and companies of either party shall be accorded national treatment and most favoured nation treatment with respect to all matters relating to importation and exportation."

There is nothing on this point in the agreement supplementing the treaty with Italy and the original treaty contains narrower language.

The foregoing clause fails to afford any guaranty against the discriminatory practices in question. It does not prevent a party to such treaty from requiring its own nationals to place their marine insurance in the national market, thus preventing the free selection by the parties to international transactions of the most favorable insurance market. Moreover, if a party to such treaty thus restricts its own nationals in the selection of the insurance market it may similarly restrict the nationals of the United States.

For this reason, and for the reason that the gravity and prevalence of such discriminatory practices require affirmative language in order to assure their elimination, the following or similar words should be inserted following the above quoted words or in some other appropriate place in commercial treaties:

"Neither Party shall impose any prohibition or restriction or discriminatory tax preventing or hindering the importer or exporter of goods of either country from obtaining marine insurance on such goods in companies of either Party."

This matter has heretofore been discussed with the Department of State and a memorandum similar to this one has been submitted to the Department. Although the Department has adopted a sympathetic attitude toward the position of American marine insurance underwriters it has not inserted in a commercial treaty any provisions which would enable the American marine insurance underwriters to compete for this insurance in the traditional American manner.

It is, therefore, respectfully requested that if the Senate ratifies these treaties it be on the understanding, condition, or reservation that the clause suggested herein be made an integral part of the treaties.

DISCRIMINATORY PRACTICES OF ITALY AND COLOMBIA ON MARINE INSURANCE

Senator SPARKMAN. You state that two countries have discriminatory provisions in their legislation. What two countries are they?

Mr. LEIFFLEN, Colombia and Italy.

Senator SPARKMAN. Italy and Colombia are involved in these treaties. In what way are those provisions discriminatory?

Mr. LEIFFLEN. Colombia practices its discrimination through its laws and through the office of exchange control, penalizing importers and exporters who place insurance in companies not authorized to do an insurance business in the Republic of Colombia.

Italy, insofar as we know, has no statutory discriminatory provision, but it exercises discrimination by means of its foreign exchange control board.

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Senator SPARKMAN. Do you feel that the provisions in the presently proposed treaties are not sufficiently tight on that?

Mr. LEIFFLEN. I don't think it covers the situation at all, Senator, for this reason: Even the so-called national treatment which Mr. Linder was talking about is not effective. If, say, Colombia imposes a restriction on its own nationals with respect to where they place insurance, we cannot expect them under the national treatment clause to give any better treatment to an American importer or exporter who is dealing with merchants, buyers or sellers in the Republic of Colombia.

Senator SPARKMAN. Let me ask this question, to see if I understand just what you mean. You mean a shipper from New York shipping goods into Colombia, if he took out insurance on the goods he was shipping with a New York insurance company, how would Colombia interfere with that?

Mr. LEIFFLEN. There are various types of contracts of purchase and sale. Insurance is a term of the contract between the buyer and the seller, and in some types the insurance is taken out by the Colombian purchaser or seller, and if he is required by Colombian law to take it out in a Colombian insurance company, you have one of the terms of the sale dictated by a government which is historically—and that is the way we like to see it continue—is a matter of open negotiation between the buyer and the seller in a competitive market.

Senator SPARKMAN. There would be nothing to prohibit the shipper in the case I gave, from taking out his insurance in New York, and that certainly could not be interfered with by Colombia.

Mr. LEIFFLEN. That is right.

Senator SPARKMAN. The question would be if insurance was to be provided by the buyer in Colombia, or in the event of shipping out of Colombia if it was to be provided by the shipper in Colombia. Then it would have to be taken by a Colombian company; is that right?

Mr. LEIFFLEN. Yes, sir, that is right. In some cases it goes further. For instance, in Argentina there is a law that if the goods coming into Argentina or going out of Argentina are at the risk of the Argentine purchaser or seller, as the case may be, the insurance must be taken out with an Argentine insurance company or else there is a large penalty.

That also has an effect on the terms of the contract which takes one term of the contract out of the sphere of free negotiation between the buyer and seller, and that is what the American insurance companies want to provide against, because historically it is a free market.

Senator SPARKMAN. You believe that in negotiating these agreements that should be one matter that should be included in the negotiations?

Mr. LEIFFLEN. Yes, sir, in negotiating commercial treaties we think our Department of State should endeavor to include a prohibition against governmental interference with the placement of marine insurance so it will be left to the buyer and seller to decide who is to take out the insurance and in what market, exactly like the financing, what the terms will be—10 days, 30 days, 2 months; the method by which the commodity will be packed. All those matters are, we feel, as advocates of private industry and business, matters which should not be dictated by any government.

Senator SPARKMAN. Senator Hickenlooper, have you any questions on this point?

Senator HICKENLOOPER. Mr. Chairman, I think I understand the position.

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NATIONAL TREATMENT WITH RESPECT TO THE PRACTICE OF PROFESSIONS

I would like to ask Mr. Linder some questions. This note was just sent me by a member of the Senate who asked me to inquire into it, and it is here. This has to do with article VIII in the treaty with Israel. I have just asked Mr. Marcy to check the other treaties. Perhaps you can tell me whether the same article is in any of the other treaties.

The entire article VIII apparently is an attempt to give great latitude and privilege to the nationals of either party to use their own technical and professional experts within the territory of the other; and then, in paragraph 2 of article VIII, it reads as follows:

> Nationals of either party shall not be barred from practising the professions within the territories of the other party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence, and competence that are applicable to nationals of such other party.

Now, as I read that, it would mean that nationals of Israel having first been properly admitted here and having met any examinations for professional or technical competence that may apply to American citizens, can go on indefinitely practising their professions here and remain aliens at all times.

Mr. LINDER. No. Do you want me to reply, sir?

Senator HICKENLOOPER. I say, that is the way I would interpret that No. 2, and I would like to comment on that.

First, is a similar provision to article VIII in the treaty with Israel in any other treaty?

Mr. WALKER. It has been in our treaties since 1923.

Mr. LINDER. And it does not carry the implication that you read into it. It rather means that a citizen of Israel or any other country with whom we have such an agreement may, upon being properly admitted to the United States, not be barred by reason of being a citizen of Israel from doing what anybody else in this country may do. In the case of certain provisions that is a matter regulated by the State and, as I understand it, a citizen of Israel, if he wants to practice medicine in, say, Florida or New York, he has to do whatever the requirements of those States are.

Senator HICKENLOOPER. I am not familiar with this subject. I mean, I can't make any positive allegation, but it runs in my mind that there are a number of States that have a flat prohibition against licensing of an alien to practice certain professions or businesses which require a specific professional license. This would abrogate that, I take it.

Mr. WALKER. Insofar as the alienage requirement is concerned, that is correct. That has been treaty policy since 1923. It has been in most treaties since then. This is a more explicit statement of the rule that has been in effect. It is national treatment on the practice of professions.

(The following information was subsequently supplied by the Department of State:)

> Eight treaties (those with Austria, El Salvador, Germany, Honduras, Hungary, Liberia, Norway, and Uruguay) provide for national treatment generally; and two (Italy and Ireland) so provide except for the practice of law, which in turn is covered by a most-favored-nation clause. Five of the remaining six also contain national-treatment clauses, but subject to qualifications. The treaty with Poland

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excepted professions reserved to citizens by laws in force on June 15, 1931; and provided further for most-favored-nation treatment on condition of reciprocity. The treaty with Finland contains the reservation "insofar as may be permitted by local law," but supplements this with a most-favored-nation clause. The treaties with China, Estonia, and Latvia contain an exception for professions "reserved exclusively to nationals of the country," without specifying whether a profession can be considered exclusively reserved to citizens if open to other aliens by virtue of a treaty with any third country. The treaty with Siam merely provides for most-favored-nation treatment on condition of reciprocity.

Senator HICKENLOOPER. Therefore I would interpret it that if an alien, under the provisions in these treaties, who is an engineer or a doctor or a lawyer or of any other profession, once has a proper entry into this country; that is, if he is here under proper entry, then the fact that he is an alien would not bar him—that alone—from the practicing of his profession if he could meet the educational standards or whatever the standards are within the area met by Americans.

Mr. LINDER. He would be required to meet all standards except the one of citizenship.

Senator HICKENLOOPER. And therefore a State law in conflict with that would fall under this treaty.

Mr. LINDER. And under other treaties that we have had for many years.

(The following information was subsequently furnished:)

MAY 16, 1952.

Hon. JOHN J. SPARKMAN,
United States Senate.

MY DEAR SENATOR SPARKMAN: I have been informed by Acting Assistant Secretary of State Linder that some questions have arisen concerning article VIII, paragraph 2, of the Treaty of Friendship, Commerce, and Navigation with Israel (Executive R), Eighty-second Congress, first session, which is now being considered by the subcommittee of which you are the chairman. This article reads as follows:

"2. Nationals of either Party shall not be barred from practising the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence, and competence that are applicable to nationals of such other Party."

This article means that a national of Israel shall not be barred from practicing a profession in the United States merely because of his alienage. As the article states, he must comply with State laws regarding qualifications, residence, and competence in his profession which a State applies to any citizen of the United States. If a State, for example, requires a written examination, residence in the State, etc., before it will grant a license to a physician, the particular foreign national must meet all such requirements. The only requirement, if it exists in any State, which may not be imposed, is that the individual concerned be a United States citizen.

Counterparts of this provision granting national treatment with respect to the practice of professions are contained in at least 10 treaties between the United States and other countries to which the advice and consent of the Senate have been given after full consideration. These are the treaties between the United States and Germany of 1923 (art. I, par. 1); with Austria of 1928 (art. I, par. 1); with El Salvador of 1926 (art. I, par. 1); with Honduras of 1927 (art. I, par. 1); with Hungary of 1925 (art. I, par. 1); with Liberia of 1938 (art. I, par. 1); with Uruguay of 1949 (art. V, par. 1 (a)); with Ireland of 1950 (art. VI, par. 1 (a), excepting only law); and with Italy of 1948 (art. I, par. 2 (a), excepting only law)., It is also contained in the treaty with Colombia (Executive M, 82d Cong., 1st sess., art. VII, par. 1), which is presently being considered by your committee.

The practice of the United States Government,to include national treatment provlions respecting the practice of professions in bilateral friendship and commerce treaties has thus been followed for nearly 30 years, and has been repeatedly merce treaties has thus been followed for nearly 30 years, and has been repeatedly approved by the Senate in its advices and consents to ratifications of these treaties. The practice was established and has been followed because it is in the interest of the Government and people of the United States. Americans are engaged in

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business and professions all over the world. They have requested, and the United States Government has deemed it appropriate to support, efforts to protect them in their right freely to pursue legitimate business and professional activities without discrimination on account of their American citizenship. Since firm commitments in treaties between foreign countries and the United States respecting this right is the most effective manner by which those rights may be secured, the United States has sought and achieved the execution of treaties with foreign countries which contain such commitments.

Since treaties involve reciprocal obligations, the United States cannot expect to secure the protection of rights of American citizens to practice professions abroad, or to engage in other gainful pursuits, without being prepared to accord reciprocal treatment in the United States to nationals of the particular foreign country. Fortunately, the United States is able to accord reciprocity with minimum interference with local legislation, since our country has always been hospitable to persons contribute to the building of a healthy and expanding economy. As a consequence of this traditional hospitality, there are on the whole few and relatively minor legal restrictions imposed by local laws on account of alienage, far fewer than are to be found in the laws of almost all other countries. As a result, by these reciprocal treaty commitments, the United States has gained most of the advantages for American citizens. A reversal of this established United States practice would be a retrogressive step inconsistent with and harmful to the interests of the United States and of American citizens.

Sincerely yours,

JACK B. TATE,
Acting Legal Adviser.

NATIONAL TREATMENT WITH RESPECT TO SCIENTIFIC, EDUCATIONAL, RELIGIOUS AND PHILANTHROPIC ACTIVITIES

Senator HICKENLOOPER. Article VIII, section 3:

Nationals and companies of either party shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party. Nothing in the present treaty shall be deemed to grant or imply any right to engage in political activities.

Is that an innovation in treaties?

Mr. LINDER. No, sir; it is not. It was in the Uruguayan Treaty and the Italian and Irish treaties.

Senator HICKENLOOPER. It is not in the other treaties heretofore, historically?

Mr. LINDER. I don't know how far back, but I know it was in those three treaties.

Senator HICKENLOOPER. Well then, as I understand it, in these treaties that we have formerly adopted, and in these treaties that are now proposed, any organization or group of people from any of the treaty countries can come here and they have a guaranteed right under this treaty to form such organizations engaged in scientific, educational, religious, or philanthropic activities as they please so long, I assume, as they do not violate criminal laws of some kind. But there is very little limit to this thing.

Mr. LINDER. As I understand it, Senator, it says that they may do the same things that a national of this country may do in that respect, and that we may do the same things as a national of their country may do, and that in any event, if any other foreign country is given more advantageous treatment, we shall share in that treatment and, by the same token, if we give more advantageous treatment to a third country they will have the benefit of that more advantageous treatment.

Senator HICKENLOOPER. I was not aware that that provision had been in existence with other countries. It has fascinating possibilities.

Mr. LANDER. It has on the whole been one that we have sought. We have sought it for our missionary activities, and I think it has been harder for us to obtain rather than the reverse.

Senator HICKENLOOPER. That is all, thank you.

As I say, this inquiry was made on the request of another Senator, asking that I inquire into this matter.

Senator SPARKMAN. May I ask a simple question for the record? An alien is a person who was born abroad and has not been naturalized?

Mr. LANDER. That is right.

Senator SPARKMAN. After he is naturalized he is no longer an alien?

Mr. LANDER. That is correct.

(The following communications were received for insertion subsequent to the hearing:)

THE SECRETARY OF COMMERCE,
Washington 25, D. C., May 12, 1952.

Hon. TOM CONNALLY,
Chairman, Committee on Foreign Relations,
United States Senate, Washington 25, D. C.

DEAR MR. CHAIRMAN: I am glad to have this opportunity again to endorse the program for the negotiation of modernized general commercial treaties with interested foreign countries.

Aside from certain refinements and variations in detail, I understand that four of the five commercial treaties that have been concluded during the past year — those with Colombia, Greece, Israel, and Denmark — contain substantially the same provisions as the general commercial treaties with Ireland and Uruguay, to which the Senate gave its consent in 1950. The fifth, that with Ethiopia, is an abridged form designed to achieve the same general objective. In addition, there is the Italian supplementary agreement which is intended to bring the 1948 treaty with that country abreast of later developments.

American businessmen who have investment or trade relations with these countries, or who are contemplating such relationships, have a genuine stake in numerous provisions of these treaties. These provisions include the ones which concern the protection of their persons and property in the other countries involved, the permitted range of their activities in those areas, the conditions of their investment and withdrawal of funds, and the treatment of imports and exports.

As you may know, the Department of Commerce has recently been giving special attention to the problems of facilitating mutually profitable private United States investments in foreign countries. The conditions under which foreign enterprises may be established and operated in the various countries, the obligations which they must assume, and the rights of which they can feel assured, are outstanding among these problems. It is therefore particularly gratifying that the modernized commercial treaties contain explicit provisions on these questions. In our opinion, they should go far toward creating — so far as governmental agreements can — that much desired favorable climate necessary to attract American capital and technology.

These commercial treaties can do no more, of course, than establish the standards to be applied reciprocally by the contracting governments in these matters. Various other favorable conditions must be present before individual firms will launch ventures where these assurances can come into play. However, our discussions with American businessmen have revealed their belief that the conclusion of commercial treaties of the type now before your committee is one of the most useful steps the Government can take to aid private United States foreign investors. I am sure they will welcome your approval of these treaties.

Sincerely yours,

CHARLES SAWYER,
Secretary of Commerce.

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AMERICAN ARBITRATION ASSOCIATION,
New York 20, N. Y., May 14, 1952.

Hon. TOM CONNALLY,
Chairman, Committee on Foreign Relations,
United States Senate, Washington, D. C.

MY DEAR SENATOR: Your committee is considering the treaties of commerce, friendship and navigation which the United States recently concluded with Denmark, Israel, Colombia, and Greece, and the agreement supplementing the commercial treaty with Italy.

All these treaties contain a provision facilitating the mutual enforcement of arbitration agreements and awards in commercial disputes between citizens of the respective countries. The State Department is to be highly commended for introducing this modern feature in bilateral treaties, thus making a real contribution to the advancement and use of arbitration.

This association, which has been dealing with international commercial arbitration in the interests of American trade and commerce for more than 25 years, considers this provision of the treaties a valuable feature and a successful effort in the protection of American trade interests.

The standard arbitation provisions in these treaties will guarantee the American trader the effective use of arbitration abroad. When, on the other hand, execution of awards rendered in a foreign country is sought in any State of the Union, they are subject to the law prevailing in the respective State and have to comply with its requirements. Thus, the rights of the States of the Union are preserved, in regard to the application of their arbitration laws.

The association welcomes the efforts, as embodied in the treaties, to secure the enforcement of arbitration agreements and awards in the interests of American trade. It recommends in this respect favorable consideration of the treaties.

Very sincerely yours,

A. C. CROFT, *President.*

(NOTE.—The subcommittee then considered the consular conventions. This portion of the hearing was printed as appendix to Ex. Rept. 8, 82d Cong., 2d sess., Consular Conventions with Iceland and with Great Britain.)

Senator SPARKMAN. Thank you very much.

(The hearing was adjourned at 12:10 p. m.)

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84TH CONGRESS, 2d Session } SENATE { EXECUTIVE E

TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS WITH IRAN

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS BETWEEN THE UNITED STATES OF AMERICA AND IRAN, SIGNED AT TEHRAN ON AUGUST 15, 1955

JANUARY 12, 1956.—Treaty was read the first time and the injunction of secrecy was removed therefrom. The treaty, the President's message of transmittal, and all accompanying papers were referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

THE WHITE HOUSE, *January 12, 1956.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a treaty of amity, economic relations, and consular rights between the United States of America and Iran, signed at Tehran on August 15, 1955.

I transmit also, for the information of the Senate, the report by the Secretary of State with respect to the treaty.

DWIGHT D. EISENHOWER.

(Enclosures: (1) Report of the Secretary of State; (2) treaty of amity, economic relations, and consular rights, signed at Tehran August 15, 1955.)

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DEPARTMENT OF STATE,
Washington, December 23, 1955.

The PRESIDENT,
The White House:

The undersigned, the Secretary of State, has the honor to submit to the President, with a view to its transmission to the Senate to receive the advice and consent of that body to ratification, if the President approve thereof, a treaty of amity, economic relations, and consular rights between the United States of America and Iran, signed at Tehran on August 15, 1955.

This treaty places economic relations between the United States and Iran on a bilateral treaty basis similar to that which existed under the treaty of friendship and commerce between the United States of America and Persia signed at Constantinople on December 13, 1856 (11 Stat. 709), and terminated May 10, 1928. It replaces the provisional agreement relating to commercial and other relations, concluded at Tehran May 14, 1928 (47 Stat. 2644), and the provisional agreement relating to personal status and family law, concluded at Tehran July 11, 1928 (47 Stat. 2652), and thus establishes the relations of the two countries on a more modern and adequate basis than has heretofore existed.

This treaty, although comparable in major substance with recent treaties of friendship, commerce, and navigation, such as those with Japan, signed April 2, 1953, and approved by the Senate July 21, 1953 (S. Ex. O, 83d Cong., 1st sess.), and the Federal Republic of Germany, signed October 29, 1954, and approved by the Senate July 27, 1955 (S. Ex. E, 84th Cong., 1st sess.), is shorter and simpler in its provisions. It most nearly resembles the treaty of amity and economic relations with Ethiopia, signed September 7, 1951, and approved by the Senate July 21, 1954 (S. Ex. F, 82d Cong., 2d sess.). Like all these and certain other recent treaties, it contains provisions relating to basic personal freedom, property rights, taxation, exchange regulation, rights to engage in business, treatment of imports and exports, navigation, and other matters affecting the status and activities of citizens and enterprises of one country within the territories of the other.

As does the treaty with Ethiopia, the present treaty contains provisions relating to privileges and immunities of consular officers and to exemption from taxation of the property, effects, and salaries of consular officers and employees. It also contains provisions relating to the acquisition of land and buildings for governmental purposes. In substance these provisions are comparable to provisions in recent consular conventions between the United States and other countries, such as that with the United Kingdom, signed June 6, 1951, which received the approval of the Senate and is now in force (Treaties and Other International Acts Series 2494). The present treaty is not intended to and does not include detailed and comprehensive provisions found in the consular conventions, such as provisions relating to notarial services and protection of shipping and seamen, but does provide the basic minimum of provisions needed for consular officers to function effectively.

The present treaty does not contain the provisions, found in recent treaties of friendship, commerce, and navigation, relating to workmen's compensation and social security, nor does it contain any pro-

vision dealing with the placement of marine insurance. The commitments stipulated, primarily in article IV, in regard to the general conduct of business enterprises relate largely to the assurance of nondiscriminatory treatment once such enterprises are established, and do not deal with rights of entry and establishment.

The provisions of the present treaty regarding entry into force and termination are similar to those ordinarily included in treaties of this type. It is provided that the treaty shall enter into force one month after the day of exchange of ratifications and shall remain in force for 10 years from that day and indefinitely thereafter, subject to termination at the end of the 10-year period or at any time thereafter on 1 year's written notice by either Government to the other Government.

Respectfully submitted.

JOHN FOSTER DULLES.

Enclosure: Treaty of amity, economic relations, and consular rights, signed at Tehran August 15, 1955.

TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS BETWEEN THE UNITED STATES OF AMERICA AND IRAN

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.

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 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 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, trademarks 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 burdensome 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 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 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.

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, 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.

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.

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 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.

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 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 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, and

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

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.

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.

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]

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Remarks to the Media

REMARKS

MICHAEL R. POMPEO, SECRETARY OF STATE

OCTOBER 3, 2018

Share

Remarks
Michael R. Pompeo
Secretary of State
Press Briefing Room
Washington, DC
October 3, 2018

0:00 / 14:57

SECRETARY POMPEO: Good morning, everyone. I want to update you on three issues, four if you want to count the – my upcoming trip to Asia, including North Korea.First, the situation in Iraq; the second, a statement about the ruling this morning from the International Court of Justice; and finally, I want to talk about my effort to put America's diplomatic corps back on the field.

To the situation in Iraq, Iran is the origin of the current threat to Americans in Iraq. It is to blame for the attacks against our mission in Basra and our embassy in Baghdad. Our intelligence in this regard is solid. We can see the hand of the ayatollah and his henchmen supporting these attacks on the United States.

On Friday, I ordered the temporary relocation of U.S. Government personnel from our consulate general in Basra. I also warned the Iranian Government that we will hold it directly responsible for any harm to Americans or our diplomatic facilities, whether perpetrated by Iranian forces or by associated proxies or elements of those militias.

These latest destabilizing acts in Iraq are attempts by the Iranian regime to push back on our efforts to constrain its malign behavior. Clearly, they see our comprehensive pressure campaign as serious and succeeding, and we must be prepared for them to continue their attempts to hit back, especially after our full sanctions are re-imposed on the 4th of November.

The United States will continue to stand with the people of Iraq as they chart a future based on Iraqi interest, not those dictated by Iran. Even with the temporary relocation of our staff, we are supporting the delivery of clean water to the 750,000 residents in Basra.

Now let me turn to the ICJ ruling from today. I'm announcing that the United States is terminating the 1955 Treaty of Amity with Iran. This is a decision, frankly, that is 39 years overdue. In July, Iran brought a meritless case in the International Court of Justice alleging violations of the Treaty of Amity. Iran seeks to challenge the United States decision to cease participation in the Iran nuclear deal and to re-impose the sanctions that were lifted as a part of that deal. Iran is attempting to interfere with the sovereign rights of the United States to take lawful actions necessary to protect our national security. And Iran is abusing the ICJ for political and propaganda purposes and their case, as you can see from the decision, lacked merit.

Given Iran's history of terrorism, ballistic missile activity, and other malign behaviors, Iran's claims under the treaty are absurd. The court's ruling today was a defeat for Iran. It rightly rejected all of Iran's baseless requests. The court denied Iran's attempt to secure broad measures to interfere with U.S. sanctions and rightly noted Iran's history of noncompliance with its international obligations under the Treaty on the Nonproliferation of Nuclear Weapons.

With regard to the aspects of the court's order focusing on potential humanitarian issues, we have been clear: Existing exceptions, authorizations, and licensing policies for humanitarian-related transactions and safety of flight will remain in effect. The United States has been actively engaged on these issues without regard to any proceeding before the ICJ. We're working closely with the Department of the Treasury to ensure that certain humanitarian-related transactions involving Iran can and will continue.

That said, we're disappointed that the court failed to recognize it has no jurisdiction to issue any order relating to these sanctions measures with the United States, which is doing its work on Iran to protect its own essential security interests.

In light of how Iran has hypocritically and groundlessly abused the ICJ as a forum for attacking the United States, I am therefore announcing today that the United States is terminating the Treaty of Amity with Iran. I hope that Iran's leaders will come to recognize that the only way to secure a bright future for its country is by ceasing their campaign of terror and destruction around the world.

The third item, putting the diplomatic team from the United States Department of State back on the field: I want to talk about the fact that there are 65 nominees now sitting with the United States Senate. That's over a quarter of all the senior-level confirmable positions that the United States Department of State is tasked with using to achieve its diplomatic outcomes. And I want every single American to know that what Senator Menendez and members of the Senate are doing to hold back American diplomacy rests squarely on their shoulders.

Both Republicans and Democrats agree that a fully staffed State Department is critical to American national security. Indeed, when I was before the Senate Foreign Relations Committee, Senator Menendez told me, quote, "The problem is we have an emaciated State Department under this administration," end of quote. Well, we've now done our part to fix that. He now needs to do his, and the Senate needs to do its part.

These candidates are quality candidates. They are not sitting on the Senate floor because of objections with respect to their quality, their professionalism, or their excellence and their ability to deliver American foreign policy. Wave after wave of these extremely qualified nominees have been sent to the United States Senate.

Let me give a few examples: John Richmond. He's been stuck for 85 days while we try to make necessary progress on combating human trafficking, a priority for this administration and a shared priority of Senator Menendez. We have Kim Breier, the President's nominee to head up Western Hemisphere Affairs, stuck for 204 days while the crisis in Venezuela and Central America continues to rage. David Schenker, the President's nominee to lead the Bureau of Near East Affairs, is held up while the humanitarian crisis continues and while Iran continues to undermine peace and stability throughout the Middle East.

Russia is seeking to prey on our elections, but Ellen McCarthy, a 30-year veteran of the Intelligence Community and the President's choice to head the Bureau of Intelligence and Research sits on the Senate floor.

As American forces are engaged against terrorists around the world, Clarke Cooper, an experienced military professional designated to lead the Bureau of Political-Military Affairs waits for the Foreign Relations Committee to act on his nomination.

You should know that as a former member, I completely appreciate the Senate's advice and consent role and their duty to conduct oversight. And I understand their need to be fair and honest brokers. But that's not what is being engaged in. We need these people. What's happening is unprecedented. We have members of the United States Senate who – for whom partisanship has now driven delay and obstruction of getting America's diplomatic corps into every corner of the world.

It will impact our operations, our ability. We don't have a COO, the under secretary for management now coming on two years with no one filling that position, and enormous, complex operations keeping our diplomats safe around the world don't have a senior leader to manage those operations. There are real, direct impacts of not having these people confirmed and I implore the United States Senate to take these quality, talented people and allow them to do what it is they have agreed to do on behalf of the United States.

And with that, I'm happy to take a couple questions.

MS NAUERT: (Inaudible). We'll start with Lesley from Reuters.

QUESTION: Thank you very much. Mr. Secretary, does the ruling of the World Court, does that have any practical impact on what the U.S. is – on U.S. sanctions, number one? And number two, what other – what assurances can you give that this will not impact any humanitarian aid? Because the Court actually said that it was not enough, that the U.S. – that the U.S.'s assurances were not adequate.

SECRETARY POMPEO: The United States has been very clear: We will continue to make sure that we are providing humanitarian assistance in a way that delivers for the people we have spoken very clearly about, the Iranian people. We care deeply about them. We will make sure that we continue to afford the flexibility so that that assistance can be needed.

Having said that, the choices that are being made inside of Iran today – to use money to foment terror around the world, to launch ballistic missiles into airports throughout the Middle East, to arm proxy militias in Iraq and in Syria and in Lebanon – those are dollars that the Iranian leadership is squandering. They could be providing humanitarian assistance to their own people but have chosen instead a different path, a path of revolutionary effort around the world showing utter disregard for the humanitarian needs of their own people.

MS NAUERT: Nick Kalman from Fox.

QUESTION: I wanted to ask about North Korea, Mr. Secretary. The North Koreans have a new commentary saying the end-of-war declaration issue should've been resolved half a century ago in light of your trip coming up. Will it be resolved this weekend? And if not, what would be the reasoning against offering this?

SECRETARY POMPEO: So I'm not going to comment on the progress of the negotiations on the end-of-war declaration or any other items, only to say this: I'm very happy to be going back to get another chance to continue to advance the commitment that Chairman Kim and President Trump made back in Singapore in the second week of June. I'm optimistic that we'll come away from that with better understandings, deeper progress, and a plan forward not only for the summit between the two leaders, but for us to continue the efforts to build out a pathway for denuclearization.

MS NAUERT: Next question, Michel from Al Hurra.

QUESTION: Yeah, thank you. Mr. Secretary, Russia has delivered today S-300 systems to Syria. You said in the past that it's a serious escalation. Are you planning to take any measures in this regard? And my second question on Iraq. Any comment on the election of Barham Salih as the president and the designation of Adel Abdul Mahdi as the prime minister?

SECRETARY POMPEO: So I've had a chance to speak with the new speaker of the house and the new president. I've not had a chance to speak with the new – the president designee as of yet. I hope to do so. And I am equally hopeful that they will follow through on the commitments that they made when we spoke. These are people that we know pretty well. They've been around the Iraqi Government scene for some time, and what we talked about was building out an Iraqi Government that was an Iraqi Government of national unity that was interested in the welfare and future good fortunes for the Iraqi people, not controlled by the Islamic Republic of Iran. It's something that was a shared set of objectives, and I'm very, very hopeful that we can continue to work with the Iraqi people and the soon-to-be-completed, formed new Iraqi Government to deliver against that.

Your first question was about the S-300. I'm certainly not going to comment on our intention on how we will address that, but my comments before were true. Having the Russians deliver the S-300 into Syria presents greater risk to all of those in the affected areas and to stability in the Middle East. We consider this a very serious escalation.

QUESTION: Thank you.

MS NAUERT: Last question. Kylie from CBS News.

QUESTION: Hi, Secretary. Question. Can you explain to us a little bit the practical reality of the U.S. terminating the amity with Iran, and just how we'll see that play out? And then secondly, just because we're going to North Korea, is there any timeframe for what the U.S. wants to achieve given that last week we heard President Trump say that they're not – the U.S. is not playing a time game, but you said that you want rapid denuclearization of North Korea completed by January 2021?

SECRETARY POMPEO: Those are entirely consistent with each other. We want it fast, but we're not going to play the time game. My comment about 2021 was not mine. I repeated it, but it was

a comment that had been made by the leaders who'd had their inter-Korean summit in Pyongyang. They'd talked about 2021 when they were gathered there, and so I was simply reiterating this as a timeline that they were potentially prepared to agree to.

President Trump's comments are exactly right. This is a long-term problem. This has been outstanding for decades. We've made more progress than has been made in an awfully long time. And importantly, we've done so in a condition which continues to give us the opportunity to achieve the final goal, that is the economic sanctions continue to remain in place, the core proposition; the thing which will give us the capacity to deliver denuclearization isn't changing. If you heard the comments at the UN Security Council, complete unanimity about the need for those to stay in place.

The Russians and the Chinese had some ideas about how we might begin to think about a time when it would be appropriate to reduce them, but to a country, they were supportive of maintaining the UN Security Council resolutions and the sanctions that underlay them. That is a – that is a global commitment that I'm not sure there's many issues in the world you can find such unanimity. And so my efforts this week will be one more step along the way towards achieving what the UN Security Council has directed the North Koreans to do.

QUESTION: And the practical fallout from pulling out of the treaty?

SECRETARY POMPEO: We'll see what the practical fallout is. The Iranians have been ignoring it for an awfully long time. We ought to have pulled out of it decades ago. Today marked a useful point with the decision that was made this morning from the ICJ. This marked a useful point for us to demonstrate the absolute absurdity of the Treaty of Amity between the United States and the Islamic Republic of Iran.

MS NAUERT: Thank you, everybody. We have to go now.

SECRETARY POMPEO: Thanks, everyone.

TAGS

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The Statute of the International Court of Justice

A Commentary

Third Edition

Edited by

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KARIN OELLERS-FRAHM
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4. Critical Date

137 The 'critical date' for determining the admissibility of an application is the date on which the application is filed.[499] Consequently, in principle later events have no impact on the power of the Court to entertain the merits of a case. However, under specific circumstances it may appear exceedingly formalistic to dismiss an application on procedural grounds, in particular if shortly after the filing of the application the defects were cured or where immediately afterwards the applicant could again institute proceedings against the respondent that would be held admissible.[500] On the other hand, it may occur that in the course of the proceedings a case is deprived of its object. In that case, the Court does not continue with the examination of the matter. According to its own words, in such instances it is 'not called upon to give a decision'.[501] In the *Nuclear Tests* cases, affirming that the dispute had become moot, it was relieved from the duty to acknowledge that, although it had indicated provisional measures under Article 41, it in fact lacked jurisdiction. In all the other cases where the issue has been discussed, the Court has declined to uphold the objection.[502]

5. Decision on Preliminary Objections

138 Article 79, para. 9 of the Rules determines how preliminary objections should be dealt with after having been considered. In any event, the Court is required to hand down its decision in the form of a judgment. The legal position is straightforward either when it finds a preliminary objection unfounded, in which case it will be rejected, or well-founded, in which case it will be upheld. If a party—the potential respondent—does not appear before the Court, in which case jurisdiction and admissibility will be examined *ex officio* without any objection having been raised, the Court is bound to find, in case the requisite requirements are met, that it has jurisdiction.[503] In many instances, however, arguments pertaining to jurisdiction and admissibility are interwoven with the merits of the dispute. The Rules which were applicable until 1972 conferred upon the Court a great measure of discretion in that respect. In case of doubt, the Court was authorized to

[499] *South West Africa* cases, Preliminary Objections, ICJ Reports (1962), pp. 319, 344; *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 95, para. 66; *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 26, para. 44 and pp. 115, 130–1, para. 43; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 318–9, para. 99; *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 17–8, para. 40; *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 148–9, para. 46.

[500] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 438 *et seq.*, paras. 81 *et seq.*

[501] *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 272–4, para. 62 and pp. 457, 478, para. 65.

[502] *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 26–9, paras. 46–51 and pp. 115, 131–4, paras. 45–50; *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 14–5, para. 32; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 297, para. 43.

[503] This happened in the *Fisheries Jurisdiction* cases between the United Kingdom and Germany, on the one hand, and Iceland, on the other, *cf. Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Jurisdiction, ICJ Reports (1973), pp. 3, 22, para. 46 and pp. 49, 66, para. 46. For the risks inherent in such a finding *cf.* Thirlway, *Non-Appearance before the International Court of Justice* (1985), pp. 172–3. *Cf.* also von Mangoldt/Zimmermann on Art. 53 MN 54–57.

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join a preliminary objection to the merits.[504] Thus, an issue which had been extensively discussed in a first round at the preliminary stage of the proceedings could come up for discussion a second time.[505] This discretion was curtailed by the reform of the Rules in 1972.[506] Now consideration of a preliminary objection can be reserved for the merits stage only if the objection does not have an 'exclusively preliminary character' (Article 79, para. 9). In other words, if such exclusively preliminary character exists, the Court must deal with the objection immediately, until it has come to a clear conclusion, without being able to postpone a final determination until the very end of the proceedings. On the other hand, if an objection lacks an exclusively preliminary character, it will indeed have to be considered along with the merits.

In the application of the new version of the Rules, the Court has in a number of pro- 139
ceedings declared that a given objection does not possess an exclusively preliminary character. The first relevant case was the dispute between Nicaragua and the United States. Here, the multilateral treaty reservation (*Vandenberg* clause) was considered to be so closely related to the substance of the dispute that it could not be exhaustively dealt with at a preliminary stage.[507] This finding, however, did not appear in the *dispositif* of the relevant judgment but was solely expressed in its legal grounds. This was reversed in the *Lockerbie* cases, where the Court had to determine whether the claims brought forward by Libya had lost their object as a result of the two resolutions adopted by the Security Council on the incident.[508] In this case, a finding was made also in the *dispositif* that the objection raised by the United Kingdom and the United States did not have an exclusively preliminary character—and would thus have to be addressed at the merits stage.[509] A few months later, the Court ruled in the dispute between Cameroon and Nigeria[510] that the eighth preliminary objection by Nigeria to the effect that any pronouncement on the maritime boundary between the two countries affected the rights and interests of third countries was so intimately bound to the merits that it could not be adjudicated upon at the preliminary stage of the proceedings. This finding was reflected both in the legal considerations as well as in the *dispositif* of the judgment.[511] Essentially, a declaration that an objection does not have an exclusively preliminary character is nothing more than its joining to the merits as under the old system of the Rules. The sole difference lies

[504] 1946 Rules of Court, Art. 62, para. 5: 'After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings.'

[505] Prominent examples are the *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 149 *et seq.*, where the fifth and the sixth preliminary objection (domestic jurisdiction and time limit) were joined to the merits to be considered again in the final judgment, ICJ Reports (1960), pp. 6, 32–6, and the *Barcelona Traction* case, with two stages: Preliminary Objections, ICJ Reports (1964), pp. 6, 41 *et seq.* and Second Phase, Judgment, ICJ Reports (1970), pp. 3, 32 *et seq.*, where the right of diplomatic protection in favour of shareholders in a juristic person incorporated in another State was at issue.

[506] *Cf.* de Aréchaga, *supra*, fn. 429, pp. 1–11 *et seq.*, as well as the comments by the Court itself in *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 29–31.

[507] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 425–6, para. 76, and p. 442, para. 113 (1) (a); Merits, ICJ Reports (1986), pp. 14, 31–8, paras. 42–56.

[508] SC Res. 748 (1992) and 883 (1993).

[509] *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 28–9, para. 50, p. 31, para. 53 (3) and pp. 115, 133–4, para. 49, p. 136, para. 53 (3).

[510] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275 *et seq.*

[511] *Ibid.*, pp. 322–5, paras. 112–7, and 326, para. 118 (2).

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in the changed requirements for ordering the postponement of its consideration to the merits stage.

140 The Court is free to choose the grounds on which to dismiss a case either for lack of jurisdiction or as being inadmissible. It does not have to follow a specific order nor is there any rule making it compulsory to adjudge first issues of jurisdiction before proceeding admissibility.[512] The Court generally bases its decision on the ground which in its view is 'more direct and conclusive'. In pure legal logic, it would seem inescapable that the Court would have to rule first by order of priority on objections to jurisdiction.[513] However, such a strict procedural regime would be all the more infelicitous since the boundary between the two classes of preliminary objections is to some extent dependent on subjective appreciation.[514] The Court therefore chooses the ground which is best suited to dispose of the case ('direct and conclusive'). Thus, in *Certain Property* it examined only two of the preliminary objections raised by Germany.[515] It has departed, however, from this general proposition with regard to the right of a party to have access to the Court in accordance with Article 35. In the view of the Court, this objection assumes precedence over all others.[516] In any event, the Court has emphasized that in principle a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings.[517]

6. Applications Lacking any Jurisdictional Basis

141 There may be cases where the applicant acknowledges that the respondent it has identified has not accepted the jurisdiction of the Court or where lack of jurisdiction is so obvious that it might amount to a violation of the rights of the defence to register such applications as ordinary cases in the General List held by the Court (Article 26, para. 1 (b) of the Rules). Regarding the former group of instances, Article 38, para. 5 of the Rules provides:

> When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

In fact, if the respondent does not consent to the jurisdiction of the Court when the application is brought to its knowledge, the case cannot proceed. In such cases, it is not even necessary to make a formal determination to that effect. Under the 1946 Rules, where even such 'phoney' cases were registered, the Court made a formal order to remove

[512] *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 25; *cf. Aerial Incident of 27 July 1955* (Israel v. Bulgaria), Preliminary Objections, ICJ Reports (1959), pp. 127, 146; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 16–7, paras. 39–40; *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 23–4, para. 26; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 298–9, para. 46.

[513] This was the position taken by Hersch Lauterpacht and Gerald Fitzmaurice, *cf.* Fitzmaurice, 'Hersch Lauterpacht—The Scholar as Judge: Part II', *BYIL* 38 (1962), pp. 1–83, 56–7.

[514] *Cf.* also Sep. Op. Bhandari in the *Marshall Islands v. UK* case, Preliminary Objections, ICJ Reports (2016), pp. 1057, 1059, para. 10.

[515] *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 27, para. 53.

[516] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 298, para. 45; *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 85, paras. 102–3.

[517] *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 852, para. 51.

Annex 92

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REVIEW OF THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE

Report of the Sixth Committee

Rapporteur: Mr. Alfons KLAFKOWSKI (Poland)

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(c) Procedures and methods of work

47. A number of representatives considered that it was necessary to simplify and expedite the Court's procedure. Several of them noted, however, that the length of proceedings was very often due to the parties themselves, which requested long extensions of time-limits and postponements. It was generally agreed that the Court's control over the duration of written and oral proceedings should be strengthened. Mention was also made of a suggestion that the Court should be encouraged to take a decision on preliminary objections as quickly as possible and to refrain from joining them to the merits unless it was strictly essential.

48. Several representatives mentioned the high cost of proceedings before the Court. Some of them, however, observed that since the general expenses of the Court were paid by the United Nations, the parties were required to pay only the fees of their counsel, and that arbitration was generally considered even more expensive. Reference was made to the idea of establishing a multilateral assistance fund to finance litigation costs; it was also suggested that the United Nations should draw up a list of qualified international jurists whom States could employ, with the costs being paid from the fund in question.

49. In addition, it was suggested that Article 25 and Article 55, paragraph 2, of the Statute should be amended to raise slightly the present quorum and to abolish the casting vote of the President.

C. The question of the review of the role of the Court

1. General comments

50. It was recalled that General Assembly resolution 2723 (XXV), by which Member States and States Parties to the Statute of the International Court of Justice were invited to submit their views and suggestions concerning the role of the Court, had been the result of a compromise between the States that advocated the establishment of a committee to undertake such a review and those that were not prepared at that time to establish such a committee. It was pointed out that the report prepared by the Secretary-General on the basis of the replies from Governments (A/8382 and Add.1-4) reflected that same divergence of opinions. Some representatives, noting that only a quarter of the States consulted had replied to the questionnaire, argued that the review of the role of the

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International Court of Justice was not a burning issue and was generally viewed with scepticism. Others, however, considered that the report testified to the importance and urgency of the matter for Governments, and expressed the view that it contained numerous suggestions, from as many Governments as normally replied to such questionnaires, which merited further consideration.

51. Those representatives opposed to a review of the role of the Court attached significance to the fact that the Court had declined the invitation which the Assembly had extended to it in paragraph 3 of its resolution 2723 (XXV). Other representatives, however, interpreted the Court's reply as meaning that it would prefer to await concrete proposals from the General Assembly before adopting any position.

52. A number of delegations considered that the strengthening of the Court's role was an important problem which had been raised at an opportune moment, and that what was now needed was a careful study of the replies received from Governments with a view to developing a consolidated body of recommendations for future action. Others held that the fact that not all States had replied to the Secretary-General's questionnaire proved the need for reflecting at greater length on the problems it raised, and possibly for some reconsideration of the questionnaire so that all States might be encouraged to undertake a constructive examination of the difficulties facing the Court. The representatives of other delegations believed that the review of the role of the Court had already achieved such objectives as were feasible. It was also said that the replies of Governments dealt largely with peripheral matters and that the role of the Court might be weakened by any attempt to introduce minor reforms which would do nothing to resolve the substantive problems.

53. In support of their view, some of those opposed to a further review of the role of the Court held that since the position of the Court was the outcome of a political situation and of the transformation which international law was undergoing, it could not be solved by new instruments or different machinery. As the President of the Court had pointed out in his message to the Secretary-General dated 18 June 1971 (A/8382, paragraph 393), the decision lay with States. Other representatives, however, while recognizing that the Court's role depended essentially on the attitude of States, did not see this as a reason for abandoning the attempt to make technical improvements in the Court. It was pointed out that the attempt was all the more justified in that changes in an institution could sometimes affect the attitudes of States towards it. It was further

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August 29, 2018

Complaint against US to prove Iran's legitimacy; Hague's ruling not binding

TEHRAN, Aug. 29 (MNA) – Iranian Deputy Foreign Minister for Political Affairs Seyed Abbas Araghchi, stressing that The Hague's ruling is not legally binding, said Iran's complaint against US was simply aimed at proving our legitimacy to the international community.

News Code 137242 Lachin Rezaian

Speaking in a Radio program on Wednesday, Araghchi asserted that JCPOA has earned Iran the title of a powerful country in international and regional arenas, adding "US pressure against Iran is because of the power of the Islamic Republic of Iran; if we were not strong, there was no such pressure on us."

"Our policy is establishing all-encompassing ties with the East and the West; except for one or two countries, we have relations with all the countries; to counteract US efforts to confront the Islamic Republic of Iran, we also need to take a global move against US policies and establish special interactions with the world," he said, referring to Leader's remarks in a meeting with the ambassadors and foreign ministry officials.

According to Iran's agreement with the United States in 1950s, he added, a lawsuit has been filed at the International Court of Justice against the country, and based on the treaty, re-enforcing sanctions is against the Law.

He added that ICJ's jurisdiction over the issue must be recognized; "this process may take a long time, and the ultimate decision is not binding under international law."

"We are not seeking a proof over US condemnation at the Hague Court, so that the United States might be forced to take action; in fact, we are seeking to show the legitimacy of the Islamic Republic of Iran to the international community, to prove that the Islamic Republic of Iran has been committed to its obligation in this regard and the United States is the wrongdoer," he noted.

Araghchi said the process will impose political and psychological pressure on the United States, adding that the "international law is such that it would not be possible for a country like the United States to be condemned and forced to respect the rules, however, the pressures would be effective."

"Iran's policy is to focus on all geographical areas; we will make our attemps to favor our national interests and, in every corner of the world, we will seek our own national interests and we will try to secure them," he concluded.

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The Statute of the International Court of Justice

A Commentary

Third Edition

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by action *ultra petita*;[150] moreover, it found that the substantive excesses of power concerned only the failure to state sufficient reasons for some of the relevant findings.[151] A possibly *infra petita* omission by the legal operator to address some question asked in the special agreement (or analogously in the application of the claimant) should be distinguished from a *non liquet*. This latter notion concerns the impossibility to decide on the merits either because of insufficient information as to facts (although in many cases the judge will be entitled in such cases to reject the claim for non-satisfaction of the burden of proof) or because of absence of clarity as to the applicable law. In these cases, the judge considers that he or she cannot decide without infringing the rules regulating his or her function, *i.e.*, without breaching the law. In our context, the issue was conversely framed as an omission which did not seem, a priori, to be motivated by such reasons, all the more since the judge did not state them at all in the judgment. The answer to the question posed must start by a careful interpretation of the judgment. If it turns out that the judge, expressly or impliedly, addressed the question but rejected the claim, or considered that the question did not need to be decided in the light of other pronouncements in the judgment, or considered that he or she was unable to decide for some of the reasons stated above in this section, *cadit quaestio*. If, conversely, the judge failed to address the relevant issues without any apparent motive, perhaps by simple inadvertence, the judgment is defective. The matter ought to be brought back to that judge under the original title of jurisdiction, or to be submitted to some other organ (or alternatively solved by negotiation). By the nature of things, such situations of defective *infra petita* action are rare in general international law. They occur with some more frequency within the framework of annulment proceedings of ICSID awards: there, the annulment committees have treated failure to exercise jurisdiction as an excess of power.[152]

For a commentary on matters of *evidence, burden of proof*, and *handling of facts*, reference should be made to a separate contribution in the present volume.[153]

D. Substantive Principles Related to the Proceedings

I. General Classification

There are two different types of substantive principles relevant to the procedural law of international tribunals such as the ICJ. The first class comprises principles of substance directly linked to the pronouncements of the Court, namely the principle of *res judicata* and the duty to state the reasons for its decision. These principles are the object of specific provisions of the Statute (Articles 59 and 56 respectively) and will be addressed in the contributions dealing with these provisions.[154] The second class of substantive principles flows from the principle of loyalty between the parties; it includes the prohibition of 47

[150] *Ibid.*, p. 313, para. 440.

[151] *Ibid.*, pp. 384 *et seq.*

[152] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 86; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, para. 80.

[153] See Benzing, Evidentiary Issues. For the position of the present author on these issues, MN 43 *et seq.* of the first edition of this commentary could still be consulted.

[154] *Cf.* Brown on Art. 59 MN 30 *et seq.*; and Damrosch on Art. 56 MN 1–26 respectively.

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abuse of procedure, estoppel, and the maxim *nemo commodum capere potest de sua propria injuria*. All of these principles rest upon the general principle of good faith.

II. The General Duty of Loyalty between the Parties (Principle of Good Faith)

48 The most fundamental principle of substantive law applicable to judicial proceedings in general is the proposition that, by engaging in proceedings before an international tribunal, the parties enter into a legal relationship characterized by mutual trust and confidence. Thus, the parties are bound by a general commitment of loyalty among themselves and towards the Court.[155] This duty flows from the principle of good faith recognized in general international law and stipulated also in Article 2, para. 2 UN Charter as a general duty of the Member States.[156] The principle of good faith has a series of 'concretizations' in the field of procedural law.[157]

First, it requires the parties not to undertake any action which could frustrate or substantially adversely affect the proper functioning of the procedure chosen, the point being to protect the object and purpose of the proceedings. As has already been said, the proceedings are also characterized by their adversarial nature and the opposing claims of the parties. Thus, it is perfectly open to a party to further its own interests even at the expense of the other party. But this selfishness has some limits. It cannot disregard requirements of a proper functioning of the procedure as such.[158] Thus, a party may not deliberately present false or forged pieces of evidence.[159] It may not impede the production of evidence by the other party by having recourse to pressure or any other equivalent device either. Second, the principle forms the basis of the more specific rule on the prohibition of abuse of procedure.[160] Third, it is the basis for the application of procedural estoppel or of the maxim *nemo commodum capere potest de sua propria turpitudine*. The last two propositions can be applied to evidentiary issues. To that extent, they can be said to govern the proceedings of international tribunals. It is proposed to focus here on the three aspects of abuse of procedure, estoppel, and *nemo commodum*.

1. The Prohibition of Abuse of Procedure

49 Abuse of procedure is a special application of the prohibition of abuse of rights, which is a general principle applicable in international law as well as in municipal law.[161] It consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established, especially for a fraudulent, procrastinatory, or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process, or for purposes of pure propaganda. To these situations, action with a malevolent intent or with bad faith can be added. In a synthetic definition, it can be said that abuse of procedure consists in the use of procedural instruments and

[155] *Cf.* Sereni (1955), p. 1714.
[156] On this provision, see Kolb, in Simma, *UN Charter*, Art. 2, para. 2, *passim*.
[157] *Cf.* the detailed analysis in Kolb (2000), pp. 579 *et seq.*
[158] *Cf. ibid.*, pp. 587 *et seq.* (in the context of negotiation).
[159] See Reisman/Skinner, *Fraudulent Evidence before Public International Tribunals* (2014).
[160] *Cf. infra*, MN 49 *et seq.*
[161] Kolb (2000), pp. 429 *et seq.* There is no room here to venture into a description of the various contents of the principle.

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entitlements with a fraudulent, malevolent, dilatory, vexatious, or frivolous intent, with the aim to harm another or to secure an undue advantage to oneself, with the intent to deprive the proceedings (or some other related proceedings) of their proper object and purpose or outcome, or with the intent to use the proceedings for aims alien to the ones for which the procedural rights at stake have been granted (*e.g.*, pure propaganda).[162] The existence of such an abuse is not easily to be assumed; it must be rigorously proven. The concept of abuse of procedure cannot be caught completely in the abstract, since it can relate to a variety of different situations.

The case law of the ICJ is replete with instances where the principle of abuse of pro- 50
cedure has been invoked. The Court, however, has never found the conditions for an application of the principle to be fulfilled. But it did not reject the concept as such; it merely affirmed that its application was not warranted in the cases under consideration. In each case, its analysis seems to have been correct.

The contentious cases in which the principle has so far been invoked are the following:[163]

- *Ambatielos* (claim of abuse of procedure by excessive delay in presentation of a claim);[164]
- *Right of Passage over Indian Territory* (claim of abuse of procedure by application in too short a time span after deposit of an optional declaration, 'surprise attack');[165]
- *Barcelona Traction* (claim of abuse of procedure by a new application with the same arguments after having discontinued a case);[166]
- *Nicaragua* (claim of futility and political propaganda intent by request of provisional measures);[167]
- *Border and Transborder Armed Actions* (claim of abuse of procedure by institution of judicial proceedings in parallel with the Contadora Process; claim of abuse by the political inspiration of the request and by its artificiality);[168]
- *Arbitral Award of 31 July 1989* (claim of abuse of procedure by invoking a declaration of the president of the arbitral tribunal in order to cast doubt on the validity of the award);[169]
- *Certain Phosphate Lands in Nauru* (claim of abuse of procedure to the extent that Nauru demanded from the respondent an attitude which it did not itself display);[170]
- *Application of the Genocide Convention* (claim of abuse of procedure by the request for provisional measures due to political motives and repetition of the request);[171]

[162] Gestri, 'Considerazioni sulla teoria dell'abuso del diritto alla luce della prassi internazionale', *RDI* 77 (1994), pp. 27 *et seq.*, 43 *et seq.* As has been said by the Australian High Court in the *Csr Ltd. v. Cigna Insurance Australia Ltd.* case, *ILR* 118 (1997), pp. 409–10: 'The counterpart of a court's power to prevent its process being abused is its power to protect the integrity of those processes once set in motion.'

[163] *Cf. ibid.*, pp. 640 *et seq.*

[164] *Ambatielos*, Merits, ICJ Reports (1953), pp. 10, 23.

[165] *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 146–7.

[166] *Barcelona Traction*, Preliminary Objection, ICJ Reports (1964), pp. 6, 24–5.

[167] *Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169, 178–9, paras. 21–5.

[168] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 91–2, paras. 51 *et seq.*, pp. 105–6, para. 94.

[169] *Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53, 63, paras. 26–7.

[170] *Nauru*, Judgment, ICJ Reports (1992), pp. 240, 255, paras. 37–8.

[171] *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325, 336, para. 19; *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 622, para. 46.

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- *Aerial Incident of 10 August 1999* (claim of abuse of procedure by invocation of a reservation to an optional declaration whose content was purportedly directed only against Pakistan, thus being discriminatory);[172]
- *Avena* (claim of abuse of procedure by delay in the presentation of the request).[173]

The conclusion to be drawn from these precedents is not that abuse of procedure is an unrecognized principle, for, as it will be shown in the following paragraphs, it has been applied by other international tribunals. It is rather that the threshold for admitting an abuse is quite high, and possibly exacting. Moreover, in most ICJ cases, the claims that there had been an abuse of procedure were made in a rather unconvincing way, as an appendix to other, more compelling arguments.

To the contrary, rules on abuse of procedure have developed with particular strength in certain branches of international law. Thus, in human rights law, petitions and communications are declared inadmissible when there is an abuse of procedure. This has been the case, for example, under the mandate system of the League of Nations and under the UN trusteeship system,[174] and later under ancient Article 27, para. 2, of the ECHR, now Article 35, para. 3, ECHR (1950),[175] Rule 96, cl. c, of the Rules of Procedure of the Human Rights Committee under the CCPR (2012),[176] Article 56, para. 3 of the African Charter on Human Rights (requests written in disparaging or insulting language),[177] or Article 22, para. 2, of the Convention against Torture

[172] *Aerial Incident of 10 August 1999*, Judgment, ICJ Reports (2000), pp. 12, 30, para. 40.

[173] *Avena*, Judgment, ICJ Reports (2004), pp. 12, 37–8, para. 44.

[174] Schwelb, 'The Abuse of the Right of Petition', *Revue des droits de l'homme* 3 (1970), pp. 313 *et seq.*, 324-6.

[175] Convention on the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5, Art. 35, para. 3: 'The Court shall declare inadmissible any individual application … with it considers … an abuse of the right of application.' See *e.g.*, Appanah, 'À la recherche posthume de l'intention du requérant: l'identification délicate de la requête abusive au sens de la Convention', *Revue trimestrielle des droits de l'homme* 26 (2015), pp. 1053 *et seq.*; Jungwiert, 'Sur la requête abusive devant la Cour européenne des droits de l'homme', in *Essays in Honor of J. P. Costa* (2011), pp. 329 *et seq.*; Flauss, 'L'abus de droit dans le cadre de la Convention européenne des droits de l'homme', *Revue universelle des droits de l'homme* 4 (1992), pp. 461 *et seq.*; Hottelier, 'La requête abusive au sens de l'article 27, 2 de la Convention européenne des droits de l'homme', *Revue trimestrielle des droits de l'homme* 2 (1991), pp. 301 *et seq.*; Spielmann/Spielmann, 'La notion d'abus des droits de l'homme à la lumière de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales', in *L'abus de droit et les concepts équivalents: Principe et applications actuelles* (Council of Europe, ed., 1990), pp. 60 *et seq.*; Palmieri, 'L'abuso del diritto di ricorso individuale dinanzi alla Commissione europea dei diritti dell'uomo', in *Essays in Honor of G. Sperduti* (1984), pp. 623 *et seq.*; Monconduit, 'L'abus du droit de recours individuel devant la Commission européenne des droits de l'homme', *AFDI* 17 (1971), pp. 347 *et seq.* The interpretation is restrictive: *Aydin v. Turkey*, Appl. No 23178/94, ECHR 1997-VI, paras. 59–61; *Andronicou and Constantinou v. Cypru*, Appl. No 25052/94, ECHR 1997-VI, paras. 163–5; *Assenov and Others v. Bulgaria*, Appl. No. 24760/94, ECHR 1998-VIII, paras. 87–9; *Buscarini and Others v. San Marino*, Appl. No. 24645/94, ECHR 1999-I, pp. 605, 613, paras. 20–1. In the more recent case law, see *Saba v. Italy*, Appl. No. 36629/10, 1 July 2014, paras. 49 *et seq.*; *Flores Quiros v. Spain*, Appl. No. 75183/10, 19 July 2016, para. 21; *Bagdonavicius e.a. v. Russia*, Appl. No. 19841/06, 11 October 2016, para. 64; *Kanaginis v. Greece*, Appl. No 27662/09, 27 October 2016, paras. 23–4.

[176] Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev.10 (2012), Art. 96, cl. c; Gestri, *supra*, fn. 162, p. 31; Cassese, 'The Admissibility of Communications to the United Nations on Human Rights Violations', *Revue des droits de l'homme* 5 (1972), pp. 375 *et seq.* See *K. L. v. Denmark* (1980), in: *Human Rights Committee, Selected Decisions under Optional Protocol* (1985) (CCPR/C/OP/I, p. 26).

[177] African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217, Art. 56, para. 3; Palmieri, 'Aperçu du règlement intérieur de la Commission africaine des droits de l'homme et des peuples', in *La Charte africaine des droits de l'homme et des peuples* (Palmieri, ed., 1990), p. 128.

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(1984).[178] There is manifestly a non-negligible danger that private individuals will abuse human rights remedies for frivolous or quixotic causes; and hence the screening under this heading has been established. International administrative law and the case law of the administrative tribunals is replete with references to misuse of authority, including on the procedural plane.[179]

The same is true for investment arbitration.[180] Thus, a claim may be declared inadmissible if certain facts have been forged and falsified, since this is a breach of good faith (*i.e.*, a sort of clean hands doctrine).[181] By the same token, if an investment was acquired in violation of municipal law or in bad faith, it is not to be considered a 'protected investment' and the arbitration clause may not be applied. This leads to a lack of jurisdiction of the arbitral tribunal.[182] The same occurs when no real investment was made at all; or if the investment was purchased with the sole aim of commencing arbitral procedures.[183] Further, the principle of abuse of procedure applies to the cases where the investor restructures his assets—*e.g.*, by the creation of new corporations, by acquiring a new corporate nationality which allows the application of a BIT[184]—with the sole aim to get access to arbitration. If a purportedly new claim is substantially the same as a previous one and is resubmitted under some circumventing legal construction (*e.g.*, transfer of the claim to another entity), it will be dismissed under the rule on abuse of procedure.[185] The rule on abuse of procedure plays further a residual role for a series of other situations, *e.g.*, the plea that proceedings are misused solely for the purpose to put political pressure on the State so as to have it abandon some criminal proceedings.[186]

Finally, within the law of the sea, Article 294 UNCLOS[187] gives the tribunal chosen by the parties to decide their dispute the power to scrutinize whether the claimant's request related to the coastal State's exercise of its sovereign rights under Article 297 constitutes an abuse of procedure and to declare it inadmissible *in limine litis*.[188]

[178] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 112, Art. 22, para. 2; Gestri, *supra*, fn. 162, p. 32–3.

[179] See Kolb, *Good Faith in International Law* (2017), pp. 169 et seq. See already Amerasinghe, 'Détournement de pouvoir in International Administrative Law', *ZaöRV* 44 (1984), pp. 439 *et seq.*

[180] De Brabandère, '"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims', *JIDS* 3 (2012), pp. 609 *et seq.*

[181] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 226 *et seq.*

[182] *Ibid.*, para. 208.

[183] *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, para. 174 and *Cementownia 'Nowa Huta' S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 13 September 2009, para. 159. False statements were also the issue here.

[184] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 106 *et seq.*; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008, paras. 134 *et seq.*, with the piercing of the corporate veil; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, paras. 2.99 *et seq.*

[185] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, paras. 49-50.

[186] The plea was finally withdrawn during the pleadings: *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, paras. 111 *et seq.*

[187] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, Art. 294.

[188] Ferrara, 'Article 298: Preliminary Proceedings', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 1896–9; Nordquist (ed.), *United Nations Convention on the Law of the*

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51 An interesting situation possibly giving rise to an abuse of procedure would present itself if a State that had lost a case before the ICJ were to move to the political organs of the United Nations in order to evade or to delay the execution of the judgment. Since the competences of political and judicial organs are different, there is no reason to conclude automatically that there has been an abuse of procedure if a political organ is seised after a judicial procedure.[189] For there may be many valid reasons to seek a more complete solution of the dispute than the one offered by a judicial institution when important political aspects are at stake. But if there was evidence suggesting that the State in question merely sought to delay the execution of the judgment, or to escape the obligations flowing from it, the political organ could find *in limine* that an abuse of procedure had been established and that the case thus could not be heard.[190] This aspect does not relate directly to the procedure of the Court, but it indirectly touches upon it, since it concerns the efficacy of the Court's rulings.

Many other instances of abuse of procedure could be envisaged, *e.g.*, the 'flooding' of the Court with procedural objections of any type, in order to frustrate the efficacy of the proceedings; the late invocation of bases of competence if there is a disadvantage to the other party;[191] the raising of a new request in the course of proceedings if it is prejudicial to the procedural position (equality) of the other party (*alternativa petitio non est audienda*).[192] Often, such questions are addressed by the constitutive texts of the tribunals. Thus the Statute and the Rules of Court provide for the timing in the presentation of arguments.[193] The content of these provisions can also be read as a sanction of the principle on prohibition of abuse of procedure, because it is essentially for that reason that they have been drafted.

2. *The Principle of Estoppel*

52 The principle of estoppel (or of the prohibition of *venire contra factum proprium*)[194] 'operates on the assumption that one party has been induced to act in reliance on the assurances or other conduct of another party, in such a way that it would be prejudiced were the other party later to change its position'.[195] Thus, under certain restrictive conditions,[196] the law does not permit the first party to change its position to the detriment of the second; or, if it changes its position, it will become liable for the damage caused

Sea 1982, A Commentary, vol. V (1989), pp. 75 *et seq.* See also Cannone, *Il tribunale internazionale del diritto del mare* (1991), pp. 134 *et seq.*; Rosenne, 'Settlement of Fisheries Disputes in the Exclusive Economic Zone', *AJIL* 73 (1979), pp. 100 *et seq.*; Caflisch, 'Le règlement judiciaire et arbitral des différends dans le nouveau droit international de la mer', in *Essays in Honor of Bindschedler* (1980), pp. 355–6.

[189] For a more general treatment of the interrelation between the Court and the political organs of the United Nations, *cf.* Gowland-Debbas/Forteau on Art. 7 UN Charter MN 20–52.

[190] *Cf.* already Salvioli, 'Les règles générales de la paix', *Rec. des Cours* 46 (1933-IV), pp. 9–163, 138–9. *Cf.* also the more reserved position of Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (1975), p. 139.

[191] *Cf.* paras. 42–4 of the interim orders in the *Legality of Use of Force* (Yugoslavia v. Belgium; Yugoslavia v. Netherlands), Order of 2 June 1999, ICJ Reports (1999), pp. 124 *et seq.*, 542 *et seq.*

[192] *Cf.* Kolb (2000), pp. 646–9.

[193] *Cf. e.g.*, Arts. 48 *et seq.* of the Rules.

[194] On this principle *cf.* Kolb (2000), pp. 357 *et seq.* (with many references), and also McGibbon, 'Estoppel in International Law', *ICLQ* 7 (1958), pp. 468 *et seq.*; Martin, *L'estoppel en droit international public* (1979).

[195] Mosler, 'General Course on Public International Law', *Rec. des Cours* 140 (1974-IV), pp. 1–320, 147.

[196] These conditions would seem to be the following: (1) a free, clear, and unequivocal initial conduct by one party, legally imputable to it; (2) an effective and *bona fide* reliance by another party on that conduct, inciting it to adopt a certain conduct on its part; (3) damage suffered by that second party resulting from its reliance on

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ARTICLE

Abuse of Process under International Law and Investment Arbitration

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Abstract—Philip Morris Asia initiated an investment arbitration against Australia with respect to Australia's tobacco plain packaging measures only a few months after it made its investment in Australia. The initiation of the arbitration raised a concern that the scope of protection under investment agreements and investment arbitration may be manipulated by multinational corporations. The tribunal in this case dismissed all the claims of Philip Morris Asia as inadmissible because it considered that the initiation of the arbitration constituted an abuse of process. While the decision is a positive development of law, at least from the perspective of respondent States, the tribunal did not sufficiently analyze the source and content of the principle of abuse of process. Against this background, this article seeks to clarify what the principle of abuse of process means under general international law and how it should be applied in investment arbitration. For this purpose, this article first examines the application of the principle by international judicial and quasi-judicial bodies other than investment arbitration. It then discusses how the principle should be applied in investment arbitration in light of its particular nature.

I. INTRODUCTION

On 22 June 2011, Philip Morris Asia, incorporated in Hong Kong, initiated investment arbitration against Australia, claiming that Australia violated its obligations under the bilateral investment treaty (BIT) between Hong Kong and Australia[2] by enacting and enforcing tobacco plain packaging measures with a view to reducing smoking.[3] The initiation of the arbitration has intensified the already existing concern that measures pursuing legitimate public policy objectives such as public health could be subject to review by investment arbitration and found to violate international investment agreements. The case has also raised a concern that the scope of protection under international investment agreements and investment arbitration may be manipulated by multinational corporations,

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[2] Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (signed 15 September 1993, entered into force 15 October 1993).

[3] *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) paras 5–8.

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because Philip Morris Asia, the claimant in this case, obtained access to investment arbitration under the BIT by acquiring the shares of Philip Morris Australia and Philip Morris Limited (PML) in Australia only a few months before the initiation of the arbitration.[4]

In its decision on jurisdiction and admissibility, the Tribunal in *Philip Morris Asia* concluded that all the claimant's claims were inadmissible because it considered that the initiation of the arbitration constituted an abuse of right (abuse of process).[5] The Tribunal stated that its decision was supported by investment arbitration case law, according to which 'the commencement of treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable.'[6] The decision may be seen as a positive development of law, at least from the perspective of State parties to international investment agreements, which are concerned that the protection under the agreements may be extended to investors and investments that they did not intend to protect at the time of conclusion of the agreements.[7]

However, in deriving this principle of abuse of process, the Tribunal in *Philip Morris Asia* relied exclusively on past investment arbitration decisions and did not consider any other international legal instruments or cases. Moreover, a careful reading of the decisions cited by the Tribunal reveals that there is no settled case law in investment arbitration on the principle of abuse of process. Does this mean that the Tribunal in *Philip Morris Asia* created the principle *ex nihilo*? Or does the principle exist under international law? If it exists, what is its content, and is it applicable to investment arbitration? This article reviews the principle of abuse of process under international law as well as its application in international investment arbitration, and discusses whether and how the principle should be applied in investment arbitration.

This article is structured as follows: First, it seeks to clarify the meaning of the principle of abuse of process under international law by discussing the concept and examining applications of the principle in the International Court of Justice (ICJ, or the Court). It also discusses the application of treaty provisions that explicitly incorporate the principle of abuse of process, such as those of the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Second, it reviews how the principle of abuse of process has been applied in investment arbitration, including *Philip Morris Asia*, and discusses how the application in investment arbitration is different from that in other international judicial and quasi-judicial bodies, and why. Finally, it considers whether and how the principle of abuse of process should be applied in investment arbitration in the future.

[4] ibid paras 6, 96–97. The claimant alleged in the proceedings that it had controlled Philip Morris Australia and PML even before the acquisition of their shares in February 2011, but the Tribunal concluded that the claimant failed to substantiate the allegation. ibid paras 496–509.

[5] ibid paras 535–88.

[6] ibid para 585.

[7] Eric de Brabandere, '"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims' (2012) 3 J Intl Disp Settlement 609, 610–12.

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II. ABUSE OF PROCESS UNDER INTERNATIONAL LAW

A. *Abuse of Process as a General Principle of Law*

(i) *Concept*

It is generally accepted that the principle of abuse of rights is a general principle of law, applicable to international courts and tribunals.[8] The principle concerns *not* whether a certain right exists, but rather how the right should be used. In other words, it applies only where a certain right does exist. If there is no right, there is no abuse of rights. Moreover, the principle demands that rights not be used in an 'abusive' way, although what constitutes an 'abusive' use of rights is not explicitly articulated in any of the international law instruments. One author defines abuse of rights as an exercise of a State's rights 'either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State.'[9] It is also pointed out that 'as legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals.'[10]

The principle of abuse of rights is closely linked to the principle of good faith, which is considered a 'fundamental principle of every legal system.'[11] In particular, with respect to the performance of treaties, Article 26 of the Vienna Convention on the Law of Treaties (VCLT) provides that every treaty 'must be performed by [the parties] in good faith.'[12] According to the ICJ, the provision 'obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized.'[13] In other words, the provision requires that treaty obligations 'be carried out according to the common and real intention of the parties.'[14] The principle of abuse of rights prescribes the same obligation as the principle of good faith in a negative way:[15] the former principle prohibits the exercise of treaty rights that is contrary to the latter.[16]

The principle of abuse of *process* is a procedural aspect of the principle of abuse of rights. As such, it is accepted as a general principle of law, and incorporated in the constitutive instruments of some international judicial and quasi-judicial bodies. What is specifically prohibited under the principle of abuse of process is abusive use of the right to procedures, particularly judicial and quasi-judicial procedures.

[8] Robert Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2001) 442–61. See also *Yearbook of the International Law Commission 1960*, vol 2, A/CN.4/SER.A/1960/ADD. 1 (1961) 41 paras 70–73; L. Oppenheim, *International Law: A Treatise* (8th edn, H. Lauterpacht ed, Longman, Green & Co. 1955) 346–47.

[9] Alexandre Kiss, 'Abuse of Rights' in *Max Planck Encyclopedia of Public International Law*, para 1. See also Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill LJ 389.

[10] Sir H Lauterpacht, *The Function of Law in the International Community* (OUP 1933) 286.

[11] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953, 2006), 105. See also *Nuclear Tests (Australia v France)*, Judgent (20 December 1974) [1974] ICJ Rep 253, para 46; *Nuclear Tests (New Zealand v France)*, Judgment (20 December 1974) [1974] ICJ Rep 457, para 49.

[12] See *Nuclear Tests (Australia v France)*, Judgment (n 10) para 46; *Nuclear Tests (New Zealand v France)*, Judgment (n 10) para 49.

[13] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment (25 September 1997) [1997] ICJ Rep 7, para 142.

[14] Cheng (n 11) 114, 118. See also ibid.

[15] Kolb (n 8) 440–41.

[16] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol 1 (Grotius Publications Limited 1986) 12. It is worth noting that Article 300 of the United Nations Convention on the Law of the Sea (UNCLOS), titled 'Good faith and abuse of rights,' provides that 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.'

The right to judicial and quasi-judicial procedures is one of the fundamental rights of States under international law as a reflection of the obligation of States to settle international disputes by peaceful means[17] and their freedom to choose means of dispute settlement.[18] Moreover, States may obtain the right to a specific court by agreeing on a founding treaty or other relevant instruments of the court. For example, a State obtains the right to have recourse to the ICJ by ratifying the Charter of the United Nations.[19] Similarly, a State obtains the right to submit disputes to the International Tribunal for the Law of the Sea (ITLOS) by ratifying or acceding to the United Nations Convention on the Law of the Sea (UNCLOS).[20] Once a State obtains the right to a specific international court, it is entitled to initiate the proceedings of the court and present evidence and submissions before the court by using such right as long as the right falls within the scope of jurisdiction of the court, which is defined by an agreement between the disputing parties as well as by the founding treaty or other instruments of the court. When the State initiates the proceedings of the court, the court has the jurisdiction over the State's claims and is obliged to exercise the jurisdiction as long as all the relevant requirements for jurisdiction are met.[21] Failure to exercise the jurisdiction would restrain the right of the disputing parties to the court.

However, according to the principle of abuse of process, if a State has the right of access to an international court yet uses it in an abusive way, the court shall refrain from exercising its jurisdiction over the State and its claims.[22] In practice, abusive use of the right to an international court may occur at different stages of court proceedings. For example, a State may abuse its right to an international court when it files a case with the court. In such cases, the principle of abuse of process demands that the court refrain from commencing a review of the case. Alternatively, if a State presents evidence and submissions in an abusive way during court proceedings, the court would have to terminate the proceedings. For the purpose of this article, it is important to note that, if the filing of a case by a State is considered abusive, the court would be required to dismiss the case as *inadmissible*. In other words, the principle of abuse of rights needs to be considered as a question of admissibility rather than one of jurisdiction. Although the distinction between jurisdiction and admissibility is not totally clear,[23] the former often implies the competence of a court to review a case while the latter is mostly concerned with the propriety of using the competence.[24] The principle of abuse of rights involves questions of admissibility since the principle does not negate the court's jurisdiction as such, but only prevents the exercise thereof.[25]

[17] See Charter of the United Nations, art 2(3).
[18] See Charter of the United Nations, art 33(1).
[19] Charter of the United Nations, art 93(1); Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945), art 35(1).
[20] United Nations Convention on the Law of the Sea, 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994) (UNCLOS), annex VI. Statute of the International Tribunal for the Law of the Sea, art 20(1).
[21] See *Arbitral Award of 31 July 1989*, Judgment (12 November 1991) [1991] ICJ Rep 53, para 120.
[22] Even if the Court has jurisdiction, it is not 'necessarily be bound to ... exercise' it. Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol 2 (Grotius Publications Limited 1986) 447.
[23] Hugh Thirlway, *The Law and Procedure of the International Court of Justice* (OUP 2013) 1708–11.
[24] Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (CUP 2015) 129–33. See also Fitzmaurice (n 22) 438–40.
[25] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment (6 November 2003) [2003] ICJ Rep 161, para 29.

Despite the general acceptance of the principle of abuse of process, it is hardly clear under what circumstances the use of the right to judicial and quasi-judicial procedures constitutes an abuse. While the practice of judicial and quasi-judicial bodies, which will be examined in the remaining part of this section, sheds some light on the meaning of 'abuse,' the term by its nature encompasses ambiguity and flexibility, and its specific content can be determined only in connection with the facts of a particular case.[26]

Nevertheless, it could at least be said that the term 'abuse of process' connotes a sense of maliciousness, unreasonableness and arbitrariness.[27] Maliciousness is concerned with the subjective intention of an actor. For example, having recourse to an international court with the sole purpose of harassing the defendant would be malicious.[28] In the meantime, unreasonableness has a broader scope than maliciousness because it is assessed in light of the impact of an act regardless of the intention of an actor. More specifically, the use of the right to an international court would be considered unreasonable if it harms the interests of the other disputing party, or if it undermines the effectiveness or purpose of the court.[29] Arbitrariness is also a broad concept that is often used interchangeably with unreasonableness.[30] Thus, for example, having recourse to a specific international court, instead of other competent international courts and tribunals, may be considered unreasonable or arbitrary if the selected court does not serve the applicant's legitimate interest while it causes significant hardship for the respondent.[31] In addition, if a State files a case with an international court without reasonable grounds or in an untimely manner, thereby causing prejudice to the respondent and compromising the proper functioning of the court, the filing of the case would be considered unreasonable or arbitrary.[32]

(ii) *Practice of the ICJ*

Although neither the ICJ Statute nor the ICJ Rules explicitly provides for the principle of abuse of process, its applicability to the ICJ proceedings is undeniable since it constitutes a 'general principle[] of law recognized by civilized nations' under Article 38(1)(c) of the ICJ Statute. Moreover, the Court has the inherent power, and the obligation under certain circumstances, to examine whether a disputing party engages in an abuse of process. In this regard, the Court held in *Nuclear Tests* that it has inherent power 'to take such action as may be required ... to ensure the observance of the "inherent limitations on the exercise of the judicial

[26] Cheng (n 11) 134.

[27] Kolb (n 8) 468–69. According to Cheng (n 11) 134, '[w]hen either an unlawful intention or design can be established, or the act is clearly unreasonable, there is an abuse prohibited by law.' Schachter notes that the principle of abuse of rights is 'associated with fairness and reasonableness.' Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 56.

[28] Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 Austria YB of Intl L 191, 202–03.

[29] Kolb writes that abuse includes the use of judicial procedures for purposes 'that are alien to those for which the procedural rights were established,' that are 'procrastinatory or frivolous,' that are 'propagand[istic],' or that are 'malevolent' or in 'bad faith,' as well as for the purpose 'of causing harm or obtaining an illegitimate advantage,' or 'of reducing or removing the effectiveness of some other available process.' Robert Kolb, 'General Principles of Procedural Law' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2012) 871, para 49.

[30] Olivier Corten, 'Reasonableness in International Law' in *Max Planck Encyclopedia of Public International Law*, para 17.

[31] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2003) 258–59. See also Michael Akehurst, 'Jurisdiction in International Law' (1974) 46 Brit YB Intl L 145, 189–90.

[32] Chester Brown, *A Common Law of International Adjudication* (OUP 2007) 248–49.

function" of the Court, and to "maintain its judicial character."'[33] The inherent power of the Court can be implied from Article 30 of the ICJ Statute, which provides that 'The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.'[34] Under certain circumstances, the Court has not only the inherent power but also the obligation to decide not to examine issues before it.[35] For example, if reviewing a case were incompatible with its status and functions, it would be precluded from reviewing the case.[36] Therefore, if an applicant State files a case in an abusive way, the Court should declare it inadmissible and should refrain from exercising its jurisdiction.[37] In the past, the ICJ has examined the respondent's objection to admissibility based on the principle of abuse of process, without questioning the applicability of the principle.

Nevertheless, the Court sets a rather high standard for a claim of an abuse of process, and it has never sustained an objection to admissibility based on abuse of process.[38] At least two reasons can explain the Court's hesitance to declare an abuse of process and the inadmissibility of applications. First, the Court's hesitance can partly be attributed to disputing parties' reluctance to bring up an issue of abuse of process in the first place. It is relatively rare that a disputing party alleges an abuse by the other disputing party as a basis for its objection to admissibility. Even in cases where a party raised an issue of abuse, it did so only in passing. The Court does not examine the issue of abuse unless one of the disputing parties raises and argues it,[39] perhaps in view of the serious nature of an allegation of abuse.

Second, more importantly, the Court seems to consider that it may limit the right of States to access the Court only 'under extreme circumstances.'[40] It should be noted that the principle of abuse of process prevents the exercise of jurisdiction of the Court, which has been established by consensus between the disputing parties, in consideration of potential harms to one of the disputing parties or to the Court.[41] It is understood that such consensual jurisdiction should be overridden by general considerations 'only on account of exceptional circumstances' where harms resulting from the exercise of jurisdiction is sufficiently clear and serious.[42] To put it

[33] *Nuclear Tests (Australia v France)*, Judgment (n 11) para 23; *Nuclear Tests (New Zealand v France)*, Judgment (n 10) para 23, quoting *Case concerning the Northern Cameroons (Cameroon v United Kingdom)*, Preliminary Objections, Judgment (2 December 1963) [1963] ICJ Rep 15, 29. For example, with its inherent power, the Court may exercise judicial economy and decide not to examine some of the issues raised by disputing parties in order to ensure the efficiency of its operation. Luiz Eduardo Salles, *Forum Shopping in International Adjudication: The Role of Preliminary Objections* (CUP 2014) 190–205. See also Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 BYIL 195, 215–22, 228–29.

[34] Elihu Lauterpacht, '"Partial" Judgments and the Inherent Jurisdiction of the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 456, 477–78. A similar provision is included in the constitutive instruments of other international courts and tribunals. See eg The Statute of the International Tribunal for the Law of the Sea, art 16.

[35] It may be argued that the Court has such power but not the obligation, see Shany (n 24) 148–63.

[36] Shabtai Rosenne, *The Law and Practice of the International Court 1920–2000* (4th edn, Martinus Nijhoff Publishers 2006) 532–39.

[37] Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989, Supplement 2005: Parts One and Two' (2006) 76 BYIL 1, 12–14. As has already been pointed out above in this subsection, an abuse does not negate the existence of the Court's jurisdiction as such, but only prevents the exercise thereof.

[38] See eg Kolb (n 7) 640–46. Other than the cases discussed below in the text of this Section, see eg *Aerial Incident of 10 August 1999 (Pakistan v India)*, Jurisdiction, Judgment (21 June 2000) [2000] ICJ Rep 12, para 40; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), Preliminary Objections*, Judgment (11 July 1996) [1996] ICJ Rep 595, para 46.

[39] Chittharanjan Félix Amerasinghe, *Jurisdiction of International Tribunals* (Martinus Nijhoff 2002) 243.

[40] *Arbitral Award*, Judgment (n 21) para 120.

[41] Christian Tomuschat, 'Article 36' in Zimmermann and others (n 29) 633, para 119.

[42] ibid para 119.

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differently, the determination of abuse requires a careful review of relevant factual circumstances in light of the fact that it would restrain the exercise of the right to the Court that the disputing parties have under the Charter of the United Nations. The fact that the Court has never sustained an objection to admissibility based on an allegation of abuse of process suggests that the alleged abuses have never been so 'extreme' or 'exceptional' as to render the applications inadmissible.

Under what circumstances would the ICJ find that an act of a disputing party constitutes an abuse of process and therefore renders its application inadmissible? In the past, the ICJ examined whether mere untimeliness of the filing of an application, either too-late filing or too-early filing, can constitute an abuse of process. For example, in the *Ambatielos* case, the respondent claimed that

> there were undue delay and abuse of the process of the Court in that, although reference of the dispute to the compulsory jurisdiction of the Court has been continuously possible since the 10th December 1926, no such reference took place until the 9th April 1951.[43]

The ICJ rejected the respondent's claim, stating that it did not consider that the applicant 'did anything improper in instituting proceedings against the United Kingdom on April 9th, 1951, in conformity with the relevant provisions of the Statute and Rules of Court.'[44] In the case of *Right of Passage*, the respondent claimed that the application violated the reciprocal right of the respondent under Article 36(2) of the ICJ Statute and constituted an abuse of process because it was filed only a few days after the applicant's declaration under the provision.[45] The ICJ rejected the claim, stating that the ICJ 'Statute does not prescribe any interval between the deposit' of a declaration under Article 36(2) and the filing of an application, and that any delay in the receipt of the declaration did not deprive the respondent of any right of reciprocity under the provision so as to constitute an abuse of process.[46] The findings in the above cases suggest that an untimely filing of an application does not normally constitute an abuse of process because there is no rule prescribing the timing of filing.

In fact, the Court is generally reluctant to declare a certain conduct or the lack thereof as an abuse unless there is an explicit provision requiring or prohibiting such a conduct. For example, in *Land and Maritime Boundary between Cameroon and Nigeria*, the respondent raised an objection to the Court's jurisdiction, claiming that the applicant infringed the principle of good faith and abused the system instituted by Article 36(1) of the ICJ Statute, by not informing the respondent of its intention to accept the Court's jurisdiction and file an application.[47] However, the Court rejected the objection, stating that '[t]here is no specific obligation in international law for States to inform other States parties to the Statute that they intend to subscribe or have subscribed to the Optional Clause.'[48] According to the Court, although the principle of good faith is 'one of the basic principles governing the creation and performance of legal obligations

[43] *Ambatielos Case (Merits: Obligation to Arbitrate)*, Judgment (19 May 1953) [1953] ICJ Rep, 10, 13–14, 23.
[44] ibid 23.
[45] *Case concerning Right of Passage over Indian Territory* (*Portugal v India*) Preliminary Objections, Judgment (26 November 1957) [1957] ICJ Rep, 125, 132.
[46] ibid 147–48.
[47] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment (11 June 1998) [1998] ICJ Rep 275, paras 22, 36.
[48] ibid para 39.

... , it is not in itself a source of obligation where none would otherwise exist.'[49]

It should be added that, while the Court has never found that the untimely filing of an application constituted an abuse of process, it has implied that such filing might constitute an abuse of process if it causes prejudice to the respondent under certain circumstances. For example, in *Phosphate Lands in Nauru*, the Court stated that it 'recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible' in certain circumstances.[50] It further noted that 'it will be for the Court, in due time, to ensure that [the applicant's] delay in seising it will in no way cause prejudice to [the respondent] with regard to both the establishment of the facts and the determination of the content of the applicable law.'[51]

While untimely filing is the only factor that the Court has examined so far as a potential source for an abuse of process, there may be other factors that render an act of a disputing party an abuse. For example, an application to the Court by a State contrary to its commitment to use another dispute settlement procedure may be considered an abusive use of the right to the Court.[52] In this regard, in *Border and Transborder Armed Actions*, the respondent argued that the applicant was precluded by the principle of good faith from initiating the ICJ procedure because it had entered into a commitment to use another dispute settlement procedure. Although the ICJ did not directly examine the question of good faith because it rejected the respondent's argument on a factual basis, it did not deny the possibility that that filing of an application with the ICJ in contradiction to a previous commitment would violate the principle of good faith and therefore be declared inadmissible.[53]

Judicial propriety is another factor that may be taken into account in determining whether an application constitutes an abuse of process. For example, in *Northern Cameroons*, the Court stated that it 'is not compelled in every case to exercise [its] jurisdiction' because '[t]here are inherent limitations on the exercise of the judicial function.'[54] In its view, the Court 'must be the guardian of the Court's judicial integrity'[55] and 'must discharge the duty ... to safeguard the judicial function.'[56] The Court dismissed the application, considering that the circumstances of the case had 'rendered any adjudication devoid of purpose' so that 'for the Court to proceed further in the case would not ... be a proper

[49] ibid, quoting *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, Judgment (20 December 1988) [1988] ICJ Rep 69, para 94.

[50] *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment (26 June 1992) [2004] ICJ Rep 12, para 32.

[51] ibid para 36. The Court concluded that the application in this case had not been rendered inadmissible by passage of time. ibid. Undue delay of the filing of an application may also be considered an 'implied waiver of rights.' See *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment (31 March 2004), [2004] ICJ Rep 12, para 44. The existence of prejudice suffered by the respondent is also a factor to be taken into account when the Court decides the question of admissibility in other contexts. In *Barcelona Traction*, the respondent argued that it had agreed to the discontinuance of the original proceedings because the applicant misled it, and that it suffered prejudice because of the new application filed after the discontinuance of the original proceeding. The respondent contended that the applicant was now 'estopped or precluded from denying that by, or in consequence of, the discontinuance, it renounced all further right of action.' *Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, Judgment (24 July 1964), [1964] ICJ Rep 6, at 24. The ICJ declined the respondent's plea because it concluded that the respondent did not suffer prejudice, based on the comparison between the respondent's position in the new proceedings and what it would have been in the original ones. ibid 24–25.

[52] See *Phosphate Lands in Nauru*, Judgment (n 50) paras 37–38.

[53] See *Border and Transborder Armed Actions*, Judgment (n 49) 105–06.

[54] *Northern Cameroons*, Judgment (n 33), 29.

[55] ibid.

[56] ibid 38.

discharge of its duties.'[57] It could be drawn from this finding that an application asking the Court to make a judicially improper review constitutes an abuse of process.

B. *Abuse of Process under Treaty Provisions*

The constitutive instruments of some judicial and quasi-judicial bodies explicitly provide that a claim constituting an abuse of process shall be inadmissible. While these bodies rarely admit that claims constitute an abuse of process, their practice suggests, at least to some extent, under what circumstances a claim is regarded as an 'abuse.'

First, Article 294(1) of UNCLOS provides that a court or tribunal 'shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process,' and that '[i]f the court or tribunal determines that the claim constitutes an abuse of legal process ... , it shall take no further action in the case.'[58] The provision is considered a 'procedural safeguard' against abusive use of the dispute settlement procedures under UNCLOS.[59] However, there have been no cases where claims were found to constitute an abuse of legal process under the provision. For example, in *Barbados v Trinidad and Tobago*, the Tribunal found that 'the unilateral invocation of the arbitration procedure cannot by itself be regarded as ... an abuse of right contrary to general international law' because it is a 'straightforward exercise of the right conferred by the [UNCLOS], in the manner there envisaged.'[60] Moreover, in *Philippines v China*, the Tribunal noted the 'serious consequences of a finding of abuse of process' under Article 294, and stated that the procedure under the provision is triggered 'in only the most blatant cases of abuse or harassment.'[61]

Second, a similar provision is incorporated in the Optional Protocol to the ICCPR, according to which the Human Rights Committee receives and considers communications from individuals claiming to be victims of violations of any of the rights set forth in the ICCPR. Having defined in Articles 1 and 2 the scope of and conditions for the competence of the Committee, the Optional Protocol provides in Article 3 that '[t]he Committee shall consider inadmissible any communication ... which it considers to be an abuse of the right of submission of such communications ... .' Thus, the Committee is required to refrain from reviewing a communication constituting an 'abuse' even if the communication falls within the scope of its competence. While the provision does not explicitly mention under what circumstances a communication is considered an abuse of the right of submission, the drafting history suggests that it was incorporated in response to a view that the Committee should be allowed to treat an unreasonable delay in the

[57] ibid.

[58] See also International Tribunal for the Law of the Sea: Rules of the Tribunal (adopted 28 October 1997), art 96.1.

[59] *Chagos Marine Protected Area Arbitration (Republic of Mauritius v United Kingdom of Great Britain and Northern Ireland)*, PCA Case No 2011-03, Award (18 March 2015) paras 311–12, 315.

[60] *Barbados v Republic of Trinidad and Tobago*, PCA Case No 2004-02, Decision (11 April 2006) para 208.

[61] *The South China Sea Arbitration (Republic of the Philippines v People's Republic of China)*, PCA Case No 2013-19, Award on Jurisdiction and Admissibility (29 October 2015) para 128.

submission of a communication as an abuse of the right of submission.[62] The concern may have been that an excessive delay in submission makes it difficult for the Committee to conduct a proper review based on sufficient evidence. Moreover, it may have been considered that looking back and reviewing a State's conduct after a long period of silence could jeopardize the stability of legal orders.

Although there have been several cases where a State party alleged that the late filing of a communication constituted an abuse under Article 3, the Committee upheld such an allegation only in a few of them. For example, in *Gobin v Mauritius*, the Committee noted that 'there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself involve abuse of the rights of communication.'[63] That said, the Committee concluded that the communication in this case should be regarded as an abuse under Article 3 because the alleged violation by the State party took place at periodic elections held five years before the submission of the communication and no convincing explanation in justification of the delay was provided.[64] In *Serna*, the Committee followed the approach taken in *Gobin v Mauritius*, stating that 'the period of time elapsing before [the] submission, other than in exceptional circumstances, does not in itself constitute an abuse of the right to submit a communication.'[65] The Committee further stated that an abuse may be found 'where an exceptionally long period of time has elapsed before the submission of the communication without sufficient justification,' and that '[i]n determining what constitutes an excessive delay, each case must be decided on its own merits.'[66] In accordance with this view, while the communication in this case was submitted 16 years after the alleged violation by the State party arose, the Committee concluded that the delay did not constitute an abuse because the violation still persisted at the time of the submission and the authors had filed numerous legal and administrative complaints during those 16 years without success.[67] The late filing of a communication is not the only reason that has been invoked as an abuse of process. For example, in *Serna*, the State party claimed that the 'communication amounted to an abuse of the right to submit communications, inasmuch as the authors had deliberately submitted unclear information to the Committee.'[68] However, the Committee found that the submitted information did not contain misleading elements and therefore did not constitute an abuse.[69]

Third, a provision similar to Article 3 of the Optional Protocol is also incorporated in the ECHR. Article 35(3)(a) of the ECHR provides that the European Court of Human Rights (ECtHR) 'shall declare inadmissible any individual application submitted under Article 34 if it considers that … the application is … an abuse of the right of individual application.' According to a guide of the ECtHR,

[62] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1994) 129.
[63] *Mr Vishwadeo Gobin v Mauritius*, CCPR/C/72/D/787/1997, Decision (16 July 2001) para 6.3.
[64] ibid.
[65] *Rosa María Serna and others v Colombia*, CCPR/C/114/D/2134/2012, Decision (9 July 2015) para 8.6.
[66] ibid.
[67] ibid.
[68] *Serna* (n 65) para 4.4.
[69] ibid para 8.5.

> any conduct of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and impedes the proper functioning of the Court or the proper conduct of the proceedings before it constitutes an abuse of the right of application.[70]

The guide enumerates 'five typical categories' of abuse:

(i) misleading information;
(ii) use of offensive language;
(iii) violation of the obligation to keep friendly-settlement proceedings confidential;
(iv) application manifestly vexatious or devoid of any real purpose; and
(v) all other cases that cannot be listed exhaustively.[71]

It is interesting to note that the guide considers not only the existence of harm to the defendant, ie, a State party but also the existence of harm to the purpose and proper functioning of the ECtHR as criteria for abuse of process.

In practice, the ECtHR rarely dismisses applications on the ground of abuse.[72] For example, in *Bestry v Poland*, the ECtHR first suggested that '[i]ncomplete and therefore misleading information may also amount to abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information.'[73] That said, the ECtHR concluded that the application in the case did not amount to an abuse because it did not concern 'the very core of the case.'[74] In *SL and JL v Croatia*, the ECtHR stated that '[a]n application may exceptionally be rejected on that ground if, among other things, it is knowingly based on untrue facts ... , the most egregious example being applications based on forged documents.'[75] However, the ECtHR also insisted that 'any deliberate attempt [of the applicant] to mislead the Court must be established with sufficient certainty.'[76] It concluded that the application was not an abuse because the applicants did not 'deliberately provide[] false information.'[77]

Finally, it is worthwhile briefly to mention the practice of the International Criminal Court (ICC), which takes a different approach from the Human Rights Committee and the ECtHR. The Rome Statute of the ICC does not explicitly or implicitly provide that a case may be dismissed as inadmissible based on abuse of process.[78] Nevertheless, the Appeals Chamber has noted that

[70] ECtHR, Practical Guide on Admissibility Criteria (2014), http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf, para 148.
[71] ibid.
[72] See eg David Harris, Michael O'Boyle, Edward Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick, Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 79–81. For the practice of the European Commission of Human Rights under the equivalent provision. See Amerasinghe (n 39) 758–60.
[73] *Bestry v Poland*, App no 57675/10, ECHR, Judgment (3 November 2015) para 44.
[74] ibid.
[75] *SL and JL v Croatia*, App no 13712/11, ECHR, Judgment (Merits) (7 May 2015) para 48.
[76] ibid.
[77] ibid para 49. See also *Gross v Switzerland*, App no 67810/10, ECHR, Judgment (30 September 2014), Joint Dissenting Opinion of Judges Spielmann, Ziemele, Berro-Lefèvre, Zupančič, Hajiyev, Tsotsoria, Sicilianos, and Keller.
[78] Article 17(1) of the Rome Statute of the ICC, which enumerates impediments that render a case inadmissible, does not identify abuse of process as one of such impediments. Moreover, while art 4(1) of the Rome Statute provides that the ICC shall 'have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes,' according to the Appeals Chamber, the provision cannot 'be construed as providing power to stay proceedings for abuse of process' because such power 'is not generally recognised as an indispensable power of a court of law, an inseverable attribute of the judicial power.' *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Defence

> [the] doctrine of abuse of process had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice.[79]

The Appeals Chamber also acknowledged that Article 21(3) of the Rome Statute 'requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms,'[80] including, in particular, the right to a fair trial. Based on the above understanding, the Appeals Chamber concluded that where a fair trial becomes impossible and thereby the object of the judicial process is frustrated, the proceedings can be stayed.[81] The finding suggests that human rights considerations, in particular a fair trial, could necessitate the application of the principle of abuse of process in international criminal procedures.[82]

The approach of the ICC is in contrast to that of the Human Rights Committee and the ECtHR, where human rights considerations make them cautious not to uphold lightly abuse of process allegations. It can also be implied that the principle of abuse of process should be applied differently in light of the nature of a judicial or quasi-judicial body and that of applicable substantive law.

III. ABUSE OF PROCESS IN INVESTMENT ARBITRATION: PAST

This section first discusses the applicability of the principle of abuse of process in investment arbitration, and points out that a particular aspect of the principle comes into play with respect to the initiation of investment arbitral proceedings. It then analyzes past investment arbitration decisions concerning the principle of abuse of process, including *Philip Morris Asia*.

A. *General Considerations*

First of all, investment arbitral tribunals have the obligation to decide cases in accordance with applicable law,[83] and it is generally understood that applicable

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Challenge to the Jurisdiction of the Court pursuant to Article 19 (2)(a) of the Statute of 3 October 2006 (14 December 2006) ICC-01/04-01/06 (OA4), Appeals Chamber, para 35. The Appeals Chamber stated that it was 'driven' to the conclusion that the Rome Statute 'does not provide for stay of proceedings for abuse of process as such.' ibid.

[79] ibid para 36.

[80] ibid.

[81] ibid paras 37–39. See also *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Redacted Decision on the Defence Application Seeking a Permanent Stay of the Proceedings (7 March 2011) para 195; *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Trial Chamber III, Decision on the Admissibility and Abuse of Process Challenges (24 June 2010) paras 252–53; *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Trial Chamber III, Decision on Defence Request for Relief for Abuse of Process (17 June 2015) paras 8–11, 18.

[82] However, in practice, the ICC has been reluctant to dismiss cases as abuse of process. Helen McDermott, 'Seeking a Stay of Proceedings for Irregular Apprehension before International Courts: Fighting a Losing Battle against the Pursuit of International Criminal Justice' (2016) 14 J Intl Crim Just 145, 161–64. See also *Jean-Bosco Barayagwiza v The Prosecutor*, International Criminal Tribunal for Rwanda, Appeals Chamber (3 November 1999) paras 73–101.

[83] ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (April 2006) r 42(1). Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules) (2010) art 35(1).

law in treaty-based investment arbitration includes rules of international law.[84] In many cases, the parties explicitly agree or tribunals explicitly decide that relevant rules of international law, together with relevant investment agreements, are applicable to investment arbitration.

Even if they do not explicitly do so, the parties and tribunals acknowledge, by implication, that at least some rules of international law apply to investment arbitration, by agreeing that arbitration is to be conducted under an investment agreement. For example, the rules of interpretation under the VCLT and customary international law inevitably apply to the interpretation of an applicable investment agreement even if the parties do not explicitly agree to the application of such rules. More importantly for the purpose of this article, rights under investment agreement are necessarily subject to limitations under rules of international law. Given that an investor's right to have recourse to investment arbitration is conferred by international law, such right is inherently limited by international law including the principle of abuse of process.[85] In this regard, the Tribunal in *Abaclat v Argentina* stated that '[t]he theory of abuse of rights is an expression of the more general principle of good faith' and that '[t]he principle of good faith is a fundamental principle of international law, as well as investment law.'[86] The Tribunal further stated that 'the theory of abuse of rights is, in principle, applicable to ICSID proceedings and has, in fact, been previously applied by several ICSID and non-ICSID tribunals in investment cases.'[87] Moreover, the Tribunal in *Phoenix Action v Czech Republic* noted that '[n]obody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused.'[88] The fact that the principle of abuse of process, as a general principle of law, is by nature a common principle of domestic law of civilized nations further confirms the applicability of the principle to investment arbitration.

In addition, it is unquestionable that investment arbitral tribunals have inherent powers to decide procedural questions, including that of abuse of process.[89] For example, Rule 19 of the International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (Arbitration Rules) provides that a '[t]ribunal shall make the orders required for the conduct of the proceeding.' Similarly, Article 17(1) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010 provides that an 'arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.'

In practice, although several tribunals have confirmed the applicability of the principle of abuse of process to investment arbitration, they are generally cautious

[84] Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP 2016) 125–26.

[85] Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 162 ('It is only at a rudimentary stage of legal development that society permits the unchecked use of rights without regard to its social consequences.').

[86] *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) para 646.

[87] ibid.

[88] *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 107.

[89] John Gaffney, '"Abuse of Process" in Investment Treaty Arbitration' (2010) 11 JWIT 515, 521–23.

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not to lightly accept an objection based on the principle. For example, the Tribunal in *Flemingo v Poland* acknowledged that the principle of abuse of process could be a 'mechanism[] to avoid parallel proceedings,' but did not uphold the respondent's objection to jurisdiction based on the principle because, according to the Tribunal, the mere fact that, as in this case, 'both a controlling shareholder and a controlling shareholder of the former [gave] notice of separate claims under respective bilateral investment treaties against the same host State for the same subject-matter, when one of them does not pursue its claim' 'cannot by itself constitute an abuse of' process.[90] Similarly, the Tribunal in *Lauder v Czech Republic* found that 'there [was] no abuse of process in the multiplicity of proceedings initiated by' the claimant because '[t]he existence of numerous parallel proceedings [did] in no way affect the Arbitral Tribunal's authority and effectiveness, and [did] not undermine the Parties' rights' while 'the present proceedings [were] the only place where the Parties' rights under the [applicable investment agreement] can be protected.'[91] In the meantime, in *Ampal-American v Egypt*, the Tribunal noted that 'while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals.'[92] The Tribunal concluded that the 'abuse of process constituted by the double pursuit' in parallel proceedings had 'crystalized' in the case.[93] The overall hesitance of investment arbitral tribunals to uphold objections based on the principle of abuse of process is understandable considering the similar hesitance of the ICJ and other judicial and quasi-judicial bodies, as discussed in the previous section.

Nevertheless, it is important to highlight that, notwithstanding the general reluctance of investment arbitral tribunals, objections based on the principle of abuse of process have been upheld by several tribunals *with respect to the initiation of investment arbitral proceedings*. In fact, most of the allegations of abuse of process that have been made in investment arbitration concerned the initiation of arbitral proceedings. As will be discussed below, there are important differences between the application of the principle of abuse of process with respect to the initiation of investment arbitral proceedings and the application of the same principle by the ICJ and other international judicial and quasi-judicial bodies.

B. *Important Differences from Other International Judicial and Quasi-Judicial Bodies*

Before pointing out the differences, it should be recalled that, in investment arbitration, it is almost always investors that initiate arbitral proceedings, and their

[90] *Flemingo Duty Free Shop Private Limited v The Republic of Poland*, Award (Redacted) (12 August 2016) para 347.
[91] *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001) para 174. See also ibid paras 176–80.
[92] *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Jurisdiction (1 February 2016) para 331.
[93] ibid para 333. For more about the applicability of the principle of abuse of process to the issue of parallel proceedings, see Hanno Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (OUP 2013) 218–26. For another possible scenario of abuse of process, see *The Renco Group, Inc v Republic of Peru*, ICSID Case No UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) paras 174–88. See also Hervé Ascensio, 'Abuse of Process in International Investment Arbitration' (2014) 13 Chinese J Intl L 763, 767–77; Gaffney (n 89) 529–30; de Brabandere (n 7) 626–35; Emmanuel Gaillard, 'Abuse of Process in International Arbitration' (2017) 32 ICSID Rev-FILJ 17, 19–27.

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right to investment arbitration is almost always provided in investment agreements, apart from limited exceptions. In addition, these agreements do not identify *specific* investors that have the right to investment arbitration, but rather provide *general* criteria that determine which investors and investment can have the right to investment arbitration. As a result, an investor that did not have the right to investment arbitration under an investment agreement at the time of the ratification of the agreement could acquire such right after the ratification of the agreement if it subsequently meets the criteria. A closer look of past investment arbitral decisions reveals that an allegation of abuse of process with respect to the initiation of arbitral proceedings concerns the allegedly abusive *acquisition of the right to investment arbitration* by a claimant investor after the ratification of an investment agreement—and often immediately before the initiation of arbitral proceedings.

Then, a question arises as to whether the abusive acquisition of the right to investment arbitration or, more accurately, an abusive *attempt to acquire the right*, can be properly regarded as abuse of process. As indicated in the beginning of Section II.A., the principle of abuse of process presupposes the existence of the right to judicial or quasi-judicial procedures. If there exists no such right, there is no abuse of process. Thus, if there is no right to investment arbitration, there can be no question of abuse of process. This might suggest that the investment arbitral tribunals, which examined the question of an abusive attempt to acquire the right to investment arbitration as that of abuse of process, were wrong because the question concerns whether such right exists and *not* how the existing right is used. In other words, an investor claimant attempting to acquire the right to investment arbitration in an abusive way cannot acquire such a right.

Having said that, an investment arbitral tribunal may be justified in examining an abusive attempt to acquire the right to investment arbitration as a question of abuse of process, *if* it distinguishes the right to investment arbitral proceedings given to a *specific* investor and the *general* right to investment arbitration provided in an investment agreement. According to the distinction, abuse of process with respect to the initiation of investment arbitral proceedings concerns *not* the right to investment arbitration that is acquired by the *specific* claimant investor but rather the right to investment arbitration that is *generally* provided in an investment agreement. In other words, an investor's abusive attempt to acquire its own right to investment arbitration is the abusive *use* of the general right to investment arbitration under an investment agreement. Thus, although an abusive attempt does not grant a *specific* investor the right to investment arbitration, it does not negate the existence of the *general* right to investment arbitration under the agreement, and therefore, there can be a question of abuse of process in the sense that a claimant investor may use such general right in an abusive way.

The application of abuse of process in investment arbitration, as a question of an abusive use of the general right to investment arbitration, entails two important differences from the application of the principle in other international judicial and quasi-judicial bodies.

First, this particular type of application of abuse of process should be examined not as a question of admissibility but rather as that of jurisdiction. In other international judicial and quasi-judicial bodies, the principle of abuse of process is examined as a question of admissibility because the principle presupposes the

existence of the right to international judicial and quasi-judicial bodies of a specific applicant and, consequently, the existence of the jurisdiction of these bodies over the applicant and its claims, as discussed in the previous section.[94] For the ICJ, for example, a question of abuse of process concerns whether the applicant uses its right to the ICJ in an abusive way and whether, as a consequence, the ICJ should refrain from exercising the jurisdiction that it has over the applicant and its claims. On the other hand, the abusive attempt to acquire the right to investment arbitration does not accord such right to a *specific* claimant investor, and therefore, a tribunal does not have jurisdiction over the investor and its claims. While the *general* right to investment arbitration does exist under an investment agreement, regardless of the abusive conduct of the claimant, that does not mean that the tribunal has jurisdiction over the claimant. Therefore, a question for the tribunal is whether the claimant abuses the general right to investment arbitration in an attempt to acquire its own right to investment arbitration over its specific claims, and whether, as a consequence, it fails to establish the jurisdiction of an investment arbitral tribunal over its claims.[95] Although the distinction between jurisdiction and admissibility is not consistently applied by investment arbitral tribunals, the two are conceptually different and have different consequences.[96] Thus, it is not appropriate to examine this particular type of abuse of process as a question of admissibility.

In relation to the first point, it is interesting to note the unique distinction made by the Tribunal in *Abaclat* between 'material good faith' and 'procedural good faith.' According to the Tribunal, the first kind of good faith is concerned with 'the context and the way in which the investment was made, and for which the investor seeks protection,' while the second kind is concerned with 'the context and the way in which a party, usually the investor, initiates its treaty claim seeking protection for its investment.'[97] The issue of abusive attempt to acquire the right involves the first kind because, strictly speaking, such attempt does not concern how an investor initiates arbitral proceedings, but rather how the investor makes investment in order to obtain the right to initiate investment arbitral proceedings. The Tribunal in *Abaclat* rightly suggested that the first kind of good faith should be examined as a question of jurisdiction or the legality of investment.[98]

Second, considering the particular nature of the principle of abuse of process with respect to the initiation of investment arbitral proceedings, it may not be appropriate to apply in investment arbitration the same criteria for abuse that is used by other international judicial and quasi-judicial bodies. On the one hand, the ICJ and other international judicial and quasi-judicial bodies have been very cautious in determining an abuse of process in the light that a determination of such an abuse would restrain the exercise of the right that States have. Moreover,

[94] See Section II.A.(i) of this article.

[95] For the concepts of jurisdiction and admissibility in investment arbitration, see eg David Williams QC, 'Chapter 22: Jurisdiction and Admissibility' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 868, 919–20.

[96] Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen and Robert Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005) 601 ('Mistakenly classifying issues of admissibility as jurisdictional may therefore result in an unjustified extension of the scope for challenging awards ... '). In Paulsson's words, 'It may be difficult to establish the dividing line between the two. There is a twilight zone. But only a fool would argue that the existence of a twilight zone is proof that day and night do not exit.' ibid 603.

[97] *Abaclat*, Decision on Jurisdiction and Admissibility (n 86) para 647.

[98] ibid para 658. The question of the legality of investment ultimately determines that of jurisdiction.

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these bodies take into account factors such as the untimeliness of filing and the submission of misleading information in making such determinations. On the other hand, the question for investment arbitral tribunals being the existence of the right of a specific claimant investor rather than its use, the caution exercised by the ICJ and other international judicial and quasi-judicial bodies may not be needed for investment arbitral tribunals. It should be recalled in this regard that, unlike in the ICJ and other international judicial and quasi-judicial bodies, abuse of process in investment arbitration would not restrain the exercise of the existing right. Additionally, many of the factors considered by other judicial and quasi-judicial bodies in examining the issue of abuse of process may not be relevant to investment arbitral tribunals as these factors presuppose the existence of jurisdiction. For example, the untimeliness of filing or the submission of misleading information would not be relevant unless the jurisdiction of an international court properly exists. That said, a threshold of abuse should not be lowered from the one that is adopted by other international judicial and quasi-judicial bodies as long as an investment arbitral tribunal applies the principle of abuse of process. Although applications of an international law principle may vary depending on fields or forums, the core concept should remain consistent throughout every field of international law.[99] Thus, the determination of an abuse of process in investment arbitration should require the examination of maliciousness, unreasonableness and arbitrariness on the side of the claimant.

The following two subsections examine how past tribunals have applied the principle of abuse of process with respect to an allegedly abusive attempt to acquire the right to investment arbitration.

C. *Philip Morris Asia*

It is worthwhile to start with a review of the factual circumstances and legal findings of *Philip Morris Asia*. The case concerns Australia's Plain Packaging measures, substantive issues of which have already been discussed elsewhere[100] and, therefore, will not be addressed in this article. The focus of the Award (and of this article) is on the admissibility of the claims, which was contested by the respondent on the basis of the principle of abuse of process.

The claimant, Philip Morris Asia is a limited liability company incorporated under the laws of Hong Kong and the regional headquarters for the Asia region of the Philip Morris International group of companies (PMI Group).[101] The claimant controls and manages business decisions of Philip Morris Australia and its wholly owned subsidiary, PML, which operates the PMI Group's sales of tobacco in Australia.[102] Both Philip Morris Australia and PML had been owned by Philip Morris Brands Sàrl ('Philip Morris Brands Sàrl'), a Swiss branch of the

[99] See *Phoenix Action*, Award (n 88) paras 77–78.

[100] See eg Tania Voon and Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia' (2011) 14 J Intl Econ L 515, 530–41. See also Eva Nanopoulos and Rumiana Yotova, '"Repackaging" Plain Packaging in Europe: Strategic Litigation and Public Interest Considerations' (2016) 19 J Intl Econ L 175.

[101] *Philip Morris Asia*, Award (n 3) paras 1, 6.

[102] ibid paras 6, 96–97. The claimant alleged in the proceedings that it had controlled Philip Morris Asia and PML even before the acquisition, but the Tribunal concluded that the claimant failed to show it had control over the Australian investments before it acquired them in February 2011. ibid paras 496–509.

PMI Group,[103] but were transferred to Philip Morris Asia, the claimant in the case, in February 2011, in the course of the global restructuring of the PMI Group, which began in early September 2010.[104] According to the claimant, the objective of the restructuring was 'to reduce costs and improve efficiencies by streamlining its legal entity structure, rationalizing business process, centralising activities, and developing shared services,' and to address 'the political risk that PMI was facing in several countries including Australia with the proliferation of new regulations on packaging and marketing of tobacco products.'[105] Through the restructuring, Philip Morris Asia obtained access to investment arbitration under the Australia-Hong Kong BIT with respect to its investment in Philip Morris Australia and PML. It should be noted here that Philip Morris Brands Sàrl would not have access to investment arbitration with respect to Philip Morris Australia and PML even if they remained in its ownership because Australia does not have an investment agreement with Switzerland, and, therefore, Swiss investors have no legal basis to have recourse to investment arbitration against Australia. It can therefore be reasonably assumed that at least one of the motives of the transfer from Philip Morris Brands Sàrl to Philip Morris Asia was to obtain access to investment arbitration under the BIT.

In the arbitral proceedings, Australia, the respondent, raised objections to the jurisdiction of the tribunal and the admissibility of the claimant's claims. Regarding the admissibility, it argued that 'the doctrine of abuse of rights forbids the Claimant from exercising the right' to have recourse to investor-state arbitration under the investment agreement.[106] In response, Philip Morris Asia, the claimant, contended that 'the scope and content of the abuse of rights doctrine is uncertain and exceptionally applied' (footnote omitted), but did not deny the applicability of the doctrine.[107] The difference between the parties was the criteria for the application of the principle of abuse of rights. On one hand, the respondent asserted that a 'foreseeability test' should be applied. In its view, 'the manipulation of corporate nationality at a time when the dispute is in existence or is *foreseeable* to a sufficient degree' constitutes an abuse of rights.[108] More specifically, the respondent argued that gaining protection under an investment agreement with the knowledge of the risk of a 'specific future dispute' was 'unfair.'[109] On the other hand, the claimant contested the appropriateness of the foreseeability test.[110] In the claimant's view, the respondent has to prove bad faith on the claimant's part to demonstrate an abuse of rights, and the standard of 'abusiveness' is 'met only in exceedingly rare circumstances involving egregious conduct akin to fraud,' such as the use of forged and fraudulent documents as evidence of a claimant's status as investor and the 'internationalization' of domestic disputes that had already accrued.[111]

Having rejected the respondent's jurisdictional objections, the Tribunal examined whether the claimant's initiation of the arbitral proceedings under the

[103] ibid para 97.
[104] ibid paras 97–98, 143.
[105] ibid para 98.
[106] *Philip Morris Asia*, Award (n 3) para 400.
[107] ibid para 411.
[108] ibid paras 420–25 (emphasis added).
[109] ibid paras 422, 441, 443.
[110] ibid paras 431–40.
[111] ibid paras 414, 417–18.

BIT constituted an abuse of right and therefore rendered the claims inadmissible. First, the Tribunal made a distinction between the situation where 'an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a *specific foreseeable dispute*' and the situation where an investor does the same, but 'in respect of an *existing dispute*'.[112] According to the Tribunal, a tribunal would lack jurisdiction *ratione temporis* in the latter case,[113] while it would have jurisdiction in the former. Second, the Tribunal reviewed past investment arbitration decisions concerning the abuse of process (abuse of rights), and concluded that:

> the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was *foreseeable*.[114]

If a tribunal determines that an investor is abusing its right, it would have to declare the investor's claims inadmissible and refrain from exercising the jurisdiction that the tribunal has over them. Third, with respect to a test to determine whether a specific dispute is foreseeable or not, the Tribunal suggested that 'a dispute is foreseeable when there is a reasonable prospect … that a measure which may give rise to a treaty claim will materialize.'[115] Finally, it found, in view of the facts of the case, that 'it was reasonably foreseeable [at the time of the restructuring] that [the Plain Packaging measures] would eventually be enacted and, consequently, a dispute would arise.'[116] The Tribunal added that the 'main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under' the BIT, and that the claimant failed to prove other reasons for the restructuring.[117] The Tribunal concluded that 'the initiation of this arbitration constitute[d] an abuse of rights,' and that it was 'precluded from exercising jurisdiction over this dispute' as the claims were inadmissible.[118]

Two remarks can be made about the findings in *Philip Morris Asia*. First, the Tribunal in the case examined the issue of abuse of process as a question of admissibility.[119] The Tribunal might have sought to follow the approach of other international judicial and quasi-judicial bodies, which have examined the issue of abuse of process as a question of admissibility. However, the analogy is not totally accurate considering that the nature of abuse of process objections with respect to the initiation of investment arbitral proceedings is different from that of abuse of process objections in other international judicial and quasi-judicial procedures, as this article has already pointed out.[120] On one hand, an international judicial or

[112] ibid para 539 (emphasis added).
[113] ibid.
[114] ibid para 554 (emphasis added).
[115] ibid.
[116] ibid paras 555–69.
[117] ibid paras 570–84.
[118] ibid para 588.
[119] While the Tribunal might have followed the line of arguments of the respondent, the respondent did not necessarily regard the issue of abuse of process as a question of admissibility, at least judging from the publicly available documents. The respondent argued, in its response to the notice of arbitration, that 'there could be no 'investment' for the purposes of Article 10 of the BIT and any reliance on Article 10 of the BIT would constitute an abuse of right. It follows that the arbitral tribunal lacks jurisdiction *or* that the claims that PM Asia now seeks to bring under the BIT are inadmissible.' *Philip Morris Asia*, Australia's Response to the Notice of Arbitration (21 December 2011) para 31 (emphasis added).
[120] See Section III.B. of this article.

quasi-judicial body applies the principle of abuse of process in examining whether it should refrain from exercising the jurisdiction that it has over an applicant and its claims. On the other hand, the question for the Tribunal in *Philip Morris Asia* was whether the attempt of the claimant to acquire the right to investment arbitration under the BIT was abusive and therefore must fail. If an investor fails to acquire the right to investment arbitration, an investment arbitral tribunal cannot have jurisdiction over the investor and its investment. In short, the Tribunal in *Philip Morris Asia* should have examined the issue of abuse of process as a question of jurisdiction.

Second, in determining whether the claimant did, in fact, act in an abusive manner, the Tribunal in *Philip Morris Asia* applied the foreseeability test, which is not used in any of the international judicial and quasi-judicial bodies discussed in this article. Although the mere lack of practice in other judicial and quasi-judicial bodies does not necessarily negate the value of the test in investment arbitration, especially considering the particular nature of abuse of process objections with respect to the initiation of investment arbitral proceedings, the appropriateness of the test is not without question. In particular, it should be recalled that the term abuse is understood to connote a sense of maliciousness, unreasonableness, and arbitrariness.[121] Whether an investor's attempt to acquire the right to investment arbitration with respect to a foreseeable dispute entails maliciousness, unreasonableness and arbitrariness would require a comprehensive analysis of the facts of a particular case. In other words, the mere fact that an investor attempts to acquire the right to investment arbitration with respect to a foreseeable dispute would not suffice to establish the maliciousness, unreasonableness, and arbitrariness of the investor. In drawing its conclusion that the foreseeability test should be applied, the Tribunal in *Philip Morris Asia* relied exclusively on past investment arbitration decisions. While the exclusive reliance on investment arbitral decisions is perhaps justifiable in light of the limited relevance of the practice of other international judicial and quasi-judicial bodies, the foreseeability test is far from an established criterion even in investment arbitration, as will be discussed in the following subsection.

D. *Other Investment Arbitration Decisions*

As acknowledged by the Tribunal in *Philip Morris Asia*,[122] this is not the first investment arbitration case to address the abuse of process, and the Tribunal in *Philip Morris Asia* heavily and exclusively relied on past investment arbitration decisions on this issue. Although some of the decisions have already been discussed elsewhere,[123] this section reviews them from a different perspective to highlight the following two points. First, many of the investment arbitration cases cited by the Tribunal and the parties in *Philip Morris Asia* addressed the issue of abuse not as a question of admissibility but as that of jurisdiction. More specifically, the question for the tribunals in these cases was whether the 'investment' or the 'investor' at issue was protected by the relevant investment

[121] See Section II.A.(i) of this article.
[122] *Philip Morris Asia*, Award (n 3) para 538.
[123] See eg Utku Topcan, 'Abuse of the Right to Access ICSID Arbitration' (2014) 29 ICSID Rev-FILJ 627, 634–44; de Brabandere (n 7) 621–26.

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agreements and arbitration rules and, therefore, fell within the jurisdiction of the tribunals. Second, while a few of the investment arbitral cases cited by the Tribunal and the parties in *Philip Morris Asia* applied the foreseeability test, they also took into account broader factual circumstances. In particular, the tribunals in these cases examined the conduct of the claimant to determine whether it exceeded a threshold of maliciousness, unreasonableness and arbitrariness.

(i) *Jurisdiction ratione temporis*

The review starts with *Venezuela Holdings v Venezuela* and *Tidewater v Venezuela*, which were relied on by the Tribunal in *Philip Morris Asia*. The question in these cases was whether the initiation of the arbitral proceedings constituted an abuse because the claimants obtained access to investment arbitration with respect to *pre-existing disputes*. In other words, in light of the well-established jurisprudence that a tribunal's jurisdiction *ratione temporis* is limited to a dispute that arises *after* the claimant obtains protection under a relevant investment agreement, the tribunals examined whether the disputes before them had existed *before* the claimants obtained such protection.

For example, in *Venezuela Holdings*, the Tribunal observed that 'in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law' or 'abuse of right,'[124] and examined whether the restructuring of the claimant investor was 'deemed as an abuse of right and as a consequence whether or not it has jurisdiction under' the investment agreement.[125] More specifically, the main issue for the Tribunal was whether the dispute existed at the time the claimant obtained access to investment arbitration through restructuring. In the tribunal's view, while restructuring aimed at gaining access to investment arbitration under an investment agreement was 'perfectly legitimate' with respect to *future disputes*, restructuring with the same objective with respect to *pre-existing disputes* 'would constitute ... an abusive manipulation of the system of international investment protection under the ICSID Convention and the BIT.'[126] In this case, although the Tribunal did not dismiss the claimant's claims *in toto* as an abuse of rights, it delimited its jurisdiction only to include any dispute arising after the date of restructuring.[127]

Similarly, the Tribunal in *Tidewater* insisted on the distinction between future disputes and pre-existing disputes. According to the Tribunal, 'it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of *future disputes* with a host state [through restructuring]. But the same is not the case in relation to *preexisting disputes* between the specific investor and the state.'[128] Moreover, there was an agreement between the parties in the case that the claimants 'could not have expected to obtain protection for *pre-existing* disputes; they expected to obtain prospective protection only against any actions in breach of the treaty the

[124] *Venezuela Holdings and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) para 169.
[125] ibid para 185.
[126] ibid paras 204–05.
[127] ibid paras 205–06.
[128] *Tidewater Investment SRL and Tidewater Caribe, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction (8 February 2013) para 184 (emphasis added).

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Respondent might take *after* restructuring.'[129] The Tribunal rejected the respondent's objection to jurisdiction based on the fact that the dispute did not exist at the time of restructuring.[130]

Thus, according to these tribunals, jurisdiction *ratione temporis* of an investment arbitral tribunal is limited to *future* disputes, and an attempt to extend the jurisdiction to *pre-existing* disputes must fail. Moreover, the Tribunal in *Venezuela Holdings* specifically suggested that a claimant investor's attempt to extend the right to investment arbitration over a pre-existing dispute would constitute an abuse of rights. Although the conclusion of the tribunals to exclude pre-existing disputes from the scope of jurisdiction *ratione temporis* is justifiable, the tribunals did not explicitly explain why the claimants' initiation of investment arbitration with respect to pre-existing disputes was considered an abuse. If the tribunals were to apply the principle of abuse of process, they should have examined whether the claimants' acts entailed maliciousness, unreasonableness and arbitrariness. Having said that, considering that the use of investment arbitration with respect to pre-existing disputes is not what is intended under investment agreements, the initiation of investment arbitration with respect to such disputes may well be regarded malicious, unreasonable and arbitrary. However, a final determination of maliciousness, unreasonableness, and arbitrariness needs to be based on a careful review of factual circumstances.[131] In any event, the tribunals could have reached the same conclusion without applying the principle of abuse of process because the scope of jurisdiction *ratione temporis* is limited as a corollary of the principle of non-retroactivity of treaties.[132]

(ii) *Jurisdiction ratione materiae*

Phoenix Action, *Cementownia v Turkey*, and *ST-AD v Bulgaria* were cited by the parties' submissions in *Philip Morris Asia*, although they were not directly relied upon by the Tribunal in the case. As discussed below, unlike *Philip Morris Asia*, the tribunals in *Phoenix Action*, *Cementownia*, and *ST-AD* addressed the issue of an abuse of process in the context of examining whether the claimants' investments were 'protected investment' under relevant investment agreements and arbitral rules and therefore fell within the scope of jurisdiction *ratione materiae*.

The Tribunal in *Phoenix Action* first noted that the purpose of protection under the ICSID arbitration was to protect legal and *bona fide* investments.[133] The tribunal then examined whether the claimant made *bona fide* investments that could fall within the jurisdiction *ratione materiae*. The Tribunal answered in the negative because the claimant was well aware of the difficult circumstances of the investment at the time of acquisition, and had no business plan or activity regarding its investment except to gain access to ICSID arbitration by

[129] ibid para 143 (emphasis added).
[130] ibid paras 183–92.
[131] The question of jurisdiction *ratione temporis* does not arise with respect to a foreseeable dispute, because a claimant investor initiates arbitral proceedings when such dispute crystalizes into an actual dispute *after* the protection under an investment agreement and investment protection became applicable to its investment. See *Philip Morris Asia*, Award (n 3) paras 527–34.
[132] Article 28 of the VCLT provides that the provisions of a treaty 'do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.' See also *Renée Rose Levy and Gremcitel SA v Republic of Peru*, ICSID ARB/11/17, Award (9 January 2015) para 147.
[133] *Phoenix Action*, Award (n 87) para 100.

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transforming a pre-existing domestic dispute to an international dispute.[134] The Tribunal found that the initiation of the proceedings was 'an abuse of the system of international ICSID investment arbitration' and that 'to accept jurisdiction in this case would go against the basic objectives underlying the ICSID convention as well as those of bilateral investment treaties.'[135] Based on these findings, the Tribunal concluded that the claimant's investment did 'not qualify as a protected investment' under the ICSID Convention and the relevant investment agreement.[136]

The Tribunal in *Cementownia* took a similar approach to the *Phoenix Action* tribunal. The Tribunal first acknowledged the trend of other tribunals that an investment for the sole purpose of gaining access to international jurisdiction was not 'a *bona fide* transaction' and was not protected by investment arbitration.[137] The Tribunal then found that the claimant 'intentionally and in bad faith abused the arbitration' in view of the facts that the claimant 'fabricated' a transaction to gain access to investment arbitration and that it was also 'guilty of procedural misconduct' during the arbitral proceedings which caused 'excessive delays.'[138]

The Tribunal in *ST-AD* confirmed that the approach of *Phoenix Action* was applicable to arbitral proceedings under the UNCITRAL Arbitration Rules in examining the respondent's 'claim of bad faith in the initiation of the arbitration.'[139] Having noted that the 'essential purpose of the Claimant's investment [ie, acquisition of shares of domestic companies in the respondent] was for it to gain access to international jurisdiction,' the Tribunal found that the claimant's initiation of the arbitral proceedings was 'an abuse of the system of international investment arbitration,' and that 'to accept jurisdiction in this case would go against the basic objectives underlying bilateral investment treaties.'[140] It concluded that the investment agreement mechanism 'was not designed to protect' the claimant's investment, which was 'domestic investments disguised as international investments or domestic disputes repackaged as international disputes for the sole purpose of gaining access to international arbitration.'[141]

The tribunals in the above three cases examined whether the claimants' investments were 'protected' under relevant investment agreements and arbitration rules and, therefore, fell within the jurisdiction *ratione materiae*. According to these tribunals, what is protected under the agreements is *bona fide* or good faith investment, which do *not* include the fabrication of international investment from domestic investment in an attempt to acquire the right to investment arbitration.[142] Their findings are consistent with the increasing trend in investment

[134] ibid paras 136, 138, 142.
[135] ibid para 144. It should be noted that this case concerned the respondent's treatment of two Czech companies, owned by the claimant, an Israeli company. What was unique is that the owner of the claimant was originally a Czech national, but fled to Israel, obtained an Israeli nationality, established the company, and obtained the share of the two Czech companies from his wife and daughter, who had been the legal owners at that time. ibid paras 22, 41, 137, 139.
[136] ibid para 145.
[137] *Cementownia 'Nowa Huta' SA v Republic of Turkey*, ICSID Case No ARB(AF)/06/2, Award (17 September 2009) para 154.
[138] ibid paras 136, 156–59.
[139] *ST-AD GmbH v Republic of Bulgaria*, UNCITRAL, PCA Case No 2011-06, Award on Jurisdiction (18 July 2013) para 405.
[140] ibid paras 421, 423.
[141] ibid para 423.
[142] The tribunals could have found that they did not have jurisdiction *ratione temporis* over the dispute because it pre-existed at least as a domestic dispute.

arbitration practice according to which investment agreements protect only good faith investment.[143] It could be said that the limitation of protection to good faith investment has the same effect as the principle of abuse of process in that both exclude malicious, unreasonable or arbitrary investments from the scope of arbitration. In fact, if the scope of the good faith requirement and that of the principle of abuse of process are identical, investment arbitral tribunals would not need to apply the latter. For example, the issue of jurisdiction over a foreseeable dispute comes down to whether a claimant investor's attempt to acquire the right to investment arbitration with respect to such dispute is malicious, unreasonable and arbitrary and therefore does not meet the good faith requirement.

(iii) *Jurisdiction ratione personae*

There are also a few cases where the respondent claimed that the claimant was not a 'protected investor' under a relevant investment agreement and arbitration rules, and was, therefore, not covered by a tribunal's jurisdiction *ratione personae*, although such claims proved unsuccessful.

For example, in *Tokios Tokelės v Ukraine*, the respondent claimed that the claimant, a Lithuanian entity, was not an 'investor' protected by Article 25 of the ICSID Convention because it was 'owned and controlled predominantly by Ukrainian nationals' and had 'no substantial business activities in Lithuania and maintain[ed] its *siège social* ... in Ukraine,' and therefore that its corporate veil should be 'pierced.'[144] The respondent argued that the claimant was 'in terms of economic substance, a Ukrainian investor in Lithuania, not a Lithuanian investor in Ukraine,' and allowing it to pursue international arbitration against its own government 'would be inconsistent with the object and purpose of the ICSID Convention.'[145] Although the Tribunal did not uphold the respondent's claim, it implied that the corporate veil should be pierced if the claimant's conduct constituted an 'abuse of legal personality' such as concealing its national identity from the respondent and creating an entity for the purpose of gaining access to investment arbitration.[146] Moreover, a strong dissent to the decision by the president of the Tribunal took a narrower view of the 'investor' under Article 25 of the ICSID Convention. In the president's view, Article 25, interpreted in light of the object and purpose of the ICSID Convention to protect *international* investment, requires a review of the economic reality of the claimant-investor, particularly in cases like this one where it is crystal clear that no question of any foreign investment is involved.[147]

Similarly, in *ConocoPhillips v Venezuela*, the respondent claimed that a corporation of convenience with no business purpose but to have access to ICSID arbitration was an 'abuse of corporate form and blatant treaty or forum

[143] For example, the Tribunal in *Inceysa* stated that investment in violation of good faith cannot benefit from the protection of an investment agreement. *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) para 239.

[144] *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) paras 21–23.

[145] ibid paras 21–22.

[146] ibid para 56. See also ibid para 54, quoting *Barcelona Traction, Light and Power Company, Limited*, Judgment (5 February 1970), [1970] ICJ Rep 3, at 3, para 56 (' ... the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations').

[147] *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Dissenting Opinion to Decision on Jurisdiction (29 April 2004) paras 23–30.

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shopping.'[148] The Tribunal acknowledged that '[t]here is jurisdiction only if the parties to the dispute have each consented and throughout the process each is treated on an equal footing,' and that the 'equality of position in the present context is ... a further factor supporting the growing body of decisions placing some limits on the investor's choice of corporate form ....'[149] Eventually, the Tribunal rejected the respondent's objection to jurisdiction, stating that, while the only purpose of the claimant's restructuring was to be able to have access to ICSID proceedings, no claim had been in prospect at the times of the restructurings, and the claimants continued to be involved in the investment.[150]

In general, it is totally reasonable for an investor to organize and reorganize its corporate structure to meet various business needs, including having access to investment arbitration. Accordingly, the corporate structure should not be a reason to deprive an investor of access to investment arbitration. That said, the arbitral decisions on jurisdiction *ratione personae* suggest, similar to the arbitral decisions involving jurisdiction *ratione materiae*, that only investors whose corporate structure is organized and reorganized in good faith is protected by investment agreements. Thus, this limitation has the same effect as the principle of abuse of process in that both exclude malicious, unreasonable or arbitrary investors from the scope of investment arbitration. As has already been indicated, as long as arbitral tribunals examine whether a claimant investor is organized in good faith, they would not need to apply the principle of abuse of process. For example, it could be argued that an investor that uses a corporation of convenience with no substantial business activities as a 'fraudulent device' to gain access to investment arbitration with respect to foreseeable disputes does not meet the good faith requirement, and therefore is not qualified as an investor 'protected' under investment agreements, regardless of the application of the principle of abuse of process.[151]

(iv) *Admissibility/Exercise of jurisdiction*

The tribunals in *Pac Rim v El Salvador*, *Gremcitel v Peru*, and *Transglobal Green v Panama* took the same approach as the Tribunal in *Philip Morris Asia* in the sense that they considered that an abuse of process by the claimant would preclude a tribunal from *exercising* its jurisdiction over the claimant's claims, although they did not explicitly distinguish between jurisdiction and admissibility.[152] They also applied the foreseeability test in determining whether the claimant engaged in an abuse, although they did so more restrictively compared to the tribunal in *Philip Morris Asia*.

[148] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, and ConocoPhillips Gulf of Paria B v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013) para 268.
[149] ibid para 274.
[150] ibid paras 279–80.
[151] See *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Decision on Jurisdiction (27 September 2001) paras 123–26; *Aguas del Tunari, SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) para 330.
[152] In addition to the cases in the text, see also *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Decision on Jurisdiction (21 February 2014). In *Lao Holdings*, the Tribunal considered, in *obiter dicta*, that 'it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith who is fully aware prior to the change in nationality of the "legal dispute."' ibid paras 69–70, 76.

For example, the Tribunal in *Pac Rim* first acknowledged that the approach regarding jurisdiction *ratione temporis* was 'materially different from' the approach regarding abuse of process.[153] According to the Tribunal, while it would have jurisdiction *ratione temporis* over a dispute that existed and continued after the date when the claimant obtained access to investment arbitration by its change of nationality, it would be precluded from exercising such jurisdiction by the principle of abuse of process if the claimant had changed its nationality knowing of an actual or specific future dispute.[154] Moreover, it clarified that the claimant's claims would constitute an abuse of process if the claimant could 'see an actual dispute or [could] foresee a specific future dispute as a very high probability and not merely as a possible controversy' at the time of restructuring.[155] Despite the similarity of the foreseeability test in this case to the one adopted in *Philip Morris Asia*, its application in this case was rather restrained. The Tribunal in *Pac Rim* considered that, although the claimant had been aware of difficulties with the respondent's measures, it had a reasonable expectation that these difficulties would be removed, and that the claimant was only claiming compensation for the period after its change of nationality.[156] The Tribunal rejected the respondent's objection to jurisdiction based on abuse of process.

In *Gremcitel*, although the Tribunal left open the question of whether abuse of process is an issue of jurisdiction or an admissibility,[157] it unequivocally stated that 'an abuse of process objection must be distinguished from a *ratione temporis* objection.'[158] It further acknowledged that, while 'an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate *per se*, including where this is done with a view to shielding the investment from possible future disputes with the host state,'[159] 'a restructuring carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.'[160] Based on this understanding, the Tribunal found that the present dispute was foreseeable at the time of the restructuring, and that the only discernible purpose of the restructuring was to obtain access to investment arbitration under the investment agreement.[161] It should be emphasized here, though, that the foreseeability was not the only reason for the Tribunal to find an abuse of process in this case. The Tribunal concluded that the restructuring constituted an abuse of process, in consideration of other circumstances of the case, in particular, the claimants' another attempt to 'manufacture' the Tribunal's jurisdiction by 'untrustworthy, if not utterly misleading' documents.[162]

The Tribunal in *Transglobal Green* examined the issue of abuse of process under the heading of 'jurisdictional objections,' but the Tribunal stated that 'the

[153] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) para 2.101.
[154] ibid paras 2.104, 2.107.
[155] ibid para 2.99.
[156] ibid paras 2.83–2.86.
[157] *Gremcitel*, Award (n 132) para 181.
[158] ibid para 182.
[159] ibid para 184.
[160] ibid para 185.
[161] ibid paras 187–91.
[162] ibid paras 193–94. The documents were backdated to make it appear that one of the claimants acquired indirect ownership of the investment well before the initiation of the arbitral proceedings. ibid paras 152–55.

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existence of abuse of process is a threshold issue that would bar the *exercise* of the Tribunal's jurisdiction even if jurisdiction existed.'[163] According to the Tribunal, a determination of whether an abuse of process has occurred had to be made in consideration of

> all the circumstances of the case, including, for instance, the timing of the purported investment, the timing of the claim, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring.[164]

The Tribunal concluded that the claimants abused the international investment treaty system because they started to involve in the investment when it was clear that there was a problem with it only for the purpose of creating 'artificial international jurisdiction over a pre-existing domestic dispute.'[165]

Thus, the application of the principle of abuse of process in the above cases is similar to that in the Tribunal in *Philip Morris Asia*. However, their conclusions that they should refrain from exercising jurisdiction because the claimant engaged in an abuse of process were drawn not exclusively from the fact that the claimants made investment when the dispute was foreseeable but also from other factors. For example, according to the Tribunal in *Pac Rim*, it would not be an abuse for a claimant investor to have made investment while foreseeing a dispute if it has a reasonable expectation that the dispute would be resolved. In addition, what led the Tribunal in *Gremcitel* to determine the claimant's abuse was not only the foreseeability of the dispute but also other circumstances, such as the fact that the claimant submitted untrustworthy documents to it. The consideration of broader factors ensures that only conduct involving maliciousness, unreasonableness and arbitrariness would be considered an 'abuse.'

Finally, could the initiation of investment arbitration in *Philip Morris Asia* be considered as abuse in light of the above considerations? First, considering that the Plain Packaging measures had not yet been adopted by the Australian Parliament at the time of the restructuring, it would not have been unreasonable for the claimant, when it obtained access to investment arbitration under the BIT, to consider that the dispute regarding the measures would not crystalize.[166] Second, even assuming that the Tribunal was right in that the dispute was foreseeable at the time of the restructuring, this should not end an analysis of the Tribunal. In particular, as the Tribunal itself implied, obtaining access to investment arbitration may not be the sole purpose for the restructuring of the claimant. Moreover, the Tribunal stopped short of analyzing whether the claimant's attempt to acquire the right to investment arbitration harms the interest of the respondent or the objective of investment arbitration. Overall, it has to be said that the Tribunal's reasoning does not sufficiently establish that the claimant's act was malicious, unreasonable or arbitrary.

[163] *Transglobal Green Energy, LLC and Transglobal Green Panama, SA v Republic of Panama*, ICSID Case No ARB/13/28, Award (2 June 2016) para 100 (emphasis added).
[164] ibid para 103 (footnotes omitted).
[165] ibid paras 100, 116.
[166] *Philip Morris Asia*, Award (n 3) paras 397, 457.

IV. ABUSE OF PROCESS IN INVESTMENT ARBITRATION: FUTURE

This section discusses whether and how the principle of abuse of process should be applied in investment arbitration in the future.

First, should the principle of abuse of process be applied in investment arbitration? The answer is yes. As previously discussed in this article,[167] the principle constitutes a general principle of law and therefore applies to investment arbitration conducted under an investment agreement, regardless of an express agreement between the parties as to the applicable law. The right to investment arbitration given to an investor by an investment agreement is inherently subject to limitations under rules and principles of international law.

Second, how should the principle be applied in investment arbitration? More specifically, should it be applied separately from the jurisdictional requirements under investment agreements and arbitration rules, or as a part thereof? One option is to include an explicit provision in an investment agreement that specifies that an investor cannot acquire the right to investment arbitration by abusive conduct. It is noteworthy in this regard that Article 8.18(3) of the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA) provides that 'an investor may not submit a claim under [the section of CETA on resolution of investment disputes between investors and States] if the investment has been made through ... conduct amounting to an abuse of process.' A similar provision could be inserted in future investment agreements.[168] In the meantime, even in the absence of such an explicit provision, the principle of abuse of process could be considered as constituting a part of the jurisdiction requirements under investment agreements. In particular, considering that many investment arbitration tribunals have interpreted the term 'investment' under investment agreements as covering only the investment that is made in good faith,[169] a malicious, unreasonable or arbitrary attempt to acquire the right to investment arbitration could not fall within the scope of investment that States parties to an investment agreement intend to protect.[170] In fact, if the notion that only good faith investment can be protected by international investment agreements is sufficiently shared among tribunals, and the good faith requirement is consistently applied, there would be no need to apply the principle of abuse of process separately from the jurisdictional requirements under investment agreements.

[167] See Sections II.A.(i) and III.A. of this article.

[168] To some extent, investment that is made through an abusive conduct could also be excluded from the scope of protection by a denial of benefits clause. For example, Article 10.12(2) of the Dominican Republic-Central America Free Trade Agreement (CAFTA) provides that 'a Party may deny the benefits of this Chapter [on investment] to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has *no substantial business activities* in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, *own or control* the enterprise' (emphasis added). Although this provision does not explicitly mention an abuse, it could be said that an investor and its investment that fit the description of this provision are not in good faith and that they are, therefore, not protected. For example, in *Pac Rim*, having rejected the respondent's objection to jurisdiction based on the abuse of process, the Tribunal found that the claimant nevertheless could not receive any benefits under the CAFTA, in accordance with Article 10.12(2) of the CAFTA because the claimant, a national of the United States, had 'no substantial business activities' in the United States, and was owned by Canada, a non-CAFTA party. *Pac Rim*, Decision on Jurisdiction (n 153) paras 4.63–4.82, 4.92.

[169] See Section III.C.(ii) of this article.

[170] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Framework for Sustainable Development (2015) at 85, 94.

Finally, what should be the criteria for determining whether the claimant's conduct amounts to an abuse? First of all, the approach for the determination should be generally consistent with the approach used in other international judicial and quasi-judicial bodies, given that investment agreements cannot and should not 'be read and interpreted in isolation from public international law.'[171] In particular, the threshold for the application of the principle of abuse of process should be as high as what is adopted in the jurisprudence of other international courts and tribunals, including the ICJ.[172] This has been confirmed by several investment arbitral tribunals. For example, the Tribunal in *Chevron* pointed out that 'in all legal systems, the doctrine[] of abuse of rights [is] subject to a high threshold' and '[i]t is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim.'[173] It added that '[t]he high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process.'[174] The Tribunal in *Rompetrol* went further to state that the respondent's objection based on abuse of process was 'evidently a proposition of a very far-reaching character,' and that 'so far-reaching a proposition needs to be backed by some positive authority in the Convention itself, in its negotiating history, or in the case-law under it.'[175] The Tribunal also insisted that a determination of abuse requires a close analysis of special circumstances of a particular case.[176] Along the line of the above findings, the Tribunal in *Philip Morris Asia* also recognized that 'the threshold for finding an abusive initiation of an investment claims is high.'[177]

That said, the same criteria in other international judicial and quasi-judicial bodies cannot simply be transposed to investment arbitration, considering that the principle of abuse of process is applied in a particular way in investment arbitration. That is, on the one hand, the criteria for the determination of abuse in other international judicial and quasi-judicial bodies concern how the right of an applicant to these bodies is used on the premise that the applicant has such a right and that, as a corollary, these bodies have jurisdiction over the applicant and its claims. Moreover, the determination that the right is used in an abusive way would prevent these bodies from *exercising* the jurisdiction. For example, the untimely filing of an application that could constitute a basis of abuse of process in the ICJ and the Human Rights Committee relates to how the applicant *uses* its right to the procedures of the ICJ or the Human Rights Committee on the premise that the applicant has such right. Similarly, the criteria used by the ECtHR, such as the submission of misleading information, use of offensive language, and violation of

[171] *Phoenix Action*, Award (n 88) paras 77–78.

[172] See *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Annulment (30 December 2015) paras 91–92. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation*, Judgment (19 June 2012) [2012] ICJ Rep 324, Declaration (Judge Greenwood) para 8 ('International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.').

[173] *Chevron Corporation & Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL/PCA, Interim Award (1 December 2008) para 143.

[174] ibid.

[175] *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Jurisdiction and Admissibility (18 April 2008) para 115.

[176] ibid.

[177] *Philip Morris Asia*, Award (n 3) para 539.

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confidentiality, question the appropriateness of the *use* of the procedures by an applicant after proceedings have been duly commenced.

On the other hand, while the criteria for the determination of abuse in investment arbitration also concern how the right to investment arbitration is used, it is not the right of a *specific* claimant investor but the right that is *generally* provided in an investment agreement. In other words, the question of abuse in investment arbitration involves whether a specific claimant investor abuses the *general* right to investment arbitration under an investment agreement in an attempt to acquire its own *specific* right to investment arbitration.[178] The determination of abuse would negate the *existence* of the investor's right as well as the jurisdiction of investment arbitration. Thus, most of the criteria used in other judicial and quasi-judicial bodies that presuppose the existence of jurisdiction cannot be transposed to investment arbitration.

Given that the criteria used by other international judicial and quasi-judicial bodies cannot be transposed to investment arbitration, the practices of investment arbitral tribunals would be the only source that could provide guidance for determining whether an attempt to acquire the right to investment arbitration constitutes an abuse. In this regard, while there is yet no settled case law in investment arbitration, the Tribunal in *Philip Morris Asia* was right in pointing out that some investment arbitral tribunals have applied 'legal tests ... revolving around the concept of foreseeability.'[179] However, the Tribunal disregarded the fact that these tribunals took into account not only the foreseeability of a dispute but also other factors such as the existence of the claimant's substantial business interests in the investment and the claimant's conduct at the initiation of the proceedings. In fact, considering that the concept of abuse entails maliciousness, unreasonableness and arbitrariness, the determination of abuse requires a careful examination of the circumstances of a particular dispute.

V. CONCLUSION

This article examined the principle of abuse of process under international law and its application in the ICJ and other judicial and quasi-judicial bodies. It also analyzed past investment arbitration decisions concerning the principle, and pointed out that the principle is applied differently in investment arbitration because the principle concerns a claimant investor's use of the general right to investment arbitration under an investment agreement in an attempt to acquire its own right to investment arbitration, and therefore the application of the principle negates the existence of jurisdiction of an investment arbitral tribunal rather than prevents the exercise thereof. Accordingly, this article suggested that the principle should be applied as a part of the jurisdictional requirements and that the comprehensive circumstances of a dispute should be taken into account in the determination of abuse.

Several State parties to investment agreements are concerned that the protection under the agreements may be extended to investors and investments which they did not intend to protect at the time of ratification. The principle of abuse of

[178] See Section III.A. of this article.
[179] *Philip Morris Asia*, Award (n 3) para 554. See Section III.C.(iv) of this article.

process could be used to address such legitimate concern. However, without a clear and shared understanding of the principle, it could end up increasing the inconsistency that already exists in the interpretation and application of international investment law.[180] It is therefore essential to clarify the source of the principle and the criteria for its application.

[180] Lauterpacht (n 85) 162–64. See also *Corfu Channel Case (UK v Albania)*, Judgment (9 April 1949) [1949] ICJ Rep 4, Separate Opinion (Alejandro Alvarez) 48.

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NEGOTIATIONS WITH IRAN: BLOCKING OR PAVING TEHRAN'S PATH TO NUCLEAR WEAPONS?

HEARING

BEFORE THE

COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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NEGOTIATIONS WITH IRAN: BLOCKING OR PAVING TEHRAN'S PATH TO NUCLEAR WEAPONS?

THURSDAY, MARCH 19, 2015

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 8:30 a.m., in room 2172 Rayburn House Office Building, Hon. Edward Royce (chairman of the committee) presiding.

Chairman ROYCE. This hearing will come to order, and the committee here today will continue to evaluate the administration's nuclear diplomacy with Iran. That is the subject of the hearing today.

Negotiators face a high-stakes deadline next week. We will hear the administration's case today. But it is critical that the administration hears our bipartisan concerns here.

Deputy Secretary Blinken, this is your first appearance before the committee, and I congratulate you on your position. I wish you well.

And after the hearing, I trust you will be in touch with Secretary Kerry, Under Secretary Sherman and others that are involved in the negotiating process to report on the committee's views and I think this is very important.

This committee has been at the forefront of examining the threat of a nuclear Iran. Much of the pressure that has been brought on the Islamic Republic of Iran and that brought them to the table was put in place by Congress, and it was put in place over the objections of the executive branch.

Now, that is the executive branch whether it was Republican or Democratic administrations, but it is the House of Representatives that has driven this process, and we would have more pressure on Iran today if the administration hadn't pressured the Senate to sit on the Royce-Engel sanctions bill that this committee produced and passed in 2013 and passed, by the way, unanimously—and passed off the House floor 400 to 20.

So Congress is proud of this role and we want to see the administration get a lasting and meaningful agreement. But, unfortunately, the administration's negotiating strategy has been more about managing proliferation than preventing it, and a case in point that I bring up is Iran's uranium enrichment program—the key technology needed in developing a nuclear bomb.

Reportedly, the administration would be agreeable to leaving much of Iran's enrichment capability in place for a decade. If Con-

gress will be asked to roll back its sanctions on Iran, which will certainly fund Iran's terrorist activities when we roll back those sanctions, then there must be a substantial rollback of Iran's nuclear program.

And consider that international inspectors report that Iran has still not revealed its past bomb work despite its commitment to those inspectors to the IAEA to do that, and the IAEA is still concerned about signs of Iran's military-related activities including designing a nuclear payload for a missile.

Iran has not even begun to address these concerns and last fall over 350 members wrote to the Secretary of State expressing deep concerns about this lack of cooperation from Iran. How can we expect Iran to uphold an agreement when they are not meeting their current commitments?

Indeed, we were not surprised to see Iran continue to illicitly procure nuclear technology during these negotiations or that Tehran was caught testing a more advanced centrifuge that would help produce bomb material quicker—a new grade of supersonic centrifuge right in the middle of this process.

This was a violation of the spirit and, in my view, the letter of the interim agreement. Iran's deception is all the more reason that the administration should obtain zero notice anywhere anytime inspections on Iran's declared and undeclared facilities.

You have to have a verification regime in this process that is going to work for us. And there is also the fact that limits placed on Iran's nuclear program as part of the final agreement now being negotiated are going to expire.

They will expire, and that means the final agreement is just another interim step. What you call the "final" agreement is an interim step with the real final step being Iran treated as any other non-nuclear weapons state under the Nonproliferation Treaty, thus licensing it to pursue industrial-scale enrichment.

With a deep history of deception, covert procurement, and clandestine facilities, Iran is "not any other country." It is certainly not any other country to be conceded in an industrial-scale nuclear program.

Any meaningful agreement must keep restrictions in place for decades, as over 360 Members of Congress, including every member of this committee, are demanding in a letter to the President this week.

Meanwhile, Iran is intensifying its destructive role in the region. The Islamic Republic of Iran is propping up Assad in Syria while its proxy, Hezbollah, threatens Israel.

Iranian-backed Shi'a militia are killing hopes of a unified, stable Iraq and last month an Iranian-backed militia displaced the government in Yemen, formerly a key counterterrorism partner to the United States.

Many of our allies and partners see Iran pocketing an advantageous nuclear agreement and ramping up its aggression in the region as a result of the hard currency that they will have at their disposal as the sanctions are lifted.

So this committee is prepared to evaluate any agreement to determine if it is in the long-term national security interests of the United States and our allies.

Indeed, as Secretary Kerry testified not long ago, any agreement will have to pass muster with Congress. Those were his words. Yet, that commitment has been muddied by the administration's insistence in recent weeks that Congress will not play a role, and that is not right.

Congress built the sanction structure that brought Iran to the table, and if the President moves to dismantle it, we will have a say.

So I now turn to the ranking member, Mr. Eliot Engel of New York, for his opening remarks.

Mr. ENGEL. Thank you very much, Mr. Chairman. Thank you for calling this very important and timely hearing.

Mr. Deputy Secretary, Mr. Under Secretary, welcome to our committee. We are grateful for your service and we look forward to your testimony and I want to congratulate both of you on your new positions.

The chairman's remarks are very similar to mine. We have worked very hard on this committee to have bipartisanship because both the chairman and I agree that if there is one place where we need bipartisanship more than any other place, it involves foreign policy.

And so wherever possible we try to talk with one voice, and I want to associate myself with the chairman's remarks. We have seen a lot of speculative reporting in the press about might or might not be included in the comprehensive nuclear deal with Iran.

Today, we are going to send over a letter to the President signed by 360 Members of Congress in both parties, a majority of each party, talking about some of the things that we are concerned with and we would hope that we could get a prompt response from the White House.

It is truly a very bipartisan letter expressing Congress' strong feelings about things that need to be in the agreement. I want to emphasize—re-emphasize what the chairman said. There really cannot be any marginalization of Congress.

Congress really needs to play a very active and vital role in this whole process and any attempts to sidestep Congress will be resisted on both sides of the aisle. We have seen a lot of speculative reporting in the press about what might or might not be included in a comprehensive nuclear deal with Iran.

We don't technically even know right now if there is going to be a deal, but if there is I think we would all be wise to review the details before passing judgment on whether it is a good deal or bad deal or simply a deal we can live with.

I think it is safe to assume that we are not going to see what I would consider a perfect deal. I have said all along that Iran should have been required to freeze enrichment during the negotiations but they weren't and it is clear that a freeze is not on the table for a comprehensive agreement.

At this stage, we need to focus on making the deal as good as it can be. I am hoping that our witnesses can shed light on a few key areas that, for me, could tip the scales between a bad deal and a deal that we might be able to live with.

First, as part of any comprehensive agreement, we need total clarity about where Iran stands in terms of its ability to weaponize its nuclear material. How far along are they?

Secondly, will the deal give us sufficient time to respond if Iran reneges and presses full throttle toward a nuclear weapon. Is a 1-year break-out period the time until Iran has sufficient enriched uranium to then build a bomb? Is that enough time to catch their violation and react?

Next, how would a comprehensive agreement stop Iran from pursuing a nuclear weapon covertly if they make a decision to sneak out rather than break out? Iran's leaders don't deserve an ounce of trust. We need very strong safeguards.

Lastly, how will we be certain that sanctions relief won't just open the faucet for funding terrorism or fueling the regime's already abysmal human rights record?

In my view, these questions lay out clear markers for what we need to see. Here is the bottom line. If we say yes to a deal, will it be worth unraveling the decades of sanctions and pressure that the United States and our partners have built against Iran?

But if we say no, would we be able to hold the sanctions coalition together, and if we maintain or even increase our sanctions, wouldn't Iran just move full speed ahead toward a bomb?

I know these negotiations have gone on for months and months. I know the P5+1 is under intense pressure to produce something. But we cannot allow those factors to push us into a bad deal being sold as a good deal.

The administration has argued that reaching a deal is the best chance to solve a nuclear crisis diplomatically and avoid another war in the Middle East, that dialing up sanctions at this stage would undermine the talks.

And as I have repeatedly said, I am willing to see what is actually in the deal before passing judgment and I strongly urge my colleagues to do the same.

But make no mistake, Congress will play an important role in the evaluation of a final deal. Again, I want to say that I will not stand by and allow Congress to be marginalized.

Any permanent repeal of sanctions is by law Congress' discretion, and before we do that we must be completely convinced that this deal blocks all of Iran's pathways to a nuclear bomb.

So I look forward to your testimony and hope we can have a frank discussion of these issues and, again, Mr. Chairman, thank you for calling this hearing today.

Chairman ROYCE. Thank you, Mr. Engel.

This morning we are pleased to be joined by senior representatives from State and from Treasury. Mr. Tony Blinken is the Deputy Secretary of State. Previously, he served as the assistant to the President and was principal deputy national security adviser.

Mr. Blinken also worked as the Democratic staff director for the U.S. Senate Foreign Relations Committee, and just confirmed last December, we welcome him for his first appearance before this committee.

Mr. Adam Szubin is the Acting Under Secretary for the Office of Terrorism and Financial Intelligence at the Department of the

Treasury. He previously served as the director of Treasury's Office of Foreign Assets Control.

We welcome him back, and without objection, the witnesses' full prepared statements will be made part of the record.

Members here will have 5 calendar days to submit any statements to you or any questions and any extraneous material for the record. We'll ask you to please summarize your remarks, and Mr. Secretary, if you would begin.

STATEMENT OF THE HONORABLE ANTONY J. BLINKEN, DEPUTY SECRETARY OF STATE, U.S. DEPARTMENT OF STATE

Mr. BLINKEN. Mr. Chairman, thank you very much. It is pleasure to be here.

I want to thank you, Ranking Member Engel and the members of this committee for having us here today and to give us this opportunity to discuss our efforts to reach a comprehensive solution to the challenge posed by Iran's nuclear program.

As we speak and as you mentioned, Secretary of State Kerry, Secretary of Energy Moniz, Under Secretary of State Sherman are in Switzerland with our P5+1 partners negotiating with the Government of Iran over the future of its nuclear program.

Our goal for these negotiations is to verifiably ensure that Iran's program is exclusively for peaceful purposes. To that end, we seek to cut off the four pathways that Iran could take to obtain enough fissile material for a nuclear weapon.

There are two uranium pathways through its activities at the Natanz and Fordow enrichment facilities, a plutonium pathway through Iran's heavy water reactor at Arak, and a potential covert pathway.

To cut off all of these pathways, any comprehensive arrangement must include exceptional constraints on Iran's nuclear program and extraordinary monitoring and intrusive and transparency measures that maximize the international community's ability to detect any attempt by Iran to break out overtly or covertly

As a practical matter, we are working to ensure that Iran, should it renege on its commitments, would take at least 1 year to produce enough fissile material for one nuclear weapon.

That would provide us with more than enough time to detect and act on any Iranian transgression. In exchange, the international community would provide Iran with phased, proportionate and reversible sanctions relief tied to verifiable actions on its part. If Iran were to violate its commitments, sanctions would be quickly reimposed.

It is Iran's responsibility to convince the world by building a track record of verified compliance that its nuclear program is exclusively peaceful. That is why we are seeking a time frame for a comprehensive deal of sufficient length to firmly establish such a track record.

Only then would Iran be treated like any other non-nuclear weapons state party to the nuclear Nonproliferation Treaty with all the rights but also all the obligations of an NPT state, including continued monitoring and inspections and a verifiably binding commitment to not build a nuclear weapon.

The Bush administration first proposed this concept for Iran. Dozens of countries around the world responsibly adhere to the NPT. Much has been said recently about the fact that a deal with Iran would have an eventual end date.

In fact, some constraints would be removed after a significant period of time, others would remain in effect even longer and some would last indefinitely, including a stringent and intrusive monitoring and inspections regime.

Iran would have to fully implement the IAEA safeguards agreement and the additional protocol. Together, these give inspectors access to all declared nuclear facilities and to any suspected undeclared facilities.

So even after some core constraints are completed, far more intrusive inspections will be required of Iran than before this agreement.

Some have argued that Iran would be free to develop a nuclear weapon at the conclusion of the comprehensive joint plan of action if we achieve it. That is simply not true.

To the contrary, Iran would be prohibited from developing a nuclear weapon in perpetuity and we would have a much greater ability to detect any effort by Iran to do so. Iran would be allowed to have a peaceful civilian nuclear program, continuously verified by the IAEA.

Our goal is to reach an agreement on the major elements of the deal by the end of this month and to complete the technical details by the end of June. There has been a lot of reporting in the press about where we are. This is what I can tell you as of today.

In Switzerland, the negotiations have been substantive and intense. We have made some progress on some of the core issues. Significant gaps remain on some of the other issues between what we and our partners in the P5+1 believe must be part of the comprehensive deal and what Iran is willing to do.

While the negotiations are taking place, it is vital, in our judgment, that we avoid any actions that would lead the world to believe that the United States was responsible for their failure.

Such actions include enacting new sanctions legislation now. New sanctions at this time, including through so-called trigger legislation, are unnecessary. Iran knows very well that if it refuses a reasonable agreement or reneges on its commitments, new sanctions can and will be passed in a matter of days.

New sanctions now would be inconsistent with our commitments under the interim agreement. They would undermine our sanctions coalition. They would give Iran an excuse to walk away from the talks or take a hard line that makes an agreement impossible to achieve while blaming the failure on us.

In our judgment, we also must avoid actions that call into question the President's authority to make commitments that the United States will keep. Negotiating with a foreign nation is the President's responsibility.

If there is confusion on this basic point, no foreign government will trust that when a President purports to speak for our country, he actually does.

In this case, such confusion could embolden hardliners in Iran, divide us from our allies, poison the prospects for a deal and make

it much more difficult to sustain international support for the existing sanctions, never mind new ones, if negotiations collapse.

That international support is critical to the success of the sanctions regime that Congress took such an important role in building. Up until now, we have kept other countries onboard despite the hardship it has caused some of them, in large part because they are convinced we are serious about reaching a diplomatic solution. If they lose that conviction, the United States, not Iran, could be isolated and the sanctions regime could collapse.

Congress has played and will continue to play a central leading role in these efforts. Congressional legislation gave us the tools to get Iran to the negotiating table and, as has been noted, only Congress has the authority to lift sanctions as part of any comprehensive solution.

Since signing the interim deal, we have been on the Hill dozens of times to update on the progress of the talks—in all, more than 200 briefings, meetings, hearings and phone calls.

If we reach an agreement we will welcome intense robust scrutiny. We also will expect that any critics explain not only why the deal is lacking but also what would be a better alternative and how it could be achieved.

Our nuclear discussions with Iran do not alter our commitment to the security of our allies in the region who are deeply affected by Iran's efforts to spread instability and support terrorism. That commitment will not change with or without a deal.

We will retain the necessary tools and the determination to continue countering Iran's troubling behavior. Indeed, the most important thing we can do to keep Iran from feeling further emboldened is to deny them a nuclear weapon and we will continue to support those in Iran demanding greater respect for the universal human rights and rule of law that they deserve and we will continue to insist that Iran release Saeed Abedini, Amir Hekmati and Jason Rezaian and help us find Robert Levinson.

Thank you very much.

[The prepared statement of Mr. Blinken follows:]

WRITTEN STATEMENT
ANTONY BLINKEN
DEPUTY SECRETARY OF STATE
U.S. DEPARTMENT OF STATE

HOUSE FOREIGN AFFAIRS COMMITTEE
"Update on Iran Negotiations"
March 19, 2015

Good morning, Chairman Royce, Ranking Member Engel, distinguished members of the Committee. Thank you for inviting me here today to discuss our efforts to reach a comprehensive solution to the challenge posed by Iran's nuclear program.

Today, as we speak, Secretary of State John Kerry, Secretary of Energy Ernest Moniz, and Under Secretary of State Wendy Sherman are in Switzerland with our P5+1 partners negotiating with the government of Iran over the future of its nuclear program. Our goal for these negotiations is one I know you share, which is to verifiably ensure Iran does not acquire a nuclear weapon. This is about making the United States safer, making our allies across the Middle East safer, and making the world safer.

Since these negotiations are on-going, it is inappropriate to share the details in this forum. But what I do hope to do today is share some of the core principles guiding our efforts to reach a long-term comprehensive joint plan of action that verifiably ensures that Iran's nuclear program is for peaceful purposes. I will also share our broader view of Iran, beyond the confines of its nuclear program, and why it is important that we reach a deal that prevents Iran from obtaining a nuclear weapon.

Cutting Off Pathways to a Bomb

We continue to believe that the best way to ensure that, as a practical matter, Iran cannot obtain a nuclear weapon is to effectively cut off the four pathways Iran could take to obtain enough fissile material for a nuclear weapon. These are the two uranium pathways, through its activities at the Natanz and Fordow enrichment facilities; a plutonium pathway, through Iran's heavy water reactor at Arak; and a potential covert pathway.

To cut off all of these pathways, any comprehensive arrangement must include tight constraints on Iran's nuclear program and extraordinary monitoring and intrusive transparency measures that maximize the international community's

ability to detect any attempt by Iran to break out, overtly or covertly. As a practical matter, our goal is to ensure that, should Iran renege on its commitments, it would take at least one year to produce enough fissile material for one nuclear weapon. That would provide us more than enough time to detect and act on any Iranian transgression.

In exchange, the international community would provide Iran with phased sanctions relief tied to verifiable actions on its part. Such relief would be structured so that it can be easily reversed, and sanctions can be quickly re-imposed, if Iran were to violate its commitments.

There is a deep deficit of trust between the international community and Iran. It is Iran's responsibility to establish – by building a track record of verified compliance – that its nuclear program is exclusively peaceful. That is why we are seeking a timeframe for a comprehensive deal of sufficient length to firmly establish such a track record. Only then would Iran be treated like any other non-nuclear-weapon State Party to the Nuclear Non-Proliferation Treaty (NPT), with all the rights and obligations of an NPT state, including continued monitoring and inspections, and a verifiably binding commitment to not build a nuclear weapon. This is not a novel concept, in fact it was first proposed during the Bush Administration for Iran, and dozens of countries around the world responsibly adhere to the NPT.

Much has been said recently about the fact that a deal with Iran would have an eventual end date. On the contrary, we see the deal as creating a series of phases to ensure that Iran's program is exclusively peaceful going forward. While some constraints would be removed after a significant period of time, others would remain in effect longer, and some would last indefinitely. For example, Iran's NPT obligation not to develop or acquire a nuclear weapon would continue indefinitely, as would its obligation to implement its Comprehensive Safeguards Agreement with the International Atomic Energy Agency (IAEA). Moreover, a centerpiece of the proposed deal is that Iran would accept the Additional Protocol, which is not currently in place, as legally binding, and which would allow the IAEA to continue to have more stringent and intrusive access to nuclear-related information and locations indefinitely. The same is true regarding Iran's implementation of Modified Code 3.1, which imposes an ongoing obligation to provide early notification of design information for any new nuclear facilities.

This means that long after the nuclear constraints in the deal have been fully implemented, the international community would be in a better position to detect any Iranian steps toward a nuclear weapon or other failure to meet its obligations.

In fact, with over a decade of additional knowledge from the inspections regime, we would be in an even better place to respond to such actions.

Some have argued that Iran would be free to develop a nuclear weapon at the conclusion of a comprehensive joint plan of action. That is simply not true. To the contrary, Iran would be prohibited from developing a nuclear weapon in perpetuity – and we would have a much greater ability to detect any effort by Iran to do so and to take appropriate measures in response, with the support of the international community. Iran would be allowed to have a peaceful, civilian nuclear program continuously verified by the IAEA.

We aim to have a political understanding of the major elements of the deal by the end of the month and to complete the technical details by the end of June. In Switzerland, I understand the negotiations have been substantive and intense, and that we have made progress on some issues. However, there continue to be gaps between what we and our partners in the P5+1 believe must be part of a comprehensive solution and what Iran is willing to do.

As we have said from the beginning, nothing is agreed to until everything is agreed to, and it may be we will not know if a deal is possible until the last minute. So I cannot tell you where we will be a week from now, or by the end of the month. But what I can promise you, and what President Obama has pledged, is that we will not agree to a bad deal. What does that mean? As I noted earlier, an acceptable deal must effectively close down all four pathways Iran could take to obtain enough fissile material for a nuclear weapon. It must include strict curbs on its nuclear program and robust transparency and monitoring measures that give the international community confidence in the peaceful nature of Iran's nuclear program and the ability to promptly detect overt and covert breakout. It must include all the elements already spelled out in the Joint Plan of Action (JPOA). And, fundamentally, it must make the United States, our allies and partners in the Middle East, and the world safer.

Progress so Far

It is important to understand what these negotiations have already accomplished in terms of our collective security. Before the JPOA was concluded in November 2013, Iran's nuclear program was rushing toward larger enriched uranium stockpiles, greater enrichment capacity, the production of plutonium that could be used in a nuclear weapon, and ever shorter breakout time. Today, as the result of the constraints in the JPOA, Iran has halted progress on its nuclear program and

rolled it back in key areas for the first time in a decade. The JPOA has also given us greater insight and visibility into Iran's existing nuclear program through more intrusive and frequent inspections. Both we and our allies are safer today than a year ago as a result of the JPOA.

Before the JPOA, Iran had about 200 kilograms of 20 percent enriched uranium in a form that could be quickly further enriched to weapons-grade level. It produced much of that material at the Fordow facility, buried deep underground. Today, Iran has no such 20 percent enriched uranium. It has diluted half and converted the other half to a form that cannot be so readily further enriched, suspended all uranium enrichment above 5 percent, and removed the connections at Fordow that allowed them to efficiently produce 20 percent enriched uranium.

Before the JPOA, Iran was making progress on the Arak reactor, which, had it become operational, together with a reprocessing facility, would have provided Iran with a potential plutonium path to a nuclear weapon. Today, the Arak reactor is frozen in place.

Before the JPOA, Iran had installed roughly 19,000 centrifuges, of which roughly 10,000 were enriching uranium, most at the Natanz facility. Today, Iran's enrichment capacity is frozen at those levels and Iran's stockpile of 3.5 percent low enriched uranium in hexafluoride form is capped at its pre-JPOA level.

Before the JPOA, inspectors had less frequent access to Iran's nuclear facilities. Today, the JPOA has enabled IAEA inspectors to have daily access to Iran's enrichment facilities and a deeper understanding of Iran's nuclear program. They have been able to learn things about Iran's centrifuge production, uranium mines, and other facilities that are important to monitoring Iran's program going forward and to detecting any attempts to break out. And the IAEA has consistently reported that Iran has lived up to its commitments under the JPOA.

Just as we have asked Iran to uphold its commitments under the JPOA, we have lived up to our commitment of providing Iran with limited financial relief – which should be worth about $14 to $15 billion from the start of the JPOA through June 2015. But that relief is dwarfed by the vast amounts denied to Iran under the existing sanctions regime. For example, in 2014 alone, oil sanctions deprived Iran of over $40 billion in oil revenue – more than four times the estimated value of the JPOA during the same period. And what oil revenues Iran is allowed to generate go into heavily restricted accounts that now encumber the great majority of Iran's more than $100 billion dollars worth of foreign reserves. Virtually the entire

sanctions architecture remains in place. Indeed, throughout the existence of the JPOA, we have maintained the robust economic pressure on Iran. And that doesn't even take into consideration the dramatic fall in oil prices, which has no doubt added to pressure generated by our vigorous enforcement of existing sanctions.

The JPOA was not intended to be a permanent solution. That is why we continue to strive toward a long-term comprehensive plan of action, and why it is so important that all of us give these negotiations every chance to succeed. If the negotiations fail, it is critical that our allies and partners understand – that the world understands it was because the Iranian government was unable to take the steps necessary to assure the international community of the peaceful nature of its nuclear program. That will place us in a better position to sustain the existing sanctions, intensify the pressure on Iran and take whatever other actions are needed to prevent Iran from acquiring a nuclear weapon.

While the negotiations are taking place, it is vital that we prevent any actions that would lead the world to believe the United States was responsible for their failure. Such actions include enacting new sanctions or other measures that will be incredibly damaging to ongoing negotiations. We do not believe that the country's interests are served by Congressional attempts to weigh in prematurely on this sensitive and consequential ongoing international negotiation aimed at achieving a goal that we all share: using diplomacy to prevent Iran from developing a nuclear weapon. Moreover, new sanctions at this time – including through so-called "trigger" legislation – are unnecessary. Iran knows that if it refuses a reasonable deal or reneges on its commitments, new sanctions can and will be passed within days. And new sanctions now would be inconsistent with our commitments under the JPOA, they could undermine our sanctions coalition, create tensions within a currently unified P5+1, and provoke Iran into walking away from the negotiating table or taking an impossibly hard line that makes a deal impossible to achieve, while blaming the failure on us.

Unfortunately, the alternative to a deal is not the status quo. Should the talks fail, which remains a distinct possibility, we assess that Iran could well start advancing its nuclear program again to pre-JPOA levels or beyond. Instead of keeping its uranium enrichment at under 5 percent, as it has since the JPOA went into effect, Iran could start enriching again at 20 percent or even beyond, as some Iranian parliamentarians have suggested. Instead of capping its stockpile of 3.5 percent low enriched uranium hexafluoride at pre-JPOA levels, Iran could grow it rapidly. Instead of suspending substantive work on the Arak heavy water reactor, Iran could restart its efforts to bring this reactor on line. Instead of providing unprecedented

access to international inspectors at its nuclear facilities, it could refuse the IAEA access, inhibiting our ability to detect a breakout attempt. Instead of limiting work on advanced centrifuges, it could resume its efforts to increase and significantly improve its enrichment capability in a relatively short timeframe.

And finally, if our international partners believe that the United States has acted prematurely by adding new sanctions now in the absence of a provocation by Iran – as most countries surely would – their willingness to enforce the existing sanctions regime or to add to it in the event negotiations fail will wane. And a fractured international consensus notwithstanding, even if we were to layer additional sanctions on Iran, their nuclear advances would far outpace any potential marginal pressure created by those sanctions. This is why the support of the international community remains crucial, and why new sanctions now are a dangerously imprudent step. Without full international compliance, the sanctions regime will be dramatically diluted. Up until now, we have kept other countries on board – despite the hardship it has caused to some of their economic interests – in large part because they are convinced we are serious about reaching a diplomatic solution. If they lose that conviction, the United States, not Iran, could be isolated, and the sanctions regime could collapse. Ultimately, the United States and its allies in the Middle East would be less safe.

In short, a collapse in negotiations caused by us, or perceived to be caused by us rather than by the Iranians, would lead to a growing Iranian nuclear program and a collapsing international sanctions regime. Now is not the time to provoke such a collapse.

Congress has a significant role to play in these discussions and has been playing it for years. It is existing congressional legislation that helped us get Iran to the negotiating table. The whole point of sanctions was to create this dynamic, and it has worked, but it has only worked when coupled with the type of robust diplomacy that is currently underway. Since signing the JPOA, we have been on the Hill dozens of times over the past year to update you and your staff about the progress of the talks – in all, more than 200 briefings, hearings, meetings and phone calls. And if a deal is finalized, Congress will certainly have a robust role to play in potentially taking action on future statutory sanctions relief once Iran has demonstrated a track record of living up to its commitments.

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Beyond the Nuclear Program

Over the last months, we have heard many voices express their concerns about negotiating with a government that still rallies around the slogan, "Death to America!" We share your concerns. Iran has taken advantage of the current upheaval and uncertainty in the Middle East to attempt to advance its interests. Iran continues to support the brutal regime of Bashar al-Asad in Syria and undermine Middle East peace by sponsoring terrorist groups like Hizballah. It continues to foment sectarian tensions in Iraq, and general instability in the region.

Our nuclear discussions with Iran do not alter our commitment to the security of our allies in the region, who are deeply affected by Iran's efforts to spread instability. Indeed the nuclear discussions are in furtherance of this goal because a nuclear-armed Iran could be more aggressive in projecting its power throughout the region. And if we are able to reach a comprehensive deal over the nuclear program, we will retain the necessary tools – and determination – to continue countering Iran's troubling behavior and defend U.S. interests. We are making this point regularly to our key allies, including Israel and the Gulf states. Already, we are working in close and continuing contact with our regional partners to expand and strengthen their own capacity as we simultaneously reinforce the robust regional security architecture we have already built – one that is comprised of a substantial force posture and broad range of advanced military capabilities. We will continue to restrict Iran's ability to move money and material for illicit purposes through sanctions and direct action when necessary. And we will continue to take steps, in coordination with partners, to address Iran's support for terrorist organizations and other destabilizing activities in the region.

We will also continue to raise our voice in support of the talented and brave Iranian people, and support their desire for greater respect for universal human rights and the rule of law. Whether at the United Nations, the State Department, or at the White House, we continue to speak up clearly and consistently against human rights violations in Iran and have called on the Iranian government to guarantee the rights and freedoms of its citizens.

I also want to emphasize that we continue to insist that Iran release Saeed Abedini, Amir Hekmati, and Jason Rezaian from detention so they can come home to their families. Likewise, we continue to call on Iran to work cooperatively with us so that we can find Robert Levinson and bring him home. Secretary Kerry and Under Secretary Sherman have raised our concerns about these U.S. citizens directly with Iran and will continue to do so until all of them are back home.

In sum, we will not relax our efforts to hold Iran accountable for its nefarious actions, regardless of the outcome of nuclear negotiations. But it is essential to understand that the most important thing we can do to keep Iran from feeling further emboldened to spread instability is to deny them the ability to obtain a nuclear weapon. That is why the nuclear negotiations are so important, and why this is a challenge that must be dealt with now.

Thank you.

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Chairman ROYCE. Mr. Szubin.

STATEMENT OF MR. ADAM J. SZUBIN, ACTING UNDER SECRETARY, OFFICE OF TERRORISM AND FINANCIAL INTELLIGENCE, U.S. DEPARTMENT OF THE TREASURY

Mr. SZUBIN. Thank you and good morning, Chairman Royce, Ranking Member Engel, distinguished members of the committee. It is a pleasure to be here today and thank you for the invitation.

This is my first appearance, as you noted, before a congressional committee in my new role as Acting Under Secretary for TFI at the Treasury Department.

In my time at Treasury, including 9 years leading the Office of Foreign Assets Control, or OFAC, I have devoted the majority of my working hours to building, honing and implementing sanctions on Iran—both executive sanctions and the strong congressional bipartisan sanctions that you all have enacted. So I am particularly appreciative of being able to testify here today on this vital issue.

The global architecture of our sanctions on Iran is unprecedented both in terms of its strength and the international foundations that underpin it. Working together with our partners around the world and with Congress, we have assembled a coalition that has fundamentally altered Iran's economic posture.

As a result, we today have a chance of resolving one of the world's most vexing and persistent security threats. At this critical juncture in the talks, it is important to note that Iran remains under massive strain and has no viable route to an economic recovery without negotiated relief from international sanctions.

This strain is visible across every sector in Iran's economy. First, their financial lifeline—oil. In 2012, Iran was exporting about 2.5 billion—I am sorry, 2.5 million barrels per day of oil to some 20 jurisdictions.

Today, Iran is exporting 60 percent less oil than just 3 years ago to just six jurisdictions. The losses, of course, have been compounded by the steep drop in global oil prices such that Iran's chief revenue source is today bringing in less than one quarter of what it brought in for Iran just 3 years ago.

Just as troubling for Iran is the fact that it can't freely access those revenues. It has a reduced stream of revenues that, thanks to Congress, are going into restricted accounts, either frozen or tied up in banks around the world.

Foreign investment in Iran has dropped precipitously. From 2004 to 2013, as foreign capital was pouring into developing countries, Iran saw an 80-percent drop in foreign investment.

Iran's oil minister recently estimated that Iran's oil, gas and petro-chem sectors will need approximately $170 billion to recover. The Iranian rial has depreciated 52 percent since 2012 and has lost 12 percent of its value just under the JPOA period alone as we have been negotiating.

The IMF for this coming year projects that Iran's economy will enter stagnation, with GDP growth falling to .6 percent. This is the lowest projected rate of any country the IMF looks at in the Middle East and North Africa region, including countries like Afghanistan that sell no oil.

Finally, Iran's banking sector remains isolated and holds a high proportion of nonperforming loans. As you can hear, their economy is under strain, but this sanctions pressure cannot be sustained without work.

Accordingly, over the JPOA period we have worked very intensively to enforce our sanctions. In the past 15 months, we have targeted nearly 100 actors, individuals and companies who were either helping Iran evade sanctions or helping Iran conduct other misconduct.

We have imposed nearly $½ billion in penalties on companies that were conducting illicit transactions under our Iran sanctions and we will not soften our enforcement of existing sanctions.

Now, as we speak, negotiators are hard at work trying to secure a joint comprehensive plan of action. Regardless of whether or not these negotiations succeed, I want to assure this committee that the Treasury Department and the administration as a whole are prepared for whatever comes next.

If we are able to secure a comprehensive understanding, we will structure nuclear-related sanctions relief in a way that is phased, proportionate and reversible. We will need to see verified steps on Iran's part before sanctions are lifted and we believe that powerful U.S. legislative sanctions should not be terminated for years to come so that we continue to retain important leverage years into a deal.

Alternatively, if we determine that a comprehensive deal with Iran cannot be obtained, the administration, working with Congress, is prepared to ratchet up the pressure. Over the past decade, we have developed very subtle insights into Iran's financial flows, its economic stress points and how it attempts to work around sanctions.

We stand ready to raise the costs on Iran substantially should it make clear that it is unwilling to address the international community's concerns. Of course, while we must prepare for every contingency, we remain hopeful that we can achieve a peaceful resolution to this serious and long-standing threat.

Thank you again for inviting me to appear here today and I look forward to taking your questions.

[The prepared statement of Mr. Szubin follows:]

Written Testimony of Adam J. Szubin
Acting Under Secretary for Terrorism and Financial Intelligence
United States Department of the Treasury

United States House of Representatives
Committee on Foreign Affairs
Hearing: "Negotiations with Iran:
Blocking or Paving Tehran's Path to Nuclear Weapons?"

March 19, 2015

Good morning. Chairman Royce, Ranking Member Engel, and distinguished members of the committee: Thank you for inviting me to appear before you today to discuss the negotiations over Iran's nuclear program. I am pleased to be here with my colleague from the State Department, Deputy Secretary Tony Blinken. I will focus my testimony on our sanctions posture with respect to Iran – the massive and mounting costs of pressure on Iran's economy today, our actions under the Joint Plan of Action to provide Iran with limited pockets of relief while maintaining the overall sanctions architecture, and, finally, how we are positioned to move forward in the sanctions lane if the negotiations either succeed or break down.

This is my first appearance before a Congressional committee in my new role as Acting Under Secretary of the Treasury, and I greatly appreciate your giving me the opportunity to testify here. The challenges posed by Iran constitute a core threat to our national security, and they have occupied the majority of my time for the last decade.

I can say honestly that I did not expect that to be the case when I joined the Treasury Department in 2004. At the time, Congress had just created TFI – a re-organization and refocusing of Treasury components – as part of the government-wide response to the terrible attacks of September 11th. That history is still embedded in our office's name, the "Office of Terrorism and Financial Intelligence." Stuart Levey was recruited from the Justice Department to be the first Under Secretary for TFI, and he asked me to join him when he moved over. Our mandate at the time was to track and disrupt the flows of funds to terrorist organizations, and we set our sights on the most dangerous groups, including al-Qa'ida, Lashkar-e Tayyiba, Hizballah, and Hamas.

Working alongside the tremendously talented counterterrorism professionals at Treasury and beyond, we pursued strategies at the micro and macro levels, both targeting individual financiers, donors, and conduits, as well as undertaking broader efforts to strengthen the resilience of financial systems worldwide and bring transparency to hawalas, charities, and exchange houses that had long functioned without meaningful oversight. That work continues to this day, of course, even as the threats evolve, and we are turning our hard-won experience to the significant challenge of ISIL, a terror group that is as barbaric as it is well-funded.

This work was what brought me to the Treasury Department, and it is what I expected would occupy most of my time at TFI. In 2006, though, TFI was asked to develop a strategy to dramatically intensify the pressure on Iran's government, in an attempt to counter a range of destabilizing Iranian behavior, most notably its failure to address the international community's concerns regarding its nuclear program. The challenge was daunting. The United States already had a broad trade and economic embargo against Iran, and the conventional wisdom at the time was that the United States was "sanctioned out," with little leverage left to exert on Iran. Under the strong leadership of Stuart Levey and then David Cohen, TFI proved otherwise. Indeed, the women and men of TFI devised and carried out a strategy that fundamentally altered Iran's economic standing in the world. A critical part of this strategy was working closely with foreign partners, particularly our European allies. In my time at Treasury, including my nine years leading the Office of Foreign Assets Control (OFAC), I have devoted most of my working hours to this effort.

By no means was Treasury alone in this campaign. From the beginning, our sanctions strategy relied upon the intrepid efforts of the U.S. intelligence community and its partners, since targeted sanctions cannot work without intelligence to guide them. The U.S. Mission to the United Nations successfully negotiated four U.N. Security Council resolutions that sharpened the global understanding of the threat posed by the Iranian nuclear program and set forth what nations across the world were expected to do in countering that threat. The State Department, here in Washington and at its embassies throughout the world, worked hand-in-glove with Treasury in helping our foreign partners enforce those resolutions and guard against evasion. A slew of enforcement and regulatory agencies, including the Justice Department, the Commerce Department, the Office of the Comptroller of the Currency, and the Fed, joined OFAC in pursuing a tough sanctions enforcement policy, deterring would-be evaders and leaving no doubt about our seriousness. And, perhaps most important, beginning in 2010, Congress brought the considerable power of the U.S. Legislature to this effort, broadening and deepening the impact of our sanctions, and pioneering new ways to incentivize foreign actors to distance themselves from problematic Iranian banks and firms.

The results were startling. Iran was subjected to mounting pressure that was notable as much for its intensity as for its international cohesion, and it imposed strains on Iran's economy that were visible from without and within. I will provide a closer look at the impacts of these sanctions and Iran's current economic prospects below. But there can be no doubt that this global, sustained campaign helped bring Iran to the negotiating table. As a result, today we at least have a chance of achieving a diplomatic resolution to one of the world's most vexing and persistent security threats.

Sanctions Impact to Date: Iran's Economy in 2015

As we enter a critical period in the P5−1 negotiations, I would like to provide a quick assessment of the current state of Iran's economy.

Iran's oil revenues are the starting point for any assessment, and the key factor in determining the health of the country's balance sheets and its overall economy. At the beginning of 2012, Iran was exporting roughly 2.5 million barrels of crude oil a day to some twenty jurisdictions. Today, Iran is exporting about 1.1 million barrels a day to only six customers. Because of this nearly 60 percent decline in Iran's oil exports, Iran lost more than $40 billion last year alone. (This sum is more than four times the total estimated value to Iran of the JPOA sanctions relief that year.) All in all, since 2012, our oil sanctions have denied Iran more than $200 billion in lost exports.

These massive losses have been compounded by the steep drop in global oil prices. Over the past year, the average price of a barrel of oil has fallen to about $60 per barrel today. As a result, Iran's chief export and revenue source is earning less than a quarter of what it was earning at its peak just three years ago.

As one might expect for an economy so dependent on oil revenues, Iran is struggling to sustain its fiscal standing. For Iran's upcoming fiscal year (March 2015 to March 2016), President Rouhani proposed a budget that assumed oil would sell for $72 per barrel and – at that aspirational level – his plan called for raising taxes, canceling subsidies, reducing contributions to Iran's sovereign wealth fund, and scrapping investment projects. If oil continues to sell below $72 per barrel, those cuts will need to be deepened.

Just as troubling for Iran is the fact that the reduced revenues that it does earn are not freely accessible. Spurred by a powerful act of Congress and our cooperation with foreign governments, banks across the world are holding Iran's foreign reserves under constraints, allowing releases only for limited purposes, with an eye toward promoting the success of the current negotiations.

Without ready access to its hard currency reserves, Iran has been limited in its ability to stabilize the rial. Under pressure from a number of directions, the rial has depreciated by about 52 percent since January 2012, including a fall of about 12 percent since the announcement of the JPOA in November 2013. This has made imported goods more expensive, caused upward pressure on inflation, and hurt the Iranian economy by causing significant uncertainty about future prices.

Beyond its energy sector, Iran remains subject to sanctions targeting its petrochemical, insurance, shipping, and shipbuilding sectors, as well as its ports and its trade in certain crucial metals and industrial materials. Nearly every source of foreign revenue for Iran is being squeezed.

And Iran's banking system is in peril, isolated from the international financial system, over-extended, and holding a high proportion of non-performing loans.

The bottom line is that, despite a recent uptick in Iran's GDP, Iran's economy remains under massive strain, and has no viable route to a broader recovery without relief from international sanctions.

Sanctions in the JPOA Period

The JPOA, reached by the P5+1 and Iran in November 2013, halted progress on Iran's nuclear program, rolled it back in key respects, and provided for enhanced access to and inspections of its nuclear facilities. As a result, it allowed the United States and our partners to pursue negotiations with the confidence that Iran was not simply buying time to advance its program under diplomatic cover.

In exchange for taking these verifiable steps, Iran received limited, targeted, and reversible relief from some defined sanctions. But the JPOA left in place the broader architecture of our nuclear sanctions – measures that have so effectively pressured Iran's banking, oil, trade, and transportation sectors. And, of course, the nuclear steps that Iran took under the JPOA did not alter the U.S. sanctions targeting Iran's support for terrorism or commission of human rights violations.

Going into the JPOA period, we knew that these negotiations would be intensely challenging and would require Iran to make difficult choices that it might not ultimately be prepared to make. For this reason we knew we needed to retain the general architecture of the sanctions throughout the JPOA period, and needed to actively combat Iranian attempts to evade the sanctions. Had the pressure eroded due to sanctions relaxation or unchecked attempts at evasion, Iran's incentive to make those difficult choices would likewise have diminished. And so, since the start of the JPOA period, the United States has taken action against nearly 100 Iran-related individuals and entities, combating sanctions evasion and other Iranian misconduct.

Our sanctions are not just words on the books – we vigorously enforce them. And that enforcement has been as tough as ever over the course of the JPOA, demonstrating plainly to the world that Iran is not open for business. During the JPOA period, we have imposed more than $450 million in penalties on violators of the Iran sanctions. We are also thankful to our foreign partners who continue to enforce the sanctions in place, as international unity remains key to a successful outcome in the negotiations.

We will not relent in these efforts, and we will continue to take action against anyone, anywhere, who violates or attempts to violate our sanctions. Iran's leaders know this, and accordingly

know that their only hope for meaningful sanctions relief is to reach a comprehensive plan of action that addresses the international community's concerns about its nuclear program.

Next Steps

Creating intense economic pressure, on its own, was never the sanctions' ultimate purpose. The goal of the sanctions was to help bring Iran to the negotiating table, where, in exchange for demonstrating to the world the exclusively peaceful nature of its nuclear program and for accepting far-reaching constraints on that program, it would be able to receive relief from nuclear-related sanctions.

Now we are engaged in those negotiations, testing whether Iran is willing to take verifiable and concrete steps that will ensure that it cannot obtain a nuclear weapon. For this Administration, preventing Iran from obtaining a nuclear weapon is a national security priority of the highest order. As President Obama has made clear, time and again, we will do everything in our power to make sure that cannot happen.

The question is whether we can achieve that objective peacefully, a priority that I know this Committee shares.

As we speak, negotiators from the P5+1 are hard at work trying to secure a political framework for a comprehensive deal with Iran. We may get a deal; we may not. Regardless of whether or not the negotiations succeed, I want to assure this Committee that the Treasury Department, and the Administration more broadly, are prepared for what comes next.

If we are able to secure a comprehensive deal, we will structure the nuclear-related sanctions relief in a way that is staged and commensurate with verifiable steps on Iran's part. We believe that legislative sanctions should be suspended first before they are terminated by Congress, so that we continue to retain important leverage years into a deal. Put simply, Iran will not receive comprehensive relief from nuclear-related sanctions absent proof that it has concretely and verifiably carried out what is expected of it as part of a comprehensive deal.

Moreover, even if we are able to secure a nuclear deal with Iran, the United States will continue to counter Iran's support for terrorism, its commission of human rights abuses, and its destabilizing activities throughout the Middle East, including through the active use of our financial tools.

Alternatively, if we determine that a comprehensive deal with Iran cannot be obtained, the Administration, working with Congress, can move to ratchet up the pressure on Iran from sanctions. Over the past decade, we have developed tremendous insight into Iran's financial flows, its economy's stress points, and how it attempts to evade sanctions. Our team stands ready to raise the costs on Iran substantially should it make clear that it is unwilling to address

the international community's concerns. Close cooperation with our international partners will be critical should we have to go that route.

In either eventuality, we are committed to working with Congress to ensure that our sanctions continue to serve our national security goals, whether to ensure that Iran abides by the conditions of a deal if it can accept those conditions, or to raise the costs substantially if Iran demonstrates that further negotiations are futile.

Thank you again for inviting me to appear here today, and I look forward to addressing your questions.

Chairman ROYCE. Thank you, Mr. Szubin.

If I could go to my first question here—it goes to the sunset. Deputy Secretary Blinken, a major concern here is the expiration date.

In as little as 10 years, all of the restrictions and other measures that you are touting here today are going to come off and Iran's nuclear program is going to be then treated as though it was the equivalent of the Netherlands.

So why 10 years? Does the administration believe or hope that the Iranian regime will have moderated within that time frame?

Mr. BLINKEN. Thank you, Mr. Chairman.

First of all, there is no agreement on the duration of various obligations. All of that is the subject of current negotiations. So whether some aspects are 10 years, more or less, that is all to be negotiated.

I think looking at this as a sunset is not the accurate way to look at what we are trying to achieve. What we are proposing and seeking to achieve is a series of constraints and obligations.

Some will end after a long period of time, others will continue longer than that and still others will be indefinite, in perpetuity. The bottom line is that even after certain obligations are completed by Iran, it cannot become a nuclear weapon state.

It will be legally bound under the nonproliferation treaty not to make or acquire a nuclear weapon. There will be legally binding safeguards on material to verify and deter its diversion. It will have to sign and implement a comprehensive safeguards agreement and the additional protocol.

Chairman ROYCE. But that is why we are here today. You are putting this stock in Iran's signature to the NPT and its safeguards agreement, right? They have had those same commitments. They have been violating those commitments for years.

That is why this process. I would just—I would just point that out. And the other point I would make is that 10 years or whatever that time frame is, they are then going to be treated as any other non-nuclear weapon NPT state, and that means no sanctions, no restrictions on procurement, no restrictions on the stockpile or the number of centrifuges it can spend at that point, 10 years out, or on the purity level to which it may enrich uranium.

And I will just give you an example of where this would put Iran. They would enrich uranium at that point to levels near weapon grade, I am presuming, claiming the desire to power a nuclear navy because that is what Brazil is doing. So I am going to assume that they are going to do the same thing there.

And that would all be permissible. It would all be blessed under this agreement, as I read it, no matter who is in charge of Iran in 10 years.

And that's why Ranking Member Engel and I have a letter going to the President, signed by over 350 Members of Congress, demanding that the verifiable constraints on Iran's program last decades, not, as being discussed, a shorter period of time. So I just want to make that point.

Let me go to my next question, and that goes to the 1-year breakout. The administration has set a benchmark—a 1-year breakout period. But is a year sufficient to detect and then reverse

potential Iranian violations and why not insist on a period of 2 or 3 years?

Mr. BLINKEN. Mr. Chairman, we think that a 1-year breakout time not only is sufficient but, indeed, is quite conservative.

We believe that with the verification and inspections and monitoring that we will insist on in any agreement that would give us more than enough time not only to detect any abuse of the agreement but also to act on it.

If you look at what various experts have said, many have said that a far lesser period of time would be sufficient to detect and act on any violations.

Chairman ROYCE. Well, let——

Mr. BLINKEN. This is—let me also, just if I can just add to this very quickly, Mr. Chairman.

One year is very conservative. First of all, that is the most—if everything went perfectly for Iran. Second, the idea that any country, including Iran, would break out for one bomb's worth of material is highly unlikely. Like I said, we are——

Chairman ROYCE. Okay. But let me go to this question then. Will you insist that the IAEA inspectors have anywhere anytime access to all facilities in Iran including Revolutionary Guard bases, from what we know about what has gone on there, and will Iran have to satisfy all questions that the IAEA has regarding Iran's covert research on a nuclear warhead including access to key scientific personnel and paperwork?

Mr. BLINKEN. So without going into the details because all of this is this still subject to negotiation, we will insist that the IAEA have the access is must have in order to do its job and to verify.

Chairman ROYCE. Yes, I understand your perspective of what is necessary to do their job. But mine is a specific list of criteria based upon my discussions with the IAEA, and I want to make certain that those are found and then are followed.

And then lastly, it seems the administration plans to push the Security Council to adopt a new resolution to basically bless this agreement and relax sanctions, but at the same time you are pushing off Congress.

Why push for U.N. action but not Congress?

Mr. BLINKEN. We are not pushing off either. I think, as you said and as Ranking Member Engel said, Congress will have to exercise its authority to lift sanctions at the end of an agreement if Iran complies and, indeed, keeping that until the end, until we see that Iran is complying, is the best way to sustain leverage.

Chairman ROYCE. Well, our concern here is if you push us off for 10 years, let us say, in theory, and if this is consequential enough to go to the U.N. Security Council at the outset under a resolution under Chapter 7, which by definition deals with a threat to peace, breaches of the peace and acts of aggression, then it would certainly be consequential enough to be submitted to the Senate for advise and consent. That is the point I wanted to make.

Mr. BLINKEN. So the Security Council—this is an international agreement. It is an agreement that would be made with the other members of the Security Council, with Iran.

Under these circumstances, it would be normal for the Security Council to take note of any agreement and then to create a basis for lifting the U.N.-related sanctions.

Chairman ROYCE. But let me——

Mr. BLINKEN. Yes, Congress will eventually have to decide whether to lift U.S. sanctions.

Chairman ROYCE. My time has expired, but suggesting that Congress has a role to play by voting on sanctions relief years from now once a deal has run its course, that to me is disingenuous. But that is my view of it.

We will go to Mr. Engel for his questions. Thank you.

Mr. ENGEL. Thank you, Mr. Chairman.

Let me, first, also emphasize that the trepidation that all of us have about these negotiations involves, at least for me, what the chairman said, that any deal that would sunset in 10 years or however much we were very, obviously, concerned about and I know you are well and we, obviously, want to push that back as much as we possibly can because we really just don't trust Iran.

And I think the chairman is right on the mark in terms of our concern with the sunset in 10 years or so. Another thing that has bothered us, you know, and again, as the chairman mentioned, he and I had legislation which passed the House 2 years ago by 400 to 20 and unanimously out of this committee, which involved strong sanctions, and had the Senate followed suit and been signed into law I think we would have been in a much stronger position now.

But one of the things that is really annoying to all of us is that we are sitting and negotiating with Iran over its nuclear program at a time when Iran continues to be a bad actor all around the world.

You take a look at capitals that Iran essentially controls, now Yemen being added to that—Baghdad, Damascus, Beirut. This is not a regime that looks like it wants peace. Iran continues to fuel terrorism around the globe.

It is the number one, in my opinion, state supporter of terrorism around the globe. So I believe that a nuclear agreement should not whitewash the fact that Iran remains a destabilizing actor in the region and funds terrorism.

Now, the Iranian Revolutionary Guard Corps theoretically could take advantage of any sanctions relief that results from an agreement between the P5+1 and Iran because money is fungible. So how could such relief be structured to minimize any benefits to the Iranian Revolutionary Guard Corps?

Mr. BLINKEN. Thank you very much, Ranking Member Engel.

First, let me just say we share your deep concerns about Iran's activities in the region—destabilizing activities, support for terrorism and, of course, its own abuse of human rights at home, which is why we will and we will continue to vigorously oppose those efforts.

And, indeed, throughout the interim agreement we have pushed back very hard on proliferation activities, WMD-related activities, terrorism support activities, sanctioning designating individuals, intercepting cargoes, et cetera, and working with our partners as we have been for more than 6 years to build up their capacity.

With regard to any money that Iran receives as a result of relief from sanctions, I would turn to my colleague to discuss this. But let me just say I think what we see is that Iran is in a very deep economic hole and a large part of the reason that Rouhani was elected as President was to respond to the desire of the people to try and get out of the hole.

So in one instance at least we believe that a significant portion of any revenues they receive would go to trying to plug their economic holes at home.

That said, you are exactly right. Money is fungible and presumably that would free up some resources for the IRGC. That said, we also believe that denying Iran a nuclear weapon is the single most significant thing we could do to prevent further emboldening Iran it its actions in the region.

Mr. ENGEL. And let us me just say, before Mr. Szubin talks, that is precisely what we are concerned about because Iran is in a deep economic hole.

By having an agreement and releasing that, helping them, so to speak, get out of that hole, we want to, obviously, make sure, and you do as well, obviously, to make sure that the safeguards are in there as well.

That is what makes me nervous because once you lose that leverage it is very, very hard to get back. Mr. Szubin?

Mr. SZUBIN. Yes. Ranking Member Engel, thank you and I will say as well that is a concern we have been keenly focused on.

The truth is the size of the hole that Iran is in, across almost any indicator you look at, is far deeper than the relief that is on the table, even the substantial relief, should Iran make good on all of the commitments that are being set out by the negotiators.

We are talking about a hole that could be described, in one sense, as a $200-billion hole, which are the losses that we assess they have suffered since 2012 due to sanctions.

In just the energy infrastructure, as I mentioned during my opening statement, their minister came out recently and said they need $170 billion just to regain their footing in that sector alone.

The average Iranian has seen steady decreases in their standard of living, decreases in their purchasing power, even since Rouhani came into office, even since the JPOA went into effect.

And so it is going to be a tremendous effort, a years-long effort, for Iran to right itself, and that is not going to happen overnight.

Finally, I just want to reiterate what Deputy Secretary Blinken said. None of our sanctions targeting the nefarious activities that you mentioned are going away. None of those are on the table for discussion.

So with respect to the Quds Force interventions in Yemen and Syria, we—and Hezbollah, very notably, we will continue to pressure any forms of support that we see.

Mr. ENGEL. Let me ask you one final quick question because you mentioned Hezbollah, and I want to say that we all agree that Iran continues to support terrorism and sow instability in the Middle East.

However, the director of national intelligence did not include Iranian terrorism or Hezbollah or any terrorist threat for that matter

in the 2015 worldwide threat assessment of the U.S. intelligence communities.

Can you tell me why? That didn't make any sense to me. Or you can—we can talk and you can send me a letter about it.

Mr. SZUBIN. Yes, I am happy to get back to you on that. But my understanding is, first of all, Hezbollah remains front and center in our concerns. I think the director was talking about the immediate front-burner concern that we have with ISIL and that was the focus of his remarks.

But it remains a foreign terrorist organization. It remains very much in the spotlight of our efforts to counter it, to push back on it, to isolate it around the world.

Mr. ENGEL. And could not exist if it wasn't for Iran?

Mr. SZUBIN. That is correct.

Mr. ENGEL. Thank you. Thank you, Mr. Chairman.

Chairman ROYCE. Thank you, Mr. Engel.

We go now to Ileana Ros-Lehtinen.

Ms. ROS-LEHTINEN. Thank you so much, Mr. Chairman.

Mr. Blinken, during your confirmation hearing in the Senate you had promised Senator Rubio and the Foreign Relations Committee that you and the administration would consult Congress on any policy changes the administration was seeking toward Cuba.

That turned out to be a complete falsehood. I worry that the Cuba example was a deliberate attempt by the administration to keep Congress in the dark regarding the Castro negotiations.

And why is this important? Not only because of the Cuba deal but of how that implicates the Iranian deal. Keeping us in the dark it foreshadows the administration's approach to Congress and keeping us out of the loop on the Iranian deal. The administration has made it clear that it does not want Congress to vote on the Iranian deal anytime soon.

But you just said to Mr. Royce that the U.N. Security Council will be having a vote, a binding vote, on the Iranian deal. Just to make it clear, you will be going to the U.N. Security Council to ask for a vote on the Iranian deal—yes or no?

Mr. BLINKEN. We will be going to the Security Council presumably, because this is an international agreement, implicating——

Ms. ROS-LEHTINEN. Yes?

Mr. BLINKEN [continuing]. All the members of the Security Council to take note of the deal and if there are any requirements——

Ms. ROS-LEHTINEN. Vote on the deal?

Mr. BLINKEN. If there are any requirements of the Security Council pursuant to the deal——

Ms. ROS-LEHTINEN. To vote?

Mr. BLINKEN [continuing]. To make clear that it will make good——

Ms. ROS-LEHTINEN. Congress can wait for the U.N. Security Council.

Mr. BLINKEN [continuing]. On its commitments just as Congress will have to vote and decide——

Ms. ROS-LEHTINEN. We have 10 years from now.

Mr. BLINKEN [continuing]. On any lifting sanctions.

Ms. ROS-LEHTINEN. Sure. No problem. And Palestinian statehood—there have been reports last night that in order for Presi-

dent Obama to continue his temper tantrum toward Prime Minister Netanyahu, what we will be doing in the United Nations is push in the shadows for a vote on Palestinian statehood in order to pressure Israel to be at the negotiation table with the Palestinians.

Is that true? Is that press report true?

Mr. BLINKEN. No. The administration's support for Israel is absolutely unshakable. We have done more for Israel's security over the last 6 years——

Ms. ROS-LEHTINEN. Oh, that support is very clear. Thank you. Thank you. No, that support is very clear.

Mr. BLINKEN [continuing]. Than any administration has.

Ms. ROS-LEHTINEN. Thank you. And I am going to ask you another question on Iran for a minute.

But I wanted to ask Mr. Szubin, your Cuba sanctions regulatory revisions earlier this year took a very broad view of the administration's licensing authority under the Trading with the Enemy Act, and I fear that the administration is using Cuba as a test case, as I said, for normalizing relations with Tehran and will utilize its licensing authority to provide broad relief for Iran.

Under the JPOA, the U.S. is committed to removing nuclear-related sanctions on Iran. However, as the author of the Iran sanctions law, the concept of an exclusively defined nuclear-related sanction on Iran does not exist in U.S. law because the sanctions are intertwined with Iran's human rights record, its ballistic missile program and its support for terrorism.

So I ask you, Mr. Szubin, which sanctions will you seek to suspend and ultimately lift under a final agreement and will you come to Congress to ask for authorities before such action is taken?

Mr. SZUBIN. Thank you, Congresswoman.

With respect to the actions we took in the Cuba amendments amending our regulations, I will note that the licensing authority is one that has been drawn on by administrations, Democratic and Republican, over the last decade and I have been involved under both presidencies, and it is an authority that——

Ms. ROS-LEHTINEN. Thank you. We will leave—it is going to take a long time.

Mr. Blinken, Iran has been cheating, skirting the rules, violating international agreements, you have heard, from both Mr. Engel and Mr. Royce on that.

What mechanism do we have to enforce any violation? Will there be penalties imbedded in the nuclear deal? If you could be specific.

Mr. BLINKEN. Thank you. First, I should note that the IAEA has said repeatedly that Iran has complied with its obligations under the interim agreement.

Ms. ROS-LEHTINEN. Is that all that the IAEA has said? Has the IAEA also not said that Iran is not complying and is not letting them in, as the IAEA has asked?

Mr. BLINKEN. No. It has said that under the agreement Iran has complied. It has also said—you are correct—that outside of the agreement Iran, of course, is seeking to do whatever——

Ms. ROS-LEHTINEN. So you look at their reports and say—you cherry pick and you say, okay, the IAEA is happy with this?

Mr. BLINKEN. No.

Ms. ROS-LEHTINEN. You should give the totality of what they have been saying——

Mr. BLINKEN. No, no.

Ms. ROS-LEHTINEN [continuing]. And how frustrated that agency has been with Iran throughout all of these negotiations.

Mr. BLINKEN. No, no. I want to be clear, to answer your question, that the IAEA said that with regard to its obligations under the interim agreement, Iran has complied.

You are also absolutely correct that outside of the agreement, including the critical question of the possible military dimensions of Iran's program in the past or for that matter now, it has not complied with what the IAEA is seeking and, indeed, that will have to be part of any agreement.

And as to enforcement, it is very straightforward. As the Under Secretary said, as I said, in the event Iran were to renege on any commitment it made the sanctions would snap back in full force.

Ms. ROS-LEHTINEN. And I am sure that Iran is just shaking at that because that is very——

Mr. BLINKEN. That is why they are at the table.

Ms. ROS-LEHTINEN. Oh, yes. Absolutely.

Chairman ROYCE. Thank you.

We go to Mr. Brad Sherman of California, ranking member of the Asia Subcommittee.

Mr. SHERMAN. We should remember why we are in this situation. The executive branch under the Bush administration refused to enforce sanctions and violated American statutes for the benefit of Iran for 8 continuous years.

The Bush administration prevented Congress from passing and used all of its power in Congress to prevent us passing new statutory sanctions. Now, that doesn't fit with the image we have of President Bush until you realize that at the time the sanctions all focused on international oil companies, which was not President Bush's target of choice.

Had we continued President Bush's policies—well, we should know that during the Bush administration Iran went from zero to 5,000 installed centrifuges—had we continued those policies, Iran would have $300 billion more available to it in cash right now because we have frozen $100 billion, and $200 billion has been lost to Iran in lost oil sales.

But it is not the executive branch but Congress that has had it right for the last 15 years, which is why I take such offense when I hear the administration say, Congress, if we have a view, we are interfering and undermining. When you read the United States Constitution you will see that when it comes to economic sanctions and international economics, all the power is vested in Congress except to the extent that the President negotiates a treaty that is ratified by the Senate.

Yet, I fear that what the administration is doing is using foreign ropes to tie the hands of the United States Congress because the foreign minister of Iran was able to cite Article 27 of the Vienna Convention on Treaties saying, well, the United States will be in violation of international law if Congress doesn't do whatever the President promises Congress will do.

I would—and the administration feeds into that when a high administration official declares foreign policy runs through the executive branch and the President and does not go through other channels.

I fear that we will have a situation where the executive branch comes to us and says, you have to take this action. You are prohibited from taking that action because you are going to hold the United States up to ridicule for being in violation of international law.

I would hope that you would look at the memo issued by the Carter Department of Justice that stated Congress may enact legislation modifying or abrogating executive agreements, and that if that was formally turned over to the Iran delegation, that would get us support under Article 46 of the Vienna Convention on Treaties.

I should point out for the record that in 2007, Senator Clinton introduced, with the co-sponsorships of Senator Obama and Senator Kerry, the Oversight of Iraq Agreements Act, which stated that any status of forces agreement between the United States and Iraq that was not a treaty approved by two-thirds of the Senate or authorized by legislation would not have the force of law and prohibited funding to implement that.

For the record, because I just don't have time to give you at this moment, I would like you to explain whether under the standards of the Obama administration the introduction of that act by those three senators constituted an interference with policy undermining President Bush's policy, et cetera.

But I want to focus on a particular question. There is a question here. I fear that you have misled this committee in telling us that once Iran has the rights of a non-nuclear state, subject to the additional protocol, that you will be able to stop sneak out because you have said first that, well, they can't develop a nuclear weapon because that would be illegal. That is a preposterous argument. Obviously, they are willing to break the law.

And the next point is that you have conjured up this idea there will be inspections. The question is, inspections of suspected sites. There is nothing in the additional protocol that adds to the NPT. The NPT was in force and it took 2 years after it was widely suspected that Fordow was a secret site for the IAEA to get there.

So why do you tell us that oh, this IAEA, it has worked fine for Japan and the Netherlands—it will work great for Iran—when it won't allow us to get in quickly to suspected sites? Mr. Deputy Secretary.

Mr. BLINKEN. Thank you very much.

First, if Iran makes an agreement it will make it with the full knowledge that if it violates the agreement there will be severe consequences.

Mr. SHERMAN. I was talking about sneaking, not being detected. Secret sites.

Mr. BLINKEN. The inspections regime that we will insist on, first of all, for any initial duration—let me finish, if I may, please—will be beyond that, that any country has had anytime, anywhere in the world.

That will—from cradle to grave of the production progress—mines, mills, factories, centrifuge facilities. That will create a basis of knowledge of the people, the places, the documents, that will last far beyond the duration of any of those provisions.

Then beyond that, its obligations under a safeguards agreement, under the additional protocol, under Modified Code 3.1. All of those taken together will, with any other measures that we might achieve on top of that and those remain to be negotiated, give us the confidence that the inspectors will have the ability to detect in a timely fashion any efforts by Iran to break out of the agreement.

Mr. SHERMAN. So you need an intrusive inspection regime, you will have it for a few years and then, for reasons you can't explain, the blindfolds will go on and we will hope that we can prevent sneak-out thereafter.

I yield back.

Mr. BLINKEN. The blindfolds won't be on. They will be off.

Chairman ROYCE. Okay.

So Mr. Dana Rohrabacher of California, chairman of the Subcommittee on Europe, Eurasia, and Emerging Threats.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. It does get a little tiring to keep being reminded that President Bush is responsible for all of our problems. After all of these years they are still blaming President Bush.

Mr. SHERMAN. If the gentleman will yield. I blame the executive branch and I spent four of it blaming the current executive branch.

Mr. ROHRABACHER. Thank you very much.

I am—are we actually more concerned about the mullah regime in Iran having possession of a nuclear weapon versus what we seem to be just talking about—is their ability to manufacture a nuclear weapon?

Don't we see this—do you see that in this debate, Mr. Secretary, and shouldn't we be—I think, frankly, with Mr. Netanyahu's speech as well as what we have been hearing here, I think the American people are being lulled into a false sense of security—that if we just prevent them from being able to manufacture the weapon that these crazy mullahs aren't going to have their hands on the ability to have possession a nuclear weapon.

Mr. BLINKEN. The issue is——

Mr. ROHRABACHER. You have to push a button on it.

Mr. BLINKEN. I apologize. Thank you.

Like it or not, Iran has mastered the fuel cycle and we can't bomb that away, we can't sanction that away and, unfortunately, we probably can't negotiate that away.

So they have the——

Mr. ROHRABACHER. Negotiate what away?

Mr. BLINKEN. The fuel—their mastery of the fuel cycle. They have the knowledge of how to put together a weapon.

So the issue is whether the program that they have is so limited, so constrained, so inspected, so transparent, that as a practical matter they cannot develop material for a bomb, or if they did we would detect it and have time to do something about it.

Mr. ROHRABACHER. That is not my question. Whether they can manufacture it or not, couldn't they get one from Pakistan or from

China or from Korea or perhaps somebody stole a couple nuclear weapons as the Soviet Union was collapsing?

Mr. BLINKEN. Yes. No, your point is very well taken, which is exactly why, as a my colleague said, even if there is an agreement, the various sanctions and stringent efforts we are making around the world to prevent Iran from proliferating or from receiving the benefits of proliferation will continue.

Mr. ROHRABACHER. Well, the only—the only way we are going to prevent these bad guys from having the nuclear weapon—we keep saying Iran. We don't really mean Iran. The people of Iran are really nice people.

In fact, I understand they like Americans more than just about any other country in the world. It is the mullah regime. It is these the bloody mullahs that are supporting terrorism around the world, that are repressing their own people.

Isn't the real answer trying to make ourselves partners with those people in Iran who want a more democratic country, a more democratic country, and has not this administration passed up time and time again the opportunity to work with the people of Iran to free themselves from these mullahs?

Mr. BLINKEN. Congressman, I think you are exactly right that the actions of the regime are the problem, whether it is destabilizing activities in the region, whether it is support for terrorist groups including Hezbollah and whether it is, indeed, their abusive human rights at home, which is exactly why across the board, whether it is standing up and supporting those who are trying get greater rights in Iran, whether it is working with our partners in the region to increase their defensive capacities, whether it is pushing back on proliferation and on support for terrorism through the actions we have taken, that is exactly why we are doing that and that is exactly why those actions will continue.

Mr. ROHRABACHER. Well, I would suggest—I would suggest that I give you an A+ in terms of being able to focus people's attention on these negotiations dealing with the ability for them to manufacture a weapon.

I would give you an F– when it comes to whether or not we can try to get rid of the threat by helping the people of Iran institute a democratic government there.

This administration from day one in order to—frankly, the irony of this is, I believe this administration is bending over backwards not to try to threaten the mullah regime in Iran in order to get a nuclear deal which will make no difference at all because it still leaves the mullahs with the right to own and possess a nuclear weapon that they didn't manufacture themselves, which leaves us vulnerable to these very same——

Mr. BLINKEN. I want to assure you they won't have the that right, period.

Chairman ROYCE. We go now to Mr. Albio Sires of New Jersey. He is the ranking member of the Subcommittee on the Western Hemisphere.

Mr. SIRES. Thank you, Mr. Chairman. Thank you for being here.

I think you can take back to the department how concerned this body is that we don't seem to be part of any of this negotiation and we don't seem—that we seem to be bypassed.

I remember when the Secretary was here. We talked about Cuba, and I asked him point blank about negotiations. They said that nothing was going on in exchange for Alan Gross.

Now we have a situation similar to what we had in those hearings. One of the questions that I have is, can you speak to how the U.N. Security Council resolutions are being handled in the negotiations?

Because once these sanctions are lifted, I think it is going to be virtually impossible to reimpose them because I don't think Russia and China are going to go along with it. They have veto powers. So how are we handling this?

Mr. BLINKEN. Thank you. First, on your first point, Congressman, I have to say having been part of this, you know, there have been by our count, since the interim agreement was signed, more than 200 briefings, hearings meetings, phone calls with Members of Congress on the ramifications.

Mr. SIRES. With all due respect, we don't get—you know, we don't get much on those briefings. That is like, you know, these classified briefings that we get—I can get more information on anything in my district than what I get here.

Mr. BLINKEN. You will understand that in—while negotiations are going on it is difficult sometimes to provide all of the details. It is something that is going back and forth on a virtually continuous basis. That said, I would be happy to talk to you further about this.

Mr. SIRES. But the problem is some of this stuff leaks out and then we look like—the press comes to us and we look like well, we don't know what is going on with the administration. You know, I mean——

Mr. BLINKEN. Don't always believe what you read.

Mr. SIRES. Yes, I know. I don't believe what I listen to when people come in front of me either, you know. Can you talk a little bit about the sanctions, about the——

Mr. BLINKEN. Yes, absolutely. So, again, and I will also invite my colleague to do the same thing, just as with our own sanctions, with regard to U.N. sanctions, first of all, we would preserve sanctions related to the non-nuclear aspects of Iran's behavior.

Second, any U.N.-related sanctions also would be—have to be lifted in a way that shows, first, Iranian compliance with various obligations under the agreement.

So they too in some fashion would have to be sequenced depending on Iran's fulfilling its obligations. We want to see a demonstration that Iran is serious. But all of that, including the sequencing, is under negotiation.

But Adam, do you want to add to that?

Mr. SZUBIN. Only to add that you are absolutely right to focus on the ability to restore sanctions in the event of a breach. That is something that, obviously, is very much at the forefront of our mind when we look at any possible sanctions relief is, is it reversible.

And it is a trickier question when you talk about U.N. Security Council resolutions where we are obviously not the only member of that council. But we are very focused on that in the negotiations

to make sure that if there is a violation there isn't the ability for one country to stand in the way of snapping back those sanctions.

Mr. SIRES. Have you had these conversations with China and Russia, you know, on this issue?

Mr. SZUBIN. Yes, absolutely. That is very much part of the conversations that we have among the negotiating partners as well as, obviously, the conversations we have with the Iranians, yes.

Mr. SIRES. Thank you, Mr. Chairman.

Chairman ROYCE. Thank you.

We go now to Mr. Steve Chabot of Ohio.

Mr. CHABOT. Thank you, Mr. Chairman.

Iran has repeatedly violated its obligations under the Nuclear Nonproliferation Treaty. It has built secret nuclear facilities. It has illicitly procured nuclear materials. It has denied IAEA inspectors access to the suspected facilities.

So isn't it foolish to trust them now? Wouldn't a bad deal be throwing Israel under the proverbial bus? And, because of Iran's intercontinental ballistic missile goals, placing the U.S. at great risk as well? Now, I know you are going to say something to the effect that we are not trusting or this is trusting and verifying, but there are a whole lot of us on both sides of the aisle who, clearly, aren't buying it.

Mr. BLINKEN. Thank you, Congressman.

You are exactly right. Iran has repeatedly violated various obligations, which is exactly why it is in the position that it is in now—that is, facing the isolation and the sanction of the entire world and exactly why it is at the table now trying to negotiate an agreement.

Those violations are what led to our ability to impose the most severe sanctions on Iran of any country in history and convinced other countries to come along.

Mr. CHABOT. We are, clearly, concerned that we are going to end up in a bad deal. Let me go to the second question I have for you.

President Obama, clearly, has disdain for the winner of the Israeli elections held this week. Maybe the only group I can think of that he might have more disdain for is the elected representatives of the American people—this Congress.

Since Israel will be the most directly affected by a bad deal with Iran, how is the administration going to repair relations with our key ally in the region?

Mr. BLINKEN. Congressman, in my judgment, no administration has done more for Israel's security than this administration. If you look at the measures we have taken, the steps we have taken to provide for Israel's security over the past 6 years, they are exceptionally extraordinary and, indeed, Prime Minister Netanyahu has called them such, and that will—that will endure.

Mr. CHABOT. That is the least credible answer I have heard all morning, that this—no President has done more for the American-Israeli relationship than this President.

Mr. BLINKEN. No, that is not what I said.

Mr. CHABOT. That is——

Mr. BLINKEN. I said for Israel's security.

Mr. CHABOT. Security, relations, whatever. This President—there has been no President that has damaged relations between the United States and Israel more than this President.

Let me go to my third question. One of the concerns about a bad deal with Iran has always been proliferation in the region—that there is a nuclear arms race with the Saudis, the Gulf States, Turkey and perhaps others developing enrichment programs and eventually nuclear weapons.

There are indications that the Saudis in particular are so alarmed that a bad deal is in the cards that they are already moving in that direction. What is your response?

Mr. BLINKEN. Thank you, Congressman.

Well, of course, if there is no deal Iran could rush to a nuclear capacity and a nuclear weapon tomorrow, which I imagine is exactly what would spark an arms race.

So, indeed, the best way to prevent countries from feeling the necessity to do that is to prevent Iran from getting a weapon. The model that is being set by this agreement, if there is an agreement, is hardly one that other countries would want to follow if they decided that they needed to acquire the capacity to build a nuclear weapon because the Iranian model is a decade or more of isolation and sanctions and, indeed, anything that emerges from this agreement will require such intrusive inspections, access and monitoring I doubt any country would want to follow that model.

The answer is exactly what we have been doing, which is to do everything we can to prevent Iran from getting a weapon so other countries don't feel the need to do it and to build up their capacity to defend themselves.

Mr. CHABOT. Well, our concern, obviously, is that we are going to end up with a bad deal—they are going to get nuclear weapons and the other countries in the region are going to feel threatened. Then all the other countries are going to end up with them and Israel is right in the middle of that, and God help us if that is where we end up.

My final question: What is the difference between the road that we traveled down with North Korea and we are now traveling down with Iran, other than Iran is a far more dangerous country than North Korea?

There are a lot of us who believe that we have seen this movie before and we know how it is going to end.

Mr. BLINKEN. Thank you. They are very different cases.

The North Korean program was far more advanced. First of all, when the Clinton administration was in office, Iran, we believe, had the material for nuclear weapons and there is some analysis that suggests that it already had nuclear weapons before the agreed framework was signed. By the time President Obama came in, of course, North Korea had nuclear weapons.

Iran has neither. It is not—doesn't have the weapons, doesn't have the material for the weapons. It hasn't tested and, of course, North Korea, as you know, has also tested. So they are in far different situations.

The inspections regime that existed at various points for North Korea was far, far less than what Iran faces right now under the

interim agreement and certainly far less than it would face under any comprehensive agreement.

Mr. CHABOT. Well, my time has expired. But, again——

Mr. BLINKEN. And we have also taken lessons. I want to assure you we have taken lessons from that——

Mr. CHABOT [continuing]. There is great skepticism on both sides of the aisle here and, I believe, for good reason. I yield back the balance of my time.

Chairman ROYCE. Mr. Ted Deutch of Florida, ranking member on the Subcommittee on the Middle East and North Africa.

Mr. DEUTCH. Thank you, Mr. Chairman, and thanks to you and Ranking Member Engel. Thanks to our witnesses, Deputy Secretary Blinken and Acting Under Secretary Szubin. It is great to have you both here in your new roles.

Let me start with this. I understand that we are now approaching a deadline and I want to express my thanks, as I have every single time I have had the opportunity, for the focus on working to bring my constituent, Bob Levinson, home.

But as we approach these last days, let me just say that raising the issue at this point can no longer suffice, and that with respect to Pastor Abedini and Amir Hekmati and Jason Rezaian and Bob Levinson, if anyone is to take Iran seriously, that there is any commitment that they can make that can be adhered to, then the best show of good faith that they can make would be to return those Americans. I urge you to make that a priority. That is number one.

Next, I have been clear. I know we are not supposed to prejudge any deal but there are certainly things that would concern us in any deal that I think it is okay for us to address and I want to just go through a few of those.

First, a couple of straightforward questions. Deputy Secretary Blinken, will a final agreement and the technical annexes and side agreements be made public? Will they be readily available to Congress and to the public?

Mr. BLINKEN. Thank you.

Can I just start by saying, first of all, we strongly, strongly agree with your statement about the American citizens who are unjustly imprisoned in Iran.

I want to assure you this is something that we are working on virtually every day. The only issue that comes up regularly within the context of the nuclear discussions, apart from those discussions, is the—is our American citizens. We are working on it very, very vigorously. We want to bring them home and we very much share your commitment to do that.

Mr. DEUTCH. Thank you.

Mr. BLINKEN. With regard to whether the agreement will be made public, certainly, the core elements will. I don't know at this stage because we don't know exactly what form any agreement would take, whether certain pieces would be—would remain made classified and be subject to classified review, what parts would be public. I can't tell you at this stage because we don't know the exact——

Mr. DEUTCH. The greater the transparency the easier it will be for people to——

Mr. BLINKEN. I think we saw with the interim agreement that we reached that it was made public and Congress had full access to it.

Mr. DEUTCH. Congress had full access to it. The American people didn't. Let me just go on.

Next, again, just a couple of straightforward questions. Does Iran—Secretary Blinken, does Iran remained the world's most active state sponsor of terror?

Mr. BLINKEN. Whether it is the most active, it certainly for sure in the very top percentile.

Mr. DEUTCH. And is the administration in any way considering removing them from the state sponsor of terrorism list?

Mr. BLINKEN. No.

Mr. DEUTCH. Thank you.

Now, when it comes to the issues that we are dealing with that concern me in any deal, one, we have talked about the number of centrifuges and the infrastructure. A question I have is whether the ultimate number of centrifuges is reduced from the close to 20,000 to 6,000 or 7,000 or 3,000, whatever the number is, what will happen to the rest?

Will any of them be dismantled? Will they go into a closet? Will they go into an attic? Will they be readily available for Iran at the expiration of the deal?

Mr. BLINKEN. All of that is subject to the negotiations. That remains to be determined. I think you are right to point in general to the centrifuges. Obviously, that is a key component. But it also important to understand it is not the only component.

Mr. DEUTCH. I understand. I understand, and I only have a little time. But I would encourage—I would suggest that if the ultimate deal doesn't require that a single one of those centrifuges is dismantled, it is going to make it awfully difficult for a lot of us to be comfortable that this is a serious enough step to prevent them from breaking out.

Next, I just—I think you can understand, and I am not going to have time to get to my other—so I will just focus on this. I think you can understand the frustration that we have when both you, Secretary Blinken and Mr. Szubin, both talked about phased, proportionate and reversible sanctions relief but then went on to acknowledge the plan to go to the United Nations Security Council and to make clear that at the U.N., Venezuela, Malaysia, Nigeria may get a chance to vote on this deal now but Congress, ultimately, will have a chance to vote on this perhaps 5, perhaps 10, perhaps 15 years in the future.

That is what we are being told. I hope you can understand the frustration and how can—and the real question I have is how can the sanctions relief be reversible if the plan is to go to the United Nations to reverse all of the multilateral sanctions, leaving only the American sanctions in place?

Mr. BLINKEN. Again, I just want to try to make it clear that this is, if it happens, an international agreement that has other parties to the agreement. That is done through the Security Council.

The Security Council would take note of any agreement and it would make clear that it is prepared, once Iran demonstrates that it is meeting its commitments, which would be at some point in the

future because there would be a series of commitments under the deal, at that point to suspend or lift any international sanctions.

Our own sanctions, again, would be under our own discretion and ultimately Congress has to pass judgment on that.

Mr. DEUTCH. And Mr. Chairman, if I could just ask to have Mr. Szubin provide to us, because I am out of time, provide to us after this hearing a breakdown to the extent that you have done it of the $700 million that has been released every—the money that has been released every few months under the interim deal, and if you have done analysis on a deal of what a final deal might look like of sanctions relief, to the extent that $10 billion, $20 billion, $50 billion of the frozen money was released all at one time where any that money in the case of the interim deal has gone in Iran, where it would go under the—under the permanent deal and whether it would simply wind up going to benefit the Revolutionary Guard, the military and their terrorist activities.

I thank you and I yield back.

Chairman ROYCE. Without objection, so ordered. And we go to Mr. Mike McCaul of Texas.

Mr. MCCAUL. Thank you, Mr. Chairman.

Mr. Secretary, Section 1, 2 and 3 of the Atomic Energy Act, as you know, requires that all significant U.S. nuclear cooperation agreements must be approved by both houses of Congress.

Last year, Congress approved two such agreements, one with South Korea and the other one with Great Britain, who are our allies. However, in this case, when we are dealing with the world's leading state sponsor of terrorism, the position of this administration is that that should not be subject to approval by the United States Congress.

I don't quite understand that distinction. Can you explain that to me?

Mr. BLINKEN. Thank you, Congressman.

I think the issue is what is the best form of an agreement in order for us to have the flexibility that we need to make sure that Iran is living up to its obligations and to be able to reimpose sanctions quickly if it is not. We—what we are seeking is—and the issue here is really whether this is a legally binding agreement or not.

If it is a legally binding agreement, it would be subject to the rules of international law on how you get into an agreement and how you get out of it, which can be quite burdensome.

So having a nonbinding agreement allows us to have the flexibility we need if necessary to snap back sanctions immediately, not wait for international partners to agree or not agree.

With regard to whether it is a treaty or not and so subject to the advice and consent of the United States Senate, as you know, the vast bulk of international agreements that we have made under Democratic administrations and Republican administrations in the nonproliferation area and the foreign policy area more generally in fact are not treaties and are not subject to the advice and consent of the Senate.

And I can go through the list under the nonproliferation area. We have everything from the missile technology control regime,

which has been very successful in creating voluntary export licensing around the world, the nuclear security guidelines——

Mr. MCCAUL. And my time is limited, and I appreciate what you are saying. I just think we are treating our allies different from a state sponsor of terror and I think that the American people, through its representatives, should be weighing in this deal. But I know we disagree on that point.

ICBMs—this concerns me greatly. There has been no—this has been off the table, not part of the discussions at all, and the intelligence community and the Pentagon in its annual report on military power of Iran have noted that by—as early as 2015 of this year they may have ICBM technology—missile ranges that could potentially reach as far as the United States of America.

And then the Ayatollah, the Supreme Leader, says that to limit this program would be a stupid idiotic expectation and that the Revolutionary Guard should definitely carry out their program and should mass produce.

Why in the world isn't this on the table and does that not concern you about their intent here?

Mr. BLINKEN. Yes. The missile program is absolutely a concern which is, again, why we have been working very vigorously around the world to deny, where we can, Iran the technology for that program and to push back against proliferation.

In that effort, whether there is an agreement or not, we will persist in those sanctions and the various measures we are taking will continue regardless of whether there is an agreement.

The scope of this agreement, if there is one, is the nuclear program. That is what our partners have agreed to. That is what is being negotiated. It is not a missile agreement.

Now, there are aspects of it that come into this that are critical in terms of Iran's capacity to make, potentially, a nuclear weapon to a missile and, indeed, we are focused on that because that does fall within the confines of what we are——

Mr. MCCAUL. Well, because that is the delivery device for a nuclear warhead.

Mr. BLINKEN. Exactly. Exactly.

Mr. MCCAUL. And so they are not backing down on that, which kind of makes me question, you know, their whole good faith analysis here. You know, if I could just say, when I read their own words, President Rouhani, who you say is taking a different tack and trying to be a peacemaker here, says that in Geneva agreement world powers surrendered to the Iranian nation's will, and that is in his words.

And then, you know, they said that the centrifuges were spinning and will never stop. When Prime Minister Netanyahu gave his speech at the joint session of Congress, Iran was they were blowing up a mock of the USS Nimitz in the Red Sea, simultaneously.

I question the good faith here. You have an extraordinary challenge, sir, and I wish you all the best. But I cannot—I just have to question the good faith on the part of Iran.

Mr. BLINKEN. Sir, you are exactly right. It is not a question of good faith.

It is a question—and by the way, whether it is President Rouhani or the foreign minister or any others, it is not that we think these are good guys who like the United States.

It is that there are some people who are somewhat more pragmatic about what Iran needs to do for its own interest in the future and they believe that negotiating an agreement and getting some relief from the pressure that they have been under is what makes the most sense for their country, again, not because they like us or have good intentions.

The other thing I would say that I think is important is that there are abhorrent statements made on a regular basis by Iran's leaders on all sorts of issues. In some instances, though, some of these statements are made for domestic political purposes.

We sometimes have a tendency to see Iran as the only country on Earth that doesn't have politics. In fact, it has very intense politics and there is a lot of politics going on right now between those in Iran who would want an agreement, again, because they believe it is in the interest of the country, and those who don't want one, and some of the statements you are seeing, as objectionable and as abhorrent as they may be, some of those designed for political consumption at home to push back against those who do not want an agreement. Thank you.

Chairman ROYCE. I hear "Death to America" on an ongoing basis regardless of the politics and that is concerning for us.

We go now to David Cicilline of Rhode Island. Mr. Cicilline?

Mr. CICILLINE. Thank you, Mr. Chairman. Thank you very much for being here and for giving us your insight on this very important issue.

I am hopeful that the ongoing negotiations will ultimately result in an agreement that we can get behind and I think, as our chairman and our ranking member said, many of us have a lot of questions about the details of a final agreement and in a letter I think we will express to you what some of those concerns are.

As I listen to the—my colleagues today, you know, guaranteeing that actors to a negotiated agreement are going to behave in a certain way is always difficult and we have no guarantee of that.

And so it seems to me what the goal of this agreement should be is to be sure that we set it out so that it is difficult for them to violate the agreement, that we make it certain that we can detect it if they do and that we have an opportunity to respond to it.

I mean, that is really the best we can do other than imagining that we can control the decisions of lots of other people.

And so with respect to that, last year the Pentagon's Defense Science Board released a report that found the U.S. Government mechanisms for detection and monitoring of small nuclear enterprises or covert facilities are "either inadequate or, more often, do not exist."

So in that context, how will we know and what are we doing to ensure that we would learn if Iran was pursuing a covert program, particularly after the sunset of a comprehensive agreement, and will the additional protocols in the NPT address this?

But isn't that a fair question to know? We are not particularly good at that from the sounds of it in general, and with respect to Iran in particular what are the protections?

Mr. BLINKEN. Thank you very much, Congressman.

Yes, I think you make a very important point and, indeed, I am well aware of the report by the Defense Science Board. We are factoring in the report's recommendations as we work on and think about any agreement with Iran.

I think it underscores the absolute necessity of having the most intrusive significant monitoring access transparency regime anywhere, anytime, anyplace in the world, and in terms of what happens in perpetuity it underscores the absolute necessity of having at the very least the combination of the additional protocol, Modified Code 3.1, and a safeguards agreement.

Those things taken together, the storehouse of knowledge that will be built up by the exceptional transparency measures, we believe that all of those things taken together will give us the ability to detect any efforts by Iran to break out or to sneak out.

But I think the report underscores the absolute essential nature of those components of any agreement.

Mr. CICILLINE. Thank you. And would you speak for a moment about kind of what you see as the kind of scenario if no agreement is reached?

There has been a lot of discussion about the urgency of enacting additional sanctions, which I think Congress would do immediately and the President would support. But to the extent that happens, do you foresee that that actually would prevent the development of a nuclear weapon?

I mean, the goal here we shouldn't lose sight of is not just to impose pain on Iran but impose conditions such that they don't develop a nuclear weapon. That is the ultimate goal.

And I am wondering if you would speak to what is the alternative of a good comprehensive agreement here. What do you likely see even if additional sanctions were imposed if these talks fall apart? Do we prevent a nuclear Iran in that scenario?

Mr. BLINKEN. Well, I think it depends very much on how an agreement is not reached. That is to say, if it is clear at the end of this process that Iran is simply not able and will not make a reasonable agreement, then, clearly, that calls not only for sustaining the existing pressure but adding to it in an effort to get them to rethink that very unfortunate position and, indeed, to bear down on all fronts in its efforts to acquire technology for a nuclear program and the resources for a nuclear program. So that is where we would want to go.

Now, if on the other hand, we are at the end of March very close, having gotten agreement on many of the key elements but not all of them, and because nothing is agreed until everything is agreed we can't put the whole thing together, then I can see a circumstance where it might be useful to take the time that we still have until June under the nature of the interim agreement that we signed. So we have to see exactly where we are.

The third possibility, of course, is that for whatever reason we are perceived as having been responsible for the failure to reach an agreement or at least there is enough mud in the waters to create

that impression, that—were that to happen, which absolutely cannot and must not happen, that would make it more challenging, not only to add new sanctions and add more pressure but just to sustain the pressure that we have because it is very important to keep remembering that this is not just about us.

The power, the efficacy of the sanctions that Congress has produced and that we have been implementing is exponentially magnified by the participation of other countries around the world. If that goes away a lot of the power of the sanctions will.

Mr. CICILLINE. Thank you. I yield back.

Ms. ROS-LEHTINEN. Thank you so much.

Mr. Poe of Texas.

Mr. POE. I thank the gentlelady.

I have a lot of questions and I think you can answer many of them with just a yes or no. They are not gotcha questions. But unless I ask you to explain the answer, don't explain the answer, if you would.

The 10-year agreement or however many years it is going to be. Is the deal that the sanctions will be lifted—all of the penalties, I should say—after the agreement is over with whenever that is? With Iran, are the penalties coming to an end?

Mr. BLINKEN. Congressman, it would be—it would be phased. That is, we would insist on Iran demonstrating compliance and then certain sanctions might be at that point suspended, not ended. And after still more compliance, at some point sanctions would actually be ended, assuming Congress agreed to end them.

Similarly, on the international front with the U.N., we would be looking at demonstrated compliance by Iran and then suspension and then ending. And then if Iran didn't do what it was supposed to do or if it cheated or reneged, we would have snap back provisions both here and internationally.

Mr. POE. Okay. The purpose of this agreement is to prevent Iran from getting nuclear weapons. Would you agree that Israel is probably concerned, being a neighbor, about Iran getting nuclear weapons?

Mr. BLINKEN. Yes.

Mr. POE. And the United States are both concerned about—the United States as well?

Mr. BLINKEN. Yes.

Mr. POE. The ICBM issue—that is not even being discussed as a part of this agreement, is it?

Mr. BLINKEN. That is correct.

Mr. POE. And the Supreme Leader has said they want to get rid of Israel first and then take on us—calls us the Great Satan. And one way to get to us is the ICBMs, correct?

Mr. BLINKEN. That is correct.

Mr. POE. ICBMs aren't needed to eliminate Israel. They have got other missiles that can already go and reach Israel. Is that correct?

Mr. BLINKEN. That is correct.

Mr. POE. We are not talking about trying to prevent the ICBMs. All we are trying to do, if I understand the State Department's position, is to keep them from getting technology.

Mr. BLINKEN. What we are trying to do apart from this agreement——

Mr. POE. Is that correct? We are trying to get them——

Mr. BLINKEN. The contours of this agreement go to the nuclear program and to the United Nations Security Council resolutions regarding that program. That is what needs to be satisfied. Those are the terms of the negotiations that our partners sign on to.

Mr. POE. Okay.

Mr. BLINKEN. Separate and apart from that, though, we are working very hard to prevent Iran from getting the technology.

Mr. POE. That is what I just asked you. It is a yes or no. We are trying to prevent them from getting technology. But isn't it true that Iran is pursuing the development of ICBMs in their country?

Mr. BLINKEN. I am sure that is true, yes.

Mr. POE. So it is true. So they are building the missiles. We are not trying to stop them, except we just don't want them to get the technology from the North Koreans or the Chinese or Russians.

Mr. BLINKEN. Well, that is why they need—that is why they need to develop it and they need to get technology from other countries with knowledge——

Mr. POE. Reclaiming my time. They are developing intercontinental ballistic missiles. Is that correct?

Mr. BLINKEN. They are trying to do so, yes. That is correct.

Mr. POE. And we are not dealing with that issue, I don't think, at all.

Mr. BLINKEN. We are, but just not part of this——

Mr. POE. Excuse me, sir. Excuse me.

Mr. BLINKEN. Sorry, Congressman.

Mr. POE. We are trying to prevent them from getting nuclear weapons, which I think at the end of the day if this agreement is signed and delivered they will get them eventually and then they may have the capability to send them to us.

I think this is a long-term threat to the world and especially the United States and Israel and peace-loving countries. Iran gets nuclear capability. Assume this. Would you agree that Saudi Arabia will get it next? Turkey will get it? Egypt will get it? And who else knows in the Middle East to balance the power over the Middle East?

Mr. BLINKEN. Yes, it sigificantly increases the likelihood, which is why we are trying to prevent them from getting one.

Mr. POE. Just a couple of more questions.

The 2015 Worldwide Threat Assessment put out by the Director of National Intelligence, you said that this report focused on ISIS.

If it is a worldwide assessment—worldwide—wouldn't you think that it would mention Hezbollah? You think it might? Should?

Mr. BLINKEN. Hezbollah is a foreign terrorist organization. It remains designated. It remains a focus of our activities.

Mr. POE. But it is not mentioned as a worldwide threat in this report. That confuses me. If the Federal Government comes out with a report and it reports on everything, and it is a worldwide threat assessment of terrorism, we leave off of the state sponsor of terrorism—Iran—and we leave off their puppet, who is causing mischief all over the world—Hezbollah—that seems a little bit confusing to me.

So would you recommend that maybe the intelligence agency go back and have an addendum to this worldwide report and add these other two organizations?

Mr. BLINKEN. What I can tell you is, led by the intelligence agencies, we are pushing back every single day on Hezbollah's activities——

Mr. POE. So you think they ought to add to the report that Hezbollah and Iran are terrorism threats to the world?

Mr. BLINKEN. Let me go back and look at the report.

Ms. ROS-LEHTINEN. Thank you. Thank you, Judge Poe.

Ms. Frankel of Florida.

Ms. FRANKEL. Thank you, Madam Chair. Thank you, gentlemen, for being here today.

Well, it does sound like the one thing that we all agree on is that Iran should not be able to get a nuclear weapon. I have a couple of questions. I want to—if I could just state them first and then you can answer.

First—my first question is if there is no deal, how long would it take Iran to—at this point, do you think, to break out to have a nuclear weapon?

It is interesting because I hear the frustration of so many of my colleagues about, you know, not trusting Iran. I think we—no one trusts Iran. But if we do not get a deal, we do not get a deal, is the alternative—the realistic alternative a military operation?

What would that look like? And if there was a military operation, how long do you think that could delay Iran from getting a nuclear weapon and what do you think would be the interim collateral damage? I mean, what would you—I am sure you have discussed this.

You know, what is the scenario of not having a deal? Now, and just to add to that, you have said, well, if there is no deal, then we are going to increase the sanctions. But I am assuming that you have made the calculation that we have taken them—that this is a time to get a deal. So you can respond to those thoughts.

Mr. BLINKEN. Thank you very much, and I think that you raise very important questions.

First, with regard to the break-out time, this is something we can, I think, best deal with in a classified setting. But what I can tell you broadly is this, that currently the break-out time is a matter of a few months, if everything went just right.

But, of course, we would—even under the interim agreement, we would see that immediately. But that is—that is where we are. So if there was no deal, that is where they would be.

But, presumably, under various scenarios they would then seek to speed to increase the number of centrifuges, and increase the other capacity, move forward on Fordow, move forward on Iraq. And as a result of all of that over some period of period of time the break-out time would drop, presumably, even further.

What are the alternatives? Well, I think that is a critical question because at the end of the day any agreement that is reached has to be evaluated, first of all, under the terms of the agreement. That is the most important thing. People will have to decide whether the agreement holds up, makes sense and advances our security.

But I think it is also going to be very important for those who would oppose the agreement, if there is one, to say what the alternative would be and how it would be achievable. Those are critical questions because we are not operating in a vacuum and in an abstraction.

So a lot, again, as I suggested earlier, depends on why there would be no deal. That is, if it was clear that Iran simply was not going to make an agreement and the international community recognized that, I think we would be in a position not only to sustain the sanctions that we have now but to increase the pressure and increase the sanctions.

Now, however, if for whatever reason that didn't happen, if Iran started speeding to a weapons capacity and to a bomb, then a military option has always been on the table. It would remain on the table. If military action were taken, it could certainly set back Iran's program for some period of time.

But, again, it is important to understand that because Iran has the knowledge and that we can't bomb that away, we can't sanction it away, that at some point they would resume their activities.

They would probably go underground. We would lose the benefit probably of the international sanctions regime and pressure and Iran would be in a better position than it is today and, certainly, than it would be under an agreement.

Ms. FRANKEL. And, if you could, because I am sure you have talked about this, what would be the ramifications especially in the region if all of a sudden there was a war with Iran? What would be the consequences, for example, to Israel? What would you expect?

Mr. BLINKEN. Well, I think, first of all, if Iran were in a position where it was rushing to a nuclear weapon, many of the concerns that have been raised by other members of the committee in terms of what other countries in the region would do would be front and center.

That is, it would be, I think, very tempting for other countries to feel that they needed to pursue a nuclear weapon to protect themselves. That is exactly one of the reasons we are trying to prevent Iran from getting a weapon. We do not want to see an arms race in the region.

In terms of Israel, it faces an existential threat from Iran and, indeed, one of the reasons we are trying to prevent Iran from getting a weapon is in defense of our close ally and partner, Israel.

Ms. FRANKEL. But would you—would you expect further acts of terrorism?

Mr. BLINKEN. Oh, I would—I would expect that Iran unshackled with a weapon or speeding toward one, would feel further emboldened to take actions in the region, including against Israel.

Ms. ROS-LEHTINEN. Thank you, Ms. Frankel.

Subcommittee chair, Mr. Duncan, is recognized.

Mr. DUNCAN. Thank you, Madam Chair. And this has been a very informative hearing. Yesterday, we had a hearing on Iran as well. Mr. Deputy Secretary, do you believe Iran is present and active in the Western Hemisphere?

Mr. BLINKEN. Yes.

Mr. DUNCAN. Do you believe their influence is steady? Do you think it is increasing, as General Kelly may say, or do you believe it is not?

Mr. BLINKEN. I think they are trying in various parts of the world including in our own hemisphere to position themselves and to take advantage of any openings that they have.

Mr. DUNCAN. The State Department report that came out in 2013 says that the Iranian threat in the Western Hemisphere is waning. Are you aware of that?

Mr. BLINKEN. I am yes.

Mr. DUNCAN. Okay. If Iran is—is Iran still on the state sponsor of terrorists list?

Mr. BLINKEN. Yes.

Mr. DUNCAN. Okay. So they are still aiding and abetting terrorist organizations like Hezbollah all over the world, correct?

Mr. BLINKEN. Yes.

Mr. DUNCAN. Okay. What is going to—what is going to change with this agreement with regard to their being on the state sponsor of terrorists list, as of the administration?

Mr. BLINKEN. Nothing.

Mr. DUNCAN. So we are negotiating with a country that is not willing to quit exporting terrorist items to terrorist organizations that could threaten the United States and its friends and allies, right?

Mr. BLINKEN. So we are negotiating in order to deny them a nuclear weapon which would further embolden those activities. And at the same time, we are making it very clear that whether or not there is an agreement we will continue to be taking action against its efforts to do all of the things you just cited.

Mr. DUNCAN. Iran has continually violated past obligations with regards to sanctions and sanctions relief and all of that. What is to make us think that they are not going to violate this?

Mr. BLINKEN. Because of the penalties that they would have to pay. The reason that they are at the table now is because they violated——

Mr. DUNCAN. But it is not legally binding on us. Do you—will you all of a sudden think it is going to be legally binding on them?

Mr. BLINKEN. I don't think——

Mr. DUNCAN. How do you think they—how do you think they view that statement?

Mr. BLINKEN. Oh, I think the issue is not whether it is legally binding. The issue is whether it is very clear, and it will be, that if they violate the agreement there will be serious consequences.

It doesn't matter if that is legally binding or not. The sanctions will come back into full force and there will be more sanctions.

Mr. DUNCAN. North Korea has the same sanctions and they violated those and they have the bomb now.

Mr. BLINKEN. But, again, with regard to Iran the very reason they are at the table is because they spent years and years and years violating their obligations. Thanks to Congress, thanks to the administration, thanks to our international partners, we exerted significant pressure on them and now, faced with that pressure, they are seeking to make an agreement.

Mr. DUNCAN. I think pressure works. I think the sanctions worked. I think Mr. Szubin talked about some of the repercussions of that.

Now, let me move on. In April 2014, Secretary of State John Kerry said that the Obama administration will consult with Congress about sanctions relief contained in a final agreement and he said, well—and this is his quote: "Well, of course, we would be obligated under the law," he said, adding "What we do will have to pass muster with Congress. We well understand that."

Yet, the Secretary's testimony in the Senate last week, excuse me—Deputy Secretary Blinken said and Under Secretary Cohen indicated that the Obama administration would not submit a potential agreement to Congress for a vote. Instead, the administration will sign what is termed a political agreement.

So What is the difference between what Secretary Kerry said in 2014 and what is being said by the administration now?

Mr. BLINKEN. No, I don't there is a difference, sir. I think the Secretary is exactly right. First of all, in our judgment, at least, we have consulted extensively throughout the duration of these negotiations—as I cited earlier, more than 200 hearings, meetings, calls, briefings.

If there is an agreement, obviously, we will go through that in great detail in Congress in open sessions and closed sessions, in meetings, in calls. And as we have been clear all along, the agreement at some point will call—will require the lifting of sanctions and only Congress can decide whether to do that or not.

So Congress will have a vote and, indeed, keeping that Sword of Damocles hanging over the heads of the Iranians—that is, the knowledge that the sanctions have been suspended but not ended and that Congress has the authority to end them—we think will be leverage to make sure that they make good on their commitments.

Mr. DUNCAN. Okay.

Madam chair, I don't have a whole lot of other questions.

Ms. ROS-LEHTINEN. Thank you so much.

Mr. DUNCAN. A lot them I asked. Thank you. I yield back.

Ms. ROS-LEHTINEN. Because although there is a vote on and we have two votes, the subcommittee—I mean, the full committee will come back. But we would never break without the opportunity of recognizing Mr. Connolly for his 5 minutes.

Mr. CONNOLLY. I thank my friend.

Unfortunately, I have to begin by chastising my friend. You know, my friend, the chair, who is truly my friend, referred to the President having a temper tantrum about Prime Minister Netanyahu, and Mr. Chabot, my friend from Ohio, and he is also my friend, said there is no President who has done more to damage the U.S.-Israeli relationship.

I cannot let that go by. A foreign leader has insulted the head of state of the United States Government. It is not a temper tantrum and it didn't start with President Obama. It started with Bibi Netanyahu.

You can decide for yourself whether it was appropriate for him to speak to a joint session. But the process is beyond dispute.

It was an insult to this government. Friends don't act that way, and I would say to my friend, Mr. Chabot from Ohio, it would come as news to Shimon Peres, the outgoing President of Israel who gave President Obama the highest award that the Israeli Government can give, for his support of Israel.

At some point, does the partisan rhetoric ever stop? Where are your loyalties with respect to the prerogatives of this government and our country? And the shameless way Mr. Netanyahu has conducted himself deserves reproach and I think the President has actually shown restraint.

And I say this as somebody who has a 35-year record of unwavering support for Israel. I am not a critic of the Israeli Government. But I am a critic of how this Prime Minister has treated my President—everyone's President—and I cannot sit here and listen to the waving away of bad behavior that is an insult to my country.

We have one President, whether you like him or not, whether you want to take political issue with him or not. Fair enough. That is fair game.

But when a foreign leader insults him, that should not be fair game and that should never be apologized away because it damages relationships long-term. It puts a divide where there was never a divide in public opinion in my country and I worry about that long term. I hope you do too.

Let me say, Mr. Deputy Secretary, it seems to me there are five issues that Congress has to be concerned about. There is the broad extensional question, are we better with a deal or without.

I would argue that same Prime Minister of Israel has never supported any agreement with Iran even though we are where we are, and he would like zero centrifuges. He would like zero enrichment capability.

He would like a complete roll back so that there is no nuclear capability, and so would I. But I don't know anybody who can achieve that, realistically, and if you feel that, if those are your goals, the only option is what has euphemistically been called the kinetic option if you are not willing to accept any nuclear capability and I am not sure the American people support that. I am not even sure the Israeli people support that. Would you agree with that analysis, Mr. Deputy Secretary?

Mr. BLINKEN. Thank you. I would agree. As we discussed earlier, that Iran has knowledge of the fuel cycle. They know how to make a bomb if they choose to do it and we can't bomb that away. We can delay it. We can't eliminate it. It is knowledge.

Mr. CONNOLLY. Let me—let me say I think there are five issues. If we move on—okay. Let us accept that and so we need an agreement. We are going to get the best agreement or we need to seek the best agreement we can.

I think with respect to my colleagues in Congress including myself there are five issues that have to be addressed and that the administration is going to have to convince us you have addressed efficaciously to the best of your ability to our satisfaction.

One is what capability is left in place? Number of centrifuges, percentage of enrichment—something we can live with? Something we got to worry about? Two, cheating, and that—the inspection regime to me is all important. If there are holes in the inspection re-

gime I don't see how you are going to get any confidence in the agreement.

Thirdly, sanctions—how do we phase in the lifting of sanctions assuming an efficacious agreement and how expeditiously can we reimpose them? Our worry up here is that we might be okay but our allies may not.

Fourth, the threshold time frame—there are a lot of—there is a lot of legitimate concern up here that it is too fast, that Iran can quickly rush to nuclear capability under the reported terms of the agreement.

And, finally, the expiration of an agreement—the time frame for expiration. A lot of people are very concerned about the that, that it is almost an open invitation to a future Iranian Government to proceed.

Thank you very much, Madam Chairman.

Ms. ROS-LEHTINEN. Thank you, Mr. Connolly, and it is not my temper tantrum to cut you off. We really are out of time.

Mr. CONNOLLY. I know. I know.

Ms. ROS-LEHTINEN. And to all the committee members and witnesses, we have two votes on the floor. We will recess briefly and then come back to get to the most amount of members that we can get to before our witnesses have to depart.

And so with that, the committee stands in recess. Thank you.

[Recess.]

Chairman ROYCE. We will re-adjourn and go to Mr. Tom Emmer of Minnesota.

Mr. EMMER. Thank you, Mr. Chair, and thank you to both the witnesses for being here today.

Just a couple of questions because you pretty much have been running the range today in front of the committee. But first, Mr. Blinken, thank you for being here, again, and thank you for your service.

Your opening remarks were assuring to somebody like me who wants to see the branches as they were constructed work the way they are supposed to and I just want to confirm, if you will bear with me.

I believe it is Article 1 Section 8 says that it is the sole responsibility of Congress to enter into agreements with foreign nations, which would include treaties or agreements such as the one that we have been discussing, and I believe that you confirmed that again this morning that it will be Congress's obligation to finalize, ratify any negotiated agreement.

Mr. BLINKEN. Because Congress imposed and legislated the sanctions on Iran, if those sanctions are ever to be lifted Congress must be the one to do it. Congress has the—only Congress has the authority to do that.

Mr. EMMER. But that is what is already in place. That part aside, any agreement with the details that the administration is participating in the negotiations in right now it is Congress that not only—I think your words this morning will play a very important role—that was number one, which indicates to me there will be much communication once this framework, if it is reached by the end of this month—once that is reached there will be some significant communication.

Mr. BLINKEN. Absolutely.

Mr. EMMER. And after that, assuming that can you can arrive at the final details by the end of June, then I just want to make sure that I understand your position on behalf of the State Department is that Congress will have to approve or will not any final agreement.

Mr. BLINKEN. No, Congressman, that is not our position. This would not be a treaty that would be subject to the advice and consent of the Senate.

This would be an agreement that, obviously, as I said before, for its terms to be implemented, assuming that sanctions are to be lifted, Congress would have to play that role and it could decide whether or not to do that.

And you are absolutely right that just as we have sought to consult fully throughout this process in hearings and briefings and meetings and phone calls, you are absolutely right that if there is an agreement in the coming weeks that we would consult intensely with Congress on that agreement. Every aspect of that agreement would be——

Mr. EMMER. But all you—but all you are going to ask for, based on what you are testifying to this morning, is that Congress lift the sanctions. You are not going to ask for Congressional approval of the final agreement.

Mr. BLINKEN. That is correct.

Mr. EMMER. So if it is not legally binding then, as Secretary of State Kerry has discussed, what do you actually believe that you are getting out of it then? And let me just add to it because I am trying to be very measured.

It disturbs me greatly to have people talk about giving an organization that is not interested in peace around the globe, that is actually and being an aggressor and trying to roil up problems—we are going to give them all kinds of hard currency. Explain to me how this is a good idea.

Mr. BLINKEN. So two things. Thank you, Congressman. First, with regard to whether it is legally binding or not, if this is really a question of international law, first and foremost, if you make a legally binding agreement then it is subject to various provisions of international law which actually make it more difficult to do things we may have to do if Iran violates the agreement.

There are all sorts of treaty law formalities that we would have to go through if we said Iran is violating the agreement.

We would have to present a legally defensible reason to cease our implementation of our commitments under the agreement. We might get into a debate with our international partners if they did not agree. I am making——

Mr. EMMER. Well, I am going to run out of time, with all due respect. I am going to run out of time. So I just—I think that this is the problem that the administration has had and now the administration and Congress are having is this breakdown in an understanding of respective positions in the process, and the idea that this administration is going to get approval from the U.N. Security Council as opposed to coming to Congress is not only disturbing, it is wrong, from my perspective.

Mr. BLINKEN. Thank you, Congressman.

Could I just mention—you know, again, I just want to be clear. We will have to go, if there is an agreement, to both. That is, there are sanctions that are pursuant to the United Nations Security Council that have been implemented by the Council so the Council will have the authority and will have to decide whether to lift them or not, suspend them or not.

Similarly, our own sanctions have been imposed and legislated by Congress. Only Congress can decide whether to end them. And, as you know, the vast majority of the international agreements that we strike around the world, a key tool of our foreign policy and national security policy, are nonbinding.

Mr. EMMER. Thank you. Mr. Chair, I am going to yield back.

But I just want to make the comment that it is amazing to me that this administration apparently puts Congress and the U.N. on the same level in terms of who they are going to deal with.

Chairman ROYCE. If the gentleman will yield. I am not sure it is on the same level because I think the U.N. vote will come immediately.

Mr. EMMER. Again, I was trying to be measured.

Chairman ROYCE. You were being measured and I appreciate that, Tom.

I do think that it is going to be a considerable amount of time under the calculus that the administration is working under when they intend to come to Congress for that vote and that is very, very concern concerning. But I appreciate the gentleman raising this issue.

We go now to Brian Higgins of New York.

Mr. HIGGINS. Thank you. Mr. Secretary, is this the most complicated negotiation that the administration has been involved with internationally?

Mr. BLINKEN. It is—I think the answer is yes. I am searching my mind to think of anything that could rise to a higher level of complexity. You know, arguably, the new START agreement was complicated. But I would I have to say this probably tops the list.

Mr. HIGGINS. Yes. Now, the interesting thing is, you know, it is still an agreement. You hear varying reports saying that, you know, 90 percent is done and 60 percent is done. But, you know, the bottom line is that it is still very fluid.

Mr. BLINKEN. That is correct.

Mr. HIGGINS. And those issues that remain will always be the most critical issues because they are the most difficult to find mutuality on.

Mr. BLINKEN. That is correct.

Mr. HIGGINS. But, clearly, the issue of fuel and enrichment capacity are central to this and inspections and verification. How many pounds of enriched uranium is Iran though to have currently?

Mr. BLINKEN. So they have a stockpile of low enriched uranium at about 3.5 percent that is, I recall, is about 7,000 kilos. Is that correct?

Mr. HIGGINS. And under the current draft framework, what would become of that 3.5 percent enriched uranium?

Mr. BLINKEN. So you will understand I can't get into the details. This is all subject to negotiations. But one of the elements, and you

are right to point to it, that would be important in figuring out their break-out time is the available stockpile of material that they have to work with.

So centrifuges—the number of the centrifuges is one component. The configuration of the centrifuges is another. The stockpile is a third. And depending on how you put those elements together you limit their break-out time.

But I can't tell you what the limitation might be under an agreement because that is all subject to the negotiation.

Mr. HIGGINS. The proliferation of centrifuges 10 years ago, really, under Rouhani, there were probably, you know, less than 200 centrifuges.

Now there is over 19,000. Now we are talking about advanced centrifuges. We are talking about next generation centrifuges. We are talking about, as you mentioned in your response, a knowledge that you can't destroy.

Is it—is it plausible, is it—is it realistic to accept the uranium—Iranian argument that they need so many centrifuges in order to sustain a civil peaceful nuclear program?

Mr. BLINKEN. Well, look, obviously, we are highly skeptical of that argument. The fact of the matter is that they, clearly, had the military aspirations for their program at least through 2003.

That is, certainly, the assessment that our intelligence community made at the time. And, of course, so many aspects of this program strongly suggest that they are seeking or have been seeking a nuclear weapons capacity.

That said, their argument, for what it is worth, is that they do want to build a nuclear power program for the country. They, obviously, have vast oil resources so why they would need it is a very good question.

They say that they want to devote oil to exports. They want to have the nuclear program for domestic energy production. They talk about a post-carbon future, which other countries talk about.

But all of that said, their activities, of course, suggest the opposite and if that is really what they were focused on, they could presumably, you know, buy nuclear fuel abroad instead of produce it.

Mr. HIGGINS. Well, let me ask you this. What percentage of Iranian's domestic nuclear power is nuclear?

Mr. BLINKEN. It is very de minimis but I will get you the exact number. But what they—what they purport to be looking at is a much more significant piece of their domestic energy program being provided by nuclear.

That is the argument they make for why they would need a significant enrichment capacity in the future and, again, we are certainly skeptical of that, especially given their oil resources.

Mr. HIGGINS. The—you know, it is just, you know, again, very, very difficult within the context of what Iran is engaged in today.

Qasem Soleimani, head of the Quds Forces, is on the ground in Iraq today, probably, you know, directly leading the Shi'a militias in Iraq today to defeat ISIS.

He saved Bashir al-Assad in the 11th hour to preserve Syria as a land bridge into Lebanon, to Hezbollah, which acts as a proxy for Iran.

And yet here we sit with them face to face in negotiations. I do understand the complexity of diplomacy and the fact that you use diplomacy with your enemies more than your—but this is a very, very, very hard thing not only technically from the standpoint of a negotiator—and we do appreciate your efforts—but politically as well. You know trust is a hard thing and America is an extraordinary superpower.

But I do believe that even if, you know, in the end we have to exercise a military option because negotiations fail, I do think we have to demonstrate to the international community that every diplomatic avenue was exhausted before that can happen and that is, unfortunately, the responsibility of America as the indispensable world power.

I yield back.

Mr. BLINKEN. Thank you.

Chairman ROYCE. I thank the gentleman for yielding.

We are going to Mr. Ted Yoho of Florida.

Mr. YOHO. Mr. Chairman, I appreciate it and I am not really sure where to start, I have so many questions, and just looking for clarification.

I think the best way to start is that there was a quote from President Dwight Eisenhower 60 years ago when he announced the Atoms for Peace program: "One lesson is clear. Civilian nuclear programs flourish only through cooperation and openness. Secrecy and isolation are typically signs of a nuclear weapons program."

I don't think that has differed and, you know, we look at Iran over the last 30 years and if you have you read, and I am sure you have, Ambassador John Bolton's book, "Surrender is Not an Option," Iran has been moving steadily in this direction ever since then. They have played the cat and mouse game. They have lied and deceived.

It is a pure game of sophistry, and sophistry, as we all know, is a well orchestrated deception, misdirection and we call that a lie, in the country. And I see that going on with our nuclear negotiations and I mean that in the sense that I think it is great that we are negotiating to prevent them from getting nuclear arms but I think we are all in agreement they are going to get nuclear arms.

I have sat here for 2 years. I am going into the third year. We have had expert after expert after expert sitting where you are that said Iran within 6 months—that is when I first got here in January 2013—within 6 months to a year has enough fissile material for five to six bombs.

And so that has been over a year so I can only assume, because the experts like you have told us, they are going to have that. And for us to say no, they are not, and then you look at Iran has prevented the IAEA to go in to inspect, we have got evidence that they have detonated a nuclear trigger in the region of Parchin but they won't let the IAEA go in.

And going back to what President Eisenhower said is if they are not going to be forthright and honest and open, is it prudent for the United States of America to go forward with this versus backing up from the negotiation table and say, when you are serious, Iran, let us know and we will take the sanctions off.

Mr. Szubin, you brought up that Iran is in a crisis mode. They are in a hole. It will take over a $160 billion to get out of it. Yet, yesterday on the Western Hemisphere meeting we had the experts again and the report from the State Department said that Iran and Hezbollah has got the most activity they have ever had in the Western Hemisphere since 2009.

Iran is working with Iraq to beat ISIS so they are funding a war in Iraq. They have funded the takeover of Yemen, and I ask you is that the nation—is that the status of a nation that is in crisis and they are starving and they are on their last dollar?

Would they be investing money into that or would they investing it into their own country? What are your thoughts on that?

Mr. SZUBIN. Thank you, Congressman. If I could take the last part of your question and then——

Mr. YOHO. Sure.

Mr. SZUBIN [continuing]. Actually defer to my colleague.

Mr. YOHO. And I have got another one I want to ask you real quick so go ahead.

Mr. SZUBIN. Sure. So I did not say that they were on their last dollar and, obviously, we are talking about a sophisticated large industrialized country. What I talked about the were indicators of the economic strain on their society and the economic strain is massive.

That doesn't mean that they don't have the thousands of dollars or even hundreds of thousands of dollars to provide to nefarious actors in their region or even in Latin America and, unfortunately, some of this activity, as dangerous as it is, comes cheap.

Mr. YOHO. Right. And their goal is—again, we hear over and over again Fidel Castro met with the Ayatollah roughly 10 years ago, said we have a common enemy—that enemy is America and our goal is to bring them jointly together to its knees.

I don't see that any different, and with the narrative coming out of there, the rhetoric you hear, it is like Chairman Royce says, you know, "Death to America."

You can pick up a paper pretty much every week and you will find that in there. To move forward, thinking that we are stopping them—and Henry Kissinger said the move that we are—we are moving to prevent proliferation to managing it.

So I think we should come clean with the American people, say they going to have a nuclear weapon. I think that we should put emphasis on what are we going to do the day that they do have that and have our foreign policy because you are already seeing Saudi Arabia and Egypt wanting to run a nuclear program.

Are we going to monitor them? Are we going to say, no, you can't? And then at what point do you intervene? And so I think all of this we are going through, I appreciate you going through it. But I think we are putting emphasis on something to say we are trying to prevent it and we know they are not going to prevent it.

Mr. BLINKEN. Thank you very much, Congressman.

I would say, first of all, as in many things and most things President Eisenhower was very wise——

Mr. YOHO. Yes, he was.

Mr. BLINKEN [continuing]. And so I think apply very appropriately to what we are looking at now, and it is precisely because of Iran's efforts to cheat and to dodge its responsibilities and dodge

its commitments and proceed with a program that the world has called them out and the world has exerted extraordinary pressure on them and that is why they are at the table.

And the only reason that they are there is in order to relieve some of that pressure and the fact that that pressure could be re-imposed is the strong incentive they would have to make good on the agreement.

And I would note again that under the interim agreement—under the terms of the agreement they have made good on those commitments for its duration. Going forward, we have to have, and we will have for there to be any agreement, the most exceptional intrusive monitoring, access and inspection regime than any country has ever seen.

That is the only thing that can give us confidence that we are not trusting Iran's word. We are looking at its actions and we will find out if it is violating its commitments.

That is what this is about. At the end of the day, again, we have to deal with—and by the way, I should say we don't accept the proposition that they would get a nuclear weapon. The entire effort that we are making is to make sure that they don't.

If there is no agreement, then there is a good chance that they will rush to a weapon or, certainly, rush to have the capacity to make one.

Mr. YOHO. Does that make all those experts previously that said that they were going to have it wrong?

Mr. BLINKEN. I think what they were—I would have to go back, Congressman, and see what—exactly what they said. I think what they were talking about was what is their capacity, where are they in terms of the capacity of producing a weapon should they choose to do it.

I believe that is what they are talking about and what would the time line be. We are pushing that back. We are making sure that if they did decide to do that we would see it and we would be able to do something about it. That is what this is about.

Mr. YOHO. My time has expired and I appreciate it. Thank you, Mr. Chairman.

Mr. BLINKEN. Thank you.

Chairman ROYCE. I thank the gentleman and I thank Secretary Blinken and Mr. Szubin. Thank you very much for your testimony here today.

I also want to remind you about the points that we made here, the points that we made in the opening statements. I implore you to convey those views immediately, if you would, to Secretary Kerry and the negotiating team.

You heard deep concerns over the sunset provision here, the fact it is only 10 years, over the question of verification of the agreement itself and whether at the—as part of this process whether Iran is going to be required to reveal its clandestine work that it has took on trying to develop a nuclear weapon in the past as part of any final agreement.

You can't have real verification going forward unless you have that revealed to the IAEA. You heard our concerns about previous military activities on the part of the regime, previous testing, what actually went on at the sites that they won't give us access to, as

well as Iran's vast ballistic missile program that is underway as we speak and about Congress' role in this.

So, there is a number of the other issues raised as well so I hope you can convey that there are some profound bipartisan concerns that need to be heard, as a deal may be announced any day.

And while our hearing was taking place there is news breaking from Switzerland that a draft is circulating there among the parties and in that draft Iran would have 6,000 spinning centrifuges for the next decade.

So I know the committee is frustrated to read the press about drafts circulating. It does says something about the administration's commitment to transparency when the press has the information and we are reading it off the news wire. So——

Mr. BLINKEN. Mr. Chairman, just on that point——

Chairman ROYCE. Yes.

Mr. BLINKEN [continuing]. My understanding is that there is no draft—that that report is erroneous and, indeed, our spokesperson clarified that.

Chairman ROYCE. That is good news. So we appreciate that.

Mr. BLINKEN. Thank you.

Chairman ROYCE. So when there is a draft, please share it with the members of this committee and of the Congress.

We thank you again for your testimony, and for now, we will stand adjourned.

Mr. BLINKEN. Thank you, Mr. Chairman.

[Whereupon, at 11:07 a.m., the committee was adjourned.]

Annex 97

APPENDIX

MATERIAL SUBMITTED FOR THE RECORD

Annex 97

FULL COMMITTEE HEARING NOTICE
COMMITTEE ON FOREIGN AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515-6128

Edward R. Royce (R-CA), Chairman

March 12, 2015

TO: MEMBERS OF THE COMMITTEE ON FOREIGN AFFAIRS

You are respectfully requested to attend an OPEN hearing of the Committee on Foreign Affairs, to be held in Room 2172 of the Rayburn House Office Building (and available live on the Committee website at http://www.ForeignAffairs.house.gov):

DATE: Thursday, March 19, 2015

TIME: 8:30 a.m.

SUBJECT: Negotiations with Iran: Blocking or Paving Tehran's Path to Nuclear Weapons?

WITNESSES: The Honorable Antony J. Blinken
Deputy Secretary of State
U.S. Department of State

Mr. Adam J. Szubin
Acting Under Secretary
Office of Terrorism and Financial Intelligence
U.S. Department of the Treasury

By Direction of the Chairman

The Committee on Foreign Affairs seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202-225-5021 at least four business days in advance of the event, whenever practicable. Questions with regard to special accommodations in general (including availability of Committee materials in alternative formats and assistive listening devices) may be directed to the Committee.

COMMITTEE ON FOREIGN AFFAIRS

MINUTES OF FULL COMMITTEE HEARING

Day *Thursday* Date *03/19/2015* Room *2172*

Starting Time *8:35am* Ending Time *11:07am*

Recesses [ ] (____to ____) (____to ____) (____to ____) (____to ____) (____to ____) (____to ____)

Presiding Member(s)

Edward R. Royce, Chairman; Rep. Ileana Ros-Lehtinen

Check all of the following that apply:

Open Session [✓]
Executive (closed) Session [ ]
Televised [✓]

Electronically Recorded (taped) [✓]
Stenographic Record [✓]

TITLE OF HEARING:

Negotiations with Iran: Blocking or Paving Tehran's Path to Nuclear Weapons?

COMMITTEE MEMBERS PRESENT:

See attached

NON-COMMITTEE MEMBERS PRESENT:

none

HEARING WITNESSES: Same as meeting notice attached? Yes [✓] No [ ]
(If "no", please list below and include title, agency, department, or organization.)

STATEMENTS FOR THE RECORD: *(List any statements submitted for the record.)*

SFR - Rep. Gerald Connelly
QFR - Chairman Edward R. Royce
QFR - Rep. Ileana Ros-Lehtinen
QFR - Rep. Chris Smith

TIME SCHEDULED TO RECONVENE _____
or
TIME ADJOURNED *11:07am*

Jean Marter, Director of Committee Operations

HOUSE COMMITTEE ON FOREIGN AFFAIRS

FULL COMMITTEE HEARING

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Statement for the Record
Mr. Connolly of Virginia

The P5+1 negotiating partners have self-imposed a late March deadline to reach a framework for a final nuclear agreement with Iran. The negotiations are currently being conducted under the auspices of the Joint Plan of Action (JPOA), which has already been extended twice. President Obama and Secretary of State Kerry have reiterated that a third extension beyond the hard deadline in June is neither feasible nor necessary to gauge whether Iran has serious intentions to reach a final agreement that is acceptable to all parties. Even for those who have been constructive partners in the pursuit of a final agreement, our patience is wearing thin.

Since January 20, 2014, the P5+1 countries have conducted a multilateral effort to engage the Islamic Republic on an issue of profound import to the region – preventing Iran from obtaining a nuclear weapon. The JPOA has arrested the Iran nuclear program on several fronts and has actually reversed gains Iran made while developing its program outside the purview of international inspectors. Before the JPOA went into effect, Iran was enriching uranium stockpiles, constructing a heavy water reactor at Arak, readying 9,000 additional centrifuges for operation, and allowing inspectors only sporadic access to nuclear facilities. Under the JPOA, Iran has eliminated all 20 percent enriched uranium, suspended all enrichment above 5 percent, stopped construction at Arak, kept 9,000 centrifuges offline, and provided inspectors with daily access to its nuclear facilities. Further, our domestic embargo and financial, banking, petroleum, trade, terrorism, and human rights sanctions remain in place under the JPOA.

This success has not stopped some irresponsible actors from using the negotiations to make crass and insincere overtures designed to undermine the talks and realize short term political gains. Senator Tom Cotton's open letter to the leaders of the Islamic Republic of Iran, signed by 46 of his Republican Senate colleagues, was a breach of any understanding of the separation of powers. Israeli Prime Minister Netanyahu's partisan collusion with his Ambassador, Mr. Dermer, and Speaker Boehner to secure the privilege of addressing a Joint Session of Congress on the subject of the P5+1 negotiations was similarly offensive. It drove a partisan wedge where none has ever existed before, it provided a gratuitous insult to our head of state, and it bypassed any reasonable norm of diplomatic protocol. It was a shameful episode that diminishes the serious issue which ostensibly caused Mr. Netanyahu to push aside diplomatic niceties; namely the Iranian nuclear negotiations. By acting in such a blatantly partisan way, Mr. Netanyahu diluted the focus from that central, existential issue, to one of parochial partisan politics - his and ours.

Additionally, while we have heard countless objections, viable alternatives have not been as forthcoming. The value of the interim agreement as our best available option for preventing Iran from obtaining a nuclear weapon should not be understated. At a November hearing before the Subcommittee on the Middle East and North Africa, General Michael Hayden stated that the euphemistically termed "kinetic" option would actually accelerate Iran's pursuit and development of a nuclear weapon. It would also deprive us of one of the most valuable components of the JPOA which is enhanced surveillance of Iran's nuclear program. We should heed General Hayden's warning and be particularly suspect of policy prescriptions that seemingly preclude a negotiated settlement to Iran's nuclear program.

I have joined the Chairman and Ranking Member of this Committee and a bipartisan coalition of my colleagues in writing to the President to further a constructive dialogue on what would constitute an acceptable final agreement. Ultimately, we want an agreement that blocks all of Iran's pathways to a bomb. This would include a curtailed nuclear infrastructure, full disclosure regarding the past potential military dimensions of Iran's nuclear program, a rigorous inspections regime that allows international inspectors to verify Iran's compliance, and an overall assurance that the Iranian nuclear program would not be capable of producing a nuclear weapon before we could stop it. In keeping with both the JPOA and an offer made by the Bush Administration to Iran in 2008, a final agreement should not sunset its onerous requirements until we have confidence that Iran's nuclear program is exclusively peaceful.

It is Iran's own actions that have isolated the Islamic Republic from the rest of the world. Human rights abuses, provocative intervention into regional conflicts, and an illicit nuclear program have necessitated the construction of a broad and effective sanctions regime. We are approaching a crossroads at which Iran must make a decision to either continue into a multilateral agreement designed to safeguard global security and stability or revert to its destructive trajectory. Regardless of Iran's decision, it is the policy of the United States that Iran will not obtain a nuclear weapon.

Questions for the Record Submitted to
Deputy Secretary Antony Blinken by
Representative Edward R. Royce (1)
House Committee on Foreign Affairs
February 25, 2015

Question 1:

Would a UNSC resolution require the United States to waive, suspend, or otherwise modify the existing domestic sanctions regime? If so, how? Specifically, which domestic sanctions and designations would be affected?

Answer:

On April 2, 2015, the P5+1 and Iran announced an understanding regarding the key parameters of a comprehensive deal with Iran to address its nuclear program. As the Administration's fact sheet summarizing this understanding, the "Parameters for a Joint Comprehensive Plan of Action regarding the Islamic Republic of Iran's Nuclear Program," states a new UN Security Council resolution would endorse the comprehensive deal and urge its full implementation, lift past UN Security Council resolutions on the Iran nuclear issue simultaneous with the completion by Iran of nuclear-related actions addressing all key concerns (enrichment, Fordow, Arak, PMD, and transparency), and re-establish core provisions of the resolutions dealing with transfers of sensitive technologies and activities. In addition, the new UN Security Council resolution would incorporate important restrictions on conventional arms and ballistic missiles, as well as provisions that allow for related cargo inspections and asset freezes. While it has yet to be agreed, it is our view that these should remain in place for an extended period of time.

Any new Security Council resolution would not convert U.S. political commitments under a deal with Iran into legally binding obligations. The United States would not be legally bound to remove any of its domestic sanctions.

With respect to U.S. domestic sanctions, as the Administration's fact sheet provides, Iran will receive relief from certain U.S. nuclear-related sanctions only after the IAEA has verified that Iran has taken all of its key nuclear-related steps. Moreover, the architecture of U.S. nuclear-related sanctions on Iran will be retained for much of the duration of the deal and allow for snap-back of sanctions in the event of significant non-performance by Iran of its commitments.

Question 2:

Does the waiver authority Congress has provided allow the President to waive all provisions of all sanctions indefinitely?

Answer:

The President may exercise a waiver of statutory sanctions or a renewal of such waiver if the statutory standard for the applicable waiver provision is met, including complying with any statutory time limits on the period of the waiver or its renewal. There are a number of different statutory provisions that require the imposition of sanctions in relation to activities involving Iran. The waiver authorities provided to the President under these provisions differ depending on the statutory sanctions provision. In cases where the applicable waiver authorities imposes a time limit requiring the President to renew the waiver at certain intervals, the President or his designee must determine at the time of each renewal that the waiver standard continues to be met.

Question 3:

How did the Administration determine that a year would be sufficient to detect and reverse potential Iranian violations? What factors did the Administration take into account to reach this number? How long did the U.S. take to find the clandestine uranium enrichment complex at Natanz? How was it discovered?

Answer:

Under a long-term comprehensive solution, Iran would be subject to significantly enhanced transparency and monitoring measures to verify the exclusively peaceful nature of its nuclear program. We are confident that a one year breakout window would give us sufficient time to effectively respond to an Iranian breakout effort, should Iran take a decision to do so. We would be happy to provide more detailed information in a classified setting.

Question 4:

In an agreement, will the Administration insist that IAEA inspectors have "anywhere, anytime" access to all areas and facilities in Iran, including Revolutionary Guard bases? If not, what limitations on access would you be willing to accept?

Answer:
There is no question that a comprehensive deal must ensure that Iran is subject to significantly enhanced transparency and monitoring measures to verify the exclusively peaceful nature of its nuclear program and to quickly detect any attempts to break out. Under a nuclear deal Iran will implement the Additional Protocol, which will significantly enhance the IAEA's ability to investigate questions about covert nuclear activities in Iran and conduct intrusive inspections of Iranian facilities. We are also seeking additional transparency measures beyond the AP.

Question 5:
Will the Administration require that Iran satisfy all questions that the IAEA has about the "possible military dimensions" of its nuclear program, including access to key scientific personnel and paperwork? Will you agree to a deal without those requirements?

Answer:
Iran must take specific concrete steps to resolve the IAEA's concerns about PMD and we continue to work on this issue. There will be no sanctions relief until Iran has taken agreed steps to address the IAEA's concerns about PMD.

Question 6:
The interim agreement states that all "nuclear-related" sanctions would be removed under a final agreement. What specific sanctions will you seek to suspend and ultimately lift under a long-term agreement? Please provide a list of such sanctions with the applicable references in underlying statute, Executive orders, and regulations.

Answer:

There are some sanctions that are nuclear-related, some that are more general, and some that have multiple rationales. As a general rule, we have said that we will not negotiate on our sanctions regarding human rights and terrorism. However, for those sanctions with multiple rationales, we have sought to balance our need to preserve these sanctions measures with our national security priority of resolving the Iran nuclear issue. As the President has said, our most urgent issue with Iran is its possible acquisition of nuclear weapons, which we are determined to prevent. We are therefore prepared to consider the suspension of certain measures that involve multiple rationales and to consider lifting them after Iranian implementation of the comprehensive deal has been fully tested, evaluated, and assessed over an extended period.

Question 7:
The interim agreement calls for Iran to abide by all UNSC resolutions – including the requirement that "Iran shall not undertake any activity related to ballistic missiles capable of delivering nuclear weapons" yet it does not explicitly mention Iran's ballistic missile program. Will restrictions on Iran's ballistic missile program be included in the final agreement? If not, what US national and multilateral sanctions will continue to apply to their missile program? Please provide a list of such sanctions with the applicable references in underlying statute, Executive orders, and regulations.

Answer:

The deal we are negotiating focuses on Iran's nuclear program, not on ballistic missiles. That said, we are seeking an arrangement in which UN Security Council restrictions on conventional arms and ballistic missiles will stay in place for a considerable period of time. We also intend to continue our efforts to counter missile proliferation to Iran, including through the use of U.S. sanctions, export controls, and the 34-country Missile Technology Control Regime (MTCR), as well as through regional security initiatives with our partners in the region and missile defense.

Question 8:

What sanctions will the Administration maintain on Iran in response to Iran's continued sponsorship of terrorism – including propping up Assad in Syria, supporting the overthrow of a U.S. partner in Yemen, and supplying rockets to Hamas and Hezbollah? Please provide a list of such sanctions with the applicable references in underlying statute, Executive orders, and regulations.

Answer:

On April 2, 2015, the P5+1 and Iran announced an understanding regarding the key parameters of a comprehensive deal with Iran to address its nuclear program. As the Administration's fact sheet summarizing this understanding, the "Parameters for a Joint Comprehensive Plan of Action regarding the Islamic Republic of Iran's Nuclear Program," states, Iran will receive relief from certain U.S. secondary nuclear-related sanctions only after the International Atomic Energy Agency has verified that Iran has taken major nuclear-related steps that extend its breakout time to at least one year.

As the Administration has made clear, under any deal with Iran with respect to its nuclear program, we will maintain and continue to aggressively enforce sanctions related to Iran's human rights abuses, support for terrorism, and destabilizing activities in the region. As you know, the United States maintains a broad array of sanctions on Iran for its support for terrorism, the Assad regime in Syria and other destabilizing activity. One key sanction is Iran's status as a state sponsor of terrorism and the sanctions consequences that flow from such a designation.

Similarly, we will maintain and continue to vigorously enforce sanctions against Iranian individuals and entities that engage in destabilizing activities in the region, engage in terrorist acts, or provide support to terrorists or terrorist groups. Sanctions on Iranian individuals or entities who commit, threaten to commit, or support terrorism pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 CFR Part 594, will remain in place, including sanctions on those determined to have provided material support to persons designated for sanctions under this Executive Order.

In addition, we will continue to sanction individuals and entities for terrorism-related activities under other relevant authorities, including relevant provisions of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 and the Iran Threat Reduction and Syria Human Rights Act of 2012.

Moreover, Iranian individuals and entities will continue to be subject to sanctions for their destabilizing activities in the region, including providing support to the Assad regime in Syria under Executive Orders 13572 and 13582 and the Syrian Sanctions Regulations, 31 CFR Part 542, to the Houthis in Yemen under Executive Order 13611 and the Yemen Sanctions Regulations, 31 CFR Part 552, and, other relevant authorities targeting such activities.

In addition to continued robust enforcement of terrorism- and regional stability-related sanctions as outlined above, U.S. support to our regional partners will continue to be the best deterrent against Iranian aggression in the region. We will continue to take robust action to counter the threats posed by Iran in the region and work with our partners to stop Iranian activities that destabilize and threaten its neighbors.

Questions for the Record Submitted to
Deputy Secretary Antony J. Blinken
Representative Ileana Ros-Lehtinen
House Committee on Foreign Affairs
March 19, 2015

Question 1:

The answer to this question is not within the purview of the Department of State. The Department of State defers to the Department of Defense.

Months ago, when it was announced that Iran had launched its own airstrikes in Iraq, both the US and Iraq claimed no knowledge – that Iran acted alone. Given that the Iraqis currently do not have any fixed wing assets or an integrated air defense system to maintain their own air sovereignty, to what extent does the U.S. control Iraqi airspace? Given all the assets the US has in Iraqi airspace – fixed wing, rotary, and unmanned – wouldn't some level of de-confliction need to take place between the U.S. and Iran for Iran to carry out airstrikes? Does the U.S. coordinate all airstrikes in Iraq against ISIL?

Question 2:

There are reports that Iran has additional covert nuclear sites that haven't been declared. Is this report accurate? Will any nuclear agreement include any covert sites that may exist but have yet to be found/declared? If a covert facility is found, or if Iran is found to be continuing to work on a dual civilian/military program, will that terminate the agreement? What will our response be?

Answer:

Iran will be agreeing to one of the most robust and intrusive inspections and transparency regimes ever negotiated for any nuclear program.

The IAEA will have regular access to all of Iran's declared facilities, including Arak, Fordow, and Natanz. Inspectors will also have access to the entire uranium supply chain that supports Iran's nuclear program, from start to finish.

These elements provide the best hedge that we've ever had against a covert path – because Iran would need an entire covert supply chain to feed into a covert enrichment facility.

Iran will also immediately begin implementing the Additional Protocol (AP) of the IAEA. Iran's implementation of the AP would provide the IAEA with expanded access to sites and facilities in Iran and impose additional reporting requirements on Iran's nuclear program. Under the AP, the IAEA can request access to investigate any suspicious sites. And under the JCPOA, we have negotiated a further international mechanism that enables timely access if challenged. Iran can't just refuse.

And Iran will commit to ratify the AP, making these commitments to greater transparency and more intrusive inspections permanent.

Questions for the Record Submitted to
Deputy Secretary Antony J. Blinken
Representatives Chris Smith (1)
House Committee on Foreign Affairs
March 19, 2015

Question:
Thus my question is, if Iran can't protect the human rights of its own people as required by treaties it has signed nor abide by its own constitution—Article 13 of which states that Christians and other religious minorities are free to practice their faith—how can we believe that Iran will abide by any nuclear agreement it signs with the U.S?

Answer:
This deal is not about trusting Iran. It is about verifiably ensuring that Iran's nuclear program is for only peaceful purposes – and that comes through credible steps that Iran will have to take.

The JCPOA does not inhibit our ability to detect and act to prevent Iran from getting a nuclear weapon, but on the contrary it makes us significantly more capable of responding quickly if it does. Bringing Iran's nuclear activities into compliance with international standards could also incentivize Iran's compliance with its international obligations.

Question:
Why haven't we insisted that Iran release Pastor Abedini as a precondition to continued negotiations, especially after the President personally committed to his family to have him released by the time of his son's birthday on March 17?

Answer:
Regardless of the outcome of the P5+1 talks with Iran, we will continue to call on Iran to immediately release Saeed Abedini, as well as detained U.S. citizens Jason Rezaian and Amir Hekmati. We will continue to request that the Iranian government to work cooperatively with us to locate Robert Levinson.

While we have raised these cases on the sidelines of the nuclear talks, we have been very clear that the P5+1 negotiations are related strictly to Iran's nuclear program and the importance of Iran bringing that program into compliance with their international obligations. Our discussions with Iran about our concerns over Mr. Abedini, Mr. Rezaian, Mr. Hekmati, and Mr. Levinson are a separate issue from the nuclear talks.

These U.S. citizens should be returned to their families as soon as possible, and we will continue to raise these cases with Iranian officials and until they are all home. Their freedom should not be tied to the outcome of these negotiations on Iran's nuclear program.

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FORM AND SUBSTANCE IN INTERNATIONAL AGREEMENTS

By Kal Raustiala[*]

International agreements exhibit a wide range of variation. Many are negotiated as legally binding agreements, while others are expressly nonbinding. Some contain substantive obligations requiring deep, demanding policy changes; others demand little or simply ratify the status quo ante. Some specify institutions to monitor and sanction noncompliance; others create no review structure at all. Thus, there is considerable variation both in the form of international agreements—in their legal bindingness, as well as in the range of structural provisions for monitoring and addressing noncompliance—and in the substantive obligations they impose. This variation in form and substance raises several fundamental questions about the role of international agreements in world politics.[1] Why do states differentiate commitments into those which are legally binding and those which are not? What relationship exists between legality and the substantive provisions of an accord, and between legality and structural provisions for monitoring behavior? What is the relationship between substantive obligations and monitoring provisions? Finally, what difference, if any, do these choices make as to the effectiveness of an agreement?

This article presents a conceptual framework for analyzing the architecture of international agreements. Using the concepts of form and substance, it examines three features of agreements, two related to form and one to substance. Legality refers to the choice between legally binding and nonlegally binding accords[2] (for simplicity, I term this a choice between *contracts* and *pledges*). Substance refers to the deviation from the status quo that an agreement demands. Structure refers to provisions for monitoring and penalizing violators. Each of these terms represents a distinct design element. Yet there are systematic trade-offs among them. Only by understanding these trade-offs can we understand the design and operation of agreements.[3] The framework advanced in this article makes these trade-offs clear, while also reorienting current research in international law. For example, one area that recent scholarship has focused on is compliance with pledges.[4] But without attention to the relationships between legality, substance, and structure, much of this work is inconclusive.[5] In other areas where progress has been made, as in the choice of legal form, the prevailing explanations are incomplete and can be improved by accounting systematically for the connections between design features.

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[1] As of July 2005, there were over fifty thousand in the UN database. *See* United Nations Treaty Collection, Overview, *available at* <http://untreaty.un.org/English/overview.asp>.

[2] *See, e.g.*, Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787 (1986); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999).

[3] An early exemplar of this approach is RICHARD B. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT (1981).

[4] *E.g.*, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000) [hereinafter NON-BINDING NORMS]; Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?* 5 J. INT'L ECON. L. 647 (2002).

[5] The same can be said about compliance generally. *See* Kal Raustiala & Anne-Marie Slaughter, *International Law, and International Relations, and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2002).

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Using this framework, I make several claims about the architecture of agreements. First, I argue that the notion of "soft law" agreements is incoherent. Under the prevailing approach, pledges are being smuggled into the international lawyer's repertoire by dubbing them soft law. Just as frequently, scholars declare that contracts containing vague or imprecise commitments are actually soft. In so doing, these commentators are conflating the legality of agreements with structure (in particular, enforcement features) or substance (e.g., rule precision), or effects with causes (i.e., looking to behavioral effects to demonstrate international law's existence).[6] Both sets of moves elaborate a conceptual category—soft law agreements—that has no compelling basis in state practice or legal theory. I argue instead for a sharp demarcation between pledge and contract. I show why this demarcation makes sense and how it unlocks puzzles in agreement design.

Second, I provide a causal account of the choice between pledges and contracts.[7] States choose on the basis of a combination of functional concerns of credibility and flexibility, the configuration of power, and the demands of domestic interest groups and the structure of domestic institutions. These factors roughly correspond to three theories of international relations: institutionalism, realism, and liberalism. I also argue that pledges, though nonlegal agreements, are emphatically the province of international lawyers: to understand how nonlegal agreements work, one must understand how legal agreements work.[8]

Third, I sketch the relationships between legality, structure, and substance. Prevailing accounts of the choice between pledge and contract focus on a functional trade-off between ex ante credibility and ex post flexibility, and are consistent with two contradictory ways that legality influences the content of substantive obligations. I argue that liberal theory, which privileges domestic political variables and institutions, helps explain when contracts are substantively deep and demanding and when they are shallow and weak. Likewise, legality influences the structure of compliance review, as does the nature of substantive obligations. The core point is twofold. We cannot understand the form or substance of an international accord in isolation because the connections between the various elements shape empirical outcomes. And we cannot understand the connections between form and substance without looking to domestic politics and institutions.

Finally, I conclude with some prescriptive claims about the design of agreements. The central thrust of my analysis—that there are systematic trade-offs between form and substance—suggests that advocates as well as analysts should pay more attention to the complex architecture of international agreements and treat agreement design holistically. In particular, I argue that the widespread preference for contracts often unduly weakens the substance and structure of multilateral agreements when states are uncertain about compliance costs. States often compensate for the risk of their own noncompliance by weakening monitoring or watering down commitments. This tendency can be exacerbated by the need for widespread adherence and the opportunity to exercise power this need creates. Pledges mitigate these tendencies, permitting states to accept more risks in the face of uncertainty. Consequently, although pledges are often

[6] *E.g.*, Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 65 (2000) ("[L]aw's existence is best measured by the influence it exerts.").

[7] This question tracks one that is sporadically investigated in contract law: Why do parties opt out of the legal system? For example, "[t]he diamond industry has systematically rejected state-created law. In its place, . . . the industry [has] developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions . . . ." Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992). However, as Herbert Bernstein and Joachim Zekoll argue, "It is extremely difficult to determine, with any degree of certainty, how widespread the use of permanent 'no-law' agreements is in actual American business practice . . . . [N]o such agreement will ever surface in a court of law unless the parties differ as to its effect." Herbert Bernstein & Joachim Zekoll, *The Gentleman's Agreement in Legal Theory and in Modern Practice: United States*, 46 AM. J. COMP. L. SUPP. 87, 88 (1998).

[8] They are also a central feature of transgovernmental networks, an increasingly important mode of cooperation. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (arguing that governments are increasingly working together through transnational networks, on issues ranging from trade to terrorism, to respond to the challenge of interdependence); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

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viewed as second-best alternatives,[9] they can, under some circumstances, be first-best. I suggest why and when this is likely to be true.

I. Three Dimensions of Institutional Design

The tripartite conceptual framework in this article is a radical simplification. It does not address important aspects of agreement design, and it dichotomizes those dimensions it does address.[10] This simplicity, however, has a great virtue: it clarifies the interaction of these elements. How these elements relate to each other is the key theme of this article. Because the interaction of design elements has not received systematic attention, even this basic framework illuminates important questions about the architecture of agreements.

Legality

The contemporary international system is suffused with agreements. However, international cooperation need not involve a legally binding or even a written accord. Indeed, many important agreements have been tacit or unwritten.[11] International accords also need not be public. Secret agreements formed a central part of President Woodrow Wilson's critique of the old international order. Less in favor today, they nonetheless were used throughout the twentieth century.[12] "Gentlemen's agreements" also have a long history.[13] Thus, the variety of international agreements is great.[14] Nevertheless, in most cases of interest, written open agreements are drafted to codify and clarify the terms of cooperation. This class encompasses both contracts and pledges. The Vienna Convention on the Law of Treaties defines treaties (contracts) as "international agreement[s] concluded between States in written form and governed by international law."[15] Although treaties are fairly well-defined under international law, if circularly so, the boundaries of soft law are more indeterminate. In practice, usage of the term varies widely. Decisions by international organizations, their internal policies, negotiated agreements between states (or their constituent elements), and even resolutions of the UN General Assembly have all been declared a form of soft law. My focus here, however, is on explicit agreements between states.

Agreements display significant variation in legality. Examples of contracts include the 1945 UN Charter, the 1985 South Pacific Nuclear Free Zone Treaty,[16] the 1989 Convention on the Rights of the Child,[17] the 1995 Convention on Stolen or Illegally Exported Cultural Objects,[18] and the 2001 Convention on Persistent Organic Pollutants.[19] Pledges include the 1975 Helsinki

[9] *E.g.*, Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 296, 304 (1977) ("[N]onbinding agreements may be attainable when binding treaties are not . . ."). Schachter "was one of the first promoters of the concept of 'soft law' alternatives to rigid treaty and custom, and perhaps the first to note the potential legal import of 'quasi-legal agreements' and General Assembly resolutions." José E. Alvarez, *In Memoriam: Commemorating Oscar Schachter, the Teacher*, 104 COLUM. L. REV. 556, 558 (2004).

[10] Some of these dimensions have been examined elsewhere. *See, e.g.*, SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING (2003); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001). Precision of obligations might arguably merit inclusion as a criterion. I do not focus on precision for reasons discussed below: as the rules-standards literature illustrates, rule precision is not per se advantageous and the significance of precision is closely linked to the structure of review, in particular when institutions are tasked with elaborating standards ex post.

[11] *See, e.g.*, Charles Lipson, *Why Are Some International Agreements Informal?* 45 INT'L ORG. 495 (1991).

[12] *See, e.g.*, ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 26 (2000).

[13] *See* Hillgenberg, *supra* note 2, at 500; Schachter, *supra* note 9, at 299.

[14] R. R. Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549 (1980).

[15] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 2, para. 1(a), 1155 UNTS 331 (entered into force Jan. 27, 1970).

[16] South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga), Aug. 6, 1985, 24 ILM 1440 (1985).

[17] Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3 (entered into force Sept. 2, 1990).

[18] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 ILM 1322 (1995), *available at* <http://www.unidroit.org/>.

[19] Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 ILM 532 (2001), *available at* <http://www.pops.int>.

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Final Act,[20] the 1985 Plaza Accord on Exchange Rates,[21] the 1988 Basel Accord on capital adequacy,[22] the 1992 Non-Legally Binding Authoritative Statement on Forest Principles,[23] the 1997 NATO-Russia Founding Act,[24] and the 2004 pact of the Paris Club of creditor states to forgive Iraqi sovereign debt.[25] Many observers have noted the increased prominence of pledges in international cooperation.[26] While pledges sometimes evolve into contracts, many pledges remain nonbinding permanently.[27] In international monetary affairs, we even observe the reverse: the transformation from contract to pledge.[28]

Substance

Whether pledge or contract, an international accord can vary significantly in its obligations. Substance refers to the substantive commitments the pact contains—for example, does it require a state to refrain from developing nuclear weapons, to restrict fish harvests, or to provide for a twenty-year patent term? Because substance is multifaceted, to simplify my analysis I focus on one key dimension. As others have previously argued, agreements vary widely in depth. Depth is "the extent to which [an agreement] requires states to depart from what they would have done in its absence."[29] Some accords are deep: they require states to make major changes in policy. Others are shallow: they codify what states are already doing or demand only minor changes in behavior. Depth clearly varies for each party to an agreement; what is deep for one state may be shallow for others. Moreover, states may often reserve out of specific provisions, altering the depth of the agreement for them.[30] I put aside these admittedly significant differences and try to capture the overall, or average, depth of an agreement. This is to simplify greatly, but the alternative—to consider the differences among 120 parties, or more—makes analysis impossible.[31]

[20] Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), 14 ILM 1292 (1975) [hereinafter Helsinki Final Act].

[21] Announcement of the Ministers of Finance and Central Bank Governors of France, Germany, Japan, the United Kingdom, and the United States, Sept. 22, 1985, 24 ILM 1731 (1985), *available at* <http://www.g8.utoronto.ca/finance/fm850922.htm> [hereinafter Plaza Accord].

[22] The International Convergence of Capital Measurement and Capital Standards (Basel Accord), July 1988, and its amendments are available on the Web site of the Bank for International Settlements, at <http://www.bis.org/publ/bcbs04a.htm>. In January 1999, a new capital accord was proposed by the Basel Committee that came to be known as Basel II. International Convergence of Capital Measurement and Capital Standards: A Revised Framework, June 2004, *available at* <http://www.bis.org/publ/bcbsca.htm>.

[23] Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, Aug. 14, 1992, 3 Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26, Annex III (1992) [hereinafter Forest Principles Statement], *available at* <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm>.

[24] Founding Act on Mutual Relations, Cooperation and Security, May 27, 1997, NATO-Russ., 36 ILM 1006 (1997), *available at* <http://www.nato.int/docu/basictxt/fndact-a.htm>.

[25] *See* Paris Club Press Release, The Paris Club and the Republic of Iraq Agree on Debt Relief (Nov. 21, 2004), *available at* <http://www.clubdeparis.org/rep_upload/PrIraq21nov04.pdf>; *see also* SC Res. 1483 (May 22, 2003), 42 ILM 1016 (2003).

[26] *E.g.*, Aust, *supra* note 2; Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q. 901 (1999); Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113 (2003); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004); Hillgenberg, *supra* note 2; Edith Brown Weiss, *Introduction* to INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 1 (Edith Brown Weiss ed., 1997); Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan./Feb. 1997, at 50.

[27] Though nonlegally binding, pledges are often connected to the development of customary law. Pledges "sometimes have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm." Dinah Shelton, *Introduction: Law, Non-Law and the Problem of 'Soft Law,' in* NON-BINDING NORMS, *supra* note 4, at 1.

[28] Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT'L ORG. 661, 661–83 (2000); Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT'L ORG. 573 (2000). Simmons argues that "[i]nternational monetary legalization can be characterized by an inverted 'J' pattern: legalization was nonexistent under the classical gold standard . . . [and] peaked between 1946 and 1971." *Id.* at 600.

[29] George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?* 50 INT'L ORG. 379, 383 (1996).

[30] *See* Vienna Convention on the Law of Treaties, *supra* note 15, Arts. 19–23 (dealing with reservations to treaties).

[31] Individualized assessments require extensive attention to specific national policies—an endeavor that is enormously, even paralyzingly complicated. However, some general claims about the distribution of depth are

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The concept of depth does not capture some critical aspects of the substance of agreements. For example, there is a large difference between security alliances and agreements on postal cooperation, even if examples of both require large deviations from prior behavior. But because depth is a variable that cuts across all types of agreements, and because it reflects the degree to which states in the aggregate are committing themselves to change their behavior, depth captures a critical component of cooperation. The World Trade Organization regime[32] is an exemplar of deep cooperation.[33] Extensive rules govern a wide array of trade issues and demand meaningful changes from many parties. Conversely, the Non-Proliferation Treaty[34] and the UN Framework Convention on Climate Change (FCCC)[35] are shallower. The former codified the existing behavior of most states; the latter demanded minor obligations related to reporting and review. I should underscore that codifying behavior can, at times, be significant in that it may prevent change in the status quo—as is certainly true for the Non-Proliferation Treaty. (A sophisticated reading of depth might track agreed obligation against the behavioral trend line, rather than against existing behavior. But I do not engage such subtleties here.)

Again, this concept of depth is a simplification. Yet depth is important because it captures the extent to which states commit themselves to serious changes in behavior.

Structure

Structure refers to the rules and procedures created to monitor parties' performance. An agreement's structure comprises those elements that seek both to provide information about performance and to deter and punish noncompliance. This conception is again purposely limited. Structure does not refer to whether an agreement is "enforced," in the sense that parties in fact are deterred from noncomplying. Structure refers only to the *mechanisms* for monitoring and enforcing performance. Effective enforcement is an outcome that may vary on the basis of a range of other factors: the nature of the parties, the legality and substance of the agreement, the precise sanctions employed, and so forth.

Extensive variation is found in the structure of agreements.[36] Some accords employ third-party dispute resolution accessible only to states, while others grant standing to individuals. Some require only self-reporting, some include on-site inspections, and some penalize violators. Some create no structure of review at all. To simplify this complexity, I again use binary categories: weak and strong. Weak structures are those in which review of performance and sanctions for nonperformance are minimal or nonexistent. In agreements in this category, the parties may self-report, but those reports are not analyzed or are only analyzed collectively. This category also includes systems with no review at all. Strong structures are those in which a central body issues a specific determination about a specific party. Such determinations may concern compliance, based either on the body's own investigations (a "police patrol" system) or on claims of private actors (a "fire alarm" system).[37] Strong structures may, but need not, include sanctions; weak structures never include this feature. Strong review structures add value to raw information about behavior, through publicizing, analyzing, or taking action based on that information. The issuance of party-specific decisions, in other words, constitutes an essential part of strong structures.

plausible. Powerful states are likely to be able to shape commitments to their liking. Consequently, generalized assessments of agreement depth should usually mask the bearing of more depth by weaker states and less depth by stronger states. States whose commitments in an agreement are especially deep are less likely to participate; those whose commitments are especially shallow are most likely to participate.

[32] WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999), *available at* <http://www.wto.org> [hereinafter LEGAL TEXTS].

[33] Downs et al., *supra* note 29, at 391–92.

[34] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, 729 UNTS 161 (entered into force Mar. 5, 1970).

[35] Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 1771 UNTS 108, *available at* <http://unfccc.int/2860.php> [hereinafter FCCC].

[36] *See, e.g.*, ADMINISTRATIVE AND EXPERT MONITORING OF INTERNATIONAL TREATIES (Paul C. Szasz ed., 1999); THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING (Philip Alston & James Crawford eds., 2000).

[37] Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 391 (2004).

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Scope of the Argument

In advancing this simple tripartite framework, I limit my analysis to agreements between states. I do not analyze the use of agreements between states and nonstate entities or substate units of federal states. While conceptually narrow, this category encompasses the vast majority of major agreements in existence today.

States bargain over international agreements intensively because there are myriad ways to craft an accord. My framework glosses over numerous details, but it is of help in systematically dividing up the many choices states face. Most important, I use this framework to illustrate some basic connections between these three dimensions. By exploring these connections we can improve our understanding of international cooperation and the role of law within it.

II. LAW AND INTERNATIONAL AGREEMENTS

Of the three dimensions discussed above—legality, substance, and structure—legality commands central interest for legal theory because it delimits the scope of law. At bottom, the distinction between contracts and pledges is a distinction between the use of law and the avoidance of law. Contracts create legally binding obligations for states, while pledges create only political or moral obligations.[38] One can loosely analogize this difference to the distinction between law and social norms domestically. Norms are important in many settings; they can produce "order without law."[39] Indeed, society could not function without such norms. But norm-based obligation is not the same as legal obligation, even if the two often overlap. Much recent scholarship aims at unlocking the connection between law and norms—and understanding why actors favor one or the other in specific circumstances.[40]

Though the primary aim of this article is to elaborate the ways that legality, substance, and structure interact, I first parse the meaning of legality in some detail. I do this because of the prominence of the concept of soft law and the significance of legality for state practice.[41] Many scholars argue or assume that the distinction between legally binding and nonbinding agreements is not sharply demarcated—that there is in fact a spectrum of legality.[42] I claim that legality is best understood as a binary, rather than a continuous, attribute. The binary nature of legal obligation gives added force to the argument, developed later in this article, that pledges offer unappreciated benefits under conditions of uncertainty.

The Problem of Soft Law: Continuous and Binary Conceptions of Legality

There is no such thing as "soft law." The concept of soft law purports to identify something between binding law and no law. Yet as an analytic or practical matter no meaningful intermediate category exists. Prior critiques of soft law are generally normative in nature, sometimes focused on the supposed dilution of international law's influence that results from using (or

[38] On the difference, see ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 13–39 (1999); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 121, 157 (1996).

[39] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

[40] *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Conference, *Social Norms, Social Meaning, and the Economic Analysis of Law,* 27 J. LEGAL STUD. 537 (1998).

[41] Agreements are rarely (if ever) labeled soft law. Instead, analysts claim that they are soft law. The idea goes back decades. Even in 1983 Sir Joseph Gold could write, "The concept of 'soft law' in international law has been familiar for some years, although its precise meaning is still debated." Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements,* 77 AJIL 443, 443 (1983); *see also* Ignaz Seidl-Hohenveldern, *International Economic "Soft Law,"* 163 RECUEIL DES COURS 165 (1979 II).

[42] The categories of substance and structure in my framework are clearly continuous in nature; I only dichotomize them for analytical clarity. The category of legality is different. As Klabbers notes, Hume wrote that "[h]alf rights and obligations, which seem so natural in common life," are "perfect absurdities" when it comes to the law. Jan Klabbers, *The Redundancy of Soft Law,* 65 NORDIC J. INT'L L. 167, 167 (1996); *see also* Prosper Weil, *Towards Relative Normativity in International Law?* 77 AJIL 413 (1983).

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talking about) soft law.[43] My critique is more fundamental: soft law agreement is not a coherent concept; nor does it accord with state practice.

The category of soft law has been deployed to encompass two distinct types of agreement. The first is nominally nonbinding but is nonetheless claimed to have soft legal qualities. Many consensus documents that emerged from the wave of UN-sponsored summits in the 1990s are exemplars. The second type, by contrast, is nominally binding but is claimed to be merely soft law owing to deficiencies of the accord, typically in rule precision or enforcement provisions. Under my framework the former is a pledge, and the latter a contract crafted to be shallow and/or to have a weak review structure. This categorical distinction between pledge and contract is more faithful to negotiators' intentions and more useful analytically, because it permits us to evaluate law's relative influence and role. It is this distinction that I defend here.

Consider state practice first. Even a cursory look at state practice demonstrates that international law is a tool that governments employ with care. Thus, perhaps the strongest argument for rejecting the concept of soft law agreements is empirical. Governments, the architects of agreements, behave as if legal agreements are decisively different from nonlegal agreements. They do not accidentally or cavalierly choose between pledges and contracts when negotiating agreements. Nor do they calibrate the legality of pacts in a continuous fashion, designating some softer law, some harder law, some not at all legal, and so forth across a demarcated continuum of legality. Instead, states carefully choose the legal nature of their agreements dichotomously.[44] Only very rarely is there subsequent dispute over the binding quality of an agreement.[45] The negotiation of the Helsinki Final Act, for example, was marked by the importance the parties put on its nonbinding nature.[46] President Gerald R. Ford explicitly declared that "the document I . . . sign is neither a treaty nor is it legally binding on any participating state."[47] A more recent example, also involving the United States and Russia, is the 2002 Moscow Treaty on Strategic Offensive Reductions.[48] The United States sought a pledge, but Russia insisted on a contract.[49] Presidents Vladimir Putin and George W. Bush went publicly back and forth on the issue; Putin's preference for a contract eventually prevailed.[50] State practice, in short, is inconsistent with the continuous or spectrum view of legality in agreements.

[43] For example, Bilder argues that the concept of soft law is dangerous in that it "depreciate[s] the currency of" law. Richard Bilder, *Beyond Compliance: Helping Nations Cooperate*, *in* NON-BINDING NORMS, *supra* note 4, at 65, 72; *see also* Weil, *supra* note 42.

[44] Negotiators rarely, if ever, label accords "soft law." On the importance of the distinction to governments, see Bilder, *supra* note 43; Weil, *supra* note 42. *But see* Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?* 32 N.Y.U. J. INT'L L. & POL. 591, 661–63 (2000) (suggesting that many government officials are unaware of the hard-soft distinction and, moreover, often do not care about that distinction).

[45] There are occasional hard cases, such as Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 1995 ICJ REP. 6 (Feb. 15) (ICJ holding that an exchange of notes between Qatar and Saudi Arabia and Bahrain and Saudi Arabia constituted a treaty between Qatar and Bahrain). This case is a favorite of those who claim that the line between binding and nonbinding pacts is not always easy to discern. A treaty between states is clearly binding, however, and hard cases like *Qatar* involve highly unusual, even unique, arrangements. And as Klabbers illustrates, the cases in which judicial bodies purportedly apply soft law turn out, on inspection, to show otherwise. Klabbers, *supra* note 42, at 172–77.

[46] *See* DANIEL C. THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM (2001); Harold S. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?* 70 AJIL 242, 246–49 (1976) (Russell was chief U.S. negotiator); Erika B. Schlager, *A Hard Look at Compliance with 'Soft' Law: The Case of the OSCE*, *in* NON-BINDING NORMS, *supra* note 4, at 346.

[47] European Security Conference Discussed by President Ford, 73 DEP'T ST. BULL. 204, 205 (1975). The Organization for Security and Co-operation in Europe (OSCE), the follow-on organization for the broader Helsinki process, continues to rely on nonbinding commitments. *See generally* Ratner, *supra* note 44.

[48] Treaty on Strategic Offensive Reductions (SORT), May 24, 2002, U.S.-Russ., 41 ILM 799 (2002), *available at* <http://www.state.gov/t/ac/trt/18016.htm#1>. The U.S. Senate consented to the Treaty on March 6, 2003, and the Russian Duma on May 14, 2003. *See President Putin: Strategic Offensive Reductions Treaty Is Crucial*, PRAVDA, May 13, 2003, *available at* <http://newsfromrussia.com/main/2003/05/13/46889.html>; Merle D. Kellerhals Jr., U.S. Senate Unanimously Approves Moscow Treaty (Mar. 7, 2003), *available at* <http://www.useu.be/Categories/Defense/Mar0703MoscowTreaty.html>.

[49] Peter Slevin, *Ambitious Nuclear Arms Pact Faces a Senate Examination*, WASH. POST, July 7, 2002, at A8.

[50] "This new, legally-binding Treaty codifies the deep reductions announced by President Bush . . . and by President Putin at [the] Summit . . . ." Fact Sheet: Treaty on Strategic Offensive Reductions (May 24, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/05/20020524-23.html>.

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Rethinking Soft Law

Scholars continue to be drawn to the concept of soft law agreements despite the weak evidence of state practice. Yet the category of soft law agreements faces conceptual problems as well. To be sure, the notion of soft law accords with a common intuition: in a decentralized, nonhierarchical legal system, some pacts and some rules are clearly more consequential than others.[51] The proliferation of agreements in the postwar era, especially in relation to multilateral public goods-oriented cooperation, has led to numerous accords that lack the traditional indicia of international law. In noting the increased prevalence of pledges, international lawyers have sought to incorporate this development in the discipline by labeling these agreements soft law (rather than treating them as nonlaw). As noted above, some agreements that expressly purport to be contracts are also said to be soft law because they are deficient in precision or enforcement measures. Under the rubric of soft law fall both pledges and those contracts that lack features deemed necessary for an accord to be "hard" law. Some analysts even argue that the soft quality of a commitment does not depend on the nature of the pact that contains it but, rather, on the particularities of the commitment itself.[52] Allegedly, language that is otherwise embodied in a legally binding agreement, yet is vague, hortatory, or heavily qualified, is also soft law.[53] Thus, scholars speak of both soft law agreements and soft law provisions within ostensibly hard law agreements.

For example, Friedrich Kratochwil states that

> highly specific declarations referring to particular controversies are construed as obligations of "hard" law, even if made in unconventional contexts, while certain declarations of principle, or agreements on guidelines, only have a "soft" character, *even if made by formal instruments*. A *soft* construction suggests itself, in that case, precisely because principles and guidelines are of a higher order of abstraction.[54]

Likewise, Christine Chinkin argues that "[t]he use of a treaty form does not of itself ensure a hard obligation. . . . [I]f a treaty is to be regarded as 'hard', it must be precisely worded and specify the exact obligations undertaken or the rights granted."[55] An example in Chinkin's view is the International Covenant on Economic, Social and Cultural Rights (ICESCR),[56] which contains obligations qualified by phrases like "as appropriate." While these writers identify an important fact about many international commitments—that they are intentionally weak or imprecise—dubbing them soft law is not only inconsistent with state practice. It also obfuscates rather than illuminates their character. As these examples suggest, assumptions about precision and flexibility often undergird claims about soft law, especially for putative contracts. Imprecise commitments are declared to be soft because they impart discretion to parties, or use general phrases whose content is open to interpretation. Yet imprecision does not alter the legal quality

[51] Klabbers, *supra* note 42, at 179. This intuition, of course, is equally true of domestic legal norms. Some are influential, some pointless or moot, some very effective, some wholly ineffective. None of this is germane to their status as law.

[52] *E.g.*, FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 200–01 (1989) (noting that "it is highly significant that the hardness or softness of [rules] can no longer be derived simply from the formality or genesis of the instrument"); *see also* Boyle, *supra* note 26, at 906–07; Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 429–30 (1991); Weiss, *supra* note 26, at 3.

[53] "Sometimes the term 'soft law' also refers to the provisions in binding international agreements that are hortatory rather than obligatory." Weiss, *supra* note 26, at 3.

[54] KRATOCHWIL, *supra* note 52, at 203.

[55] Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 851 (1989); *see also* Ratner, *supra* note 44, at 614–15; Shelton, *supra* note 27, at 4 (referring to the "[r]ecent inclusion of soft law commitments in hard law instruments"). Paul Szasz likewise claimed that soft law includes "hortatory rather than obligatory language contained in an otherwise binding instrument." Paul C. Szasz, *General Law-Making Processes*, *in* THE UNITED NATIONS AND INTERNATIONAL LAW 27, 32 (Christopher C. Joyner ed., 1997).

[56] International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, Art. 19, 993 UNTS 3, 10.

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of rules. These provisions are better understood as akin to standards, rather than rules.[57] Standards are ubiquitous in domestic law (e.g., "reasonable person," "due process," "good faith"). In fact, many domestic statutes contain language quite similar to that in the ICESCR.[58] In domestic contexts the imprecise nature of standards does not alter their legal character. As the rules-standards debate demonstrates, standards offer many advantages; hence, it is unsurprising that states often choose standards over rules when crafting international agreements.

One might argue that standards in domestic law operate differently from standards in international law because the domestic examples are really forms of delegation to judges. Standards delegate substantial decision-making power to courts; judicial decisions render the vague provision concrete in a specific case. This, however, is an argument about the *structure* of agreements rather than their legality or substance. Conflating the lack of delegation in an agreement's structure with its legal quality thus confuses two distinct issues. International accords can easily be negotiated to provide for an adjudicative body that is delegated the task of interpreting standards ex post. Indeed, the WTO Appellate Body regularly engages in just such interpretation, elaborating ambiguous terms and filling gaps.[59] If the ICESCR created a similar dispute settlement body, the provisions referred to above could likewise be elaborated and adjudicated.[60] In sum, there is nothing inherent in the provisions of the ICESCR that renders them soft; they are standardlike commitments that are *intentionally* unconnected to a structure of authoritative delegated interpretation.

Thus, calling imprecise provisions "soft law" muddles several issues. Obligations in the Covenant are legally binding because the parties intended them to be legally binding. That the Covenant lacks a structure of ex post elaboration does not alter this intent—though it clearly may alter the effectiveness of these obligations. To be sure, international law is likely to be more effective when enforcement is possible—all else equal (below I discuss why all else is rarely equal). But legal obligation can exist even if it cannot be enforced.[61] Declaring all legal rules that are not susceptible of enforcement to be soft law not only misses this fundamental point,[62] but also makes law's definitional qualities dependent on the very effect these qualities are typically claimed to produce. This approach—international law comprises those rules that affect state behavior[63]—becomes circular once any claim about the relative influence of international law is made. Conflating legality and substance thus stymies the study of law's relative influence on state behavior. This reasoning is particularly damaging because, as much interdisciplinary scholarship suggests, international agreements influence behavior through many causal pathways: lowering transaction costs, creating focal points, mobilizing domestic actors, enhancing monitoring, and altering the nature of justification, among others.[64] While legality may render commitments less

[57] Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

[58] The Hostage Act, for instance, requires the president to "use such means, not amounting to acts of war and not otherwise prohibited by law as he may think necessary and proper" to obtain the release of a U.S. citizen held hostage by a foreign government. 22 U.S.C.S. §1732 (2005). Likewise, the National Environmental Policy Act requires the use of "all practicable means . . . to improve and coordinate Federal plans, functions, programs and resources." 42 U.S.C. §4331(b) (2000 & Supp. 1 2002).

[59] Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 337–38 (1999). Another example is the arbitral award construing "best efforts" in the U.S.-UK Air Services Agreement. Samuel M. Witten, *The U.S.-UK Arbitration Concerning Heathrow Airport User Charges*, 89 AJIL 174, 176 (1995).

[60] Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* 98 AJIL 462 (2004).

[61] Many rules of constitutional law have little prospect of judicial enforcement. Yet we do not consider these rules to be "soft law." There is no jurisprudential reason to treat international legal rules differently.

[62] R. R. Baxter, for example, wrote that some commitments had the "characteristic of not creating legal obligations which are susceptible of enforcement, in whatever sense the concept of 'enforcement' is employed. They are all 'soft' law." Baxter, *supra* note 14, at 554.

[63] Brunnée & Toope, *supra* note 6; *see also* Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2621 (1991) ("[A] necessary criterion for the validity of any [legal rule] . . . is the willingness of . . . states and international bodies . . . to enforce it.").

[64] See, for example, the instructive table on international norms and institutions from the perspective of regime theorists and international lawyers, *in* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205, 220 (1993).

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easily reversed and therefore more credible, it is neither a necessary nor a sufficient cause of change in state behavior. To move forward in our understanding of how international cooperation is organized and sustained, we must carefully distinguish law as an independent variable from behavior as a dependent variable.[65]

One might still argue that the difference between terming a vague, but nominally legally binding agreement a "soft law agreement" vs. terming it, as I do here, "a shallow contract" is semantic. But for several reasons the distinction is not merely semantic. First, legality is important to state officials, as evidenced by the often-considerable debate over whether a proposed pact will be a contract or a pledge. Little, if any, state practice supports the concept of law that is soft, but nonetheless law. Second, as discussed further below, an agreement's legality often has implications for domestic law, which in some cases may explain why states—and private actors—argue over legality. Third, the politics of legal agreement as opposed to political agreement are distinctive. Legalization "mobilizes different political actors and shapes their behavior in particular ways."[66] Thus, the behavioral *result* of a pledge or a shallow contract may be similar or even identical, but the *reasons* for that behavioral outcome are distinct. Indiscriminately lumping any agreement that appears weak or flexible under the rubric of soft law conflates distinct concepts and obscures our ability to tease out the particular influences of law, substance, and structure.

I have devoted considerable attention to legally binding agreements that are nonetheless said to be soft. Let me briefly touch on the opposite: agreements that are avowedly nonlegal yet, it is claimed, are endowed with some soft legal effect. Typically, this claim attaches to declarations and decisions of multilateral conferences, such as the 1995 Beijing Declaration,[67] or similar collective and public resolutions of states. The animating idea is that these declarations are intended to influence state behavior and therefore possess some minimum indicia of international law. This idea conflates intentions with formal qualities. Law does not comprise all efforts to shape state action. And, like the claim that putatively legal commitments are in fact soft law, there is a dearth of state practice in support of the idea that formally nonlegal agreements are actually quasi-legal. No evidence suggests that state actors view commitments that external analysts have labeled soft law, such as the Beijing Declaration and the Basel Accord on Capital Adequacy, as legal commitments at all. Rather, they frequently stress their nonlegal character.[68] This is not to deny that states often negotiate pledges that have the rough look and feel of legally binding texts. But they do not expressly or impliedly claim that these agreements are lawlike accords in disguise. That many nonbinding commitments ultimately influence state behavior illustrates the complexity of world politics, not the legal character of those commitments.

My criticism of the concept of soft law is not meant to imply that nonlegal pacts fall outside the domain of international lawyers. For several reasons, both pledges and contracts ought to be central parts of contemporary lawyers' repertoires. The choice between pledge and contract is a choice between employing and avoiding law. Lawyers have special expertise on the effects of law. This choice is not a simple one, and understanding its fundamental effects is crucial to good agreement design. Moreover, many of the features of pledges are similar—or can be drafted to be similar—to those familiar to lawyers from treaty law. And some of the factors that explain

[65] Likewise, it is essential to recognize that legal and political agreements are quite closely aligned but nonetheless empirically and causally distinct. In this sense my argument draws on the Oppenheimian tradition. *See, e.g.*, Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law,* 13 EUR. J. INT'L L. 401, 403 (2002).

[66] Kahler, *supra* note 28, at 661.

[67] Fourth World Conference on Women, Beijing Declaration and Platform for Action, Sept. 15, 1995, UN Doc. A/CONF.177/20 & Add.1 (1995).

[68] As the Basel Committee, which negotiated the Basel Accord and Basel II, *supra* note 22, makes clear, "The Committee does not possess any formal supranational supervisory authority, *and its conclusions do not, and were never intended to, have legal force*" (emphasis added). The Basel Committee on Banking Supervision (n.d.), *available at* <http://www.bis.org/bcbs/aboutbcbs.htm>.

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the operation of contracts, such as reciprocity and transaction costs, apply to pledges as well. Finally, pledges, as many scholars have noted, frequently beget contracts.[69]

States "cooperate without law all the time."[70] As pledges grow in importance in international relations, lawyers must neither ignore them nor attempt to render them quasi law through conceptual redefinition. Rather, legal scholars and political scientists alike must systematically study the two forms of cooperation and the differential effects each produces.

III. The Choice of Legal Form in International Agreements

While the pledge-contract distinction is fundamental, few theories have been advanced as to how this choice is made. Until recently, political scientists ignored issues of legal form—and international law itself—entirely.[71] International lawyers have long been interested in the phenomenon of soft law but have generally eschewed theories of why and when states choose to create or avoid legally binding commitments. The few efforts to date have rarely moved beyond more or less ad hoc lists of factors that appear to influence the legality of agreements. These lists are helpful, but—much like multifactor lists in adjudicatory doctrine—they are often unsatisfyingly malleable and indeterminate.

In the existing scholarship on choice of instruments, a core set of arguments appear repeatedly. These arguments are broadly "functionalist."[72] Functionalist explanations assume rational actors; these actors design institutions based on the differing outcomes anticipated. As Robert Keohane explains, "Functional explanations in social theory . . . are generally *post hoc* in nature . . . . [They assume] that institutions can be accounted for by examining the incentives facing the actors who created and maintain them."[73] Effects, in short, are causes. Below I discuss the prevailing functionalist explanation of legality in international agreements, critique that explanation, and offer some additions to it.

Functional Arguments

What desired effects drive states to choose a pledge or a contract? Why do states not always negotiate contracts? One recent, and representative, study suggests the following reasons why states choose pledges over contracts.[74] Pledges (1) offer greater flexibility; (2) are more preliminary, and hence less precedential and public; (3) can be made with parties not diplomatically recognized or incapable of signing treaties; and (4) rarely require ratification and legislative action (hence take "effect" faster). The last reason focuses on domestic law and politics: variables associated with liberal theories of international relations. I return to this approach below. The third flows from doctrinal aspects of public international law. The first two, however, are core elements of the functional approach.

Many functional analyses stress the importance of flexibility to states. For example, Charles Lipson argues that pledges are sometimes preferred because they make fewer informational demands on governments than contracts.[75] As a result, a pledge enables states to adjust or exit

[69] The various human rights conventions arguably build on and extend the Universal Declaration of Human Rights, which is nonbinding. *See* Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948).

[70] Goldsmith & Posner, *supra* note 26, at 116.

[71] As the late Abram Chayes liked to say, political scientists fear using the "*L* word." That fear is fading. *See, e.g.*, Legalization and World Politics (Judith Goldstein et al. eds., 2001); Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55 Int'l Org. 289, 290–91 (2001).

[72] The functional claims in the literature are remarkably uniform. *See, e.g.*, Bilder, *supra* note 3; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421 (2000); Aust, *supra* note 2; Boyle, *supra* note 26; Goldsmith & Posner, *supra* note 26; Hillgenberg, *supra* note 2; Lipson, *supra* note 11; Weiss, *supra* note 26; *see also* Chinkin, *supra* note 55; Dupuy, *supra* note 52; Mary Ellen O'Connell, *The Role of Soft Law in a Global Order*, *in* Non-Binding Norms, *supra* note 4, at 100.

[73] Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 80 (1984).

[74] Hillgenberg, *supra* note 2, at 501.

[75] Lipson, *supra* note 11.

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the agreement more easily later on. This flexibility is advantageous when uncertainty is high.[76] Thus, pacts within the Organization of Petroleum Exporting Countries (OPEC) are pledges—oil market conditions change rapidly—whereas arms control accords are usually contracts—underlying changes in weaponry or in the distribution of power are likely to be slow.[77] Pledges also avoid a prominent public commitment, and hence have lower reputational costs. Finally, pledges are faster to negotiate and come into "force" immediately. Kenneth Abbott and Duncan Snidal similarly argue that the major advantage of pledges is flexibility. Pledges, they claim, also produce greater opportunity for compromise when state preferences are deeply divergent.[78] And, as others have noted, pledges do not bring into play the interpretive rules of the Vienna Convention on the Law of Treaties.[79]

Despite these advantages it is obvious that many (if not most) agreements are contracts. Functionalists generally point to the need for credibility of commitments to explain the predominance of contracts. Credibility is a core concern in an anarchic system with no central body to enforce agreements. Unlike pledges, contracts "signal . . . intentions with special intensity and gravity,"[80] and therefore bolster the credibility of commitments. Moreover, as a matter of domestic law, contracts must often be ratified by legislatures. This process adds to the signaling dynamic.[81] Flexibility, while often useful, can be problematic when agreements require states to undertake costly actions that depend on complementary actions by other states. Thus, contracts, with their ex post inflexibility, increase the incentive to make the agreement-specific investment ex ante. Even with a contract, of course, credibility is a problem because states may renege on their commitments. Realists frequently note this en route to casting doubt on the capacity of states to cooperate effectively beyond a few circumscribed areas.[82] Nonetheless, contracts are widely believed to be more credible than pledges, even if analysts may differ over how credible contracts (or pledges) generally are. This is true both because contracts evidence greater seriousness and because, by explicitly using international law, contracts tie the commitment to the body of international legal rules. If states believe that contracts raise the likelihood of compliance by others, they will be more likely themselves to comply. Abbott and Snidal elaborate this argument by claiming that states prefer contracts (or "hard law")[83] under four conditions: when the risk of opportunism is high; when noncompliance is hard to detect; when they may serve as a sorting device to form clubs of like-minded parties; and when executive branches use them as a means of committing other branches of government.[84]

In sum, credibility and flexibility lie at the core of functionalist analysis. Rational states trade off ex ante credibility for ex post flexibility. The central explanatory variables are (1) uncertainty in the underlying cooperative issue; (2) desire for speed or confidentiality; (3) the risk of opportunistic behavior by other states; and (4) diversity in interests and preferences. When the potential

[76] *Id.*; *see also* GEORGE W. DOWNS & DAVID M. ROCKE, OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1995); Koremenos, *supra* note 71; Beth A. Simmons, *International Efforts Against Money Laundering*, *in* NON-BINDING NORMS, *supra* note 4, at 244, 262 (noting that the use of pledges "may be the most appropriate way to deal with rapidly changing financial practices and market conditions") .

[77] Lipson, *supra* note 11, at 519–20; *see also* Koremenos, *supra* note 71; Simmons, *supra* note 76, at 262. There are arms control pacts that are pledges, especially in the areas of technology export controls. David S. Gualtieri, *The System of Non-Proliferation Export Controls*, *in* NON-BINDING NORMS, *supra* note 4, at 467; *see also* Anastasia A. Angelova, *Compelling Compliance with International Regimes: China and the Missile Technology Control Regime*, 38 COLUM. J. TRANSNAT'L L. 420 (1999).

[78] Abbott & Snidal, *supra* note 72, at 423, 438 (stressing the costs associated with delegation); *see also* P. W. Birnie, *Legal Techniques of Settling Disputes: The "Soft Settlement Approach,"* *in* PERESTROIKA AND INTERNATIONAL LAW 177 (W. E. Butler ed., 1990); Dupuy, *supra* note 52, at 429–30; Seidl-Hohenveldern, *supra* note 41, at 193; Szasz, *supra* note 55.

[79] Goldsmith & Posner, *supra* note 26, at 130–32.

[80] Lipson, *supra* note 11, at 508; *see also* Goldsmith & Posner, *supra* note 26, at 124–25; Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002).

[81] Lisa L. Martin, The United States and International Commitments: Treaties as Signaling Devices (2003) (unpublished manuscript, on file with author).

[82] *E.g.*, Downs et al., *supra* note 29.

[83] A category similar to contracts, but with focus on precision and delegation as well.

[84] Abbott & Snidal, *supra* note 72, at 429–30. In the international relations literature, opportunism refers to deliberate noncompliance (or cheating) in a prisoner's dilemma or in other analogous situations.

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for opportunism is high, uncertainty low, or preferences broadly aligned, contracts are favored. But when uncertainty is high, opportunism low, preferences highly divergent, or speed or confidentiality of the essence, pledges are favored. And though not stressed by functionalists, functionalism suggests that pledges ought to be relatively common in coordination situations. In coordination situations incentives to violate commitments—once agreed upon—are quite low.[85] Similarly, this functional analysis implies that pledges ought to be relatively more common during the postwar period, as the number of states in the international system increased dramatically and divergences between North and South became pronounced. This functional theory, and its corollaries, is testable and explains a significant portion of state behavior. Yet it suffers from several limitations.

The Limits of Functionalism

A critical question is how the different factors interrelate. If uncertainty is high (predicting a pledge), yet the risk of opportunism is also high (predicting a contract), what happens? How, in short, are these factors traded off?

Empirically, it is not hard to find cases that seem inconsistent with the functional approach, or at least suggest modifications to it. For example, despite the functionalist prediction that states will prefer pledges under high uncertainty, many agreements on subjects of high uncertainty are actually contracts. Thus, climate change is marked by significant uncertainty, yet the 1992 UN Framework Convention on Climate Change[86] and the Kyoto Protocol to the FCCC[87] are both contracts. At the same time as the FCCC was being negotiated, the same set of states was drafting what was to have been a contract on forest management. Instead, it became a pledge, the Non-Legally Binding Authoritative Statement on Forest Principles,[88] even though preference cleavages were quite similar in both cases. Most important, uncertainty about forests is low, not high. Hence, the resulting pattern turned out to be the opposite of that predicted by functional accounts.

The risk of opportunism, however, may be the key causal variable. In climate change the risk is high. Emissions reductions are costly, yet a stable climate is a public good. In forest preservation the risk is low: healthy forests are a quasi-public good, but much of their benefit accrues to the state itself. If opportunism is the key variable, these simultaneous choices among a stable set of states—a contract for climate change, but a pledge for forest protection—make sense. This amended functional approach suggests that pledges will be observed only when the risk of opportunism is low *and* uncertainty high. Even this theory, however, faces anomalies. OPEC commitments are famously plagued by opportunism, yet commonly said to exemplify a pledge.[89] (Path dependence and tradition may also play a role, leading states to favor certain forms of agreement in certain areas simply because of a long history of doing so.) Functional accounts face another problem: they tend to draw the distinctions between contracts and pledges in overly stark terms. For example, considerable flexibility can be built into contracts in the drafting process. Some contracts, such as fisheries regimes, incorporate provisions for ex post adjustments to commitments. Others include escape clauses, reservations, sunset deadlines, or exit

[85] The incentive to defect is not zero. Some coordination games create incentives for one party to defect publicly to move the equilibrium. In general, however, "no incentive exists for surreptitious cheating. Since the point of diverging from an established equilibrium is to force joint movement to a new one, defection must be public." Lisa L. Martin, *The Rational State Choice of Multilateralism*, *in* MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 91, 102 (John Gerard Ruggie ed., 1993). Coordination games refer to situations in which no party has an incentive to defect surreptitiously from the agreed standard, though there may be disagreement about the choice of the standard. A common example is driving on the right or the left: no party has an incentive to deviate once the standard has been chosen.

[86] FCCC, *supra* note 35.

[87] The Kyoto Protocol is an amendment to the FCCC. It was opened for signature on March 16, 1998, and came into force on February 16, 2005. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, UN Doc. FCCC/CP/1997/7/Add.2, *available at* <http://unfccc.int/resource/docs/convkp/kpeng.html>.

[88] Forest Principles Statement, *supra* note 23.

[89] Lipson, *supra* note 11, at 519–20.

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provisions. In short, there are many ways to make an agreement flexible. As a result, we cannot satisfactorily explain the choice to negotiate a pledge simply as the product of a preference for flexibility on the part of negotiators.

Similarly, pledges are not the only solution to preference cleavages. Many contracts grow out of deep divisions. States can use substantive ambiguity to address preference heterogeneity. The recently negotiated Cartagena Protocol on Biosafety[90] graphically illustrates the ability of negotiators to draft contracts that paper over differences.[91] Contracts sometimes span preference cleavages by simply postponing resolution of a controversial issue: the Cartagena Protocol itself grew out of just such a provision in the Convention on Biological Diversity.[92] To be sure, in many instances pledges have been used to bridge cleavages. Yet contracts can be used for the purpose as well. Why was a contract chosen for global human rights cooperation in the International Covenant on Civil and Political Rights[93] but rejected for East-West human rights cooperation during the Cold War?[94] Why was a contract rejected for a forests accord but accepted for a contemporaneous climate accord?

In the last analysis, the choice between pledge and contract is difficult to account for with a purely functional approach. While pledges clearly facilitate compromise between divergent states, contracts are often employed when preferences are heterogeneous. Many pledges can be found between similar states.[95] State choices, moreover, often do not appear to reflect uncertainty; and since flexibility can be built into a contract directly, governments need not, and frequently do not, resort to pledges when faced with high levels of uncertainty. One way to strengthen the explanatory power of functionalism is to focus on opportunism. However, this revision also meets with some empirical anomalies: pledges have been used in situations where opportunism appeared likely (e.g., OPEC, the "30% Club" in the nitrogen oxides agreement in Europe, the Paris Club of creditor states[96]) or have been strongly proposed in such situations, even if not adopted (the Bush-Putin arms negotiations). But these problems are fewer, suggesting that the risk of opportunism may be central to the choice between legal and nonlegal agreement.

The fact that flexibility can be readily produced in contracts may explain yet another problem with functional accounts: the apparent lack of pledges in many key areas of cooperation. While functionalists do not predict a particular quantity, the theory suggests that pledges should be very common. Uncertainty is endemic in world politics; and many cooperative situations are not plagued by opportunism, either because the level of cooperation is low or because the situation is a coordination game. Yet it is difficult to argue that pledges dominate major multilateral negotiations. Admittedly, pledges are not uncommon. But they do not constitute the primary mode of agreement in areas such as the environment and human rights, where uncertainty is arguably highest and, at least for human rights, the risk of opportunism low. They are unusual—some say nonexistent—in arms control.[97] They are similarly scarce in trade, investment, and intellectual property. They do not necessarily predominate even in areas characterized by coordination

[90] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 ILM 1027 (2000), *available at* <http://www.biodiv.org/>.

[91] Sabrina Safrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 96 AJIL 606, 628 (2002).

[92] Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79, *available at* <http://www.biodiv.org/>.

[93] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

[94] In part, the choice of a contract for the ICCPR may reflect the prior existence of a pledge, in the form of the 1948 Universal Declaration of Human Rights. *See* note 69 *supra*.

[95] Transgovernmental networks of regulators, for instance, frequently employ pledges and tend to be most active among states that are broadly similar in preferences and regulatory approaches. Raustiala, *supra* note 8.

[96] On the "30% Club," see text at notes 195–96 *infra*. On the Paris Club, see its Web site, <http://www.clubdeparis.org>.

[97] *See* Richard L. Williamson Jr., *International Regulation of Land Mines*, *in* NON-BINDING NORMS, *supra* note 4, at 505, 517. Pledges in the arms control area are concentrated in the export control arena, which Williamson considers distinct. Williamson notes that "there are no non-binding instruments negotiated by the relevant parties that would constitute a soft law arms control instrument." *Id.* at 517; *see also* Gualtieri, *supra* note 77 (discussing export control regimes and noting that the Non-Proliferation Treaty and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 UST 583, 1015 UNTS 163, are binding, but that supplier group arrangements such as the Zannger Committee and Nuclear Supplier Group are not).

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games, such as air traffic control.[98] Moreover, pledges appear concentrated in distinct areas, such as international monetary affairs.[99] This is not to claim that pledges are rare, but rather to claim that functionalism implies that pledges should be quite common.

In sum, functionalism explains much about the design of agreements. But it faces a twofold problem: the alleged advantages of either pledges or contracts are much more contingent in practice than the theory suggests, and the relative frequencies of the two choices are imbalanced: pledges appear to be less common than a reasonable reading of functional theory suggests. Those pledges that do exist are clustered in certain areas of cooperation.

The Domestic Politics of International Cooperation

In this section I look to the role of domestic politics and institutions as a means to supplement and amend functional accounts.[100] This approach draws on liberal international relations theory.[101] Because on its own liberal theory says little about whose preferences get realized in world politics, I also look to realist premises about power.[102] These premises carry particular weight when examining endogenous change in agreement features.

The liberal framework. Liberal international relations theory makes three core assumptions. First, individuals and private groups are the fundamental actors. Second, these actors use the state as a means to their preexisting ends. Third, the configuration of interdependent state preferences ultimately determines state behavior. Liberal theorists recognize the importance of realist conceptions of power but stress that liberalism provides a unique understanding of power: one rooted in a society's "willingness to pay" for certain ends.[103] I make three further assumptions. First, I assume that states care moderately about compliance with international law. This concern is not overwhelming—states, to be sure, violate their legal obligations—but it is present. This assumption is realistic rather than heroic: substantial evidence indicates that many states try seriously to comply with international law,[104] and that they seek to ensure, when negotiating agreements, that they can comply with them. Second, I assume that states are moderately risk averse.[105] They are cautious about undertaking commitments in the face of uncertainty. Third, as a starting point I assume that the respective choices of the legality, substance, and structure of an agreement do not influence one another. This assumption is not realistic, but it is useful for laying out the basic argument. I later relax this assumption and show how these choices interrelate. Supplementing functional accounts with liberal insights helps illuminate how and why legality, substance, and structure interact in the design of agreements.

I consider three explanatory factors: domestic preferences, domestic institutions, and relative state power. Domestic preferences refer to the demands of domestic constituencies for or against cooperation. My first hypothesis is that governments negotiate agreements—and negotiate agreements in a particular form—not primarily in hopes of solving functional problems but in response to demands of domestic constituencies. Failure to satisfy the preferences of these "constituencies for cooperation" gives rise to domestic costs for governments.[106]

[98] For example, the Chicago Convention on International Civil Aviation is a contract. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295, *available at* <http://www.icao.int/cgi/goto_m.pl?icao/en/takeoff.htm>.

[99] *See* Plaza Accord, *supra* note 21; Basel Accord & Basel II, *supra* note 22.

[100] Hence, I am not claiming that functional accounts are fatally flawed. Rather, "domestic politics complements . . . functionalist explanations for legalization by supplying an explanation for government preferences." Kahler, *supra* note 28, at 667.

[101] Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

[102] "States first define preferences—a stage explained by liberal theories of state-society relations. Then they debate, bargain, or fight to particular agreements—a second stage explained by realist and institutionalist (as well as liberal) theories of strategic interaction." Moravcsik, *supra* note 101, at 544.

[103] *Id.* at 523–24.

[104] BILDER, *supra* note 3, at 7–10; ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 1–28 (1995); Raustiala & Slaughter, *supra* note 5.

[105] DOWNS & ROCKE, *supra* note 76, at 16.

[106] Kahler, *supra* note 28, at 675, uses a similar concept of "compliance constituencies."

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What are these preferences? Preferences about cooperation obviously vary widely. Some domestic actors will strongly oppose a pact, while others will demand one. But there is little evidence that demandeurs prefer pledges as a first-best choice. Rather, as many commentators have noted, they almost always favor contracts.[107] For example, the recent land mines convention[108] was spearheaded by an alliance of nongovernmental organizations (NGOs). These NGOs did not seek a pledge: they demanded a contract.[109] Likewise, the pharmaceutical and entertainment industries in the United States did not demand a pledge when they sought to strengthen intellectual property protection in the 1980s; they demanded, and received, a contract, the Trade-Related Intellectual Property Agreement of the WTO, or TRIPS.[110] The systematic preference for contracts accords with the prevailing view that pledges are weak, ineffective, and inferior to contracts.[111] (A similar belief underlies the claim that contracts are more credible than pledges, though this claim can have a self-fulfilling quality.) In many areas of cooperation—such as the environment, arms control, trade, and human rights—the preference for contracts is pervasive. Indeed, in these areas negotiations that end in a pledge are often dubbed failures, while those that produce contracts, though subject to criticisms about substance or structure, are largely considered successes.[112] For example, as Dinah Shelton states regarding international labor law, "It is notable that here, as in other contexts, non-state actors favor binding instruments . . . ."[113] Elsewhere she argues similarly that "[i]t was clear at the Rio Conference on Environment and Development that [NGOs] had a strong preference for a binding Earth Charter over the ultimately-adopted Rio Declaration, and that states were unwilling to accept a legally binding text because of the consequences flowing from legal obligations."[114] Likewise, Douglass Cassel claims:

> The long-term question may be not whether human rights hard law is, in fact, more likely than soft law to induce compliance, but whether it is so perceived by NGOs, issue networks, elites, the media, and even governments. It seems that the binding nature of the norm is significant. Human rights hard law tends to be perceived as raising the moral, political, and, of course, legal stakes of non-compliance.[115]

Correctly or incorrectly, many domestic groups demand contracts when they favor cooperation.[116] Liberal theory suggests that this bias helps explain why contracts are so common. I do not claim that domestic constituencies always favor contracts (indeed, they may oppose any

[107] *See* Douglass Cassel, *Inter-American Human Rights Law, Soft and Hard*, *in* NON-BINDING NORMS, *supra* note 4, at 393; O'Connell, *supra* note 72; Shelton, *supra* note 27, at 9–10; Williamson, *supra* note 96; *cf.* Christine M. Chinkin, *Normative Development in the International Legal System*, *in* NON-BINDING NORMS, *supra* note 4, at 21, 31 (arguing that nongovernmental organizations "view the soft/hard law distinction as carrying little weight").

[108] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 ILM 1507 (1997), *available at* <http://www.icrc.org>.

[109] Williamson, *supra* note 97.

[110] MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY (1998); *see* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *reprinted in* LEGAL TEXTS, *supra* note 32, at 321.

[111] *See, e.g.*, Ratner, *supra* note 44, at 653 (arguing that there is "an implicit assumption that hard law will affect behavior more than will soft law").

[112] *See* William K. Stevens, *Lessons of Rio: A New Prominence and an Effective Blandness*, N.Y. TIMES, June 14, 1992, §1, at 10 ("Environmentalists attacked the [nonbinding forest principles] as hopelessly weak, even a step backward . . ."). This view has changed little over the intervening decade. *See, e.g.*, Maria Adebowale et al., Environment and Human Rights: A New Approach to Sustainable Development (Int'l Inst. for Env't & Dev., May 2001), *available at* <http://www.iied.org/docs/wssd/bp_envrights.pdf> (noting that "('soft law') treaties such as the Rio agreements are an inadequate basis for effective control of [globalization]").

[113] Dinah Shelton, *Commentary and Conclusions*, *in* NON-BINDING NORMS, *supra* note 4, at 449, 458. That said, pledges are common in the International Labour Organization system.

[114] Shelton, *supra* note 27, at 9–10.

[115] Cassel, *supra* note 107, at 401.

[116] Domestic preferences are asymmetric in another dimension. There are always domestic actors that oppose cooperation as well as those that prefer it. Those that prefer a new agreement to the status quo (which may or may not be "no agreement") generally demand a contract. But it does not follow that domestic actors that prefer the status quo therefore demand pledges. Rather, there are three relevant choices: pledges, contracts, and no agreement. While there is little empirical evidence, it appears to be rare for domestic actors to demand pledges as a first-best choice. And domestic actors opposed to new cooperation generally oppose any pact at all, though they may ultimately prefer a pledge to a contract.

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agreement at all). I claim only that domestic actors that prefer cooperation exhibit a decided tendency in favor of contracts. This preference skews the supply of agreements away from what a pure functional theory would predict. The result is more contracts, and fewer pledges.

Domestic institutions and the approval of agreements. Liberal theory stresses the preferences of private actors. But it also looks to domestic institutions as important intervening variables. Typically, international accords—especially contracts—must be approved by some domestic process. In democratic states the executive branch often negotiates agreements and presents them to the legislature—or part of the legislature—for formalized consent prior to ratification. In parliamentary democracies such as the United Kingdom, the executive controls the legislature and thus the process of legislative approval may be largely pro forma. In presidential systems the legislative role is more profound.[117]

The choice between pledge and contract is not unrelated to these domestic procedures. Unlike a contract, a pledge in the United States is not subject to congressional action. The Case Act mandates that "any international agreement . . . other than a treaty" be transmitted to Congress "as soon as practicable . . . but in no event later than sixty days thereafter."[118] The Act refers to sole executive agreements—those subject to no congressional approval—and congressional-executive agreements, which go before both houses of Congress. The implementing regulations of the Case Act, however, do not require the transmittal of nonbinding agreements. For the Act to apply, "[t]he parties must intend their undertaking to be legally binding . . . . Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements [for the purposes of this Act]."[119] This fact may help explain both why the U.S. government (and, by analogy, that of other states) sometimes prefers pledges and why domestic actors rarely do. Pledges favor the executive branch. They are more confidential and less prominent; members of Congress are less likely to hold hearings on pledges; debate is likely to be rare; and negotiations can take place more quickly.[120] These claims should not be overstated—congressional hearings were held on the Helsinki Final Act—but pledges rarely attract high levels of political attention.[121] The lack of applicability of the Case Act with regard to pledges, even in comparison to sole executive agreements, lessens the likelihood that Congress—and domestic interest groups—will be aware of an agreement or able to capitalize politically on criticism of it.[122] Of course, the Case Act and the dynamics it spawns do not apply to other governments. But the preceding illustrates how domestic institutions influence preferences over legal form.

Governments may also prefer pledges because they fear that the political prominence of contracts will increase domestic scrutiny in the future. For example, Richard Cooper has argued that one reason monetary regimes are commonly pledges is that

> the world economy is very asymmetric in its functioning. For technical reasons, it is both likely and desirable that one or a few currencies will emerge with special status in market transactions. Even when this fact is fully known and acceptable, it cannot always be formally acknowledged and sanctified in treaties, in part for reasons of status . . . . There thus emerges a discrepancy between what governments say in formal negotiations and what they do, or are willing happily to accept, in day-to-day operations . . . .

[117] According to David Sloss, some 25% of global treaties, as opposed to bilateral or regional treaties, submitted to the Senate between 1993 and 2000 were rejected. David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1984–85 (2003).

[118] Case-Zablocki Act, 1972, 1 U.S.C.S. §112b(a) (2005). The United Kingdom has a similar rule: pledges do not have to be published, whereas contracts do. Aust, *supra* note 2, at 789–90.

[119] U.S. Dep't of State, International Agreements, Coordination, Reporting and Publication of International Agreements, 22 C.F.R. §181.2(1) (2005).

[120] A set of states may also choose to negotiate a pledge so as to avoid registration with the United Nations, pursuant to Article 102 of the UN Charter.

[121] THOMAS, *supra* note 46, at 91–156.

[122] This phenomenon is similar to, but distinct from, what Lisa Martin has called the "evasion hypothesis." That is the claim that the president uses sole executive agreements or congressional-executive agreements to circumvent Senate involvement. Martin finds that there is little empirical support for that claim. *See generally* LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION (2000).

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> Formal arrangements induce sovereign states to insist on formal symmetry in status, partly to cater to nationalist sentiment at home. Informal arrangements carry no such compulsion.[123]

In other words, pledges usefully insulate governments against domestic political pressures.

Domestic institutions thus create some incentives for government officials to favor pledges over contracts. The degree to which domestic institutions actually explain the choice between pledge and contract is a topic for further research. Some pledges do become politically prominent, and unless an agreement is classified interest groups or legislators will have no difficulty finding out about it. More important, the lack of legislative attention to pledges is a double-edged sword. When states need to signal seriousness about a commitment, a contract will serve them better than a pledge. But a contract has another signaling advantage irrespective of its legal quality on the international plane: it typically requires some domestic action before ratification. By involving legislatures in approval, a contract indicates widespread domestic support and is therefore more credible.[124] By the same logic pledges are easier to reverse by future governments. In the United States, for example, as a constitutional matter the president can terminate a contract as easily as a pledge.[125] But politically it is harder because the contractual form carries a stronger signal of intent and because the Senate has bought into the agreement through its advise-and-consent role. Likewise, courts construe statutes that facially contradict binding treaty commitments as consistent with the international obligation whenever possible.[126] Pledges, which do not create the legal obligations the interpretive canon seeks to protect, are thus more liable to be held as reversed by legislative action and may therefore be less valuable to the executive ex ante.

Constitutional systems differ in many respects, and I have focused here on U.S. law and practice. But it seems reasonable to assume that, where domestic constitutions provide for a legislative consent process, that process likely applies more frequently to contracts than to pledges.[127] Domestic institutional differences create incentives that help account for and accentuate the contractual bias of domestic interest groups. Because they often want new agreements, and because contracts typically provide greater access to the policy process, these groups will favor contracts above and beyond whatever preference for them already exists. Thus, domestic actors may prefer contracts for at least two reasons. One is perceptual: the belief that contracts are more effective than pledges at shaping state behavior. The second is tactical: domestic institutions in many states, especially democracies, require more process for contracts and therefore create more opportunity for influence by private actors. Contracts are likely to correlate with the preferences of strong domestic constituencies for a third reason. The stronger the domestic support, the more likely a state is to comply with its commitments. All else equal, a state with strong domestic support for an agreement will want to signal its reliability through a contract. Government officials will sometimes favor pledges (because they seek to keep the agreement on a low profile politically) but will often favor contracts, because they need to signal credibility. And they will often favor contracts because they want to satisfy the demands of politically powerful domestic actors. The predicted result is an oversupply of contracts.

Power, public goods, and club goods. Individual states generally cannot unilaterally determine whether an accord will be a contract or a pledge. But realist theory suggests that the preferences of powerful states dominate the determination of legal form—and they often do. However, otherwise-weak states sometimes have significant contextual power that can influence the terms

[123] Richard N. Cooper, *Prolegomena to the Choice of an International Monetary System*, 29 INT'L ORG. 63, 95–96 (1975); *see also* Gold, *supra* note 41.

[124] Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SCI. REV. 829 (1998).

[125] The dominant view is that the president may terminate treaties without the Senate's consent. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 211–12 (2d ed. 1996).

[126] In the United States, this is due to the "*Charming Betsy*" canon of construction. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

[127] I say "likely" advisedly, since the various studies on national reception of treaties typically do not discuss pledges at all.

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of an agreement. This is sometimes termed veto power, referring to the power to withhold agreement. Veto power depends crucially on the nature of the good in question. In issue-areas that produce club goods veto power is nonexistent or trivially weak. Club goods are goods that are nonrivalrous in consumption. However, the benefits of cooperation regarding club goods are by definition excludable.[128] Only members of the "club" can enjoy the good; hence, others face an incentive to join the club to gain access to that good. Consequently, a threat to remain outside the club is rarely credible.[129] Indeed, the opposite holds true: numerous states outside, say, the European Union or the WTO are eager to enter; few are eager to exit. The advantages of cooperation flow only—or at least predominantly—to participants. Conversely, veto power is strong with regard to public goods.[130] Public goods create incentives to free ride. States that desire an agreement find themselves vulnerable to the exercise of veto power by potential free riders. The provision of side payments to satisfy these hold-out states is one result of the exercise of veto power; change in the legality, substance, and structure of agreements is another. A third potential result of veto power—no agreement—is important, but its measurement encounters severe methodological obstacles.

Consequently, while pledges truly are "often a compromise between those States which did not favor any regulatory instrument and those which would have preferred the conclusion of a treaty,"[131] this claim rests critically on the type of problem under consideration. When governments desire wide participation in a public goods regime, whether because of fears of leakage, relative gains, or free riding, the threat to remain outside the regime is credible, and recalcitrant states can force the negotiation of a pledge rather than a contract—or can scuttle the pact altogether.

A Liberal Analysis of Legality

Let me summarize the argument so far. Liberal theory posits that states channel and respond to the demands of domestic actors. Many of these groups favor contracts—in part because of the structure of domestic institutions and in part because of the prevailing belief that contracts are more credible and more effective than pledges. This preference provides one potential explanation of the observed bias toward contracts. Yet states plainly care about other factors as well, such as flexibility in the face of uncertainty or confidentiality, and these factors militate toward pledges. How do states respond to these varied pressures?

We lack good answers, but we know that contracts prevail in international cooperation. Liberal theory suggests that domestic demands for contracts ought to outweigh concerns over uncertainty (which push toward pledges). There are two reasons why domestic pressures may outweigh the desire for flexibility. First, state officials tend to have short time horizons: they are known to discount future events.[132] While they may care about flexibility in the face of uncertainty, the need for flexibility arises ex post. Domestic pressures frequently exist ex ante. Second, the tendency to discount flexibility is accentuated because implementation (and perhaps noncompliance) will often be a problem for a later government, not the negotiating government. Both of these factors can be subsumed under the rubric of time preference. If governments exhibit time preference, and there is good reason to believe that they do, domestic pressures may reasonably be expected to operate prior to functional variables such as flexibility.[133]

[128] *See generally* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS (2d ed. 1996).

[129] Unless the state in question has preponderant power. *See, e.g.*, Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

[130] GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul et al. eds., 1999).

[131] Chinkin, *supra* note 55, at 861.

[132] The implications of discounting have been heavily addressed in the literature on the European Union. *See, e.g.*, KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001); Paul Pierson, *The Path to European Integration: A Historical Institutional Analysis*, 29 COMP. POL. STUD. 123, 135–36 (1996).

[133] The concern for credibility, however, is a functional variable that operates ex ante, but also tends to push governments toward the negotiation of contracts rather than pledges.

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Another observable implication of this argument is that the mix of pledges and contracts should vary according to the level of domestic demand for cooperation. All else equal, we should observe a higher percentage of contracts when domestic constituencies for cooperation are politically powerful, and a lower percentage when they are weak. Moreover, liberal analysis predicts that contracts will be relatively favored when legislative approval is needed to signal credibility—perhaps because the obligations in question require legislative action to be implemented. Where credibility is less important, or governments possess other means to enhance credibility, or the obligations in question can be implemented by the executive branch, pledges become more attractive.

The empirical evidence is generally, though not entirely, consistent with these broad claims. Absent good data on international agreements, much of this evidence is impressionistic.[134] Pledges appear comparatively uncommon in agreements on the environment, human rights, and trade—areas that exhibit active domestic constituencies known to favor contracts. There are exceptions, notably the aforementioned Helsinki Final Act, but also the many nonbinding agreements of the International Labour Organization.[135] But aside from the last, these pledges are exceptional. Indeed, the Helsinki Final Act and the Forest Principles Statement both illustrate veto power. In each, the power of certain states—those essential to the viability of the agreement—led to the negotiation of pledges rather than the contracts desired by many other states and domestic pressure groups.

By contrast, pledges appear most common in areas of technocratic cooperation where domestic interest groups are relatively inactive. This result is consistent with the foregoing analysis. Where domestic pressures are weak, states appear to have greater latitude in the choice of legality and, as a result, more frequently negotiate pledges. Situations where pledges appear especially common include securities regulation, antitrust enforcement, sovereign debt restructuring, and monetary cooperation. In these areas transgovernmental networks of government officials are particularly active and often employ nonbinding "memoranda of understanding" on an agency-to-agency basis.[136] Because these agreements engender so little political attention, they are rarely documented.[137] Such accords are frequently seen as extensions of domestic regulatory activities, which are already within the purview of the executive branch. Often these agreements address coordination problems, for which standards need to be agreed upon, but once so agreed are self-enforcing. That much of this cooperation employs pledges is consistent with the functional claim made earlier that pledges ought to be most common in coordination situations.

In these more technocratic and arcane areas, the available empirical evidence suggests that the prevalence of pledges roughly, if inconsistently, rises as uncertainty rises—as functional theory predicts. For example, as international capital and foreign exchange markets have grown and intensified, monetary agreements have declined in legalization.[138] Exchange rate pacts such as the Plaza and Louvre Accords[139] addressed issues of high uncertainty—governments have only limited control over the fundamentals that determine exchange rates—and were pledges. Similarly, the *Forty Recommendations* on money laundering of the OECD's Financial Action Task Force (FATF) is a pledge, as are the Basel Accord on Capital Adequacy and the Paris Club agreements on sovereign debt.[140] These examples are consistent not only with the functional

[134] Several efforts are under way to create extensive data sets of international agreements and their provisions. However, these data sets are nearly always focused on contracts.

[135] The ILO has sponsored more than two hundred pledges and approximately the same number of contracts. *See* Database of International Labour Standards, *at* <http://www.ilo.org/ilolex/english/recdispl.htm>.

[136] SLAUGHTER, *supra* note 8; Raustiala, *supra* note 8, at 22.

[137] Aust, *supra* note 2, at 791–92. Aust also argues that pledges are most likely in such technocratic areas of cooperation. *Id.* at 789, 791.

[138] Simmons, *supra* note 28, at 598–600.

[139] The Plaza and Louvre Accords of 1985 and 1987 were attempts at exchange rate and macroeconomic policy coordination. For more on the Plaza Accord, see *supra* note 21. For more on the Louvre Accord, see YOICHI FUNABASHI, MANAGING THE DOLLAR: FROM THE PLAZA TO THE LOUVRE (2d ed. 1989).

[140] *See, e.g.*, FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS (June 20, 2003), *available at* <http://www1.oecd.org/fatf/pdf/40Recs-2003_en.pdf>; Basel Accord and Basel II, *supra* note 22. On the recent Paris Club Iraqi debt decision, see Paris Club Press Release, *supra* note 25; Craig S. Smith, *Major*

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expectation that uncertainty will influence the form of commitments, but also with the liberal claim that pledges are most common in areas of low domestic salience—or, as Cooper suggests, in areas in which governments seek to keep domestic salience low.

The framework advanced in this article also helps clarify when pledges or contracts will be used to bridge preference cleavages. It sheds light on why, for example, the Helsinki Final Act was cast as a pledge, whereas other contemporaneous human rights accords were contracts. Unlike the global human rights conventions, the Helsinki Accords were fundamentally about East-West cooperation. Thus, the United States and the USSR each had enormous veto power—the implied threat to stay out of any pact mattered because the exercise was pointless without them. For universal human rights accords such as the International Covenant on Civil and Political Rights, no single state or group of states possessed sufficient veto power to succeed in demanding a pledge.

As these arguments illustrate, liberal theory does not produce fully accurate predictions of state behavior. But it usefully supplements functional arguments. This richer analysis can be fruitfully extended by systematically considering the interactions between form and substance in international agreements.

IV. Pledges, Contracts, and the Substance of Agreements

Governments are the architects of agreements; they collectively determine the substantive terms of their obligations. I define the substance of an agreement as the depth or shallowness of the commitments.[141] Deep agreements require significant changes from the status quo; shallow agreements require little or no change. Examining variation in depth through the lens of liberal theory can illuminate when and why states choose pledges or contracts. Most important, it can show how legality influences substantive obligations and vice versa. Legality and depth are interactive, not independent, variables.

Deep and Shallow Multilateralism

Many scholars have noted the variety in depth of international agreements. Environmental accords, for example, are often shallow. Trade agreements are generally thought to be deeper, as are many arms control accords.[142]

Is there a connection between agreement depth and legality? Functional theory suggests two contrasting arguments: that contracts are likely to be associated with shallow commitments and that contracts are likely to be associated with deep commitments. Both are broadly consistent with functional premises. Because functional arguments cannot distinguish when one or the other should occur, they pose a puzzle.

The logic of the first argument about depth and legality is as follows. Credibility reflects expectations about performance. The more shallow the commitment, the more likely performance will be, and therefore the more credible the commitment ex ante. Negotiating commitments as contracts should lead to a reduction in the depth of those commitments, all else equal, because states seek a "compliance cushion" or large margin of error.[143] Likewise, pledges are preferred if commitments must be deep because they do not raise acute compliance concerns. A pledge "enables states to adjust to the regulation of many new areas of international concern without fearing a violation (and possible legal countermeasures) if they fail to comply."[144] Legality and depth, in sum, are negatively correlated.

Creditors Agree to Cancel 80% of Iraqi Debt, N.Y. Times, Nov. 22, 2004, at A6. The Paris Club agreements are nonbinding, though the creditor nations then typically negotiate binding bilateral accords, based on the Paris Club agreement, with the debtor state.

[141] Following the definition in Downs et al., *supra* note 29.

[142] *Id.*

[143] As Simmons argues, "[G]overnments are hesitant to make international legal commitments if there is a significant risk that they will not be able to honor them in the future. . . . [C]ommitment is associated with conditions that one can reasonably anticipate will make compliance possible." Simmons, *supra* note 28, at 599.

[144] Steven R. Ratner, *International Law: The Trials of Global Norms*, Foreign Pol'y, Spring 1998, at 65, 68.

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This dynamic implies that we should observe high levels of compliance with contracts. This implication follows from the initial premises: if contracts are deliberately rendered shallow, then they are easy to comply with by definition. While measurement of compliance is challenging, most international lawyers believe that contracts do exhibit high compliance. Louis Henkin stated in his famous aphorism that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[145] Substantial numbers of scholars have seconded Henkin's claim. Whatever the merits of this claim, it corresponds with the argument I have described, as well as with the oft-noted phenomenon of lowest-common-denominator treaties. Indeed, the major reason Henkin was right is not that international law is powerful but that international agreements are often shallow and codify what states would do anyway. States build compliance cushions into contracts, making the commitments credible—yet also shallow.

The second argument asserts that legality and depth are positively correlated. Functionalists assert that states fear the prospect of cheating by other parties, especially when they negotiate deep commitments.[146] Deep commitments are costly to implement; hence incentives to defect are high. Casting such commitments as contracts raises the costs of nonfulfillment. Thus, the deepest, most costly commitments are contracts to maximize the probability of compliance by other parties. This prediction of a positive correlation is consistent with the experience of the WTO, the North American Free Trade Agreement, and many arms control agreements, which are often deep and legally binding.

One way to think about these contrasting functional arguments is in terms of risk. Are states more concerned about the risk of *their own* noncompliance, or the risk that *other parties* will fail to comply? The first is illustrated by a negative correlation, the second by a positive correlation. Both correlations are logically plausible, and both are consistent with functional theory. Both also enjoy some empirical support. Liberal theory, however, suggests that differing domestic political dynamics explain when negative or positive correlations are likely to be observed.

In proffering a liberal explanation for this puzzle, I highlight two factors, both focused on domestic politics. The first is the organizational structure of the relevant domestic constituencies, understood in Olsonian or collective action terms.[147] The second is the degree to which domestic actors are directly affected by the consequences of noncompliance and hence have continuing incentives to monitor compliance. Both of these factors in turn influence the credibility of political demands (threats) by domestic actors for agreement features, and therefore, in the liberal paradigm, both influence the choices of governments. Differences in these factors help explain who prevails in the interest-group politics of cooperation. Consequently, they help explain when depth and legality are positively correlated and when they are negatively correlated.

Organizational structure refers to the distribution of gains and losses associated with cooperation. As Mancur Olson noted decades ago, concentrated benefits and diffuse harms produce political power for those who benefit and weakness for those harmed. Olson's claims imply that interest groups that are concentrated and stand to gain from cooperation, such as export interests in the trade context, can credibly demand that unless their governments negotiate the accords they desire—in most cases, deep contracts—they will withhold political support.[148] Similarly, domestic actors that lack these attributes will be less likely to see their political demands met. Direct impacts refer to the degree to which domestic actors are directly harmed by violations in other parties. Harm creates incentives for extensive and persistent monitoring of compliance by domestic actors. To continue the example of economic accords, exporters are directly harmed by violations of trade agreements. Moreover, information about market access in other states is an inherent by-product of their normal business. When violations occur, these groups know immediately and apply pressure on governments; indeed, they often fashion the political and

[145] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979).

[146] *E.g.*, Abbott & Snidal, *supra* note 72, at 429.

[147] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

[148] *See also* Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603 (2000).

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legal claims that states bring against other states.[149] Rational governments anticipate this continual monitoring and the resultant political pressures it may raise. The likelihood of continuing pressure from domestic actors—resulting from the direct impacts they experience—helps make domestic demands credible (or, alternatively, raises the domestic costs of failure to satisfy those demands).

Contrast the situation of export groups in trade with human rights or environmental NGOs. The latter may also desire deep contracts. But these groups lack the political power of export interests. Because they will not be directly affected by noncompliance in other states, it is less credible that they will closely monitor implementation over the long term.[150] And, at least in the environmental arena, there is only modest evidence that they do so.[151] Human rights NGOs do place a high premium on monitoring, but in practice can address only a small range of potential violations.[152] Environmental and human rights NGOs clearly pressure states to produce the agreements they desire, but the political leverage at their command is comparatively weak. Most important, they lack the organizational advantages of firms in the trade arena. The benefits from human rights and environmental accords are typically diffuse. The costs, by contrast, are usually concentrated, leading (often) to strong opposition by other domestic actors. As a result, states are more likely to negotiate shallow contracts here than in areas like trade.

In short, the pattern of agreement design—the varied balances struck between form and substance—can be more easily explained once we examine the domestic political underpinnings of cooperation. Environment and human rights accords are generally shallower than trade, investment, and arms control accords, in part because of the differential political power of the domestic groups that demand cooperation in these areas. We generally observe a positive correlation between depth and legality when the domestic demandeurs of cooperation are politically privileged, and a negative correlation when they are not. This claim may seem obvious, but the functional approach to agreement design, with its focus on unitary state actors, does not make it.

This line of argument raises the question why governments supply shallow contracts rather than deep pledges when they face relatively weak or conflicting pressure from domestic actors. As an empirical matter, deep pledges are uncommon.[153] Another way of posing the question is to ask, why do many domestic actors put such a high premium on contracts?

I have already offered some answers to this question. Domestic actors may prefer contracts because of the domestic process advantages they offer: greater opportunities for notice, comment, and influence. Domestic actors may believe that contracts are simply more effective than pledges—which, all else equal, they generally are. And it may be that agreement form is more politically salient, hence more valuable to domestic groups, than substance. That an accord is legally binding may be readily understood by the public, donors, and members. That an accord is deep and demanding is often a much more complicated assessment that may be realized only over time. A contract, however shallow, may also insulate state officials from the charge that they ignored a politically salient problem. Singly or in conjunction, these factors create incentives for states to supply shallow contracts rather than deep pledges.

Let me briefly consider an alternative functional approach to the connection between legality and depth. As noted earlier, incentives for cooperation vary, depending on the nature of the

[149] GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN W.T.O. LITIGATION (2003).

[150] "Many international NGOs strongly identify with the norms of environmental and human rights regimes but often experience no direct, material harm from their violation." Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT'L STUD. Q. 109, 120 (1998).

[151] Kal Raustiala & David G. Victor, *Conclusions*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 659 (David G. Victor et al. eds., 1998) [hereinafter IMPLEMENTATION AND EFFECTIVENESS].

[152] THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING, *supra* note 36. Oona Hathaway's argument about human rights treaties rests critically upon relaxation of pressure by nonstate actors on states that sign and ratify agreements, leading, in some cases, to backsliding in behavior. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002); *cf.* Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003).

[153] One exception is the 1988 Toronto declaration on climate change. Environment Canada Conference Statement, The Changing Atmosphere: Implications for Global Security? (1988) (available from World Meteorological Organization); *see* IAN H. ROWLANDS, THE POLITICS OF GLOBAL ATMOSPHERIC CHANGE 190–92 (1995).

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good at stake. So, too, do incentives to penalize noncompliers. In a club good situation, parties can punish noncompliant states with exclusion, including such limited forms of exclusion as those practiced in the WTO.[154] In a public good situation, exclusion is counterproductive and unlikely. To see this, consider a state that violates an air pollution treaty. Other parties gain nothing by forcing the noncomplier to exit the regime.[155] Indeed, they are made worse off. That is one reason many such agreements contain "managerial," rather than enforcement-based, noncompliance systems.[156]

How might this difference affect the relationship between legality and depth? Casting a pact as a contract raises the costs of noncompliance, all else equal. Thus, all else equal, contracts ought to be relatively *less* likely for club goods than for public goods because alternative ways of deterring noncompliance—namely, (partial) exclusion—can be applied to club goods. Contracts, in other words, are less necessary in club good situations. This reasoning may help account for the bias toward contracts in some public goods cooperation, such as the environment. But it fails to account for the fact that trade accords are almost all contracts as well. And so are other reciprocity-based accords, such as the Geneva Conventions.[157] Indeed, contrary to this hypothesis, pledges appear even less common for trade than for the environment. While the role of sanctions in agreement design is important, there is little support for this functional claim.

Power

The liberal approach to form and substance can be extended by considering the role of power. A negative correlation between legality and depth can be exacerbated when state preferences diverge. States that desire a contract may have to coerce or compel other states to agree. The degree to which such pressure is necessary also depends on the distinction between club and public goods. Public goods create veto power. States with veto power may demand a shallow agreement or side payments to cooperate (or both). At the limit, they may abandon the negotiations altogether. These demands can decrease the depth of the accord and, as I discuss below, may also weaken its review structure.

On the other hand, veto power rarely attaches to club goods. One might expect this feature to mitigate a negative correlation between legality and substance, and, as noted previously, trade agreements typically evidence a positive correlation. Human rights accords present some unique qualities. States acquire weaker veto power than in the public goods setting, but it is not as weak as with club goods. Human rights accords do not depend on universal adherence to be effective in any state. They can readily be implemented unilaterally, and are often seen as primarily expressive rather than regulative.[158] The degree of veto power that states wield regarding such accords flows largely from the desire to have near-universal participation. In general, human rights agreements exhibit a special pattern: they are riddled with reservations at a high rate. Reservations operate to reduce the depth of the accord, and in this sense the limited veto power states wield in human rights cooperation manifests itself much as veto power does in public goods settings: as a constraint on the depth of agreements, and occasionally as a constraint on their legality.

[154] The WTO permits suspension of benefits by a wronged party in the event of noncompliance with an Appellate Body ruling. This is tantamount to exclusion from a subset of the regime's benefits, i.e., market access in the wronged state.

[155] This point is true of trade regimes as well. But as a political matter, rather than an economic one, it has little traction.

[156] Downs et al., *supra* note 29, at 380–81.

[157] I consider the Geneva Conventions to be reciprocity based in a structural/political, rather than a legal, sense. Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

[158] *E.g.*, Hathaway, *supra* note 152, at 2004–11.

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V. The Structure of Agreements

I use the term "structure" to refer to rules, procedures, and institutional bodies for the collective monitoring and enforcement of parties' performance. Structure is central to international agreements; international relations theorists have long stressed that a primary function of accords is to disperse information and allow strategies of reciprocity to operate efficiently.[159] Like legality and substance, agreement structure varies widely. Some accords create courts or tribunals. Sometimes these courts can impose sanctions. Other agreements do not provide for sanctions, or often any structure of review at all. In between these extremes lie many alternatives. Scholars have frequently folded the structure of review into a hard law–soft law spectrum, treating it as one more factor that determines whether a pact is hard or soft. But structure is a distinct design feature, one that may influence the effects of agreements regardless of whether they are contracts or pledges.

Types of Structures

The most familiar type of review structure is a court. Third-party adjudication strikes many lawyers as an essential component of a legal system. Yet the international legal system is distinguished by the rarity of courts and the weakness of those that exist. In practice, most agreements neither create courts nor employ sanctions as enforcement tools.[160] The dispute settlement clauses in many of the agreements that do contain them have never been invoked. In addition, international courts clearly lack the authority and coercive bite of domestic courts.[161] Yet the number of international courts is rising.[162] International accords also provide for a wide array of noncourt review structures.

For clarity I dichotomize the category of agreement structure into strong and weak. Strong review structures render individualized decisions about state performance. These decisions may, but need not, be accompanied by sanctions. They also need not address particular disputes; they may be statements about individual actors and their performance. Weak review structures either make no such evaluations or make evaluations only about collective party behavior. In either case, the evaluation does not specify any tangible sanction. Structure, as I define it, should not be conflated with whether an agreement is effectively enforced, in the sense of deterring or punishing violations. These are outcomes. Structure refers only to the specific *mechanisms or procedures* for monitoring the parties' performance and meting out penalties. Like the choices of legality and substance, the choice of agreement structure is endogenous; in practice, states trade off structural provisions against legality and substance.

The Consequences of Different Structures

Different structures of review create different incentives for state behavior. Functional theory predicts that these incentives will explain the choice of structure in particular cases; liberal theory predicts that domestic political institutions and preferences (related, in many cases, to perceived consequences) will explain the choice of structure; and realist theory predicts that relative power will translate whatever preferences states have into outcomes. No matter which theoretical

[159] *See, e.g.*, Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (1986); Lisa L. Martin, *The Political Economy of International Cooperation*, *in* GLOBAL PUBLIC GOODS, *supra* note 130, at 51.

[160] Andrew Guzman argues that sanctions are rare in part because they represent "a net loss to the parties—one party faces a cost that is not recovered by the other." Andrew T. Guzman, *The Design of International Agreements*, 17 EUR. J. INT'L L. (forthcoming 2006). The theoretical puzzle of why states do not generally provide compensation mechanisms within their international agreements remains to be explained.

[161] "A fundamental (and frequent) criticism of international law is the weakness of mechanisms of enforcement." Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 19 (1997).

[162] Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?* 14 LEIDEN J. INT'L L. 267 (2001); Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 679–933 (1999).

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approach one favors, the empirical impact of different structures should be understood. Yet the dearth of research on this topic makes any such claims tentative.

Unsurprisingly, strong structures, particularly courts, are believed to be more likely to promote compliance. However, the probable impact of international courts qua courts—as seats of legal discourse—should be separated from the enforcement powers that courts may be presumed to have in the domestic context but rarely possess internationally. Even in the WTO, where the Appellate Body can determine noncompliance and authorize withdrawal of trade concessions by a "wronged" state against a noncompliant state, the court itself does not wield the power to enforce directly or even to authorize other centralized enforcers; it merely plays a gatekeeping role with regard to what is fundamentally a self-help process. Thus, even the strongest international court does not actually have the power to enforce its decisions at all like that of a domestic court.

Nevertheless, this deficiency does not render international courts useless. Regardless of the extent of their enforcement powers, courts of all stripes are widely believed to be institutions of principle, rather than power; they force actors to be more reasonable.[163] For example, Joseph Weiler has argued that "when governments are pulled into [an international] court and required to explain, justify, and defend their decision, they are in a forum where diplomatic license is far more restricted, where good faith is a presumptive principle, and where states are meant to live by their statements."[164] This claim reflects the view that legal discourse is by nature, if not antithetical to assertions based on power, at least in tension with the brute use of power. Justification is commonly thought to be a necessary element of judicial decisions.[165] Simply by channeling state claims—by requiring justification—courts are said to induce more compliant behavior by parties. The implicit assumption here is that word and deed can only diverge so much before countervailing pressures arise: while word can shift to match deed, if legal proceedings constrain the kinds of arguments that can validly be made, deed may shift as well. Some constructivist arguments go further and claim that engagement in legal processes changes state identity and thus state interests and actions, further promoting cooperation and compliance.[166]

Courts may also enhance reputation and reciprocity. Social scientists have long noted the importance of both in sustaining cooperation, particularly in situations characterized by suboptimal equilibria (such as the prisoner's dilemma) where the parties cannot enter into enforceable contracts. Centralized dispute settlement fosters cooperation by enhancing the flow of information about the parties' behavior. In the process it deters noncompliance, whether or not the dispute settler can enforce its decisions coercively.[167]

The medieval law merchant is a famous example. The law merchant system adjudicated disputes and retained information about prior behavior by long-distance traders. The system "succeeds even though there is no state with police power and authority over a wide geographical realm to enforce contracts. Instead, the system works by making the reputation system of enforcement work better."[168] By similarly highlighting and deterring violations of commitments, international courts may promote compliance even if they lack—as indeed they typically do lack—coercive powers of enforcement. For this process to work, however, states must fear being excluded from the pact or from acquiring desired goods. For agreements involving club goods this is a reasonable assumption. For public goods it is less plausible. Dispute settlement can also

[163] ALTER, *supra* note 132, at 211–32.

[164] J. H. H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 519 (1994).

[165] "According to the requirements of most, if not all legal systems, a judgment not only has to contain at a minimum the 'decision' reached but has also to provide reasons in support of the particular choice made by the judges." KRATOCHWIL, *supra* note 52, at 212.

[166] *See* AREND, *supra* note 38, at 129–33; Jutta Brunnée, *The Kyoto Protocol: Testing Ground for Compliance Theories?* 63 HEIDELBERG J. INT'L L. 255, 261 (2003).

[167] Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990).

[168] *Id.* at 19; *see also* James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137, 138 (2000) (asserting that legalized dispute settlement in trade accords "tends to improve compliance by increasing the costs of opportunism").

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clarify legal rules, which in turn may promote compliance. Managerial theory, for example, argues that noncompliance is partly due to ambiguity of commitments.[169] Courts, by adjudicating disputes, refine ambiguous obligations and hence stimulate future compliance. The important point is this: all these arguments suggest that strong review structures, *even if they lack enforcement powers like those of domestic courts*, can promote compliance with international agreements. To the degree that they possess enforcement powers, compliance is even more likely to be promoted.

Unlike strong structures of review, weak structures do not make individualized determinations. As a result, they are at least presumptively less likely to influence state behavior. Three reasons support this view. First, because determinations of performance are collective (or nonexistent), reputational signals are highly attenuated. Second, the normative pressure to engage in justificatory discourse, emphasized by so many theorists of courts, is nonexistent or highly diluted because states need not defend their own policies or actions. Third, by definition weak review structures cannot authoritatively endorse even self-help enforcement measures by states.

Despite these relative deficiencies, weak review structures do not wholly lack impact. By prodding governments to report on implementation, they may stimulate more bureaucratic attention to international commitments. They may also disseminate information to other states and increase transparency.[170] Some studies of weak review structures suggest that they can help states to "learn," collectively, how to implement complex collective commitments, thus promoting compliance.[171] Finally, they may empower domestic actors interested in the accord. Over time these effects may promote better compliance and a more effective agreement. These causal chains are long, however, and contingent. In general, weak structures generate only limited influence over state behavior.

Structure and Legality

Contracts are negotiated with a wide array of review structures, some strong, many weak. The review structure of some agreements is set forth in separate, optional protocols. Pledges present a more striking pattern. Pledges rarely include strong review. The paradigmatic strong structure—the court—does not appear to be included in any existing pledge. One partial exception to the lack of strong review is the above-mentioned FATF *Forty Recommendations*, aimed at money laundering. The FATF uses a system of review in which each state's legislation and activities are evaluated by the others, "compliance" being enforced by reputational concerns and the threat of expulsion.[172] Similarly, the Helsinki process involved regular follow-up meetings aimed at a "thorough exchange of views . . . on the implementation of the provisions of the Final Act."[173] These meetings played an important role in the effectiveness of the Act.[174] The OSCE process, which builds on Helsinki, extends this model even further, with extensive and continuous discussion of implementation by the parties and continued use of pledges rather than contracts.[175] Though important, these examples are the exceptions that prove the rule.

Why is strong review so rare in pledges? From a functional perspective there are good reasons to expect the opposite: if strong monitoring procedures raise the costs of noncompliance, then states ought to be more willing to embrace them when the standard is not legally binding. (Put differently, when rules are binding, states may seek weak review as a way of ensuring that

[169] CHAYES & CHAYES, *supra* note 104, at 1–28.

[170] Mitchell, *supra* note 150.

[171] CHAYES & CHAYES, *supra* note 104; Raustiala & Victor, *supra* note 151.

[172] Simmons, *supra* note 76, at 261 ("The key to the FATF's success seems to flow from the serious and sustained attention the organization gives to monitoring and assessment."); *see also* note 140 *supra*.

[173] Helsinki Final Act, *supra* note 20, Follow-up to the Conference, 14 ILM at 1325, para. 2(a).

[174] Schlager, *supra* note 46, at 355.

[175] The official OSCE *Handbook* notes that "the fact that OSCE commitments are not legally-binding does not detract from their efficacy. Having been signed at the highest political level, they have an authority that is arguably as strong as any legal statute under international law." OSCE SECRETARIAT, THE HANDBOOK OF THE ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE) 3 (3d ed. 2002), *available at* <http://www.osce.org/>.

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their own noncompliance is not discovered or addressed.) Indeed, as Beth Simmons states in her analysis of the FATF, "it is less likely that mechanisms for mutual monitoring and surveillance would have been agreed to in a binding legal context."[176]

Yet the FATF is aberrational. While contracts contain a myriad of structures both weak and strong, pledges nearly always have weak ones. One explanation for this pattern is that pledges may be largely symbolic: if states did not intend to implement pledges, they would not include institutions for monitoring or enforcement in them. This argument, however, raises several problems. Empirically, states often do implement pledges, and some appear quite effective (I discuss this further below). But even if pledges are merely symbolic, what explains their prevalence? Both states and domestic audiences have plenty of experience with pledges. If pledges are meaningless, we would not observe them in equilibrium.[177] Moreover, if pledges are simply cheap talk, why do states expend so much effort in bargaining over their terms?[178] Symbolism alone cannot explain the prevalence of pledges. Perhaps pledges are crafted with weak structures because they are seen as stepping-stones to "real" treaties—permitting the structure of review to be added later when the contract is struck. Many pledges, however, remain pledges forever. While the causal story is unclear, the empirical pattern is clear: pledges typically lack strong review. Yet, as I argue below, pairing pledges with strong review structures may be an optimal cooperative approach under certain circumstances.

Structure and Substance

Does the choice of review structure affect the substantive obligations contained in an accord? As with legality and substance, a functional view of structure and substance leads to two contradictory predictions. The first is that strong review structures correlate with deep agreements; the second, that strong review correlates with shallow agreements.

The first rationale should now be familiar. Strong review structures disperse information, enhance the influence of states' reputations, clarify rules, and force states to justify their actions. They also may employ coercive enforcement measures. All these features improve compliance. Consequently, strong review serves to dampen the likelihood of opportunism, rendering cooperation more robust. States that prefer a deep agreement will construct strong review structures to ensure that violations are deterred or revealed. For example, a comprehensive study of regional trade pacts claims that "the more ambitious the level of proposed integration, the more willing political leaders should be to endorse legalistic dispute settlement."[179] In short, substance and structure are positively correlated.

The second line of reasoning reverses this logic. The deeper the agreement, the *less* likely it will be to feature strong review. Faced with a deep set of commitments, states fear the ramifications of noncompliance but recognize that it is possible, even likely. Hence, the effects of strong review are precisely what leads states to eschew it. British diplomat Patrick Széll finds "an inevitable correlation between the strictness of a treaty's compliance and enforcement regimes and the stringency of its substantive obligations. One should expect countries to be ready to undertake tougher commitments if they see that supervision will be light, and vice versa."[180]

[176] Simmons, *supra* note 76, at 262.

[177] Realists might argue that pledges are simply what political scientists call "cheap talk": symbolic, costless action. Cheap talk can become a self-perpetuating equilibrium outcome; for example, all job applicants claim to be hard-working since, if they failed so to state, it would make them stand out. In such a "pooling equilibrium" all actors behave the same way, by engaging in cheap talk pledge-making. But this is unlikely in the case of multilateral pledges. They are too costly, both in transaction costs and in risking the incitement of political action, to be negotiated simply to avoid not negotiating them.

[178] Chinkin, *supra* note 56, at 860; Dupuy, *supra* note 52.

[179] Smith, *supra* note 168, at 148.

[180] Patrick Széll, *The Development of Multilateral Mechanisms for Monitoring Compliance*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 97, 107 (Winfried Lang ed., 1995); *see also* Shelton, *supra* note 27, at 15 ("It may even be possible that some stronger monitoring mechanisms exist in soft law precisely because it is non-binding and states are therefore willing to accept the scrutiny they would reject in a binding text."); Simmons, *supra* note 76.

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Which claim is most consistent with the evidence? Empirically, both find some support. Széll provides several examples of the latter dynamic from environmental agreements, whereas trade, investment, and arms agreements tend to exemplify the former. As with the legality-substance relationship, liberal theory helps clarify this pattern; the substance-structure connection also varies according to the type of agreement. This variation derives from differences in domestic politics and interest group power. As noted, private actors in trade are both organizationally privileged and likely to monitor implementation and compliance over time because noncompliance affects them directly. Private actors in other areas, such as environmental protection, are weaker on both counts and hence wield less political power. Thus, trade accords such as the WTO Agreements feature deep structure and strong review because the domestic actors that favor these accords are politically privileged. By contrast, the environmental agreements that Széll refers to feature weak review structures, especially as their substance becomes deeper and deeper. Environmental organizations may prefer a strong review structure but, lacking the organizational advantages of firms in trade, they cannot exert enough influence to achieve their aims. Rather than negotiate agreements with strong review structures—what one would expect if states really wanted to ensure compliance—states choose weak review to be able to manage the uncertainty of complying with those commitments. These agreements are designed to be weak.

Although human rights accords are similarly characterized by a negative correlation between structure and substance, there is a twist: while most provide for weak review, the various optional monitoring protocols permit those states—and only those states—that desire strong review to opt for it. This is consistent with the unusual nature of human rights pacts, in which no true collective dilemma exists. Arms agreements present yet another pattern: extensive and often strikingly intensive monitoring but little formal dispute settlement. States clearly want to know whether other parties are complying and accordingly design stringent review provisions far more elaborate and intrusive than those found in other types of accords.[181] Like trade accords, arms accords are marked by a positive correlation between depth and structure of review. But judicial settlement of disputes over compliance with arms agreements, unlike those concerning trade pacts, offers little: states will much prefer to respond to another party's violation by breaching than to seek a neutral judgment about it. The empirical patterns of agreement design, in short, are driven by the structure of domestic politics and interests, as well as by functional concerns about credibility and flexibility.

In the preceding sections I have endeavored to highlight, using the tripartite framework advanced in this article, some of the basic connections between form, substance, and structure in international agreements. Several key points emerge from this discussion. First, trade-offs are endemic and agreement features cannot be understood in isolation. Second, these trade-offs cannot simply be explained by functional logic—though functionalism is a powerful explanatory approach. In an interdependent world international cooperation spawns, and is spawned by, domestic politics; hence it is unsurprising that domestic politics and institutions affect the patterns of cooperation we observe.

Finally, this article's positive analysis of the design of international agreements also leads to policy prescriptions. Advocates as well as analysts of international accords must pay more attention to the complex architecture of agreements and treat their design holistically. For example, if an increase in the depth of substantive obligations in an agreement is offset by weaker monitoring and review, the agreement may be rendered no more effective, and possibly, even less so. In general, the analysis here suggests that concerns about reputation, credibility, and uncertainty often lead states to negotiate international commitments that may be legally binding but are shallow and lack strong review structures. As a result, compliance with these commitments may be high, but their impact on actual behavior is low.[182]

[181] Kenneth W. Abbott, *"Trust but Verify": The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1, 36–38, 53–54 (1993).

[182] Raustiala & Victor, *supra* note 151.

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VI. The Undersupply of Pledges

How can more effective agreements be created? Greater reliance on pledges offers a potential, though limited, solution to the dilemma of high compliance but low effectiveness that often results from the choice of a shallow or weakly structured contract.[183] By minimizing concerns about legal compliance, pledges may permit states to negotiate more ambitious and deeper agreements that are tied to stricter monitoring and review provisions. This approach holds special promise for conditions of uncertainty, where rational governments seeking credibility may choose to ensure that international accords will produce compliance by decreasing their depth and the severity of review. Pledges do not eliminate this problem, but they may limit it enough in particular circumstances to justify greater reliance on them.

While the advantages of pledges are deductively plausible, empirical evidence suggests that pledges may promote deeper commitments than comparable contracts, and are equally, if not more, effective at changing state behavior. I do not mean to imply that pledges are more effective tools for cooperation than contracts, all else equal. Rather, the central point of this article is that in agreement design all else is rarely equal. Consequently, pledges, which may more effectively influence behavior in situations of uncertainty, deserve more serious attention.

Compliance vs. Effectiveness

The argument in favor of pledges rests on the now well-understood conceptual distinction between compliance and effectiveness. Compliance refers to conformity between behavior and a specified rule. Compliance has many causes, and can be inadvertent, coincidental, or an artifact of the legal standard. Consequently, the sheer fact of compliance with a given commitment tells us little about the impact of that commitment. Effectiveness refers to observable changes in behavior that result from a specified rule. Thus, to say an accord is effective is necessarily to make a causal claim, whereas to say that a state is in compliance with an agreement entails no causal claim.

Even when defined in this modest manner, many international rules are not effective. The critical issue is the relationship between the stringency of the legal standard and the baseline of behavior. When the legal standard mimics the behavioral baseline—whether intentionally or coincidentally—compliance is high (because the accord is shallow) but effectiveness low. Yet the converse is also possible: rules can be effective even if compliance is low. All else equal, more compliance with a well-crafted standard is better. Yet rules that are not broadly observed can still be effective if they induce desired changes in behavior that otherwise would not have occurred.

This statement carries special weight given the nature of international law. Because treaties are an endogenous cooperative strategy of states, rather than an externally imposed set of rules, the parties themselves largely determine the levels of compliance. Collectively setting the legal standard at a low level is one way states can ensure compliance with their commitments, make those commitments credible, and safeguard reputations for future bargains—all the while providing the contracts that many domestic groups demand. But this approach does not ensure that these agreements will be effective. Instead, it often ensures that they will be ineffective.[184]

Pledges, Contracts, and Effective Agreements

Why do we observe so many ineffective agreements? One reason, I have argued, is that faced with future uncertainty states will often build in compliance cushions—altering the substance and

[183] For another view in this issue on the effectiveness of nonbinding agreements, see Steven A. Mirmina, *Reducing the Proliferation of Orbital Debris: Alternatives to a Legally Binding Instrument*, 99 AJIL 649 (2005).

[184] A completely shallow agreement—one that simply ratified the status quo ante—would not be effective at all, since it would not change state behavior. As I noted earlier, this claim can be challenged by the fact that an accord may be aimed at forestalling future backsliding; an example would be the Non-Proliferation Treaty. But aside from this, shallow agreements, even when perfectly complied with, are by definition ineffective (or have little effectiveness) since they do not demand that states deviate from prior behavior. If such a shallow agreement induced overcompliance for some reason, that agreement would plausibly be called effective.

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structure of accords to increase the probability of compliance over time. The fear of noncompliance ex post results in shallower substantive rules ex ante. The exercise of veto power by recalcitrant states can augment this tendency. When public goods are at issue, veto power is common and shallow agreements should be even more likely. The end result has been noted by many lawyers and political scientists alike: numerous shallow, ineffective international agreements.

A converse set of concerns may also exist. In some areas of international cooperation, deep contracts may prevail and actually be too effective at changing behavior. The power of domestic actors in the trade context, for example, may lead to contracts that are too deep. Such contracts create risks for state credibility and for compliance; they are brittle rather than flexible. Some analysts have suggested that the WTO faces just such a problem.[185] I call these twin sets of concerns the "overly shallow" and "overly deep" problems. The overly shallow problem appears to be far more common, and hence I address this first.

One way to counteract the overly shallow problem is to use pledges rather than contracts.[186] By sidestepping concerns about legal compliance, pledges reduce—though they do not eliminate—the incentives to weaken substantive commitments or the structure of review in situations of uncertainty. The downside of this strategy is that pledges create weaker incentives to implement shared commitments, though they do not eviscerate all such incentives. As discussed throughout this article, several factors drive states' behavior vis-à-vis their international commitments. These factors relate to legality but are not dependent on the legality of commitments.[187] Pledges can trigger many of these processes in much the same way—albeit more weakly—than contracts. As Judith Goldstein and Lisa Martin argue, "Mechanisms that deter [noncompliance] include domestic costs of violations, enforcement provisions, and reputational concerns. These mechanisms are identical to those identified in standard theories of international institutions, suggesting that extensive international cooperation does not always require legalization."[188] In short, the factors that push states to comply with contracts often apply, albeit more weakly, to pledges as well. Yet pledges break the ex ante concern to ensure ex post legal compliance, reducing the incentive for states to weaken the substance of their commitments at the negotiating phase.

Again, all else equal a contract will be more effective than a pledge. But the crux of this article is that all else is rarely equal. In view of the high transaction costs of negotiating contracts, even a finding that pledges are nearly as effective as contracts, under certain conditions, is significant from a policy perspective. The opposing argument, of course, is that pledges will be largely empty: states may negotiate deep pledges but do little or nothing to implement them. This is the chief reason pledges are criticized as a tool of cooperation. But what matters most from the perspective of effectiveness is whether the losses associated with the increased propensity to violate pledges are outweighed by the gains from deeper, clearer, more ambitious, or more effectively monitored commitments. While one needs to read the evidence carefully—and more research is needed—there are good reasons to believe that such losses will not necessarily overshadow the gains.

A few studies posit that the gains from using pledges rather than contracts can be marked. The Helsinki Final Act is the most widely noted example; another is the Basel Accord on Capital Adequacy.[189] "The fact that [the] Helsinki agreements were not cast in the form of legally binding treaties," Erika Schlager argues, "ultimately permitted more ambitious norms to be adopted, best illustrated by the 1990 Copenhagen Document . . . . Many of the significant provisions of the Copenhagen Document would have been unacceptable to legal advisors as *treaty obligations*

[185] Goldstein & Martin, *supra* note 148, at 631–32.

[186] I owe much to the perceptive thinking of David Victor on this issue.

[187] Goldstein & Martin, *supra* note 148; Raustiala & Slaughter, *supra* note 5.

[188] Goldstein & Martin, *supra* note 148, at 622.

[189] *See, e.g.*, Ho, *supra* note 4; David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 282, 287–92 (1998).

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without clearer definitions . . . ."[190] Clare Shine suggests that pledges can be more specific, ambitious, and innovative—thus ultimately more useful.[191]

Similarly, in several environmental cases states have been more willing to adopt international commitments that are clear and ambitious when presented in the form of pledges rather than contracts. These pledges have led to observable change in behavior, change that appears greater than it probably would have been under a politically feasible contract. In the case of the North and Baltic Seas, pacts to address marine pollution have been made in both contract and pledge form.[192] The pledges emerged from a high-level political process, aided by scientific assessment and collective, periodic reviews of implementation. The pledges were more ambitious than the contracts, and because commitments were drafted more clearly—specifying percentage cuts of major pollutants—they were more easily assessed in the review process and proved fairly effective in changing behavior.[193] In another case, the Protocol Concerning the Control of Emissions of Nitrogen Oxides and Their Transboundary Fluxes to the Long-Range Transboundary Air Pollution Convention,[194] a contract, called for a freeze on emissions. A group of states went further and agreed to cut emissions by 30 percent, but designed that commitment to be a pledge.[195] The evidence suggests that, thanks to the pledge, states participating in the "30% Club" cut emissions more than they probably would have done otherwise and made more meaningful regulatory efforts to meet the stricter target.[196] And in the aftermath of the GATT *Tuna/Dolphin* controversy of the early 1990s, the La Jolla Agreement, a pledge aimed at protecting dolphins in the Pacific, was negotiated. The La Jolla Agreement "proved extremely effective," reducing the dolphins' mortality in the region by 75 percent in six years.[197]

Pledges are likely to be most effective when states are cooperating in a novel area of high uncertainty, leading governments to be especially cautious. In addition, some studies (as well as theory and common sense) suggest that pledges work better when they are tied to strong structures of review.[198] Yet, as I noted earlier, such pledges are rare. The FATF system is a partial exception; other exceptions include the Helsinki review process, the OSCE system, the Paris Club system of sovereign debt restructuring, and the Marshall Plan system for allocating aid in the wake of World War II.[199] As Thomas Schelling argues, the Marshall Plan experience suggests that regularized review can be quite effective even in the absence of binding rules. Indeed, Schelling claims that the "multilateral reciprocal scrutiny" under that system probably had greater effect than a more regularized, rule-bound system would have had.[200] This kind of multilateral scrutiny is likely to work best when the states involved cooperate extensively on many other matters, and thus have greater concerns about reputation and more elaborate and entrenched policy

[190] Schlager, *supra* note 46, at 353–54; *see also* Ratner, *supra* note 44, at 610 (arguing that the OSCE experience suggests that soft law commitments may be more valuable and effective than commonly believed).

[191] Clare Shine, *Selected Agreements Concluded Pursuant to the Convention on the Conservation of Migratory Species of Wild Animals*, *in* NON-BINDING NORMS, *supra* note 4, at 196, 222; *see also* Edith Brown Weiss, *Understanding Compliance with International Environmental Law: A Baker's Dozen Myths*, 32 U. RICH. L. REV. 1555 (1999).

[192] *See* Jon Birger Skjærseth, *The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation*, *in* IMPLEMENTATION AND EFFECTIVENESS, *supra* note 151, at 327.

[193] *Id.*

[194] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides and Their Transboundary Fluxes, Oct. 31, 1988, *available at* <http://www.unece.org/env/lrtap>.

[195] Marc A. Levy, *European Acid Rain: The Power of Tote-Board Diplomacy*, *in* INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 75 (Peter M. Haas et al. eds., 1993).

[196] Jørgen Wettested, *Participation in NOx Policy-Making and Implementation in the Netherlands, UK, and Norway: Different Approaches but Similar Results?* *in* IMPLEMENTATION AND EFFECTIVENESS, *supra* note 151, at 381.

[197] INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 999–1000 (David Hunter et al. eds., 2d ed. 2002). For the text, see La Jolla Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, Apr. 1992, *available at* <http://www.oceanlaw.net/texts/lajolla.htm>.

[198] Raustiala & Victor, *supra note* 151, at 659–707.

[199] On the Marshall Plan as a model, see Thomas C. Schelling, *The Cost of Combating Global Warming*, FOREIGN AFF., Nov./Dec. 1997, at 8, 10–12.

[200] *Id.* at 10.

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linkages. It may also be true, though it is untested here, that liberal states are more likely to cooperate successfully through pledges than nonliberal states or mixed groups of states.[201]

Pledges are by no means a panacea. But the conventional wisdom—that contracts are always superior to pledges, and that pledges are decidedly second-best options—is not backed by conclusive empirical evidence or theoretical conjecture. Empirical examples, while limited, support the idea that pledges can be quite effective. Moreover, the political incentives facing states often induce them to make contracts weaker (more shallow, and with weaker structures of review) than they ought to be by any objective standard of effectiveness. This article has attempted to show that states can and do trade off substantive obligations against the legality and monitoring of agreements. When states must contend with abundant uncertainty about the costs of commitments or the best way to organize cooperation, pledges may be especially useful. Under these conditions, pledges may be first-, rather than second-, best options.

The Danger of Deep Contracts

While pledges may be useful when concerns with compliance lead to contracts that are too shallow, agreements can also be too deep. If an agreement is overly deep, the danger is not that effectiveness is sacrificed for legal compliance. Rather, the difficulty of complying with overly deep commitments may lead to numerous violations, which could undermine future credibility or create political backlash against international cooperation.[202] When deep contracts are tied to a strong structure of review, such as third-party dispute resolution, these dangers are magnified.

The WTO constitutes the leading example of an overly deep contract. The WTO embodies depth of substance, contractual form, and strong review. As Goldstein and Martin observe, the unintended effects of this combination

> could interfere with the pursuit of progressive liberalization of international trade. . . .
>
> . . . .
>
> . . . Reducing the ability of governments to opt out of commitments has the positive effect of reducing the chances that governments will behave opportunistically by invoking phony criteria for protecting their industries. On the other hand, tightly binding, unforgiving rules can have negative effects in the uncertain environment of international trade. When considering the realities of incomplete information about future economic shocks, we suggest that legalization may not result in the "correct" balance between these two effects of binding.[203]

The dangers of overdepth are magnified by strong review, particularly when independent tribunals adjudicate compliance.[204]

Clearly, claims of overdepth, like claims of underdepth, are contestable normative judgments. Observers will disagree about the optimal depth of any agreement. Nonetheless, as Goldstein and Martin argue, increasing depth is not always beneficial, and indeed can have detrimental consequences. Obligations that demand too much from the parties and lack the ex post flexibility to respond to unanticipated problems or new developments may lead to an unraveling of the treaty as parties withdraw their participation (to the degree that states can anticipate these problems, they may simply not sign the accord ex ante). Though overly deep contracts are rare, the WTO is probably not unique. The International Monetary Fund's structural adjustment accords,

[201] *See, e.g.*, Raustiala & Victor, *supra* note 151, at 689–97. For a skeptical take, see José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 246 (2001).

[202] *See, e.g.*, Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

[203] Goldstein & Martin, *supra* note 148, at 603–04.

[204] Nevertheless, international courts often show themselves to be politically astute. In the context of the WTO Appellate Body, see Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AJIL 247 (2004).

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the European system of human rights, and perhaps the Rome Statute of the International Criminal Court represent other examples of agreements whose depth may exceed the optimal level.[205]

VII. CONCLUSION

Agreements form the core of contemporary cooperation. While the nineteenth century was the heyday of customary international law, the twentieth century witnessed a dramatic increase in the use of international agreements—both contracts and pledges. The twenty-first century may usher in a cooperative system based on transgovernmental networks and increasing reliance on pledges and unwritten understandings.[206] But even a networked world will require explicit agreements. Hence the need to understand the architecture of international agreements.

The recent flourishing of interdisciplinary work in law and international relations provides an increasingly powerful base from which to tackle these questions. My central claim here is that the tripartite framework of legality, structure, and substance clarifies the design of agreements and, most significantly, illuminates the trade-offs states encounter as they craft bargains in an anarchic world. I have also critiqued the prevailing approach of international relations scholarship to the design of agreements, which is functional analysis. Though useful, functional accounts in themselves cannot solve persistent puzzles of design that liberal theory can elucidate. A focus on the domestic underpinnings of international cooperation is consistent, moreover, with the increasing recognition that the domestic and the international spheres are no longer hermetically sealed—if they ever were.

To be sure, the foregoing analysis has raised as many questions as it has answered. But the purpose of this approach is to promote more systematic analysis of agreement design, not to propose a definitive explanation of the construction of agreements. Carefully breaking down the architecture of agreements furthers the design of more effective and robust international accords. Though this article is primarily positive and conceptual, it suggests some prescriptions as well. Scholars, statesmen, and activists alike have too often assumed that contracts are the best choice for cooperation, and pledges a feeble substitute. But pledges can have surprising power. And while pledges represent the avoidance of legal entanglement, they are critically important for international lawyers to understand. The existence of trade-offs between form and substance necessitates a holistic comprehension of agreement design. International lawyers need to know when circumstances are propitious for the use of law, and when, conversely, effectiveness instead dictates nonlegal agreement. Only by grasping when law ought to be avoided can we effectively counsel when law ought to be employed.

[205] The withdrawal by the United States of its signature of the Rome Statute is an example of a state's decision not to participate because of ex ante concerns about overlegalization.

[206] SLAUGHTER, *supra* note 8; Raustiala, *supra* note 8.

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The Design of International Agreements

Andrew T. Guzman*

Abstract

States entering into international agreements have at their disposal several tools to enhance the strength and credibility of their commitments, including the ability to make the agreement a formal treaty rather than soft law, provide for mandatory dispute resolution procedures, and establish monitoring mechanisms. Each of these strategies – referred to as 'design elements' – increases the costs associated with the violation of an agreement and, therefore, the probability of compliance. Yet even a passing familiarity with international agreements makes it clear that states routinely fail to include these design elements in their agreements. This article explains why rational states sometimes prefer to draft their agreements in such a way as to make them less credible and, therefore, more easily violated. In contrast to domestic law, where contractual violations are sanctioned through zero-sum payments from the breaching party to the breached-against party, sanctions for violations of international agreements are not zero-sum. To the extent that sanctions exist, they almost always represent a net loss to the parties. For example, a reputational loss felt by the violating party yields little or no offsetting benefit to its counter-party. When entering into an agreement, then, the parties take into account the possibility of a violation and recognize that if it takes place, the net loss to the parties will be larger if credibility-enhancing measures are in place. In other words, the design elements offer a benefit in the form of greater compliance, but do so by increasing the cost to the parties in the event of a violation. When deciding which design elements to include, the parties must then balance the benefits of increased compliance against the costs triggered in the event of a violation.

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1 Introduction

States enter into international agreements all the time, and these agreements vary widely along several dimensions.[1] Some are formal treaties, while others fall short of that classification, being labelled instead 'soft law';[2] some include dispute resolution procedures while others do not;[3] and some provide for sophisticated monitoring mechanisms that are absent from other agreements.[4] When states draft their agreements they often make choices – like the choice of soft law or the decision to omit provisions for dispute resolution or monitoring – that serve to weaken the force and credibility of their commitments.[5] This behaviour is puzzling. International law is routinely criticized for being too weak and failing to offer effective enforcement mechanisms. If this is indeed a problem, one would expect states to seek out ways to enhance the strength and credibility of their commitments. After all, states enter into international agreements as a way of exchanging promises about future conduct. These agreements have value only if the promises exchanged serve to bind the parties. The agreements are, therefore, more valuable if they can bind the parties more effectively. If international law is weak, we should expect states to do everything in their power to increase the strength, credibility and 'compliance pull' of their agreements.

In the domestic context, for example, the parties to a contract typically want their written agreements to be enforceable. This enforceability allows them to rely on one another's promises and enter into a more profitable exchange.[6] States cannot write enforceable promises in the same way as private parties, but one would expect them to use the tools at their disposal to make their agreements more, rather than less,

1 This article offers an explanation for some, but not all, of the diversity that exists in international agreements. Some of the other sources of diversity within agreements are discussed in the Autumn 2001 symposium issue of *International Organization*. See Koremenos, Lipson, and Snidal, 'The Rational Design of International Institutions', 55 *Int Org* (2001) 761; Koremenos, Lipson, and Snidal, 'Rational Design: Looking Back to Move Forward', 55 *Int Org* (2001) 1051.

2 E.g., the North American Free Trade Agreement (NAFTA) is the product of a formal treaty while the Basle Accord is not a treaty. See Basle Committee on Banking Supervision, 'International Convergence of Capital Measurement and Capital Standards' (July 1998), available at http://www.bis.org/publ/bcbs04a.htm; see generally, Lee, 'The Basle Accords as Soft Law: Strengthening International Banking Supervision', 39 *Va J Int'l L* (1998) 1; Oatley and Nabors, 'Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basle Accord', 52 *Int Org* (1998). 1, at 35–54.

3 E.g., bilateral investment treaties (BITs) typically include dispute resolution procedures, as does the WTO, whereas the Geneva Convention Relative to the Treatment of Prisoners of War does not. See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, 14 Nov. 1991, U.S.-Arg., arts. II-V, S. Treaty Doc. No. 103-2, at 3–6 (1993); Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS (1949) 135.

4 E.g., the International Covenant on Civil and Political Rights (ICCPR) provides for the submission of reports by the parties when so requested by the Human Rights Committee ('the Committee'), and the Committee is authorized to review and comment on these reports: see ICCPR, 999 UNTS (1966) 171 (1966), art. 40(1)(b), (4); see also Raustiala, 'Police Patrols, Fire Alarms & the Review of Treaty Commitments', mimeo, at 2 (2003) (on file with author).

5 A soft law agreement reduces the credibility of the commitment relative to a treaty because it represents a lower level of commitment. Omitting dispute resolution and monitoring procedures has a similar effect because these procedures serve to identify and publicize violations.

6 This is a simple insight from contracts. It is discussed in detail in Section 2.

credible. Yet states do not do so. They routinely fail to draft agreements to maximize the credibility of their promises. They frequently enter into soft law agreements; most agreements, including treaties, do not include mandatory dispute resolution provisions;[7] and mechanisms for monitoring and review are often weak or non-existent.[8] Neither legal nor political science scholars have a theory to explain why states are so hesitant to use these credibility-enhancing strategies.[9]

The central claim of this article is that state resistance to such strategies is the product of tension between two objectives pursued by states when they enter into an agreement.[10] The first is the desire to make the agreement credible and binding. This is analogous to the desire on the part of private parties to make their agreements enforceable. The design elements of hard law, dispute resolution, and monitoring all promote this goal.[11] The observation that each of these design elements promotes credibility and compliance yet is often not incorporated in an agreement is at the heart of the puzzle addressed in this paper.

The second part of the explanation is related to the sanctions triggered by the violation of an international agreement. In the domestic context, a contractual breach is normally punished through monetary damages paid by the breaching party to the breached-against party. This is a zero-sum transfer in the sense that what is lost by

[7] See Guzman, 'The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms', 31 *J Legal Stud* (2002) 303. Domestic contracts do not normally include dispute resolutions provisions either, but, unlike international agreements, they can rely on the background legal system for enforcement. International contracts provide a better example of private parties seeking to ensure the credibility of their agreements. These contracts typically include a choice of law clause and frequently an arbitration clause, which identifies the law that is to govern the dispute and the forum in which a dispute will be resolved.

[8] See Raustiala, *supra* note 4. Domestic contracts do not always provide for monitoring, but they tend to do so where monitoring is most important. E.g., secured creditors will normally include monitoring provisions of some sort in their credit agreements when the amount involved is large enough to justify the costs of monitoring.

[9] See, e.g., Raustiala, 'Form and Substance in International Agreements', mimeo (2002) (stating that international lawyers 'have produced few theories of why states chose to use or avoid legality') (on file with author); Guzman, *supra* note 7, at 307 ('The reluctance of states to include binding dispute resolution clauses in their agreements has received limited attention from international law scholars.'). But see Sykes, 'Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations', 58 *U Chicago L Rev* (1991) 255 (offering a public choice explanation of the escape clause provisions contained in Art. XIX of GATT).

[10] As this sentence makes clear, this article embraces an institutionalist view. It is worth noting that there is considerable debate about the proper way to model state behaviour, and institutionalism is only one of the possible choices, with the other common ones being realism and constructivism. The merits and demerits of these approaches have been exhaustively catalogued, debated, and discussed elsewhere, and it serves no purpose to revisit that debate here. For discussions of these approaches, see Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale J Int'l L* (1989) 335 (institutionalism); Koh, 'Why Do Nations Obey International Law?', 106 *Yale LJ* (1997) 2599 (constructivism); Koh, 'Transnational Legal Process', 75 *Nebraska L Rev* (1996) 181 (constructivism); M.E. Brown, S.M. Lynn-Jones, and S.E. Miller (eds.), *The Perils of Anarchy: Contemporary Realism and International Security* (1995) (realism).

[11] Throughout this article the term 'design elements' will be used to describe the credibility enhancing devices that represent the focus of the article – hard law, dispute resolution, and monitoring.

one party is gained by the other.[12] When agreements between states are violated, however, the associated sanctions do not have this zero-sum character.[13]

When a state violates an international commitment it suffers, to the extent that it faces any sanction, a loss of reputation in the eyes of other states, perhaps combined with some form of direct sanction.[14] These sanctions represent a loss to the state that has violated its obligation, but do not provide an offsetting gain to the party to whom the obligation was owed. The sanction, therefore, is a net loss to the parties – one party faces a cost that is not recovered by the other.[15]

When the parties enter into an agreement, they recognize the potential for this future loss and the fact that credibility-enhancing design elements serve to increase this net loss in the event of a violation. The desire to increase the credibility of commitments, then, is tempered by a desire to avoid this loss. It is the tension between these competing goals of credibility and loss avoidance that explains the fact that states use the design elements discussed in this article – hard law, dispute resolution, monitoring – in some but not all international agreements.

The article proceeds as follows. Section 2 describes in detail why the failure of states to design their agreements in such a way as to maximize the credibility of their commitments is a puzzle, especially in light of what we know about the exchange of promises in the domestic setting.[16] Section 3 explains how the desire for greater credibility and compliance interacts with the fear of losses generated in the event of a violation. Section 4 presents the predictions yielded by the theory regarding the use of credibility-enhancing devices. Section 5 explores some of the implications of the theory, including predictions about when credibility-enhancing devices are most likely. Section 6 concludes.

2 The Puzzling Diversity of International Commitments

When states enter into an international agreement, they have complete control over what is and is not included. Among the decisions that must be made are: the choice between hard and soft law; the decision to include or exclude dispute resolution provisions; and the decision to include or exclude monitoring, reporting and verification

[12] There are, of course, transaction costs, including lawyers' fees, but these are put to one side. In many cases these fees will be modest, and perhaps even zero, because most disputes are settled prior to trial, and some are settled before lawyers are even hired.

[13] See *infra* note 33.

[14] See Guzman, 'A Compliance-Based Theory of International Law', 90 *Calif L Rev* (2002) 1823.

[15] States could, of course, provide for money damages in their agreements. In fact, they almost never do so. The reason for state resistance to money damages is itself something of a puzzle and this article does not attempt to explain this fact. It may be that money payments are not considered an effective deterrent, or that the political costs associated with either paying money damages or accepting them in compensation for a violation are significant. Alternatively, there may be a sense among states that money damages would be ignored too easily. Whatever the reason, this article simply recognizes this fact and assumes that money damages are not available. For a more detailed discussion of this issue, see Section 5B.

[16] Along the way, Section 2 considers existing explanations for the resistance to credibility-enhancing devices in international agreements, including some that rely on domestic political forces.

provisions.[17] This section explains why we would expect states to use these design elements to increase the credibility and effectiveness of international agreements, and shows that the failure of states to use them more often should be puzzling to international law scholars. It also reviews and evaluates existing arguments advanced to explain why these elements are so rarely used. Some of these arguments have merit and the explanation advanced here is intended as a complement to these claims, not a substitute. Other arguments advanced in the literature, however, have little to recommend them and should be dismissed.

The first design element of interest to this article is the soft law/hard law divide,[18] which will be referred to as the choice of 'form'.[19] When states enter into an agreement, they have the option of adopting either form.[20] If they evidence an intent to be 'bound', the agreement is labelled a treaty, and if they do not demonstrate such an intent, it is labelled 'non-binding,' or soft law.[21] Though the precise place of soft law within the framework of international law is uncertain, it is clear that traditional

[17] The choice regarding dispute resolution and monitoring is, of course, not a binary one. There are a wide variety of ways each of these design elements could be incorporated. The article frequently speaks of a choice to include or exclude such elements, but this should be recognized as a shorthand for the actual choice that includes not only whether or not to include the design elements, but how strong to make them.

[18] There is no single agreed-upon definition of soft law. One approach is to identify what soft law is not. It is not 'hard law', by which is meant treaties or custom, nor is it a purely political understanding without a legal component. Rather, soft law is what lies between these two alternatives. See Abbott and Snidal, 'Hard and Soft Law in International Governance', 54 *Int Org* (2000) 421, at 422. For more about 'soft law,' see Wellens and Borchardt, 'Soft Law in European Community Law', 14 *ELRev* (1989) 267; Handl *et al.*, 'A Hard Look at Soft Law', 82 *Am Soc Int'l L Proc* (1988) 371; Gruchalla-Wesierski, 'A Framework for Understanding "Soft Law" ', 30 *McGill LJ* (1984) 37. The term 'soft law' is used herein to denote law that falls short of the classical definition of international law. See Raustiala, *supra* note 9 (describing the term soft law). This is a common usage of the term, but it is not the only one. Some use the term to describe rules that meet the classical definition but are imprecise of weak. See Weil, 'Toward Relative Normativity in International Law', 77 *Am J Int'l L* (1983) 413, at 414 n.7 ('It would seem better to reserve the term "soft law" for rules that are imprecise and not really compelling, since sublegal obligations are neither "soft law" nor "hard law": They are simply not law at all.'); Dupuy, 'Soft Law and the International Law of the Environment', 12 *Mich J Int'l L* (1991) 420; O'Connell, 'The Role of Soft Law in a Global Order', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (2000), at 100, 109–110; Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *ICLQ* (1989) 850.

[19] In other writing I have commented on the conceptual problems that soft law presents for international legal scholars. See Guzman, *supra* note 14, at 1878–1883.

[20] See A. Aust, *Modern Treaty Law and Practice* (2000).

[21] The terms 'binding' and 'non-binding' are sometimes used as synonyms for hard and soft law respectively but these terms are somewhat misleading because binding commitments – meaning treaties – often do not include enforcement mechanisms of any kind, let alone the sort of coercive enforcement mechanisms that we are used to in domestic law. Non-binding agreements, on the other hand, are commonly thought to affect the behaviour of states, and do so in part because they impose some sort of obligation on the signatories. We cannot, therefore, distinguish these two categories of commitment based on whether there is a sanction for non-compliance or whether state behaviour is affected. If non-binding agreements affect behaviour, a failure to comply must entail some consequences. On the other hand, it is clear that violation of a binding agreement imposes only limited costs on states. The most that can be said about the distinction between binding and non-binding agreements, then, is that a violation of the former will, all else being equal, impose greater costs on the violating state than violation of the latter.

international law scholarship considers soft law less 'law' than the 'hard law' of treaties and, for that matter, custom.[22] By this it is meant that soft law is less obligatory than hard law and, presumably, has less impact on behaviour.[23] This article accepts as given the conclusion that, all else being equal, soft law impacts state behaviour less than do treaties in the sense that a given set of substantive obligations is more likely to affect behaviour if it takes the form of a formal treaty.[24]

But soft law is not the only design element that can affect the 'compliance-pull' of an agreement. States also choose whether or not to adopt formal dispute resolution processes.[25] These can range from a framework for consultation to a formal system of binding adjudication.[26] Though some high-profile agreements, such as the WTO[27] and the Law of the Sea Convention,[28] include mandatory dispute resolution mechanisms,

[22] Van Dijk, 'Normative Force and Effectiveness of International Norms', 30 *FRG YB Int'l L* (1987) 9, at 20. Perhaps the most traditional position views agreements other than treaties as nothing more than evidence of custom. See Dupuy, *supra* note 18, at 432. Under another view, soft law 'tends to blur the line between the law and the non-law, be that because merely aspirational norms are accorded legal status, albeit of a secondary nature; be that because the intended effect of its usage may be to undermine the status of established legal norms': Handl, *supra* note 18, at 371.

[23] One additional clarification is needed here. Some commentators use a definition of soft law that encompasses formal treaties whose substantive obligations are weak. Thus, e.g., a formal treaty that has no clear requirements, but instead consists of a set of goals, aspirations, or promises to pursue certain general objectives, would be considered 'soft' under this taxonomy. See Baxter, 'International Law in "Her Infinite Variety" ', 29 *ICLQ* (1980) 549, at 554; Chinkin, *supra* note 18, at 851. It is certainly true that the impact of an agreement is affected by both its form (binding versus non-binding) and its substantive provisions. That is, a formal treaty can certainly have its impact reduced if the substance of the agreement is watered down. Furthermore, one could talk in general terms about a treaty being 'strong' or 'weak' based on how much pressure it puts on states to change their behaviour, and this would depend on both the form and substance of the agreement. All that said, it remains useful to distinguish between the impact of a choice of form and the impact of a change in the substance of a treaty. For this reason, this article will retain the terms 'binding' and 'non-binding', as well as hard and soft law, to refer to the formal legal status of an obligation. Treaties will be referred to as binding or hard; other agreements as non-binding or soft. This is done to clarify the discussion and demonstrate the fact that many binding agreements impact on state behaviour less than some non-binding agreements.

[24] This is assumed to be true even if the treaty has no monitoring, dispute resolution provisions or other enforcement mechanisms. Thus, it is the treaty form itself that increases the commitment, the costs of violation, and the likelihood of compliance.

[25] At various points this article will refer to the decision to include or exclude dispute resolution provisions. In fact, states face a range of options with regard to dispute resolution rather than a binary choice. When the article refers to this choice, then, it should be taken to mean a choice among the full variety of possible strategies, ranging from little or no system to deal with dispute to a very structured and formal mandatory process.

[26] An example of the former can be found in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 12 ILM (1973) 1085, which provides for negotiations between disputing parties and which allows for arbitration of disputes, but only with the consent of both parties. See *ibid.*, at Art. XVIII. An example of the latter can be seen in bilateral investment treaties (BITs). See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, 14 Nov. 1991, U.S.-Arg., arts. II-V, S. Treaty Doc. No. 103-2, at 3–6 (1993), 31 ILM (1992) 124, at 129–132; Vandevelde, 'U.S. Bilateral Investment Treaties: The Second Wave', 14 *Mich J Int'l L* (1993) 621.

[27] See Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Agreement Establishing the World Trade Organization), 15 Apr. 1994, reprinted in 33 ILM (12994) 1226.

[28] See United Nations Convention on Law of the Sea, 10 Dec. 1982, Art. 76, UN A/Conf.62/122, 21 ILM (1982) 1261.

most agreements do not provide procedures of that sort.[29] The conventional view of dispute resolution, and the one adopted in this article, assumes that it increases the incentive toward compliance because it provides a mechanism to identify violations and may provide for some formal sanction.[30] The third design element that increases credibility is the use of monitoring procedures. There are, of course, a wide range of ways to monitor compliance, ranging from self-reporting or occasional and informal statements of state conduct to formal inspections of state behaviour and compliance by neutral observers.[31]

A *International Agreements as Contracts*

International agreements are, at root, an exchange of promises among states. This is true whether they are full-blown treaties or merely statements of intent; whether they require wholesale changes to domestic practices or merely reflect existing behaviour; and whether or not they include provisions for enforcement. Because our understanding of promises made at the international level is quite poor, there is much to be gained by looking to other areas of law where we have a better set of theoretical and conceptual tools with which to work. In particular, scholarship on the law of contracts offers a sophisticated understanding of promises made in the domestic context. It is, therefore, helpful to think of international agreements as a form of contract and bring to bear on the study of those agreements some of the insights from the contracts literature. Of course, there are important differences between promises exchanged by states and those exchanged by private parties. In fact, this article points to one such difference to help explain why states often enter into agreements that are less binding than one might expect. Nevertheless, analogy to contracts is useful because it offers a good starting point for the study of international agreements.

Consider one of the most basic ideas from contract theory, the Coase theorem.[32] In the absence of transaction costs, the parties will negotiate an efficient contract, meaning one that generates the maximum possible joint surplus.[33] The terms of the contract will then provide for some distribution of that surplus. In a contract between a buyer and a seller, for example, the seller will offer higher and higher quality up to the point where the buyer's willingness to pay for higher quality is less than the cost of further quality increases. The ultimate sale will include a price adjustment to reflect

[29] See Guzman, *supra* note 7, at 304.

[30] Dispute resolution may provide an additional benefit, in that it serves to reduce the use of costly sanctions, especially when there has been no violation, because a finding that there has been no violation can prevent the unjustified use of such sanctions.

[31] See, e.g., *supra* note 4. Kal Raustiala categorizes the different monitoring systems as either strong or weak. His category of strong systems include 'police patrols', by which he means investigation and evaluation of behaviour by a central authority, and 'fire alarms', by which he means a determination by a central authority based on self-reporting or claims by other parties. See Raustiala, *supra* note 4.

[32] Coase, 'The Problem of Social Cost', 3 *J L & Econ* (1960) 1.

[33] In discussions of international institutions the effort to maximize the total joint surplus of the parties to an agreement is sometimes referred to as 'rational design'. See Koremenos, Lipson, and Snidal, *supra* note 1, at 781.

this higher quality, though precisely how the gains generated by the contract are divided will vary based on the market power of the parties. Notice that this interaction generates the optimal quality level – higher quality would not be worth the cost, lower quality would reduce the total benefit enjoyed by the parties by more than the cost savings.

This simple theory of negotiation is well established in the contracts literature, but how does it affect the way in which we view inter-state agreements? Before proceeding, we must make some assumptions about state behaviour. This article assumes that states are rational beings; that they act in their own self-interest, at least as that interest is defined by the political leaders of the state; and that states are aware of the impact of their actions on the behaviour of other states. These represent standard assumptions about state conduct, but our understanding of state behaviour remains sufficiently contested that it is worthwhile to identify them explicitly.[34] The assumptions imply that when states enter into international agreements they will, like domestic parties entering into a contract, seek to maximize the joint benefits to the parties.[35]

With the above assumptions in mind, imagine two (or more) states engaged in negotiation over some set of issues. For example, Mexico and the United States might be concerned about a set of environmental issues that affect both states. The states may have different priorities and different goals, and each may pursue its own interests without regard for the interests of the other. Whatever agreement they ultimately reach, however, our assumption that they will reach an efficient agreement ensures that there is no alternative agreement that could make both parties better off. Suppose, for instance, that the United States prefers tougher environmental standards than does Mexico. If those standards are sufficiently important to the US, it will get the standards it wants in exchange for some other concession – perhaps better treatment for illegal immigrants within the United States. Alternatively, if the cost to Mexico of higher standards is greater than what the US is willing to pay, lower standards will prevail in the agreement because the compensation demanded by Mexico for its acceptance of higher standards would exceed the willingness to pay of the United States. The parties will increase the level of agreed-upon standards as long as

[34] The assumptions made here are conventional institutionalist ones. See Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale J Int'l L* (1989) 335; R. O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984), at 27; Raustiala and Slaughter, 'International Law, International Relations and Compliance', in W. Carlsnaes *et al.* (eds.), *Handbook of International Relations* (2002).

[35] Note that these assumptions about state behaviour are consistent with both a public interest model of governance, in which states pursue the welfare of their citizens, and an alternative public choice model, in which governmental leaders pursue their own private goals: see Guzman, 'Choice of Law: New Foundations', 90 *Georgetown LJ* (2002)_883, at 900 (discussing how public choice issues can be handled in an international law context). The most able scholar using public choice analysis in the international context is Alan Sykes. See Schwartz and Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization', 31 *J Legal Stud* (2002) 179; Schwartz and Sykes, 'Toward a Positive Theory of the Most Favored Nation Obligation and its Exceptions in the WTO/GATT System', 16 *Int'l Rev L & Econ* (1996) 27; Sykes, 'Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations', 58 *U Chi L Rev* (1991) 255.

the US is willing to pay more than Mexico demands – leading them to an agreement that maximizes their joint welfare. No other agreement could, when combined with some transfer payment, make both parties better off.

The domestic contract law story ends at this point – it is assumed that, having reached an agreement that maximizes joint welfare, the parties will enter into a binding legal contract.[36] The contract would reflect the efficient bargain; disputes between the parties would typically be resolved by the domestic court system or, perhaps, some form of mandatory private arbitration; and monitoring would be provided for, up to the point where the marginal benefit of additional monitoring is outweighed by its marginal costs. Entering into such a contract encourages both sides to uphold their end of the agreement, permits greater reliance by each party, and allows the parties to achieve the joint gains that motivated the contract in the first place.[37]

A glance at international agreements reveals that they appear inconsistent with the above description.[38] Specifically, agreements among states frequently do not make use of familiar and accessible mechanisms to increase the credibility of commitments. States often enter into soft law agreements rather than treaties, typically fail to provide for any dispute resolution procedures,[39] and frequently require little or no monitoring or verification of performance.[40]

[36] Domestic parties do occasionally enter into agreements that are not binding. E.g., in the course of the negotiation of a loan, two parties may sign a 'letter of intent' which lays out the terms of the ultimate agreement but is not itself legally enforceable. Agreements of this sort are often, though probably not always, intended to help the parties make sure that they have a common expectation about ongoing negotiations. In any event, and whatever their purpose, it is clear that such agreements are atypical of domestic law agreements, and private contracting normally takes the form described in the text.

[37] See text accompanying note 44.

[38] Variance in the use of credibility-enhancing devices is almost certainly related in part to the subject matter of the agreement. E.g., it is conventional wisdom that dispute resolution is more common in trade and human rights than in, e.g., arms agreements: see, e.g., Smith, 'The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts', 54 *Int Org* (2000) 137. Similarly, it is said that monitoring is more common in the environmental context: see, e.g., E. B. Weiss and H. K. Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accord* (2000), at 91. This article does not attempt to evaluate these empirical claims or to test the theory against them in a formal way. Section 4, however, discusses when the theory predicts that credibility-enhancing devices are most likely and offers some comments suggesting how well these predictions accord with what we observe. More formal testing of the theory is left for future work.

[39] And they almost never provide for dispute resolution procedures that attempt to impose something analogous to expectation damages.

[40] To illustrate the basic difference between what analogy to domestic contracting suggests and what we observe in the international context, consider how odd it would seem to see sophisticated business parties enter into negotiations, expend significant resources, produce a complex agreement, and then intentionally make that agreement non-binding and unenforceable. Similarly, one would be surprised to see an agreement that is legally binding, but that declares itself unenforceable before any court or tribunal. Indeed, the use of agreements that are intentionally not adjudicable before any body is so alien to conventional contract law that it is hard even to know what it means for a contract to be legally binding if there is no enforcement: see Uniform Commercial Code § 1–201(3, 11) (defining 'Contract' and 'Agreement'). Finally, a lawyer who negotiated a complex, long-term agreement and then failed to provide for the use of available and cost-effective monitoring procedures would be criticized for an error of judgement. Not only do all of these things happen in the world of inter-state agreements, they represent standard operating procedure.

Before proceeding further, it is important to recognize that all the design elements discussed in this article are related.[41] Each of them alters the extent to which an agreement provides an incentive for states to comply. Signing a treaty rather than soft law, including mandatory dispute resolution, and choosing to put monitoring procedures in place, all increase the impact of an agreement on state behaviour. Furthermore, it is possible to trade the compliance benefits of one of these elements off against those of another. For example, a treaty that has stringent monitoring and reporting obligations but no dispute resolution procedures might have the same impact on behaviour as an agreement with limited monitoring and reporting but a mandatory dispute resolution procedure.[42]

That there is a trade-off among these elements, however, does not explain state behaviour because from a contracting perspective, one would expect states to use each of the elements to increase the credibility of their commitments.[43] Like the parties to a domestic contract, states wish to maximize the joint benefits from an agreement. Consistent with that desire, the parties will adopt enforcement techniques that ensure performance unless the total joint cost of performance is greater than the total joint benefit. Specifically, they want to provide an incentive to perform, even if it turns out that performance is costly to one of the parties, as long as performance yields net benefits to the parties taken together. In domestic contracts, of course, the law attempts to provide a system of damages and other remedies that leads to efficient results. It is for this reason that expectation damages represent the standard remedy for contract violation – they encourage efficient breach.[44]

The standard enforcement tools of international law are, of course, a great deal weaker than those present in domestic systems. In particular, states cannot rely on a system of coercive enforcement to ensure an efficient level of damages.[45] The enforcement

[41] I am not the first to make this observation. In a recent draft article, Kal Raustiala has observed that the choice of form (i.e., treaty v. soft law) can be traded off against the substance of an agreement: see Raustiala, *supra* note 9, at 34.

[42] See Kaplow, 'The Value of Accuracy in Adjudication: An Economic Analysis', 23 *J Legal Stud* (1994) 307, at 352–354 (explaining the relationship between increased accuracy and costly sanctions in the domestic context).

[43] As already discussed, see *supra* the text accompanying notes 35–37: contract theory tells us that states should increase the level of commitment up to the point at which the costs of violation are equal to the benefits thereof. If some combination of design elements generated excessive commitment states would provide for some lower level of commitment. In the international arena, however, it is hard to believe that any combination in the design elements can generates optimal, let alone excessive, incentives to comply.

[44] See R. A. Posner, *Economic Analysis of the Law* (4th edn., 1992), at 117–126; Barton, 'The Economic Basis of Damages for Breach of Contract', 1 *J Legal Stud* (1972) 277, at 283–289; Shavell, 'Damage Measures for Breach of Contract', 11 *Bell J Econ* (1980) 466. But see Friedmann, 'The Efficient Breach Fallacy', 18 *J Legal Stud* (1989) 1 (challenging the claim that expectation damages yield an efficient outcome). In domestic law there are other efficiency goals – specifically efficient insurance and efficient precaution – that may lead one to favour less than expectation damages. These objectives, however, have less applicability to inter-state agreements and, in any case, the level of damages provided by the background rules of international law seems too low even if these other goals are taken into account.

[45] See, e.g., Damrosch, 'Enforcing International Law Through Non-Forcible Measures', 269 *Recueil des Cours* (1997) 19 ('A fundamental (and frequent) criticism of international law is the weakness of mechanisms for enforcement.'); Falk, 'The Adequacy of Contemporary Theories of International Law – Gaps in Legal Thinking', 50 *Va L Rev* (1964) 231, at 249 (1964) ('Among the most serious deficiencies in

mechanisms are sufficiently weak that, as far as I am aware, no commentator argues that enforcement measures in international law are sufficient to secure optimal levels of compliance.[46]

Given the weakness of the international enforcement system, one might expect that international agreements would include mechanisms intended to increase the likelihood of compliance. In fact, such mechanisms are not routinely included in agreements, and sanctions are normally not provided for. Where sanctions are provided, they are often not severe, and often only prospective.[47] Simply put, in many agreements, the tangible sanctions for a failure to comply with international law are very weak. Though there may also be a reputational sanction,[48] there is no reason to think that reputation is sufficient to provide for an efficient level of breach between states. Reputational sanctions are limited in magnitude and can be unpredictable, and even a total loss of reputation may not be enough to deter a violation of international law.[49] Reputational sanctions are also likely to under-deter breach because the actions of the parties may not be observable to third parties. In the absence of a disinterested adjudicator, the breached-against party cannot credibly demonstrate that the other party was at fault.

Before proceeding it is worth pausing to address a potential objection. It might be said that a rule of customary international law imposes on a violating state the obligation to 'make full reparation for the injury caused by the internationally wrongful act'.[50] If one has sufficient belief in the power of customary international law, one might ask if states rely on this background rule and therefore do not find it necessary to provide for damages in their agreements. Analogizing to the domestic sphere, the argument would be that private parties relying on the default remedies of contract law may not feel it necessary to include a liquidated damage clause of other contractual language governing damages.

A realistic appraisal of both the power of customary international law and the status of this particular rule, however, makes it clear that this claim is implausible. First,

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international law is the frequent absence of an assured procedure for the identification of a violation.'); Franck, 'Legitimacy in the International System', 82 *Am J Int'l L* (1988) 705, at 705 (observing '[t]he surprising thing about international law is that nations ever obey its strictures' because 'the international system is organized in a voluntarist fashion, supported by so little coercive authority').

46 But see Damrosch, 'Enforcing International Law Through Non-forcible Measures', 269 *Recueil des Cours* (1997) 19–22 (arguing that there are more sanctions for violation of international law than is generally recognized).

47 See, e.g., the WTO Dispute Settlement Understanding, Art. 22(4) ('The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.').

48 See R. O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984), at 105–108; R. Axelrod, *The Evolution of Cooperation* (1984); Guzman, *supra* note 14.

49 See Downs and Jones, 'Reputation, Compliance, and International Law', 31 *J Legal Stud* (2002) 95 (discussing reputation as it affects international law).

50 See Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd session (Sept. 2001), Supp. No. 10 (A/56/10), chap. IV.E.1, at www.un.org/law/ilc/convents.htm (this site also contains the authoritative commentaries).

it does not seem to be the case that there exists a rule requiring reparation in the event of a violation of international law. The determination of what is and what is not customary international law is, of course, contentious, and it is beyond the scope of this article to attempt a comprehensive analysis of the question in this context.[51] It is enough to note that we do not witness a consistent pattern of reparations being paid between states when international obligations are violated.

Furthermore, even if this is, indeed, a rule of customary international law, it is only relevant when states have chosen to enter into a hard law agreement and include a dispute resolution mechanism. The hard law form is necessary because the rule only binds states in the event of a violation of a treaty. States, therefore, could only consider the reparations obligation relevant in instances in which they select the hard law form. If anything this deepens the puzzle addressed in the article since a customary international law requiring reparation would make hard law even more powerful and effective relative to soft law.

Similarly, if this obligation were thought to be both effective and desirable we would expect more, rather than less, use of dispute resolution since the obligation to make reparation requires some authority to determine whether or not there has been a violation. And where states have determined that they do not want to provide for dispute resolution we would expect to see them routinely opting out of this obligation to make reparations. This is so because whatever concerns states about dispute resolution (for instance, fear of losing a case, fear of being perceived to be in violation of the law) should concern them about the reparation obligation. For example, a state making a reparation payment is also admitting guilt, so if states avoid dispute resolution because they do not want to be declared to have violated international law one would also expect them to avoid the reparations obligation.

Even if one were to accept, contrary to the practice of states, the claim that there exists a customary international law rule requiring the payment of reparation in response to a violation of international law, this rule could only serve as a substitute for credibility enhancing devices if it is equally effective. Again, this is not the place for a complete discussion of the problems with customary international law, but it is clear that it is at best a weak force acting on states. As such, it is hard to believe that it offers a substitute to the credibility-enhancing devices discussed herein.

Finally, even if one believes that a rule of customary law exists, and that it is effective, the compensation it calls for is often quite modest. For example, a state that violates international law 'is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.'[52] This form of 'reparation' hardly seems sufficient to explain why states avoid the credibility-enhancing devices discussed in this article.

[51] See Goldsmith and Posner, 'A Theory of Customary International Law', 66 *U Chicago L Rev* (1999) 1113; Swaine, 'Rational Custom', 52 *Duke LJ* (2002) 559.

[52] Draft Articles, Art. 37.

B *Existing Explanations*

1 Explanations for the Presence of Soft Law[53]

This article is not the first to ask why states use soft law, and there are a number of existing explanations for why states enter into soft law agreements.[54] The two most salient – flexibility and domestic issues – are presented below. The flexibility argument is largely unconvincing but the claims about domestic politics are surely an important part of the explanation for soft law.

2 Flexibility

The basic flexibility argument is that '[s]oft legalization allows states to adapt their commitments to their particular situations rather than trying to accommodate divergent national circumstances within a single text. This provides for flexibility in implementation'.[55] In simple terms, states choose soft law because it is less binding on them and, therefore, gives them greater flexibility.[56] This flexibility is said to be desirable for a variety of reasons, including to help states deal with an uncertain world,[57] to reduce the costs of termination or abandonment,[58] or to make renegotiation easier.[59]

[53] There is a significant literature on the subject of soft law. See the sources cited *supra*, at note 18. The general view of soft law in international law is that it is in some sense less 'binding' than traditional sources of international law, and states are accordingly less likely to comply: van Dijk, 'Normative Force and Effectiveness of International Norms', 30 *German YB Int'l L* (1987) 9, at 20. Perhaps the most traditional position views agreements other than treaties as nothing more than evidence of custom: see Dupuy, *supra* note 18, at 432; Steinberg, 'In the Shadow of Law or Power? Consensus-based Bargaining and Outcomes in the GATT/WTO', 56 *Int Org* (2002) 339, at 340 ('[M]ost public international lawyers, realists, and positivists consider soft law to be inconsequential.').

[54] See Hillgenberg, 'A Fresh Look at Soft Law', 10 *EJIL* (1999) 499; Lipson, 'Why are Some International Agreements Informal?', 45 *Int Org* (1991) 495, at 500; Abbott and Snidal, *supra* note 18; Gruchalla-Wesierski, *supra* note 18; Guzman, *supra* note 18.

[55] Abbott and Snidal, *supra* note 18, at 445; Lipson, *supra* note 54, at 500 ('[I]nformal bargains are more flexible than treaties. They are willows not oaks.').

[56] To the extent that the argument here is that it may at times be desirable to have weaker or less precise substantive provisions in an agreement, it is a question of what this article defines as the 'substance' of the agreement, and it is discussed in Section 3F. This article uses a definition of 'soft law' that turns entirely on questions of form – an agreement is soft if it is not a formal treaty. Given this definition, there is no *a priori* reason why soft law instruments (meaning instruments that fall short of formal treaty status) must be less precise. States could negotiate a detailed set of terms but have that exchange of promises take the form of soft law. Similarly, states can enter into formal treaty commitments that lack precision. Other scholars, in particular Abbott and Snidal, who are quoted above, see *supra* 56, use a different definition of soft law. As a result, some arguments made by other authors about 'soft law' may in fact be referring to characteristics of agreements (such as the precision of the substantive obligations) that are defined in differently in this article.

[57] See Abbott and Snidal, *supra* note 18, at 441 (stating that soft law helps states to deal with the fact that '[t]he underlying problems may not be well understood, so states cannot anticipate all possible consequences of a legalized arrangement'); Lipson, *supra* note 55, at 518 (arguing that soft law 'is useful if there is considerable uncertainty about the distribution of future benefits under a particular agreement'); Guzman, *supra* note 9, at 18 ('governments need not predict the future and can easily adjust the agreement or renege').

[58] See Lipson, *supra* note 55, at 518.

[59] See Abbott and Snidal, *supra* note 18, at 435.

The merit of flexibility, then, turns on the fact that soft law is less binding on states, allowing them to respond to unexpected future events. The problem with the argument is that flexibility of this sort reduces the value of the agreement to the parties. When entering into the agreement states have an incentive to set terms that maximize the expected payoff from that agreement. Granting each party the ability to unilaterally change those terms reduces this expected payoff. Though a state prefers that its own commitments be 'flexible' in this way, it would prefer that its counter-party be held to its promise. In conventional contract language, an efficient treaty compels performance unless the joint costs of performance exceed the joint benefits.[60]

3 Domestic Law and Politics

A different explanation for the use of soft law instruments concerns the domestic processes by which international agreements are approved. The use of a soft law instrument rather than a treaty triggers a different set of domestic practices and this may affect the choice of form. These arguments, whatever the merits of any particular claim, are surely part of the explanation for the use of soft law. This section simply mentions three prominent explanations for soft law that turn on matters of domestic law and politics.[61]

Soft law agreements differ from treaties in that they do not require formal ratification and therefore can be implemented more quickly.[62] They also lie more completely within the domain of the executive branch of government.[63] These traits may cause soft law instruments to be used when speed is important or when legislative support is lacking or uncertain. Soft law also differs from treaties in that treaties serve to 'commit [different] domestic agencies (especially legislatures) or political groups when those officials are able to make international agreements with little interference or control'.[64] Thus, an executive that wants to enter into an agreement can use treaties to more effectively bind these other actors. Finally, the choice between a treaty and soft law is also likely to be influenced by domestic political interests. International agreements reflect, among other things, the demands of domestic groups. When interest groups pressure a government to enter into negotiations, they typically want

[60] Some of the specific arguments about the merits of flexibility have additional problems. Claims that soft law is desirable because it makes renegotiation or termination easier seem wrong on their face, except inasmuch as they relate to matters of domestic politics, as discussed in Section 2B3. When negotiating an agreement, the parties remain free to include any termination and renegotiation provisions they wish, and can do so independently of the choice of form. They could, e.g., provide for termination without notice, or with short notice, or on whatever conditions they choose. Similarly, the parties can provide any amendment provisions they wish, regardless of the form of the agreement. E.g., the UN Charter can be amended 'by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all permanent members of the Security Council': see United Nations Charter, Art. 108.

[61] This section is intended to offer only a glimpse at the domestic law arguments. It is not intended to be comprehensive. For more on the subject see Abbott and Snidal, *supra* note 18; Lipson, *supra* note 54.

[62] Lipson, *supra* note 54, at 500.

[63] *Ibid.*, at 516 ('It is plain . . . that executives prefer instruments that they can control unambiguously, without legislative advice or consent.').

[64] *See* Abbott and Snidal, *supra* note 18, at 430.

a treaty rather than soft law.[65] This is what we would expect from a contractual perspective – those who push for an international agreement want it to be in the most credible and binding form possible. There is, of course, no guarantee that interest groups pushing for a treaty will get what they want. Governments entering into the agreement may decide to enter into a soft law agreement for any number of reasons, including the fact that other interest groups may oppose a treaty. The point here is that the political balancing of interests may cause a state to enter into a soft law agreement as a form of compromise between groups seeking a treaty and those seeking to avoid any commitment.

4 Explanations for the Rarity of Dispute Resolution

A small number of writers have commented on the reluctance of states to enter into dispute resolution procedures,[66] but they have failed to advance a convincing explanation for this behaviour. Two main arguments have been advanced.

The first proposed explanation turns on the desire of states to retain control over disputes. When a dispute arises, the argument goes, states prefer to resolve the dispute through bargaining and diplomacy rather than third-party adjudication.[67] Though this argument may explain why states do not refer cases to third-party tribunals after disputes arise, it does not shed light on the question of why dispute resolution is not included in agreements when they are signed.[68] The presence of dispute resolution, even if it is mandatory, does not prevent negotiation between the parties. Until one of the parties turns to the dispute resolution procedures and, indeed, even after the formal mechanism of dispute settlement has been put into motion, the parties are able to discuss the dispute and enter into any settlement they choose. The idea that dispute settlement procedures somehow prevent diplomatic negotiation is simply wrong. It may affect the outcome of the negotiation because it changes the consequences of a refusal to settle, but it does not prevent the negotiation itself.

[65] See Guzman, *supra* note 9, at 28 ('[M]any domestic and transnational interest groups focus on bindingness – on contractual form – as a necessary factor in international cooperation.').

[66] See Morris, 'High Crimes and Misconceptions: The ICC and Non-party States', 64 *Law and Contemporary Problems* (2001) ('States are particularly unwilling to enter into broad commitments to adjudicate future disputes, the content and contours of which cannot be foreseen.'); Rovine, 'The National Interest and the World Court', in L. Gross (ed.), *The Future of the International Court of Justice* (1976), i, at 462–473; J.G. Merills, *International Dispute Settlement* (3rd edn., 1998).

[67] 'It is one thing to show that resort to the [International Court of Justice] is preferable to armed conflict; it is quite another matter to demonstrate that judicial processes are as valuable as ordinary out-of-court bargaining and discussion': Rovine, *supra* note 67, at 314. '[T]here is a more fundamental reluctance to submit to third-party adjudication that rests on the perceived advantages to States in some circumstances of retaining control over the resolution of disputes': Morris, *supra* note 66, at 17 (citing Rovine, *supra* note 66.)

[68] Because commentators attempting to explain the absence of dispute resolution provisions frequently fail to distinguish between the inclusion of mandatory provisions in an agreement and the decision to submit disputes to third party arbitration at the time of the dispute, it is impossible to know if they seek to explain only the latter, in which case the arguments advanced seem right but the question asked is of less interest to this article; or if they hope to explain the former, in which case the arguments are flawed.

A second explanation sometimes advanced for the refusal to adopt dispute resolution clauses relies on the notion that states are afraid of losing a case.[69] Without a larger theory of state behaviour it is hard to know why a state's fear of losing a case would outweigh its interest in winning a case. The most likely explanation for such behaviour is risk aversion on the part of states.[70] Risk aversion, however, is an unsatisfactory explanation for the choice of soft law for at least two reasons.

First, states enter into many agreements and interact with other states on a regular basis. Because each individual commitment represents only a small fraction of the total set of interactions, it is hard to see why risk aversion would be a sensible strategy for most agreements.[71] It would make more sense to maximize the expected value of each agreement and rely on the large number of agreements to diversify the total benefits to the state. Second, the use of a dispute resolution clause may, in fact, reduce the level of risk. Such a clause increases the probability of compliance, which, depending on the range of future states of the world, may reduce the overall risk of the agreement.[72]

5 *Explanations for the Rarity of Monitoring Strategies*

There is only a small literature on monitoring and review mechanisms,[73] and virtually no discussion of why these mechanisms exist in some agreements but not in others.[74] There does not appear to be any available explanation of why states do not use monitoring mechanisms more often to increase the credibility of their promises and why the mechanisms used are often weak.[75]

69 'Most obviously, but most fundamentally, states resist judicial settlement because they fear losing': Rovine, *supra* note 66, at 317.

70 '[T]he more uncertain the adjudicated outcome of a particular dispute would be, the less willing a State will be to seek binding third-party adjudication': Morris, *supra* note 66; Merrills, *supra* note 66, at 293–294 ('when the result is all important, adjudication is unlikely to be used because it is simply too risky').

71 The risk aversion explanation even fails for agreements that are central to the existence or welfare of a state. Even under the most credible of international agreements the consequences of a violation are quite limited. There is no authority to compel compliance, so the harm from losing a dispute before a dispute settlement body is limited to the lesser of the costs of compliance and the costs of ignoring the decision of that body.

72 It is also worth noting that there are a number of alternative ways to deal with the risk of an agreement. States could, e.g., build in escape clauses triggered by poor economic performance, national crises, or other contingencies that concern the parties. This strategy reduces the exposure to risk without reducing the agreement's effectiveness in those states of the world in which the parties want compliance. An alternative strategy would be to weaken the substantive requirements of the agreement. This reduces the benefits of the agreement, but also reduces the level of commitment. Taken together, this may generate a higher expected return to the parties than an agreement with greater substantive provisions. Each of these strategies provides flexibility to the parties in a more nuanced and targeted way than simply including or excluding a dispute resolution provision.

73 See Raustiala, *supra* note 4.

74 See Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes', 102 *Colum L Rev* (2002) 1832, at 1841 (pointing out that even with the single field of human rights there is considerable diversity in human rights monitoring mechanisms).

75 See, e.g., Frischmann, 'A Dynamic Institutional Theory of International Law', 51 *Buffalo L Rev* (2003) 679 (observing the most international environmental agreements that include a monitoring system rely on self-reporting by states).

3 Seeking Credibility, Avoiding Commitment

A *Sanctions for Violations of International Law*

The explanation for why states do not make more use of credibility-enhancing devices takes account of the unique way in which state violations of law are sanctioned in the international arena. In a typical domestic contracts case between private parties, a contractual violation gives the aggrieved party the right to damages from the violating party. These damages normally take the form of a cash transfer from one party to the other. Because the penalty is a transfer, it has no impact on the joint welfare of the parties – what is lost by one party is gained by the other. For this reason, when private parties enter into a contract the fact that damage payments may have to be paid in the future does not affect the expected benefits of the contract.[76]

In the international arena, however, the de facto consequences of a violation are quite different. When an agreement is violated the offending state rarely pays money damages to other states. In fact, violations are normally not compensated in any direct fashion.[77] One can think of examples in which a form of compensation is provided, but even these examples rarely represent the sort of zero-sum transfer that exists in the domestic case. For instance, the WTO's dispute resolution procedures have provisions for the suspension of concessions previously granted to a violating party.[78] Rather than being a zero-sum transfer, the suspension of concessions is costly for both the sanctioning and sanctioned party.[79] Furthermore, a party is permitted to impose sanctions only up to the point where the cost imposed on the violating party equals the ongoing costs of the violation, and the sanctions must stop when the violative measure is ended.[80] There is no compensation for past violations.[81]

That violations are not penalized through a transfer of money or other assets from the violating party to the aggrieved state, however, does not mean that they are not penalized in any way. If international law matters at all, it is because there is some sanction for its violation.[82] There are two primary ways in which a state can suffer harm as a result of its violation of international law: direct sanctions and reputational sanctions.[83] Direct sanctions are those imposed by other states against a violating state because it violated the agreement. They are explicit punishments for the violation. Direct sanctions are important to some international

[76] What is meant here is that the actual transfer of funds from one party to the other does not itself affect the value of the contract. The level of damages may, of course, affect the behaviour of the parties and this, in turn, may affect the value of the agreement.

[77] See *supra* note 15.

[78] See Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), Art. 22.

[79] With a public choice perspective it is possible that the sanctions are zero sum, as discussed *infra* Section 3E.

[80] *Supra* note 79, Art. 22(4).

[81] See *ibid.*

[82] Guzman, *supra* note 14.

[83] See *supra* note 14 for a detailed discussion of why states comply with international law and the impact of both direct and reputational sanctions.

agreements,[84] but most agreements do not provide for explicit sanctions of this sort.[85] This leaves reputation as an important factor in the compliance decision of states.

A state that violates an international commitment signals to other states that it does not take its international promises seriously and that it is willing to ignore its obligations. When that state seeks to enter into agreements in the future, its potential partners will take into account the risk that the agreement will be violated, and will be less willing to offer concessions of their own in exchange for promises from that country. If there is enough suspicion, potential partners may simply refuse to deal with the state. A violation of international commitments, then, imposes a reputational cost that is felt when future agreements are sought. A state known to honour its agreements, even when doing so imposes costs, can extract more for its promises than a state known to violate agreements easily. When making a promise, a state pledges its reputation as a form of collateral. A state with a better reputation has more valuable collateral and, therefore, can extract more in exchange for its own promises.

B *The Impact of Costly Sanctions*

The key to explaining why states so frequently avoid credibility-enhancing devices is that the sanction for a violation of international law is costly to the parties.[86] That is, reputational loses felt by one party are not captured by the other party to the agreement. Imagine, for example, that the United States and Russia enter into an arms agreement under which both parties agree to reduce their stockpile of nuclear weapons. If Russia subsequently violates the agreement, countries around the world will observe that violation and Russia will suffer a reputational loss as a result. This loss is not captured by the United States.[87] When the agreement is violated, then, one party suffers a loss but the other party does not enjoy an offsetting gain.[88]

[84] E.g., bilateral investment treaties provide for direct sanctions in the form of compensation to investors who have been mistreated by a host state: see Guzman, 'Explaining the Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties that Hurt Them', 38 *Va J Int'l L* (1998) 639; Robin, 'The BIT Won't Bite: The American Bilateral Investment Treaty Programme', 33 *Am U L Rev* (1984) 931; R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), at 97–117.

[85] See Guzman, *supra* note 7, at 304 and n.3 (observing that of 100 treaties surveyed only 20 included dispute resolution provisions, and of those, 12 were BITs).

[86] The theory of costly sanctions and their use in the domestic context is laid out in Shavell, 'Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent', 85 *Colum L Rev* (1985) 1232; Polinsky and Shavell, 'The Optimal Use of Fines and Imprisonment', 24 *J Pub Econ* (1984) 89; Kaplow, 'A Note on the Optimal Use of Nonmonetary Sanctions', 42 *J Pub Econ* (1990) 245. The theory developed here is related to these earlier papers, though I am not aware of any previous work applying these ideas in the international context.

[87] The United States may benefit from its now more accurate estimate of Russia's willingness to comply, but this represents only a small fraction of the harm suffered by Russia whose reputation is harmed worldwide. This example is given in the context of a bilateral agreement. In the case of multilateral agreements a similar but more complex reasoning applies: see Guzman, *supra* note 7, at 319–320.

[88] Similar reputational effects may be at work in domestic law, but the presence of zero-sum damages creates a separate incentive to enter into contracts with efficient terms. Furthermore, the role of reputation is diminished in the domestic environment because credibility is provided by the legal system – parties do not have to rely as heavily on their reputations when they wish to enter into agreements.

Now, consider once again the decision of the parties when they enter into an agreement. To keep the analysis simple, suppose they must choose between a treaty and a 'non-binding accord'. The difference between these instruments is that the treaty is more likely to induce compliance – this is why treaties are considered the most effective instrument of cooperation.[89] A treaty, however, is a double-edged sword. If there is a compliance benefit, it must be that a violation of the treaty imposes greater costs than a violation of the accord – that is, the reputational and direct harms associated with a violation must be greater for a treaty. When choosing between a treaty and a soft law instrument, then, the parties face a trade-off. A treaty generates higher levels of compliance, which (assuming the parties select terms optimally) increases the joint payoff, but in the event of a violation it imposes a larger penalty on the violating state.

To see how this trade-off operates as the parties draft their agreement, notice that there are three categories of outcomes relevant to the choice between soft and hard law. The first category includes those states of the world in which the parties to the agreement will comply whether or not the agreement includes design elements intended to enhance the credibility of the commitments. That is, international law provides sufficient incentives even if a soft law agreement is chosen. In this category, the parties are neither better nor worse off if they opt for a formal treaty over a soft law agreement.[90]

The second category consists of all circumstances in which there would be compliance if a treaty is chosen, but violation otherwise. This is the category of all cases in which the increased compliance pull of the treaty makes the difference between compliance and violation. Because compliance is preferred to violation, the parties are better off in this category if they choose a formal treaty.

The third and final category of cases includes those in which there is a violation even if a formal treaty is used. In these states of the world the use of a formal treaty would impose a larger reputational cost on the parties than would be the case if they chose a soft law agreement. There is no compliance benefit to offset this cost, so in these cases the parties are better off with a soft law agreement.

In deciding between hard and soft law, then, the states face a trade-off between the second and third categories above. In the former, the use of hard law increases cooperation and gains to the states but in the latter hard law brings net costs. To maximize the total value of the agreement the states must balance these concerns.

C *The Optimal Agreement*

This section considers what the above theory predicts about the strength or weakness of agreements among states.[91] We begin with the assumption that the parties to an agreement are able to anticipate and provide for every possible contingency. We also assume that a dispute resolution authority is available (or can be created) and that this

[89] See Lipson, *supra* note 54, at 508 ('The effect of treaties, then, is to raise the political costs of noncompliance.').

[90] If the choice of hard law implies some additional costs such as ratification costs, then the parties would do better if they chose soft law.

[91] The discussion here draws on Shavell, *supra* note 86, at 1241–1246.

authority has perfect information about both the agreement and the facts of the dispute. Though thoroughly artificial, these assumptions help to explain how agreements are affected by the fact that only costly sanctions are available. The assumptions are then relaxed to generate a more realistic picture of international agreements.

Under these extreme assumptions we expect the parties to tailor the agreement to the three outcome categories described in the previous section.[92] First, any behaviour with total benefits that outweigh its costs will be permitted under the agreement. This set of substantive obligations maximizes the total value of the agreement. Second, harmful behaviour that cannot be deterred by any available sanction will be permitted. Because sanctions are costly to the parties, providing for them when the behaviour cannot be prevented would only increase the harm resulting from that behaviour.[93] Finally, behaviour that is harmful and that can be deterred will be prohibited under the agreement and will be subject to dispute resolution procedures. As part of the effort to deter this behaviour, the parties are likely to enter into a formal treaty with dispute resolution provisions and monitoring.[94] Because the behaviour can be deterred, of course, no violation will ever take place.

So if the parties could craft a complete agreement, they would prohibit only behaviour that is harmful and that could be deterred. The agreement would be optimal in the sense that it would generate as much desirable cooperation as possible without ever actually imposing the costly sanction.[95]

States cannot, of course, enter into agreements that provide for every possible contingency, so we must relax these assumptions. It is clear that states cannot identify every behaviour that they would like to prevent because they cannot anticipate every circumstance. Thus, for example, the parties to a trade agreement might wish to permit the use of safeguard measures when domestic industries are threatened, but it may be impossible to verify when that is the case.[96] The agreement, then, is likely to permit some safeguard measures the parties would prefer to prohibit and to prohibit some measures the parties would like to have permitted.

With respect to deterrence, the parties to the agreement will be unable to perfectly identify behaviour that can or that cannot be deterred. In particular, some conduct that cannot be deterred will nevertheless be prohibited. Furthermore, to the extent that the parties use credibility-enhancing devices, such as hard law, dispute resolution, and monitoring, these devices will increase the reputational sanctions imposed when conduct that cannot be deterred takes place.

[92] See text accompanying note 90.

[93] If, e.g., under certain circumstances a state (or its leaders) stands to gain so much by abrogating an environmental treaty that it will do so even if all available credibility-enhancing devices are in place, then the higher sanctions brought on by these devices represent a cost to the parties with no offsetting gain.

[94] It may be possible to deter the behaviour without using all of the credibility-enhancing devices, in which case a subset of them may be used. All that matters is that the sanction be high enough to deter the conduct.

[95] See Shavell, *supra* note 86, at 1241–1242.

[96] The fact that safeguards are, according to many experts, always or almost always inefficient need not concern us because what we call the objectives of states are in fact the goals of decision makers within the states: see *supra* note 35 and accompanying text.

In the world of imperfect agreements, then, greater use of costly credibility-enhancing devices generates two main effects. First, it increases compliance, which generates benefits for the parties. Second, it leads to the use of costly sanctions when an obligation is violated – an outcome that imposes losses on the parties. When deciding whether or not to use credibility-enhancing devices, then, states must consider this basic trade-off between the benefits of increased compliance and the costs of reputational sanctions.

For our purposes, the most important implication of this trade-off is that the presence of costly sanctions discourages the use of credibility-enhancing devices, at least when compared to the case of costless sanctions, such as money damages. By choosing a hard law form, for example, the parties to an agreement generate benefits in the form of increased compliance and costs in the form of imposition of the costly sanction. If the costs are larger than the benefits, of course, states will resist the hard law form.

D *A Numerical Example*

The above discussion is somewhat abstract, so the following numerical example is provided to illustrate the main argument regarding the choice of design elements. To keep the example simple, only one design element – dispute resolution procedures – is considered. The analysis of the other design elements discussed in the paper would be identical.

Assume that there are two countries, labelled A and B. They face a prisoner's dilemma, which they are attempting to resolve through an international agreement. For concreteness, imagine that the agreement imposes obligations on each party with respect to domestic environmental policies. The question at hand is whether the agreement should include a dispute resolution provision.[97]

Assume that if both parties comply with the terms of the agreement, they each receive a payoff of 5.[98] If one or both of the parties violate the agreement, the payoffs are affected by the presence or absence of a dispute resolution clause. If there is no such clause and both parties violate their commitments, they each earn zero. If one party violates the agreement while the other complies, the complying party faces a loss of 5, while the party that violates the agreement receives a positive payoff. These payoffs reflect the fact that the violating party avoids the costs of domestic changes but may still get the benefit of compliance by its counter-party. The complying party, on the other hand, makes costly changes to its domestic regime but does not get the expected benefit of compliance by the other state.

[97] For simplicity we assume that the parties are choosing whether or not to include an established set of dispute resolution provisions. In reality, of course, states may be able to construct any number of different dispute resolution mechanisms. The example captures this wider set of options if one imagines the states choosing between any pair of approaches to the question of dispute resolution.

[98] The game as presented should be thought of as the present discounted value of a repeated game rather than a one shot game. This is important because the game must be repeated for cooperation to emerge as a possibility in the absence of an enforcement mechanism.

The size of the payoff received by the breaching party is a random variable, labelled N. The range of possible values of N is such that the agreement will be breached in some cases, but not in others.[99] In the absence of a dispute resolution clause, then, the game can be represented as follows:

		Country B	
		Cooperate	Defect
Country A	Cooperate	(5, 5)	(-5, N)
	Defect	(N, -5)	(0, 0)

If the states include a dispute resolution clause, a breached-against party can bring the breaching party before a neutral tribunal which has the authority to declare that the state is in violation of the agreement.[100] The presence of this dispute resolution procedure increases the likelihood of compliance because a state that loses before the tribunal suffers a reputational loss.[101] The loss comes about because the state that loses before a tribunal finds it more difficult to establish international agreements in later periods with either its counter-party in this agreement or third parties.[102] Assume that this reputational loss imposes a cost of 2 on a state.

If the parties adopt the dispute resolution clause described above, the game can be represented as follows:

		Country B	
		Cooperate	Defect
Country A	Cooperate	(5, 5)	(-5, N-2)
	Defect	(N-2, -5)	(-2, -2)

Finally, assume that the probability of compliance in the absence of a dispute resolution procedure (which is determined by the variable N) is 50 per cent, and the addition of such a procedure increases that probability to 60 per cent. Now consider whether the states prefer to include a dispute resolution mechanism or not when they negotiate the agreement. If they conclude the agreement without providing for

[99] This variable could represent any number of factors exogenous to the discussion, including economic shocks, domestic political developments, international events, and so on.

[100] One could imagine stronger dispute resolution provisions. For example, the tribunal could be authorized to impose some form of sanction. All that matters for present purposes is that the dispute resolution provisions work to increase the costs of a violation.

[101] See Guzman, *supra* note 14.

[102] Without a dispute resolution clause, it is assumed for simplicity that there is no reputational loss in the event of a violation. It is straightforward to incorporate a positive reputational loss even in the absence of a dispute resolution clause.

dispute resolution, they each expect to earn 5 with 50 per cent probability (i.e., if there is compliance), generating an expected payoff of 2.5.[103]

If instead they provide for dispute resolution, they expect to earn 5 with 60 per cent probability and lose 2 with 40 per cent probability, yielding an expected payoff of 2.2. Thus, even taking into account the increased compliance generated by the dispute resolution clause, the parties are better off without such a clause. This is so because when there is a violation, a net cost is imposed on the parties (meaning that one suffers a loss that is not offset by the other's gain). In this example, the benefits of increased compliance are outweighed by that loss.

With a small change in the assumptions, one can generate the opposite result. Assume that everything remains the same except the dispute resolution clause increases the probability of compliance to 70 per cent rather than 60 per cent as previously assumed. In that case, the parties still expect to receive 2.5 if they do not have dispute resolution, but if they provide for dispute resolution, they can expect to enjoy a gain of 5 with 70 per cent probability and a loss of 2 with 30 per cent probability, yielding a net expected gain of 2.9 (5*0.7–2*0.3). With this modified set of assumptions, a dispute resolution clause is beneficial to the parties.

The intuition behind this result is straightforward. A dispute settlement clause is attractive because it increases the likelihood of compliance and, therefore, the probability of the cooperative outcome. As the impact of dispute resolution on compliance increases, so does the use of dispute resolution clauses. On the other hand, even in the presence of a dispute resolution clause, breach will sometimes occur. Because the reputational loss is a net loss to the parties rather than a transfer between them, increasing that loss reduces the payoff to the parties in those states of the world in which there is a breach.

When negotiating an agreement, therefore, the parties must take into account both the increase in compliance that is generated by the dispute resolution clause and the resulting joint loss that occurs when there is a breach. These offsetting effects will lead them to include dispute resolution provisions in some agreements but not in others.

E *Public Choice*

The above discussion has proceeded on the assumption that injuries to one state that take the form of reputational losses or direct sanctions represent a net loss to the parties – that is, the harm to the violating party is not offset by a gain to the other party. That assumption may be problematic if a particular form of political economy is at work in the sanctioning state.

When direct sanctions are applied, it is at least conceivable that the political leaders applying those sanctions may benefit. Thus, for example, if a government imposes trade sanctions in retaliation for what is perceived to be a violation of the trade obligations of another state, this may enhance the political support of the government, despite the fact that it harms the citizens of the sanctioning state.

[103] By assuming that the variable N is the same for both states we ensure that if one violates the agreement the other one does as well. This assumption is not necessary for the results.

To the extent sanctions generate benefits to the sanctioning party, their influence resembles that of transfers. That is, the loss to one party is at least partially offset by benefits to the other party. Where this is true, the parties have a reduced incentive to avoid the use of sanctions because they are able to get the compliance benefits of the sanctions with a lower cost in the event of a violation. If this is the case, the design elements of interest in this article – hard law, dispute settlement mechanisms, and monitoring – are less costly to include in the agreement. Notice that if the political economy works in the way described here, it is even more surprising that credibility-enhancing devices are not used more often. Once we recognize the relevance of public choice it is clear that the predictions of the theory[104] are sensitive to such issues. Thus, for example, areas in which political leaders enjoy benefits when they impose a sanction (trade agreements, perhaps) are more likely to feature credibility-enhancing devices.

F *Substantive Provisions and Weak Agreements*

The design elements discussed in this article are procedural or structural aspects of agreements. The article intentionally limits the discussion to a small number of procedural issues because their use can be observed directly in an agreement, and because the observed practice of states seems especially surprising. It is hard to say, *a priori*, which substantive obligations one would expect to find in an agreement. The substantive terms are the product of bargaining between the states and the positions of the states are the product of a complex domestic political dynamic. On the procedural side, however, the case for strong and credible agreements is much more compelling.

The same theory, however, could be applied to any aspect of an agreement that increases the commitment of the parties but imposes a net loss on the parties in the event of a violation. This includes both other procedural provisions of agreements and substantive provisions.

Like the elements already discussed, the substance of international agreements varies widely from one agreement to another. By substance I refer not to the particular topic or subject matter of an agreement, but rather to what is sometimes called 'depth'.[105] Depth can be defined as 'the extent to which [an agreement] requires states to depart from what they would have done in its absence'.[106] The notion of depth is intended to capture the fact that some agreements place a considerable burden on states and demand significant changes in behaviour, while other agreements do little more than 'codify' what states are already doing.[107]

There are obviously many other ways in which the substance of an agreement may vary, but this article restricts itself to a discussion of depth. It might be argued that the notion of depth is itself unsatisfactory because it requires speculation about a

[104] See Section 4.

[105] See Downs, Rocke, and Barsoom, 'Is the Good News about Compliance Good News About Cooperation?', 50 *Int Org* (1996) 379, at 383; Raustiala, *supra* note 9, at 7.

[106] See Downs, Rocke, and Barsoom, *supra* note 107, at 383.

[107] See Raustiala, *supra* note 9, at 7.

counter-factual set of actions, because it is impossible to quantify, and because a single agreement may demand large changes in some states and virtually no changes in others.[108] Without resisting any of these critiques, the concept is useful for our purposes, which are limited to a discussion of the fact that the depth of an agreement between states may diverge from what the states would choose but for the fact that sanctions are costly.[109]

As with the design elements that are the main focus of this article, states are free to adopt whichever substantive provisions they wish. Under a traditional model of contracting, one would expect them to select terms that maximize the value of the agreement. Such terms generate an efficient contract when combined with efficient penalties in the event of default. Unlike the design elements discussed in the article, however, there is no simple way to observe the relationship between the chosen terms of an agreement and the efficient terms.

The theory advanced in this article, however, suggests that states may select substantive terms that are systematically weaker than those that would maximize the benefits to the states if a costless (i.e., zero-sum) system of damages were available. To see why this is so, consider a simple example. Suppose that the United States and India wish to enter into an agreement that will facilitate the practice of using Indian residents as telephone support for the US-based customers of American firms. The American government wants to enter into the agreement to assist its firms in the computer, airline and other industries that rely heavily on telephones for customer service. India is interested in the agreement for the obvious reason that it will provide employment to its residents. Imagine that the states agree on the preferred substantive terms of the agreement, which deal with the provision of training programmes by

[108] E.g., the TRIPs Agreement required substantial changes to the law of intellectual property in many states, including most developing countries, but was largely consistent with the existing regimes in the United States and Europe.

[109] A clear example of how the theory presented here might impact on the substance of an agreement is the common use of escape clauses. An escape clause allows the parties to an agreement to suspend their compliance if certain conditions are satisfied. E.g., Art. XIX of the GATT and the WTO's Agreement on Safeguards allow WTO members to suspend their obligation under certain circumstances. Like the design elements discussed throughout this article, the use of escape clauses is influenced by two offsetting effects. First, it reduces the level of commitment of the states in a manner analogous to how the omission of a dispute resolution clause reduces the incentive to comply with the terms of the agreement. The safeguards do provide that a member implementing a safeguard is to 'maintain a substantially equivalent level of concessions': Agreement on Safeguards, Art. 8(1). This requirement offsets the impact of the safeguards provisions on the level of commitment, but only partially. The state adopting a safeguard measure is given the discretion to determine how to maintain the level of concessions, and this discretion obviously reduces the extent to which the state is constrained in its actions. Secondly, because the escape clause allows a state to suspend its commitment, it reduces the sanction for doing so in a manner analogous to the way in which the omission of a dispute resolution clause reduces the sanction for a violation. When drafting an agreement, then, states must consider both the reduced likelihood of compliance with the (other) terms of the agreement and the reduction in total loss if there is such non-compliance. There are, of course, other explanations for the use of escape clauses, and the explanation offered here is intended to be complementary to these earlier theories: see Sykes, 'Protectionism as a 'Safeguard', 58 *U Chi L Rev* (1991) 255; Rosendorff and Milner, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape', 55 *Int Org* (2001) 829.

India, access for US companies to recruitment opportunities, a commitment by the United States to underwrite some of those programmes, and a promise to support and permit American firms to use Indian phone operators.

Having established the value-maximizing terms, the states could incorporate them into the agreement, as would be expected if they were private parties negotiating a contract. The states, however, are concerned about the possibility of future violations. In particular, the United States is concerned about criticism from domestic constituencies who would prefer that the jobs be in the United States.

If this were a private contract, the parties would either proceed with the contract and include the value-maximizing terms or abandon the contract altogether.[110] If they proceeded with the contract, they would rely on an efficient sanctions regime to ensure that the United States would breach if and only if it were efficient to do so. In the event of such a breach, India would receive damages in compensation.

Because India and the United States are entering into an international agreement, however, and because we assume that sanctions are costly,[111] they behave differently. In particular, they must concern themselves with the fact that if the United States violates its commitment under the agreement, the relevant sanction will not be a transfer from the US to India. To keep the example simple, assume that the only sanction will be a reputational one, and that the harm to the US from that sanction would be more than *de minimus*. To the other costs and benefits of the agreement, then, the parties must add the cost borne by the United States in the event that it violates the agreement. This reduces the total expected value of the agreement. If the parties choose a weaker set of substantive commitments – perhaps eliminating the American funding of some training programmes – it is less likely that the United States will violate its commitment, and less likely that it will suffer the reputational harm. In drafting the agreement, then, the parties must balance a desire to include the efficient terms against a desire to avoid the consequences of a violation. This may lead them to enter into an agreement with weaker substantive terms.

4 Predictions of the Theory

This paper explains that state reluctance to use credibility-enhancing devices is the consequence of the fact that sanctions for violations of international law are costly. The theory also generates some predictions about when one would expect more or less use of these design elements.

A *Bilateral v. Multilateral Agreements*

The non-zero-sum nature of sanctions in the international arena is a fundamental difference between international agreements and private contracts, and drives the

[110] They would proceed with the contract if its total expected value, taking into account the costs and benefits incurred by both parties and the risk of a breach, were positive.

[111] See *supra* note 15.

main results of this paper. When a state violates a commitment it suffers a reputational loss for which there is little offsetting gain to its counter-party. The reputational sanction, however, is not a pure loss. Other states get a benefit in the form of improved information about the reputation of the violating state. The more these informational benefits are internalized by the parties to the transaction the more attractive are credibility-enhancing devices.

In many bilateral contexts it is reasonable to ignore these informational benefits because the bulk of them go to states that are not party to the agreement. The non-violating state gains only a small fraction of the informational benefits. In a multilateral agreement, however, more of the informational benefits are captured by parties to the agreement. This reduces the cost of a credibility-enhancing device in the event of a violation. In the extreme, a universal organization would capture all of the informational benefits that result from a violation. In that case it seems likely that the sanctions, rather than being negative-sum as they are in most bilateral cases, would be zero-sum or perhaps even positive-sum. The notion here is that the violation allows states to form a more accurate view of the violating state's willingness to comply with commitments, which is valuable. Following a violation, then, states as a group have better information as they seek cooperative arrangements. Though the effect on the violating state is negative, it is reasonable to expect that better information yields a net benefit to all states.[112] The ability to capture the informational benefits of a violation offers an explanation for why agreements with near-universal membership, such as the WTO, sometimes have a formal treaty structure and dispute resolution.

More generally, the more the parties to an agreement are able to internalize the informational benefits that flow from a violation, the less costly are credibility-enhancing devices. Thus, an agreement whose parties have many dealings with one another and relatively few dealings with non-parties will capture a large share of the informational benefits. This might explain, for example, why regional agreements such as NAFTA or some regional human rights agreements (e.g., The Inter-American Commission of Human Rights) take the form of formal treaties and provide for dispute resolution.

B *High Stakes v. Low Stakes Agreements*

The benefits of the use of credibility-enhancing devices are felt in those states of the world in which there would not be compliance but for these devices. If this set of cases is larger the incentive to adopt such devices obviously increases. More specifically, where the compliance decision of states is likely to be influenced by reputational issues, the use of credibility-enhancing devices is more likely. Where reputation is unlikely to affect decisions, these devices will be used less often. Put another way, credibility-enhancing devices are more likely to be used when the marginal impact of such devices on compliance is larger.

[112] See Guzman, *supra* note 7, at 319–320 (explaining why it is not certain that the net effect will be an increase in welfare).

One implication of this relationship between reputation and compliance is that 'high stakes' agreements, such as those that concern national security or arms control, tend not to provide for dispute resolution provisions. Reputation is limited in its ability to impose costs on states and as the stakes increase, the likelihood that reputation will tip the balance falls. For very high stakes issues, then, dispute resolution offers very modest compliance benefits.[113]

High stakes agreements may use monitoring provisions, but this is explained by the fact that these provisions do more than simply impose reputational costs in the event of a violation. They also turn high stakes agreements into low stakes commitments. Monitoring makes it more likely that a violation will be observed shortly after it occurs. This reduces the expected benefits from a violation since it reduces the time period during which its counter-party continues to comply. In this sense, monitoring can serve to change a high stakes agreement into a low stakes one. Imagine, for example, an arms control agreement which requires the parties to limit the number of nuclear missiles they have in their possession. If a monitoring arrangement makes it impossible to exceed the agreed-upon number by more than a small amount without being detected, the gains from violation are reduced. A decision to violate the agreement, then, would offer only modest advantages over a decision to withdraw from the agreement because the state's counter-party would observe the violation before any large-scale violation and would react by demanding compliance or by terminating its own compliance.

C *High Compliance v. Low Compliance*

The costs of credibility-enhancing devices are only felt when an international obligation is violated. It follows that these devices are more attractive, all else being equal, when the probability of a violation is small. Imagine, for example, an agreement that the parties recognize is very likely to be violated, even if credibility-enhancing devices are used. This means that the expected reputational loss is relatively large. For any given increase in compliance, therefore, the devices are less attractive. Thus, parties entering an agreement which they expect to yield a high level of compliance are more likely to find credibility-enhancing devices worthwhile than parties entering into an agreement where the expected level of compliance is low.

5 Implications of the Theory

The main purpose of this article is to explain why states are reluctant to use credibility-enhancing tools such as hard law, dispute resolution mechanisms and monitoring. The explanation provided, however, has implications for a range of questions related to international agreements. This section highlights of few of these implications. It is

[113] High-stakes agreements are frequently, though certainly not always, formal treaties. Though this is contrary to what the theory suggests, the domestic reasons to prefer a treaty seem likely to offer an explanation. The desire of the executive branch to bind domestic actors (e.g., Congress) as much as possible seems a likely explanation of the treaty form.

neither an exhaustive cataloguing of implications nor a complete discussion of the ones mentioned.

A *The Interpretation of International Agreements*

Each of the design elements discussed offers negotiators a tool to modulate the level of credibility and the probability of compliance, but increased compliance comes at the cost of a loss to the parties in the event of a violation. Because the design elements all feature this trade-off they are, to some degree, substitutes. For example, the decision to include a dispute resolution mechanism may generate compliance incentives that resemble those of a monitoring system, and one may be chosen over the other because of their respective impacts if one party violates the agreement.

Recognizing the interdependence of the various aspects of treaty drafting sheds light on how one should interpret and evaluate international agreements. The simple lesson for drawing normative judgments about agreements is that one cannot evaluate or interpret a treaty by looking at a single design element. If interpretation is to be based on the intent of the parties, it must take into account all aspects of the agreement. To see this, consider the example of the International Labour Organization (ILO) Declaration on Fundamental Labour Rights, which imposes a set of international labour standards.[114] The Fundamental Declaration is binding on all member states of the ILO, and has become a focal point in the discussion of international labour rights. It is particularly important in the debate about the proper relationship between trade and labour. Among the arguments in this debate is the claim that trade sanctions are necessary to enforce the rights laid out in the Fundamental Declaration because no other effective mechanism exists.

The claim that no other effective enforcement strategy exists is quite possibly correct. The ILO itself provides no enforcement mechanism beyond some monitoring procedures,[115] and unilateral strategies of enforcement, such as boycotts, military intervention, diplomatic protests, social labelling, and so on, lack both credibility and good evidence that they influence state behaviour.[116] For present purposes, then,

[114] These standards include: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation: ILO Declaration on Fundamental Principles and Rights at Work, International Labor Conference, art. 2, 86th Session, Geneva, June 1998

[115] See Alvarez, 'The New Treaty Makers', 25 *BC Int'l & Comp L Rev* (2002) 213, at 222.

[116] See Trebilcock, 'Trade Policy and Labour Standards: Objectives, Instruments and Institutions' (University of Toronto Law and Econ. Research Paper No. 02-01, 2002), available at http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID307219_code020501530.pdf?abstractid=307219, at 16–18; Diller, 'A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labeling and Investor Initiatives', 138 *Int'l Labor Rev* (1999) 99; Blackett, 'Global Governance, Legal Pluralism and the Decentralized State: A Labour Law Critique of Codes of Corporate Conduct', 8 *Ind J Global Legal Stud* (2001) 401; Howse, 'The World Trade Organization and the Protection of Workers' Rights'*J Small & Emerging Bus L* (1999) 131, at 159–161. Compensation-based strategies involve the making of some form of payment to states that achieve a positive change in their practices. They are criticized both because they involve the dubious practice of compensating states that have tolerated the worst labour

assume that trade is the only available tool and that threats of trade sanctions are, in fact, effective.[117]

The question for trade and labour, then, is whether states should be permitted to impose trade sanctions on states that violate the ILO Declaration.[118] This is, of course, a complex question and a full discussion is beyond the scope of this article.[119] For this discussion it is only necessary to consider whether the absence of effective enforcement other than trade advances the case for such trade sanctions. The lesson from this article is that, far from supporting a claim for trade sanctions, the ILO's failure to adopt enforcement procedures or other sanctions should be viewed as evidence against them. Though states agreed to the substantive provisions of the Fundamental Declaration, they only did so within the context of the Declaration, the ILO and the associated enforcement mechanisms. The fact that the agreement does not feature

practices, and because they generate perverse incentives. Compensation for improvement that is not accompanied by a scheme for penalizing a deterioration in those same standards generates an incentive for states to lower their standards so they can subsequently be improved and the state can capture the payment: Chang, 'Trade Measures to Protect the Global Environment', 83 *Geo LJ* (1995) 2131. The effectiveness of social labelling – the placing of a label on products that are produced by workers able to exercise their core labour rights – is also subject to significant limitations. The primary weakness of labelling is the voluntary nature of compliance and the lack of enforcement mechanisms: see Bloomfield, ' "Sweating" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System', 22 *Hastings Int'l & Comp L Rev* (1999) 567 (discussing more generally problems of enforcement and monitoring in voluntary codes of conduct for multilateral corporations); Groos, 'International Trade and Development: Exploring the Impact of Fair Trade Organizations in the Global Economy and the Law', 34 *Texas Int'l LJ*. (1998) 379, at 408 ('WTO rules mandate that goods cannot be subject to statutory labeling requirements or differentiated on the basis of how they are produced'). To the extent enforcement stems from consumer preferences, social labelling also suffers from a collective action problem. The individual consumer has an incentive to purchase lower priced goods produced under poor labour conditions, relying on other consumers to bear the cost of the higher priced goods produced under core labour standards: see Trebilcock, *supra* this note; Van Wezel, 'To the Yukon and Beyond: Local Laborers in a Global Market', 3 *J Small & Emerging Bus L* (1999) 93; Garg, 'Child Labor Social Clause: Analysis and Proposal for Action', 31 *NYU J Int'l L & Pol* (1999)_473, at 504–505.

[117] There is serious debate about whether trade sanctions are an effective tool to influence labour policies. The most important empirical evidence on the question is in G. C. Hufbauer *et al., Economic Sanctions Reconsidered: History and Current Policy* (2nd edn., 1990).

[118] It is assumed that the WTO does not already provide an exception of this sort. This is the dominant view, but it is challenged by some scholars: see Howse and Mutua, 'Protecting Human Rights in a Global Economy' (20 February 2002), available at http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html; Howse, *supra* note 116.

[119] I have expressed my views on the subject elsewhere: see Guzman, 'Trade, Labor, Legitimacy', 91 *Calif L Rev* (2003) 885. The key articles in the trade and labour literature include Sykes, 'International Trade and Human Rights: An Economic Perspective', University of Chicago Law and Economics Working Paper No. 188 (2003), available at www.law.uchicago.edu/Lawecon/WkngPprs_176-200/188.aos.humanrights, pdf; Trebilcock, 'Trade Policy and Labour Standards: objectives, Instruments and Institutions', University of Toronto Law and Economics Research Paper No. 02-01 (December 2001), available at http://ssrn.com/abstract=307219; Charnovitz, 'The Influence of International Labor Standards on the World Trading System: An Historical Overview', 126 *Int'l Labor Rev* (1987) 565; Howse and Mutua, *supra* note 118; Leary, 'Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, US laws)', in J. Bhagwati and R. Hudec (eds.), *Fair Trade and Harmonization* (1996), ii, at 177; Langille, 'Eight Ways to Think About International Labour Standards', 31 *J. World Trade* (1997) 27; Howse, *supra* note 117.

dispute resolution procedures and sanctions should be viewed as an intentional choice made by the parties; not as an unfortunate oversight that can be corrected by subjecting the Fundamental Declaration's substantive rules to the WTO's dispute settlement process.[120] There is simply no reason to infer from the existence of the Fundamental Declaration that states consented to comply with its provisions in any environment except the one established by the ILO. In particular, there is no evidence that they would have consented to the substantive provisions if they faced trade sanctions in the event of a violation or if their behaviour was subject to dispute resolution procedures.

The general lesson, then, is that states enter into agreements, including the enforcement mechanisms, intentionally and attempt to draft those agreements in such a way as to maximize their value. If enforcement mechanisms were omitted it should be presumed that this was done because the states did not feel the compliance benefits of those mechanisms were large enough to justify the costs that would be imposed in the event of a violation.

B *Damages and International Law*

The basic puzzle of why states do not increase the credibility of their commitments has been explained in this article by the fact that in the event of a violation the parties to an agreement suffer a net loss rather than simply a transfer from one party to the other. As a result, states may fail to enter into what would be value-maximizing agreements if zero-sum transfers were available.

In other words, if it were possible to eliminate the loss to the parties that results from a violation and, instead, have damages take the form of a zero-sum transfer from one party to the other, more efficient forms of cooperation would be possible. Even though reputational and direct sanctions would not be eliminated, the presence of transfers would reduce their importance by increasing the credibility of and compliance with international agreements without adding to the disincentive that the former sanctions generate.

The ideal form of damages would, of course, be money damages. These represent pure transfers from one state to the other, can be made in any amount, and payment is easily verifiable. Despite these advantages, states appear reluctant to call for the use of money damages in their agreements. I do not have a complete explanation for why they are so resistant,[121] and am aware of no compelling

[120] See ILO Declaration on Fundamental Principles and Rights at Work, 18 June 1998, 37 ILM (1998) 1233.

[121] I offer here two possible reasons why money damages may be unpopular. These are merely suggestive. I am not confident that either is an important part of the explanation for the resistance to money damages. First, states may avoid money damages because they serve as an ineffective incentive device for states. Because damages could be paid out of general revenues, the political costs of having to pay a fine may be small. Second, it may be that there are significant political costs to paying an award mandated by an international body. Indeed, there may even be political costs to receiving such an award. Imagine, e.g., an agreement between two states regarding environmental issues. There may be political resistance to the notion that one's counter-party can violate and simply pay damages. Accepting the award as full compensation may, therefore, be politically costly for government.

theory on the subject, but the observed resistance to money damages cannot be ignored.[122]

Despite this resistance, however, there are at least some instances where states have accepted the use of money damages, suggesting that they might be encouraged to do so more often. Bilateral investment treaties (BIT), for example, typically provide for the payment of money damages from states to private parties whose investments have been expropriated.[123] Similarly, some human rights agreements include dispute resolution and a requirement of compensation to the victims of human rights abuses.[124] Within the EU the Court of Justice has the authority, under certain circumstances, to impose a monetary penalty on a Member State.[125] Given the benefits of money damages, states should consider adopting at least some form of monetary sanction for other violations. The easiest to imagine are those with relatively direct financial effects such as injury resulting from violations of trade obligations. In at least some cases – think, for example, of an illegal anti-dumping measure – the harm is almost purely economic and could be estimated with reasonable accuracy. In at least these cases, the use of money damages may be palatable because the harm is closely tied to economic harms.

C *The Role of Soft Law*

This article advances a new explanation for why states choose soft law when they could choose to make their commitments through treaties. The merit of a treaty is that it provides a relatively high level of commitment – allowing a state to rely on the promises made by its treaty partner. In other words, the commitment is more credible. The credibility provided by a treaty, however, comes at a price in the form of a higher cost associated with breach. When deciding between a treaty and other forms of commitment, then, the parties take that loss into account.

There is considerable confusion and ambiguity in how international law views soft law. This is, in part, due to the fact that commentators have tried to reconcile soft law with classical definitions of international law, which do not mention this form of agreement. This doctrinal approach is awkward because it implies that soft law is not law at all, leaving little room for discussion among legal scholars. A more promising approach starts with the question of how international agreements of all kinds affect the incentives and behaviour of states. In this sense, we begin with an eye toward compliance issues.[126] Although one can find discussions of compliance in both the

[122] See Bhagwati, 'After Seattle: Free Trade and the WTO', 77 *Int Aff* (2001) 15.

[123] Guzman, *supra* note 85; Vandevelde, *supra* note 26.

[124] See, e.g., International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 9(5) ('Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.').

[125] See Treaty Establishing the European Community, Art. 228(2).

[126] I have written on compliance issues in the past: see Guzman, *supra* note 14.

legal and international relations literature,[127] I are unaware of any well-developed attempt to address soft law in this way.[128]

The discussion in this article suggests that soft law is simply another form of legal promise. Like a decision to exclude dispute resolution provisions, soft law represents a choice by the parties to enter into a weaker form of commitment. Just as the absence of dispute resolution does not imply that an agreement is not 'law', the decision to use soft law should not exclude the agreement from study or somehow render it less relevant.

Rather than focus on doctrinal questions of what is soft or hard law, scholars should recognize that states draft their agreements to lie at a particular point on a spectrum of credibility and effectiveness. In doing so, they are trading off the credibility of their commitments against the cost of a violation. Ultimately, then, the study of international law should treat soft law in much the same way as it should treat treaties – as a device that promotes international cooperation. The differences between treaties and soft law – for example, the significant differences in their domestic effect – should be taken into account, but both should be considered legal commitments with the potential to affect behaviour.

In addition, soft law should not be viewed as a 'second-best' outcome.[129] The fact that states have reached an agreement does not imply that it in some sense *should* be a treaty. States may prefer to enter into soft law agreements as a way of maximizing their joint benefits, and there is no *a priori* reason why this should be viewed as a less desirable form of cooperation.

D *Drafting Agreements*

This article explains why states enter into agreements that contain quite limited enforcement mechanisms. This need not mean that they are disingenuous about the commitments being made. It may instead mean that they are reluctant to accept the joint loss that would be triggered by a violation. This point has implications for the way in which we view agreements and the ways in which agreements should be structured. The importance of using damages or some other sort of transfer has already been discussed, and, as pointed out, a system of damages would go a long way toward overcoming state resistance to more credible or binding commitments.

If damages are not available, however, other strategies must be considered. One lesson from this article is that states should not be discouraged from entering into agreements that appear weak and fail to make use of available design elements to

[127] See L. Henkin, *How Nations Behave* (1979), at 46–48; Chayes and Chayes, 'On Compliance', 47 *Int Org* (1993) 175, at 176; T. M. Franck, *Fairness in International Law and Institutions* (1995); Koh, *supra* note 10; Raustiala and Slaughter, *supra* note 34; Keohane, *supra* note 34, at 25.

[128] See Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?', 32 *NYU J Int'l L & Pol* (2000) 591, at 654. But see E.B. Weiss (ed.), *International Compliance with Nonbinding Accords* (1997); Shelton (ed.), *supra* note 19 (analysing 'soft law' in environment and natural resources, trade and finance, human rights, and multilateral arms control).

[129] See Schacter, 'The Twilight Existence of Nonbinding International Agreements', 71 *Am J Int'l L* (1977) 296, at 304 ('non-binding agreements may be attainable when binding treaties are not').

increase the incentives toward compliance. It is possible that such agreements represent the highest value form of cooperation for the states involved, and it should therefore be pursued.[130]

6 Conclusion

International agreements are at the foundation of international cooperation and international law. Yet we have no more than a crude understanding of why states structure agreements as they do. This article explains why states are not more enthusiastic about including credibility-enhancing devices in their agreements. The paper has explicitly addressed the choice of soft versus hard law, the inclusion or exclusion of dispute settlement, and the provision or omission of monitoring mechanisms, but the same reasoning could apply to any credibility-enhancing strategy that improves the probability of compliance but also increases the joint loss in the event of a violation.

The insight of this article represents only a small piece of the larger set of questions such as: Why do states behave the way they do? How do international agreements affect behaviour? When will international law succeed and when will it fail to constrain states? Which institutional strategies might be used to increase the power of international law? Though much more work remains to be done on all of these questions, this article has lessons for the way in which we view agreements. It is clear, for example, that the commitments made by a state in an international agreement should be viewed as a single undertaking that includes not only the substantive commitments, but also the procedural elements of the agreement. It is also apparent that mechanisms to allow for zero-sum sanctions in the event of a violation should be investigated and pursued. This article mentions the advantages of money damages, but other forms of sanction may exist that would increase the credibility of commitments without reducing the total benefits of the agreement in the event of a violation. More generally, further research is called for on a wide range of questions that relate to international agreements and the ways in which states make commitments. These are fundamental questions for international law whose answers will greatly increase our understanding of the discipline.

[130] The major caveat to this conclusion relates to the public choice issues that are always present in international relations. Depending on one's public choice assumptions, it may be unwise to give negotiators the ability to enter into agreements that do not include rigorous obligations and enforcement strategies. E.g., if one believes that those who negotiate agreements have a strong incentive to achieve some concrete agreement, even when the substantive impact of the agreement is virtually nil, then it may be desirable to impose discipline on negotiators by forcing them to choose between truly effective agreements and no agreement at all: see, e.g., Stephan, 'The Political Economy of Choice of Law', 90 *Geo LJ* (2002) 957, at 961 ('[T]he people who negotiate international agreements, as well as the people who serve the institutions that promote these negotiations, have powerful incentives to achieve some kind of agreement regardless of substantive outcome.').

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Letter dated 11 May 2018 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General

I have the honour to enclose herewith a letter dated 10 May 2018 from the Minister for Foreign Affairs of the Islamic Republic of Iran, M. Javad Zarif, regarding the unilateral and unlawful decision of the United States to withdraw from the Joint Comprehensive Plan of Action (see annex).

I should be grateful if you would have the present letter and its annex circulated as a document of the General Assembly, under agenda item 65, and of the Security Council.

(*Signed*) Gholamali **Khoshroo**
Permanent Representative of the Islamic Republic of Iran

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Please recycle

Annex to the letter dated 11 May 2018 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General

As you are aware, on 8 May 2018, the President of the United States announced his unilateral and unlawful decision to withdraw from the Joint Comprehensive Plan of Action (JCPOA), in material breach of Security Council resolution 2231 (2015), to which the JCPOA is annexed. Simultaneously, he signed a presidential memorandum instructing relevant US authorities "to cease the participation of the United States in the JCPOA" and "to reimpose all United States sanctions lifted or waived in connection with the JCPOA", thus committing multiple cases of "significant non-performance" with the JCPOA, and in clear non-compliance with Security Council resolution 2231 (2015). These acts constitute a complete disregard for international law and the Charter of the United Nations, undermine the principle of the peaceful settlement of disputes, endanger multilateralism and its institutions, indicate a regress to the failed and disastrous era of unilateralism, and encourage intransigence and illegality.

Unlike the Islamic Republic of Iran, which has scrupulously fulfilled its undertakings under the JCPOA, as repeatedly and consistently verified by the International Atomic Energy Agency (IAEA), the United States has consistently failed — since "implementation day", and particularly after the assumption of office by President Trump — to abide by its commitments under the JCPOA. I have brought the most significant cases of US non-performance to the attention of the Joint Commission, inter alia, through 12 official letters to the High Representative of the European Union for Foreign Affairs and Security Policy, in her capacity as Coordinator of the JCPOA Joint Commission.

In my letter of 2 September 2016, I registered Iran's complaints about US failures to perform its obligations eight months after "implementation day" by not issuing the necessary licences for the sale or lease of passenger aircraft, by hindering Iran's free access to its assets abroad, by obstructing re-engagement of the non-American banking and financial community with Iran and by the reintroduction of certain sanctions under Executive Order 13645, which was supposed to be terminated in its totality. That letter also referred to the failure of the US President to use his constitutional authority to prevent "the US Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015" from violating US obligations under the JCPOA.

In my letter of 17 November 2016, I underlined the necessity of the use of the US President's constitutional authority to prevent the coming into force of the "Iran Sanctions Extension Act", which constituted the reimposition of the sanctions lifted under the JCPOA, which is clearly prohibited by the JCPOA. The same letter underlined that "Iran has hitherto exercised enormous restraint in the face of lackluster implementation of JCPOA by some participants, in particular the United States, especially with regard to banking and financial services as well as persistent public and private harassment of Iran's business partners by various US institutions, agencies and instrumentalities."

Subsequently, in my letter of 16 December 2016, I informed the JCPOA Joint Commission that, as a result of the extension of the "Iran Sanctions Act" (ISA) on 14 December 2016, "the United States committed a significant breach of its obligations under the JCPOA by reintroducing the sanctions under ISA."

In my letter of 28 March 2017, I protested to the Joint Commission that, "Since the assumption of office by the new US administration, what used to be 'lackluster' implementation of the JCPOA by the previous administration has now turned into

total and open hostility towards the deal, threatening to render the entire bargain meaningless, unbalanced and unsustainable." The letter underlined that the Trump administration had "maliciously intended to prevent normalization of trade with Iran and to deprive Iran from the economic dividends clearly envisaged in the JCPOA, by ensuring continued — and even exacerbated — uncertainty about the future of economic relations and cooperation with Iran", inter alia, through the illegal "review process" and by "the pattern of provocative statements against the JCPOA by senior US administration officials".

In my letter of 28 May 2017, I brought several instances to the attention of the Joint Commission illustrating that, even when the United States purported to comply by renewing the required waivers, "it aimed to reverse Iran's benefit from the JCPOA … and to 'call into question the US's long-term support for the nuclear accord' in order to increase uncertainty and dissuade engagement with Iran".

In my letter of 19 July 2017, I produced conclusive evidence which corroborated that the United States was following a systematic policy aimed at dissuading Iran's economic partners from engaging with Iran in clear contradiction of US commitments under the JCPOA, in particular paragraphs 28 and 29. In this respect, I referred to an official statement by the White House Principal Deputy Press Secretary in which she officially acknowledged through a 'public statement' that President Trump, "in his discussions with more than half a dozen foreign leaders … underscored the need … to stop doing business with … Iran".

In my letter of 13 August 2017, I warned the Joint Commission that the United States was destroying the 'atmosphere' needed for the 'successful implementation' of the JCPOA in an exhibition of bad faith. Specifically, I referred to President Trump's rhetoric and his administration's distortions — in blatant violation of the letter, spirit and intent of the JCPOA — in order to allege non-compliance by Iran in spite of repeated verifications by the IAEA.

In my letter of 19 August 2017, I provided one example of how the United States sought to affect the professional work of the IAEA. While objecting to the US Permanent Representative's travel to Vienna "to discuss the US Government's concerns about the Iran nuclear deal with the International Atomic Energy Agency" and to "press IAEA on Iran deal compliance", I insisted that the publicly stated purpose of such visits raises several serious concerns over further violations of the letter and spirit of the JCPOA and Security Council resolution 2231 (2015), which could also undermine the credibility of the Agency — vital to the non-proliferation regime in general, and the JCPOA in particular.

In my letter of 18 September 2017, I informed the Joint Commission that the United States Government was manufacturing fabricated excuses either to get out of the JCPOA outright or to make it impossible and irrational for Iran to continue its good faith, patient and scrupulous adherence with the agreement. Several facts at that time were indicating that the US was concocting "decertification" of Iran's compliance, in spite of all IAEA reports and US State Department repeated admissions. I underlined in that letter that the US administration cannot hide behind such domestic procedure that it is maliciously initiating itself, and will have to bear full responsibility for the aftermath in Congress. I indicated that, "while the Islamic Republic of Iran has a clear preference for the survival and continued scrupulous implementation of the JCPOA, and while it has proven its good faith and exercised maximum restraint in the face of continued and persistent US violations and intransigence, the renowned patience of Iranian people is not limitless, and the options of the Iranian Government are not limited".

In my letter of 16 October 2017, referring to the unlawful decertification within a US domestic procedure on 13 October 2017, I underscored that the United States

was actively seeking to deprive Iran of enjoying the benefits of American sanction-lifting obligations under the JCPOA. As such, they constituted a grave breach of the very letter and substance of paragraphs 26, 28 and 29 of the JCPOA. In the same letter, I reiterated that the Islamic Republic of Iran will never accept illegal demands and expects other JCPOA participants to do likewise.

In my letter of 1 February 2018, I officially objected to the ultimatum by President Trump on 12 January 2018, demanding that other JCPOA participants follow him in unlawfully altering the terms of the agreement. I urged other JCPOA participants to remain cognizant of their shared responsibility to safeguard the agreement by holding the United States accountable for its reckless and unlawful actions, and refraining from any statement or action that may be interpreted as conceding or acquiescing to US attempts to alter, amend or otherwise undermine the JCPOA.

In my letter dated today, I specified measures that need to be taken through the Joint Commission to address the wrongful acts by the United States against Iran and international law, including its unlawful withdrawal from the accord and the reimposition of sanctions.

As you have seen from these correspondences, the United States had been persistently violating the terms of the agreement almost from its inception, even preventing other JCPOA participants from fully performing their obligations. Those violations included systematic failures, late, lackluster, defective, superficial and ineffective nominal implementation, undue delays, new sanctions and designations, derogatory anti-JCPOA statements by senior officials — in particular the President himself — refusal to issue any Office of Foreign Assets Control licences in the past 16 months, as well as concerted efforts by the US Government's agencies and instrumentalities to actively dissuade businesses from engagement with Iran.

The unlawful US act of unwarranted withdrawal from the JCPOA renders it responsible for the most blatant material breach of its obligations under the agreement. The US has also flagrantly violated Security Council resolution 2231 (2015), which was sponsored, inter alia, by the United States itself and adopted unanimously by the Council. The United States must, therefore, be held accountable for the consequences of its reckless and wrongful act, which flies in the face of the United Nations Charter and international law.

The prolonged and multiple cases of significant non-performance by the US over the last three years — particularly in the last 16 months — its active obstruction of performance by other JCPOA participants, its bad faith nominal implementation, and its unlawful and unwarranted cessation of implementation of its commitments under the JCPOA and the official reimposition of unlawful sanctions have caused irreparable harm to Iran and its international business relations. The United States should be held responsible for these damages, and the Iranian nation must be compensated.

The JCPOA is a multi-party agreement based on reciprocity. Its scope, provisions and time frames are based on a delicate, negotiated and multilaterally accepted balance that cannot be widened, altered or renegotiated. Its benefits to the Iranian people cannot be subjected to any conditionality other than those nuclear-related voluntary measures specifically stipulated solely in the JCPOA and its annexes. Some of the most significant economic benefits to Iran from the JCPOA derive from the sanctions-lifting obligation of the United States. If the JCPOA is to survive, the remaining JCPOA participants and the international community need to fully ensure that Iran is compensated unconditionally through appropriate national, regional and global measures.

The Islamic Republic of Iran has been in full compliance with its commitments under the JCPOA. This fact has been repeatedly verified by the IAEA, as reflected in its Director-General's reports to the IAEA Board of Governors and the United Nations Security Council since "implementation day" in January of 2016. In line with Iran's commitment to legality and the peaceful resolution of international disputes, the Islamic Republic of Iran has decided to resort to the JCPOA mechanism in good faith to find solutions in order to rectify the United States' multiple cases of significant non-performance and its unlawful withdrawal, and to determine whether and how the remaining JCPOA participants and other economic partners can ensure the full benefits that the Iranian people are entitled to derive from this global diplomatic achievement. If, after the exhaustion of available remedies, our people's rights and benefits are not fully compensated, it is Iran's unquestionable right — recognized also under the JCPOA and Security Council resolution 2231 (2015) — to take appropriate action in response to persistent, numerous unlawful acts by the US, particularly its withdrawal and reimposition of all sanctions.

I urge the United Nations to keep the United States accountable for its unilateral and irresponsible conduct, which will detrimentally affect the rule of law, multilateralism and the very foundations of diplomacy.

(*Signed*) M. Javad **Zarif**

Annex 100

In the name of God, the Compassionate, the Merciful

8 May 2019

His Excellency Xi Jinping, honorable President of the People's Republic of China

His Excellency Emmanuel Macron, honorable President of the French Republic

Her Excellency Angela Merkel, honorable Chancellor of Germany

His Excellency Vladimir Putin, honorable President of the Russian Federation

Her Excellency Theresa May, honorable Prime Minister of the United Kingdom

Excellency,

It is now a year since the United States announced its withdrawal from the JCPOA. Today, not only has it re-imposed all of its unlawful and unilateral nuclear sanctions, it is officially and publicly pursuing the policy of 'maximum pressure' and 'zero oil sales' for Iran. The US withdrawal from the JCPOA constitutes a clear violation of UNSCR 2231, and is an affront to the will of the international community. Yet unfortunately it did not receive the appropriate and required reaction by the Security Council, or the remaining participants of the JCPOA.

This action by the United States has rendered a significant part of the JCPOA ineffective, and substantially destroyed the balance between the gives-and-takes in the accord, which were attained after almost twelve years of complicated and difficult negotiations. After the US withdrawal, and upon your request, I offered a window of a few weeks for the remaining JCPOA participants to compensate for the effects and consequences of the U.S. withdrawal and to restore the lost balance to the accord. The 'few weeks' window was extended upon your request, and now has reached a full year.

During this time, the Islamic Republic of Iran invoked the mechanism envisioned in Paragraph 36 of the JCPOA, and the Joint Commission of the JCPOA met twice at the level of political directors and twice at the ministerial level. In these meetings, the remaining JCPOA participants explicitly acknowledged that the lifting of sanctions—and the economic dividends arising from it for Iran—constitutes an essential part of the JCPOA. The foreign ministers of your countries committed to design "practical solutions" aimed at normalizing and even enhancing economic cooperation with Iran, including through establishing effective banking channels, continuation in the export of oil, gas and petrochemical products, continuation of cooperation in transportation, export credits, support for economic actors involved in trade, financial and investment cooperation with Iran (and protecting them against the U.S.' extraterritorial sanctions), and encouraging further investment in Iran.

But, unfortunately, apart from issuing numerous political statements, no operational mechanism to counter U.S. sanctions and to compensate for themhave been put in place. In the meantime, almost all foreign economic interests—includingall from European JCPOA participants—have left Iran; foreign contracts and agreements—even with entities from JCPOA participants—have

been annulled, transportation and shipping have been disrupted, Iranian flights to the territories of most of the JCPOA participants have been stopped or limited, and flights to Iran are mostly cancelled. Furthermore, banking relations are almost entirely blocked, and Iran's oil export has decreased significantly. After a year, no prospect has been presented for Iran's benefit from the dividends of sanctions lifting. After a year, even the European special financial channel, INSTEX, which is merely one of more than ten commitments undertaken by the foreign ministers, has not been operationalized and there is not much hope in its efficacy in ensuring financial transactions between Iran and other countries.

As you are aware, on 4 May 2019, the government of the United States hit the JCPOA with yet another strike and refrained from extending its arbitrary exemptions for even the continuation of some of the nuclear projects enshrined in the JCPOA, making it impossible for Iran to sell or exchange its enriched uranium and heavy water. This manifests that the clear policy of the United States is to directly prevent the implementation of the JCPOA, and undoubtedly all consequences will be solely borne that government.

Excellency;

During the past one year, with exceptional self-restraint, the Islamic Republic of Iran created many opportunities and possibilities for diplomacy, but unfortunately no good use of these opportunities was made. In my letter dated 6 June 2018, I made it clear to some of you that "there shall be no doubt that concurrent continuation of the JCPOA and sanctions is impossible." Also, stating that "for the time-being" Iran's actions will remain in the framework of the JCPOA, I warned that "the next step which will not be too far away, is to cease performing Iran's commitments in whole or in part, which is among Iran's rights under paragraph 36 of the JCPOA."

Now, after elapse of a year, the Islamic Republic of Iran, considers "ceasing performing some of its commitments under the JCPOA" inevitable—in order to preserve the JCPOA by restoring its balance. Therefore, I would like to bring the following to your attention:

1. In response to the US withdrawal from the JCPOA and the re-imposition of its unlawful sanctions, the Islamic Republic of Iran, in accordance with its rights under paragraphs 26 and 36 of the JCPOA, will "cease performing its commitments under the JCPOA in part". Details will be notified by the Foreign Minister to the distinguished coordinator of the JCPOA.
2. If mechanisms related to meeting Iran's rightful demands are operationalized within 60 days —particularly if the level of Iran's oil exports return to the level existing in April 2018 and the undisturbed return of its revenues is guaranteed—the above-mentioned decision will be reversed. Otherwise, in line with paragraphs 26 and 36 of the JCPOA, the Islamic Republic of Iran will further reduce its voluntary measures and will continue this trend in the next stages.
3. The Islamic Republic of Iran stands ready, at any time, to resume implementing its voluntary commitments if, and to the same extent as, its rightful demands from the JCPOA are met.
4. If, sixty days from now, the project of Modernization of Arak Heavy Water Reactor is not returned to its completion process based on the agreed upon time-table, the Islamic Republic of Iran will abandon the joint project of completing this reactor and will return to the original design, the knowledge and technology of which are available to Iran.

My country has so far been vigilant in maintaining the JCPOA as a valuable achievement of diplomacy, and to this end has endeavored unilaterally to preserve it against the destructive attempts of the United States. You are well aware that despite being deprived of the dividends of sanctions lifting, the Islamic Republic of Iran has been fully compliant with all its commitments in the JCPOA, as certified by now fourteen consecutive reports of the IAEA.The above-mentioned measures have only been adopted after one year since the unlawful withdrawal by the U.S., and are solely meant to restore balance in the implementation of the JCPOA. But if Iran, under whatever pretext, is subjected to any resolution of the Security Council, not only will the process of implementation of the JCPOA come to an absolute end, but Iran will also trigger the process of withdrawing from the NPT, in accordance with paragraph 1 of Article X therein.

We stand ready to continue our consultations with the remaining JCPOA participants at all levels.

Excellency;

I would like to take this opportunity to bring another issue to your attention. During past four decades, the Islamic Republic of Iran has been hosting millions of immigrants and refugees from Afghanistan, and as its humanitarian responsibility has shown them excellent hospitality. Now, near three million Afghans live in Iran and enjoy all the advantages of Iranian nationals, including health and education. Considering costs such as job opportunity removal, education, outflow of foreign currency, and using subsidies by the government for food, medicine, health and fuel, municipal services and transportation, the annual cost of Afghan nationals residing in Iran is estimated to be around eight billion Euros annually. On the other hand, for the past several decades, the Islamic Republic of Iran has been fighting a difficult and unremitting fight against narcotics produced in Afghanistan and trafficked through Iran to other destinations, especially to Europe, by international drug traffickers. This fight has taken a heavy human and financial toll on us; more than 4000 members of our law enforcement forces and our border patrol have lost their lives, and annually an amount of more than 150 million Euros is being spent. Unfortunately, US sanctions have resulted in a considerable decrease in our financial resources, and therefore the government is obliged to limit both these expenses and expenses arising from other international services.

It is evident that full responsibility for all consequences of the current situation lies fully on the shoulders of the U.S. government.

Best Regards,

Hassan ROUHANI

8 May 2019

In the name of God, the Compassionate, the Merciful

Excellency,

As you and the JCPOA Participants are well-aware, the Islamic Republic of Iran has repeatedly—including *inter alia* in some of my 16 letters to you and other JCPOA Participants from 2 September 2016 to 7 April 2019, and in my letter of 10 May 2018 to the Secretary-General of the United Nations (S/2018/453)—invoked paragraph 36 of the JCPOA in response to primarily U.S. grave violations and failures to comply with its undertakings under the agreement, most notably after the unlawful unilateral withdrawal from the JCPOA. Following several meetings of the JCPOA Joint Commission, the overwhelming majority of the cases of "significant non-performance" remained unresolved, as solid "grounds to cease performing its commitments under this JCPOA in whole or in part" by Iran.

Additionally, ever since the re-introduction and re-imposition by the U.S. of the sanctions specified in Annex II that it had ceased applying under the JCPOA, Iran has been entitled to cease performing its commitments under the JCPOA in whole or in part in accordance with paragraph 26 of the JCPOA, *while remaining fully within the terms of the agreement.*

Yet, while officially reserving the above-mentioned rights under the JCPOA, Iran decided to exercise maximum restraint and honor the request of the remaining JCPOA Participants to give them a "few weeks" to deliver the commitments made by them on May 15, May 25, 6 July and 24 September of 2018. As fourteen IAEA reports—including four reports following the U.S.' withdrawal—substantiate, Iran continued to fully implement all its commitments under the JCPOA.

Her Excellency
Ms. Federica Mogherini
High Representative of the European Union for Foreign Affairs and Security Policy,
Coordinator of the JCPOA Joint Commission

Now a year has passed since the announcement of the unlawful withdrawal from the JCPOA by the United States. And it is almost a year since the EU/E3+2 made firm political commitments to restore the lost balance of the deal following the US withdrawal. Regrettably, and in spite of repeated promises and declarations, to this day absolutely no effective practical measure has been put in place in terms of the lifting of sanctions—and their effects as specified in Annex II—that allows for the normalization of trade and economic relations with Iran.

Hence, and in implementation of the first provision of the attached letter dated today from H.E. Dr. Hassan Rouhani, President of the Islamic Republic of Iran and addressed to his E3+2 counterparts, I have been instructed by the highest authorities of the Islamic Republic of Iran to officially notify you in your capacity as Coordinator of the JCPOA Joint Commission—and through you all the JCPOA participants—that the Islamic Republic of Iran, in exercise of its rights under paragraphs 26 and 36 of the JCPOA, has decided "to cease performing its commitments in part" as of today. These voluntary measures are:

1. Keeping its uranium stockpile under 300 kg of up to 3.67% enriched uranium hexafluoride (UF6) contained in paragraph 7 of JCPOA and paragraph 56 of Annex I;
2. Making available heavy water, in excess of 130 metric tons, for export to the international market, contained in paragraph 14 of Annex I.

In fact, the latest decision of the United States—in contravention of the JCPOA as well as Security Council Resolution 2231—regarding international nuclear cooperation, has prevented the implementation of these provisions by impeding the sale, transfer or exchange of enriched uranium and heavy water produced by Iran.

Furthermore, in the implementation of the second provision of the aforesaid letter, the Islamic Republic of Iran will "cease performing its commitments in part" with regard to the following voluntary measures in 60 days:

1. Keeping its level of uranium enrichment at up to 3.67 percent;
2. Redesigning and rebuilding a modernized heavy water research reactor in Arak based on an agreed conceptual design, unless agreed timetable is respected.

The Islamic Republic of Iran—in implementation of the fourth provision of the aforesaid letter of President Rouhani—is prepared to engage in expeditious and extensive negotiation with the "Arak Working Group" co-chaired by China and United Kingdom.

As and when needed, the IAEA will be informed of the exact timing and other details of the measures to be taken.

Iran's decision is fully consistent with the JCPOA and within the terms foreseen by it. We reaffirm our resolve to continue to support the JCPOA in good faith and in a constructive atmosphere.

The Islamic Republic of Iran remains prepared to engage in good faith dialogue with the E3+2 at all levels, and to resume implementation of all the above provisions commensurate with the realization of the objectives set out in the JCPOA and commitments made by the Joint Commission since May 8, 2018.

I would be grateful if you, in your capacity as the coordinator of the Joint Commission of the JCPOA, could share this letter with the remaining participants of the JCPOA.

Please accept, Excellency, the assurances of my highest consideration.

M. Javad Zarif

Today we announce a strategic decision/ JCPOA either win-win or lose-lose; we won't let US turn it into win-lose/ Today not end of JCPOA but the day of new step in its implementation/ JCPOA beneficial to region, world, detrimental to Iran's enemies/ American hardliners, Zionism, regional reactionaries anti-JCPOA, anti-Iran



President described the Joint Comprehensive Plan of Action (JCPOA) beneficial to the region and the world and detrimental to the enemies of Iran, stressing, "American hardliners, Zionism and regional reactionaries have been -and are- anti-JCPOA and anti-Iran".

Wed 08 - May 2019 - 10:02

Speaking in a cabinet session on Wednesday, Dr Hassan Rouhani said, "After the Joint Comprehensive Plan of Action (JCPOA), the people of Iran took to the ballot box and announced with their 24 million votes that they favour moderation, prudence and constructive interaction with the world".

Stressing that the enemies of the Iranian nation have been against the JCPOA since the beginning, he said, "American hardliners, Zionism and regional reactionaries have been -and are- anti-JCPOA and anti-Iran".

"Anyone can have criticisms towards anything, and this is the right of people, but animosity towards the JCPOA is –and has been- particular to Zionists, regional reactionaries and American hardliners," he said.

The President also said, "The JCPOA is beneficial to the region and the entire world, and detrimental to the enemies of Iran, and this is why they have put all their efforts on destroying and wrecking down this glorious structure since 2015".

"After the new US administration took office, which was the result of an unconventional, unusual situation in this country, the administration did not live up to its commitments made to the voters regarding its slogan of peace and withdrawing forces from the region," said Rouhani.

- JCPOA's enemies are the same enemies to Iran and our people
- Trump's goal was to provoke Iran to exit JCPOA immediately
- It was Iran's skill and wisdom that we didn't play in his field
- We have given deadlines to JCPOA member states several times
- Enjoying rights proportionate to commitments is an obvious principle
- We are announcing the reduction of our commitments, not withdrawal from it
- Today, we chose diplomacy over war again

Annex 103

He added, "Today, an extremist group that is running the affairs in the White House has taken the authority from even the President, and this has made problems not only for the peoples of the region, but also America's friends in Europe, Canada and Mexico".

Dr Rouhani added, "Today, all those who were allies to the United States, and all enterprise owners and entrepreneurs around the world are suffering. In such conditions, Zionism, the reactionaries and internal groups in the US, especially AIPAC, put pressure on the government to withdraw from the JCPOA".

Stating that, "JCPOA's enemies are the same enemies to Iran and our people," he said, "Trump's goal was to provoke Iran to exit JCPOA immediately".

The President of the Islamic Republic of Iran also went on to say, "It was Iran's skill and wisdom that we didn't play in his field".

"We have given deadlines to JCPOA member states several times," said Rouhani, adding "Iran's actions have been within the framework of JCPOA's legal mechanisms".

"Seven months ago, I announced at the United Nations that our strategy is commitment against commitment and violation against violation; today, we act based on those words," he said.

He continued, "IAEA has announced 14 times that Iran has fully complied with its commitments," adding, "Enjoying rights proportionate to commitments is an obvious principle".

"I sent letters to JCPOA parties that we have waited one year at your request," said the President, continuing, "This strategic patience indicates the Iranian nation's power and greatness".

He said, "Today is not end of JCPOA but the day of new step in its implementation," adding, "Today, we stop selling our enriched uranium and heavy water deposits; this decision is for 60 days".

"We will begin our two next steps regarding the level of enrichment and Arak Heavy Water Reactor if we don't get the desired results," added Rouhani.

"If the parties to JCPOA come to negotiation table and meet our main interests, especially in oil and banking fields, we will return to the previous point," added Rouhani.

Dr Rouhani went on to say, "We have explicitly told the other parties to JCPOA that if they take Iran's case to UNSC, they will face a very decisive actions".

Stating that, "Today we will announce a strategic and important national decision," the President said, "JCPOA will be either win-win or lose-lose. We won't let US turn it into a win-lose situation".

He continued, "JCPOA is still standing, but today, we showed the other side of the coin to the world," adding, "We are announcing the reduction of our commitments, not withdrawal from it".

Dr Rouhani stated, "In a simpler language, we felt that there was a need for surgery and the one-year-old painkillers were not enough; today's action is a surgical procedure to save the JCPOA, not to end it, and we believe that if our nation and our system work integrated in this direction, the world receives the message of the nation of Iran well".

He continued, "We always favour peace and moderation; we have never began violating an agreement and will not begin a war, but will give decisive response to any aggressor".

The President of the Islamic Republic of Iran also went on to say, "We are still ready for negotiation within the framework of the JCPOA; not a word more or less".

It is not acceptable that the JCPOA remains in action but the price is ours to pay, said the President, adding, "If the deal is important for security, peace and development of the region, everyone must pay its price"

He added, "Know that Iran is standing strong and we will put differences aside against US pressures," stressing that "Today, we chose diplomacy over war again".

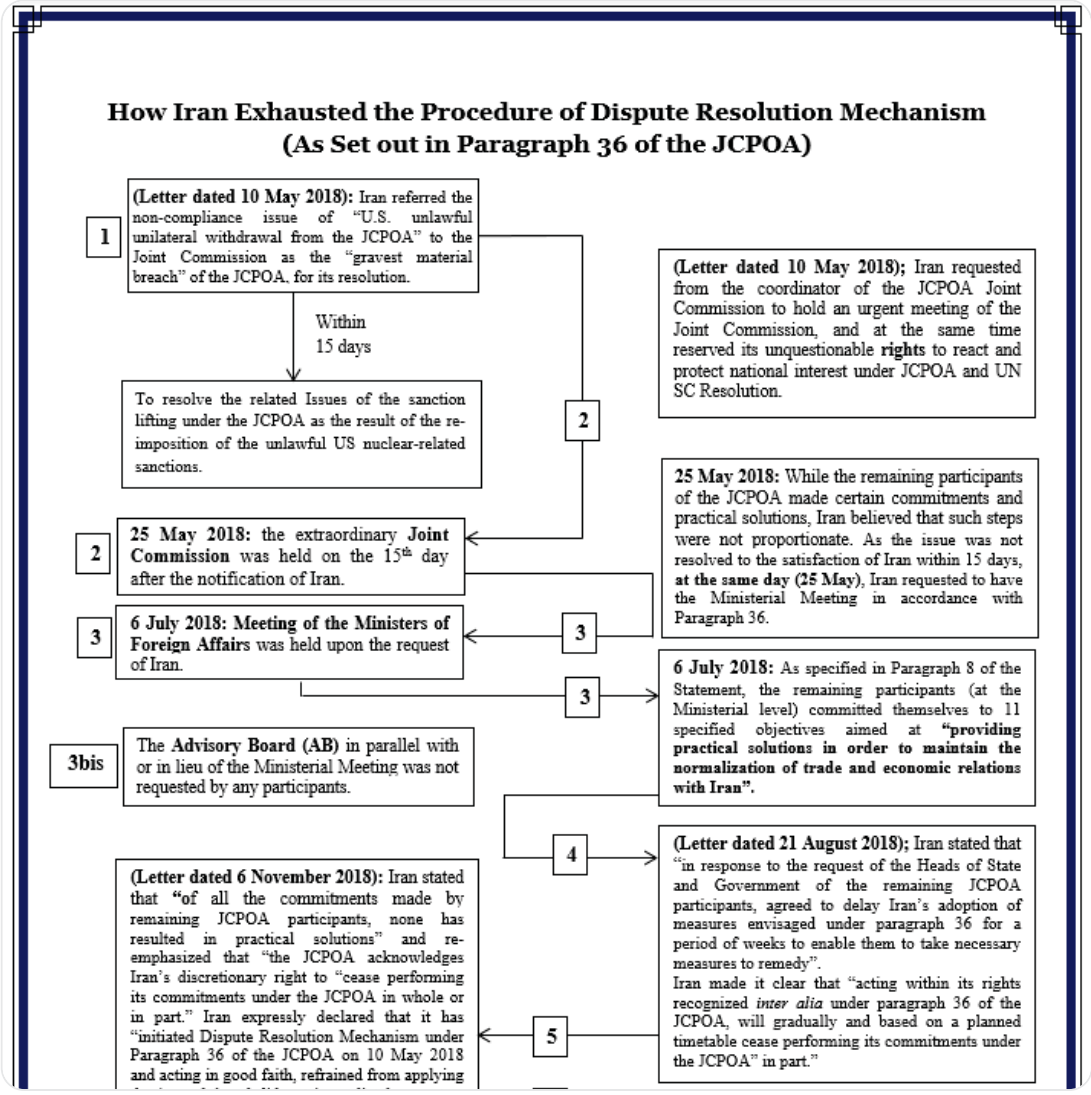
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Javad Zarif
@JZarif

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Irony of IAEA Board meeting on US request:
a. US abhors JCPOA, axed & violates it, and punishes all who observe it;
b. US has no standing to raise JCPOA issues;
c. Iran fully complied with JCPOA per 15 IAEA reports;
d. Iran's actions are lawful under para 36 of accord:

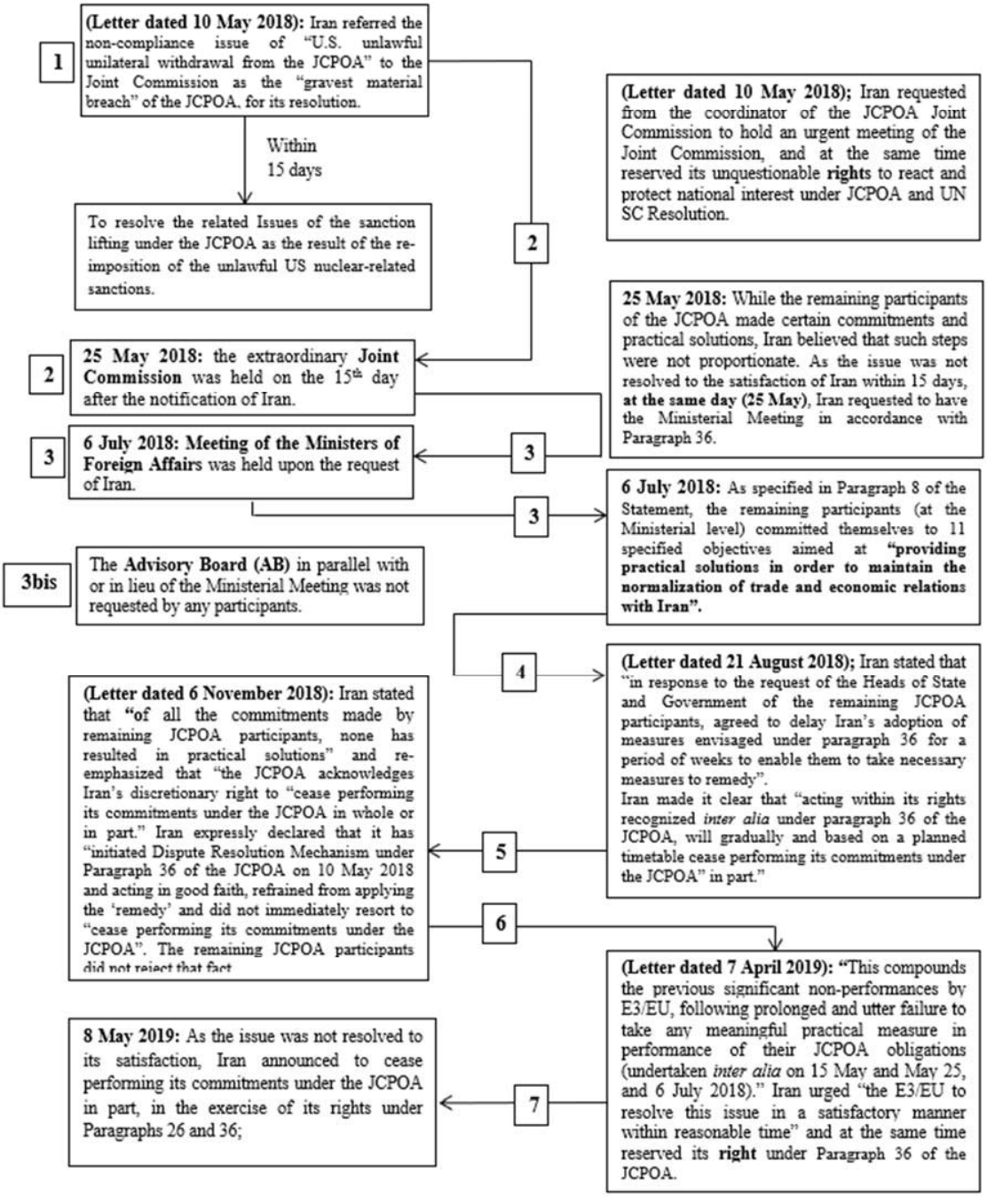


4:30 AM - 10 Jul 2019

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How Iran Exhausted the Procedure of Dispute Resolution Mechanism (As Set out in Paragraph 36 of the JCPOA)





Javad Zarif
@JZarif

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Today, Iran is taking its second round of remedial steps under Para 36 of the JCPOA. We reserve the right to continue to exercise legal remedies within JCPOA to protect our interests in the face of US #EconomicTerrorism. All such steps are reversible only through E3 compliance.

2:55 AM - 7 Jul 2019

767 Retweets **2,545** Likes

401 767 2.5K



Javad Zarif @JZarif Jul 7
Having failed to implement their obligations under JCPOA—incl after US withdrawal—EU/E3 should at minimum politically support Iran's remedial measures under Para 36, incl at IAEA. E3 have no pretexts to avoid a firm political stance to preserve JCPOA & counter U.S unilateralism.

112 351 1.4K

Javad Zarif
@JZarif

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We have NOT violated the #JCPOA.

Para 36 of the accord illustrates why:

We triggered & exhausted para 36 after US withdrawal.

We gave E3+2 a few weeks while reserving our right.

We finally took action after 60 weeks.

As soon as E3 abide by their obligations, we'll reverse.

DISPUTE RESOLUTION MECHANISM

36. If Iran believed that any or all of the E3/EU+3 were not meeting their commitments under this JCPOA, Iran could refer the issue to the Joint Commission for resolution; similarly, if any of the E3/EU+3 believed that Iran was not meeting its commitments under this JCPOA, any of the E3/EU+3 could do the same. The Joint Commission would have 15 days to resolve the issue, unless the time period was extended by consensus. After Joint Commission consideration, any participant could refer the issue to Ministers of Foreign Affairs, if it believed the compliance issue had not been resolved. Ministers would have 15 days to resolve the issue, unless the time period was extended by consensus. After Joint Commission consideration – in parallel with (or in lieu of) review at the Ministerial level - either the complaining participant or the participant whose performance is in question could request that the issue be considered by an Advisory Board, which would consist of three members (one each appointed by the participants in the dispute and a third independent member). The Advisory Board should provide a non-binding opinion on the compliance issue within 15 days. If, after this 30-day process the issue is not resolved, the Joint Commission would consider the opinion of the Advisory Board for no more than 5 days in order to resolve the issue. If the issue still has not been resolved to the satisfaction of the complaining participant, and if the complaining participant deems the issue to constitute significant nonperformance, then that participant could treat the unresolved issue as grounds to cease performing its commitments under this JCPOA in whole or in part and/or notify the UN Security Council that it believes the issue constitutes significant non-performance.



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Iran's decision to exercise its rights under paragraphs 26 and 36 of the JCPOA

Background

1. The JCPOA is a multi-party agreement based on reciprocity. Its scope, provisions and timeframes are based on a delicate, negotiated and multilaterally-accepted balance that cannot be widened, altered or renegotiated. Its benefits to the Iranian people cannot be subjected to any conditionality other than those nuclear-related voluntary measures specifically stipulated solely in the JCPOA and its annexes. Some of the most significant economic benefits to Iran from the JCPOA drive from the sanctions-lifting obligation of the United States.
2. Unlike the Islamic Republic of Iran, which has scrupulously fulfilled its undertakings under the JCPOA, as repeatedly and consistently verified by the IAEA for 14 times, the United States has consistently failed – since "implementation day", and particularly after the assumption of office by President Trump – to abide by its commitments under the JCPOA. The US continues to exert maximum pressure to dismantle the JCPOA and the UNSC resolution 2231. These malign policy if continued, will be detrimental to the peace, stability and security in the region and beyond.
3. On 8 May 2018, the President of the United States announced his unilateral and unlawful decision to withdraw from the Joint Comprehensive Plan of Action, in material breach of Security Council Resolution 2231 (2015) to which the JCPOA is annexed. Simultaneously, he signed a Presidential Memorandum instructing relevant U.S. authorities "to cease the participation of the United States in the JCPOA" and "to re-impose all United States sanctions lifted or waived in connection with the JCPOA", thus committing multiple cases of "significant non-performance" with the JCPOA, and in clear non-compliance with the Security Council Resolution 2231.
4. The United States had been persistently violating the terms of the agreement almost from its inception, even preventing other JCPOA Participants from fully performing their obligations. Those violations included systematic failures, late, lackluster, defective, superficial and ineffective nominal implementation, undue delays, new sanctions and designations, derogatory anti-JCPOA statements by senior officials—in particular the President himself, refusal to issue OFAC license, as well as concerted efforts by the U.S. government's agencies and instrumentalities to actively dissuade businesses from engagement with Iran.
5. During this time, the Islamic Republic of Iran invoked the mechanism envisioned in Paragraph 36 of the JCPOA, and the Joint Commission of the JCPOA met twice at the level of political directors and twice at the ministerial level. In these meetings, the remaining JCPOA participants explicitly acknowledged that the lifting of sanctions—and the economic dividends arising from it for Iran—constitutes an essential part of the JCPOA. The foreign ministers of remaining JCPOA participants committed to design "practical solutions" aimed at normalizing and even enhancing economic cooperation with Iran, including through establishing effective

banking channels, continuation in the export of oil, gas and petrochemical products, continuation of cooperation in transportation, export credits, support for economic actors involved in trade, financial and investment cooperation with Iran (and protecting them against the U.S.' extraterritorial sanctions), and encouraging further investment in Iran.[1]

6. But, unfortunately, apart from issuing numerous political statements and support, no operational mechanism has been put in place to counter U.S. sanctions and to compensate for them in terms of sanction lifting effects, as specified in Annex II of the JCPOA that allows for the normalization of trade and economic relations with Iran.

Legal Basis

1. Since 8 May 2018, including through the official letters, Iran has notified the JCPOA participants that the US withdrawal and re-imposition of sanctions lifted under the JCPOA is a "significant Non-performance" by a member of EU/E3+3 and is a grave violation of the UNSC Resolution 2231, accordingly Iran had invoked provision of paragraphs 26 and 36 of the JCPOA. Thereupon, the Islamic Republic of Iran in response to the request of the heads of Governments of the remaining JCPOA participants pledging prompt remedial actions, agreed to postpone adoption of the measures envisaged under paragraphs 26 and 36 of the JCPOA, and exercising utmost prudence, while continued to fully implement all its commitments under the JCPOA, as verified by 14 subsequent IAEA DG reports.
2. Para 26 of JCPOA states: "... There will be no new nuclear-related UN Security Council sanctions and no new EU nuclear-related sanctions or restrictive measures. The United States will make best efforts in good faith to sustain this JCPOA and to prevent interference with the realization of the full benefit by Iran of the sanctions lifting specified in Annex II. The U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from re-introducing or re-imposing the sanctions specified in Annex II that it has ceased applying under this JCPOA, without prejudice to the dispute resolution process provided for under this JCPOA. The U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from imposing new nuclear-related sanctions. **Iran has stated that it will treat such a re-introduction or re-imposition of the sanctions specified in Annex II, or such an imposition of new nuclear-related sanctions, as grounds to cease performing its commitments under this JCPOA in whole or in part.**"
3. Para 36 of JCPOA states: "If Iran believed that any or all of the E3/EU+3 were not meeting their commitments under this JCPOA, Iran could refer the issue to the Joint Commission for resolution ... if the complaining participant deems the issue to constitute significant non-performance, **then that participant could treat the unresolved issue as grounds to cease performing its commitments under this JCPOA in whole or in part** ..."

[1] . Please see statement from the Joint Commission of the JCPOA, 6 July 2018 which is attached.

Iran's Decision

1. It is almost one year that the US unilaterally decided to unlawfully re-impose its sanctions against Iran, and followed by provocative and malign activities. In the absence of effective and meaningful measures by the other JCPOA participants to remedy the most devastating effects of the US actions, the Islamic Republic of Iran has decided to undertake practical measures to exercise its recognized rights under Paragraphs 26 and 36 of the JCPOA, to secure its rights and restore balance to the obligations set forth in the JCPOA.
2. Iran in exercise of its rights under paragraphs 26 and 36 of the JCPOA, and in response to the US withdrawal from the JCPOA and the re-imposition of its unilateral sanctions, has decided "to cease performing its commitments in part" as of 8 may 2019. These voluntary measures at first stage are: a) keeping its uranium stockpile under 300 KG up to 3.67%, b) making available heavy water, in excess of 130 metric tons, for export to the International market. In fact, the latest decision of the US, in contradiction of the JCPOA as well as the UNSCR 2231 regarding the international nuclear cooperation, has made the implementation of these provisions impossible by impeding the sale, transfer or exchange of enriched uranium and heavy water produced by Iran.
3. If mechanisms related to meeting Iran's rightful demands are operationalized within 60 days, particularly if the level of Iran's oil exports return to the level existing in April 2018, the above mentioned decision will be reversed. Otherwise Iran in implementing paragraph 26 of the JCPOA will further reduce its voluntary measures and will continue this trend in the next stages. At the second stage Iran will "cease performing its commitments in part" with regard to the following voluntary measures in 60 days: a) keeping its level of uranium enrichment at up to 3.67%, b) redesigning and rebuilding a modernized Heavy water research reactor in Arak.
4. Indeed, the aforementioned violations by the US administration, and recent provocative actions, inter alia, the US decision to halt Iran's oil trade and sanction international nuclear cooperation with Iran, provided for Iran "grounds to cease performing its commitments under the JCPOA in whole or in part" as stipulated in Paragraph 26 of the JCPOA. Therefore, the current decision by Iran is fully consistent by the terms of the JCPOA, including those related to dispute resolving mechanism enshrined in paragraph 36 of it.
5. In implementation of the decision at the first stages, the Islamic Republic of Iran, exercising utmost restraint, did not touch upon the cooperation with the IAEA through provisional application of the Additional Protocol.
6. The International Community has a responsibility to maintain the agreement and preserve its effectiveness. The US unilateral actions has rendered the significant part of the JCPOA ineffective, and substantially destroyed the balance between the gives-and-takes, which were attained after almost twelve years of complicated and difficult negotiations.
7. Iran has shown its utmost restraint in response to the decision by the US, and by now has continued to meet its obligations under the JCPOA, and has cooperated fully with the IAEA verification requirements and the IAEA continued to carry out its verification and monitoring activities without any restriction or hindrance that has been confirmed 14 times by the IAEA

Director General's reports. In turn, Iran should continue to receive the economic benefits it is entitled to, this imbalance approach to the rights and obligations cannot be sustainable.

8. Iran still believes on the importance of diplomacy and multilateralism as a practical means to resolve disputes. Iran will continue to support the JCPOA and is ready to consult with international community, in particular remaining JCPOA participants to find effective practical ways to preserve the JCPOA.
9. Iran Reaffirms the significance of the JCPOA and would like to express its readiness to reconsider the decision, if the current unacceptable situation is addressed to the satisfaction of the Islamic Republic of Iran and the meaningful balance restored and expected benefits from sanction lifting ensured. Now, it is the remaining countries' turn to prove their good will and take serious and practical steps to preserve the JCPOA.

Iran stops some of its measures under JCPOA/ We are no longer committed to limitations on keeping enriched uranium, heavy water deposits/ 60-day deadline to remaining parties to live up to their commitments, esp. in banking, oil sectors



The Supreme National Security Council issued a statement addressing the Joint Comprehensive Plan of Action (JCPOA) member states, stating that the Islamic Republic of Iran has shown considerable restraint in the past one year after the illegal withdrawal of the United States from the JCPOA and violations of United Nations Security Council resolutions".

Wed 08 - May 2019 - 09:42

The statement, which addresses member states to the JCPOA in separate letters by the Supreme National Security Council (SNSC) and the head of the council President Hassan Rouhani, stresses, "In order to protect the security and national interests of the people of Iran, and in implementation of its rights set forth in Paragraph 26 and 36 of the JCPOA, the Islamic Republic of Iran stops some of its measures under the JCPOA from today, 08 May 2019".

The full text of the statement is as follows:

In the Name of Allah, the Most Beneficent, the Most Merciful

Statement by the Supreme National Security Council of the Islamic Republic of Iran

In order to protect the security and national interests of the people of Iran, and in implementation of its rights set forth in Paragraph 26 and 36 of the JCPOA, the Supreme National Security Council the Islamic Republic of Iran has issued an order to stop some of Iran's measures under the JCPOA from today, 08 May 2019. The decision was announced in an important letter by Dr Rouhani, President and Head of the Supreme National Security Council of the Islamic Republic of Iran, to the leaders of the member states, Germany, Britain, China, Russia and France.

Now, one year after the United States' illegal withdrawal from the JCPOA and violation of United Nations Security Council resolutions, that country has re-implemented its unilateral, illegal sanctions contrary to all internationally recognised principles. This blatant bullying behaviour of the US has, unfortunately, not been appropriately addressed by the Security Council or the remaining members.

The Islamic Republic of Iran has shown considerable restraint in the past one year at the request of the other members, giving them considerable time to compensate for the impacts and consequences of US' withdrawal from the JCPOA. During this time, the Joint Commission of JCPOA has been held two times at the level of deputies and two times at the level of foreign ministers, and the remaining

countries have explicitly stated in these meetings that the lift of sanctions and Iran's enjoying of its economic benefits were a critical part of the JCPOA. They promised to design "practical solutions" to normalise and promote economic cooperation with Iran.

Unfortunately, the goodwill and wise self-restraint of the Iranian people have remained unanswered, and no operational mechanisms have been set up to compensate for US sanctions except for the issuance of political statements. Therefore, in order to secure its rights and restore balance to the demands of the parties to the agreement, the Islamic Republic of Iran has no option other than "reducing commitments".

In this regard, it is being stated that the Islamic Republic of Iran does not commit itself to respecting the limits on the keeping of enriched uranium and heavy water reserves at the current stage. The remaining countries will be given sixty days to fulfil their obligations, especially in banking and oil fields. If they fail to meet Iran's demands in the time given, then the Islamic Republic of Iran will suspend compliance with the uranium enrichment limits and measures to modernise the Arak Heavy Water Reactor. Whenever our demands are met, we will resume the same amount of suspended commitments, but otherwise, the Islamic Republic of Iran will suspend the implementation of other obligations step by step.

The Islamic Republic of Iran is ready to continue its consultations with the remaining members of the JCPOA at all levels, but will show a strong and immediate response to any irresponsible action, including referral to the UN Security Council or implementation of further sanctions. In his letter to the leaders of the member states, the President of the Islamic Republic of Iran has clearly pointed out the types of reactions of the Islamic Republic of Iran.

Currently, the Islamic Republic of Iran has said it final word to the member states and the international community. We entered nuclear talks with goodwill, made an agreement with goodwill, implemented the agreement with goodwill, and provided enough time to the other members after the withdrawal of the United States with goodwill. Now, it is the remaining countries' turn to prove their goodwill and take serious and practical steps to preserve the JCPOA.

The window that is now open to diplomacy will not remain open for a long time, and the United States and the remaining members will be fully responsible for the failure of the JCPOA and any possible consequences.

Supreme National Security Council of the Islamic Republic of Iran

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Rosenne's Law and Practice of the International Court: 1920–2015

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II.230. Distinction between Objection and Defence. The distinction between a preliminary objection, especially to the admissibility, and a defence to the merits, is also subtle. As a rough rule of thumb, it is probable that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of the case depend, or when to decide the objection would require decision on what, in the particular case, are substantive aspects of the merits, the plea is not an objection but a defence to the merits. Several examples may be given to show the flexibility with which the Court approaches this type of problem. Thus, to take the plea of the national character of the claims, in the *Panevezys-Saldutiskis Railway* case the Permanent Court held it to be in principle of preliminary character, but in the particular case a defence. In the *Nottebohm* (Second Phase) case, the present Court recognized its preliminary character. In the *Barcelona Traction* (New Application) case the Court was unable to come to any decision on this aspect in the preliminary objection proceedings, and therefore joined the objection to the merits. With regard to the plea of non-exhaustion of local remedies, in the *Panevezys-Saldutiskis Railway* case it was admitted and upheld as a preliminary objection, but only after the preliminary objections had been joined to the merits and the Permanent Court had established that it could decide the issue without prejudging the merits. In the *Ambatielos* (Merits: Obligation to Arbitrate) case, however, the present Court held it to be a defence directed to the admissibility cognizable in that case by the Arbitral Commission to be set up in accordance with that judgment.[203] In the *Interhandel* case the same objection was advanced as an objection to the jurisdiction, but specifically held by the Court to be an objection to the admissibility.[204] In the *Barcelona Traction* (New Application) case the objection to the admissibility was joined to the merits, since allegations of denial of justice constituted the major part of the merits.

In the *Electricity Company of Sofia* case, the Permanent Court dismissed as a preliminary objection the argument that the dispute was not a legal dispute within the meaning of Article 36, paragraph 2, of the

[203] [1952] 39; [1953] 23. In the arbitral proceedings these questions were specifically included in the special agreement and the International Arbitration Commission did not have to consider whether they were of a preliminary or other character. Nevertheless it stated in the award that it regarded the exhaustion of local remedies rule as referring to the admissibility of the claim and not as a defence to the merits. XII RIAA 83; 23 ILR 334; Stuyt, *Survey* 437.

[204] [1959] 6, 26.

Statute, or one which could be decided in application of Article 38 of the Statute, when the argument *ratione materiae* in support of this objection formed part of the merits of the dispute.[205] However, the present Court in the *Right of Passage* case first joined similar contentions to the merits, dismissed them as an objection, and then went on to dismiss them as a defence to the merits.[206] Other contentions held not to be preliminary have included questions of judgment in the form of an injunction, and questions of set off.[207] It also appears that the Court will consider whether it has heard full argument on a plea advanced as a preliminary objection. Such a plea may lose that character if the Court is not satisfied that it has been fully argued by the parties, in which case they will be free to take it up again at a later stage.[208]

It appears as a matter of principle that the rejection of any such plea as a preliminary objection, as opposed to its dismissal as such, is without prejudice to the freedom of the parties to take it up again in support of their case on the merits, as was specifically mentioned in the *Electricity Company of Sofia* case.

II.231. Character of the Decision on Preliminary Objection. As seen, the view that the Court should be able to dispose of preliminary objections in proceedings which would not in any way prejudge the final outcome of the argument on the merits, was first propounded in the *Mavrommatis Palestine Concessions* case.[209] This philosophy was the basis of the Permanent Court's later approach to the problem, both in the drafting of the Rules and in deciding matters relating to its jurisdiction. However, the formula is an oversimplification, and in the *German Interests in Polish Upper Silesia* case the Permanent Court, while retaining the principle, nevertheless drew attention to its limitations in passages which contain both positive and negative elements. Thus:

[205] A/B77 (1939) 77–78, 82–83.

[206] [1957] 125, 149; [1960] 6, 32, 36. A similar argument was raised in the *Aerial Incident of 27 July 1955* case, but was not decided by the Court. In the oral pleadings Bulgaria agreed that consideration of that objection could be deferred to the merits. Pleadings 362.

[207] *Chorzów Factory* (Jurisdiction) case, A9 (1927) 33.

[208] Cf. *Ambatielos* (Prel. Obj.) case, [1952] 28, 45; *Ambatielos* (Merits: Obligation to Arbitrate) case, [1953] 10, 21; *Barcelona Traction* (New Application) (Prel. Objs.) case, [1964] 6. 43. See also ch. 27, § III.393.

[209] A2 (1924) 10.

WORLD TRADE ORGANIZATION

WT/DS512/R

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RUSSIA - MEASURES CONCERNING TRAFFIC IN TRANSIT

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Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Australia – Apples	Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
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Short Title	Full Case Title and Citation
China – Rare Earths	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
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EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
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EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
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Short Title	Full Case Title and Citation
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
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US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, p. 10127
US – Anti-Dumping Measures on Oil Country Tubular Goods	Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, p. 10225
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, p. 1481
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619

Short Title	Full Case Title and Citation
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
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US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Nicaraguan Trade	GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986 (unadopted)
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Orange Juice (Brazil)	Panel Report, *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R, adopted 17 June 2011, DSR 2011:VII, p. 3753
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Sugar Quota	GATT Panel Report, *United States – Imports of Sugar from Nicaragua*, L/5607, adopted 13 March 1984, BISD 31S/67
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

JUDGMENTS OF INTERNATIONAL COURTS AND TRIBUNALS CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Case Concerning the Northern Cameroons	International Court of Justice, Preliminary Objections, *Case Concerning the Northern Cameroons,* (Cameroon v. United Kingdom) (1963) ICJ Reports, p. 15
Case Concerning Oil Platforms	International Court of Justice, Merits, *Case Concerning Oil Platforms*, (Islamic Republic of Iran v. United States of America) (2003) ICJ Reports, p. 161
Case of Military and Paramilitary Activities in and Against Nicaragua	International Court of Justice, Merits, *Case of Military and Paramilitary Activities in and Against Nicaragua,* (Nicaragua v. United States of America) (1986) ICJ Reports, p. 14
Certain Expenses of the United Nations	International Court of Justice, Advisory Opinion, *Certain Expenses of the United Nations,* (United Nations) (1962) I.C.J. Reports, p. 151
Nuclear Tests Case	International Court of Justice, Questions of Jurisdiction and/or Admissibility, *Nuclear Tests Case,* (Australia v. France) (1974) ICJ Reports, p. 253
Prosecutor v. Tadić	International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, (1995), Case No IT-94-1-A

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1982 Decision	Decision Concerning Article XXI of the General Agreement
2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, or 2014 Belarus-Russia Border Bans	Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods takes place exclusively through the checkpoints across the Russian state border
2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods	Bans on all road and rail transit from Ukraine of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic. Transit of such goods may only occur pursuant to a derogation requested by the Government of Kazakhstan or the Government of the Kyrgyz Republic, which is then authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (below)
2016 Belarus Transit Requirements	Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from the Belarus-Russia border, and comply with a number of additional conditions related to identification and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border
A350	Airbus A350 Aircraft
April 1989 Decision	Improvements to the GATT Dispute Settlement System Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989
BCI	Business Confidential Information
CIS-FTA	Treaty on a Free Trade Area between the members of the Commonwealth of Independent States, done at St Petersburg, 18 October 2011, retrieved from: http://rtais.wto.org/rtadocs/762/TOA/English/FTA%20CIS_Text%20with%20protocols.docx
Covered agreements	Agreements listed in Appendix 1 (of the Understanding on Rules and Procedures Governing the Settlement of Disputes)
CU	Customs Union
DCFTA	Deep and Comprehensive Free Trade Area Title IV (Trade and Trade-Related Matters) of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, L 161/13, Vol. 57, 29 May 2014, ISSN 1977-0677

Abbreviation	Description
De facto measure	Restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic
Decree No. 1	Decree of the President of the Russian Federation No. 1, "On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 1 January 2016
Decree No. 319	Decree of the President of the Russian Federation No. 319, "On Amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016", dated 1 July 2016
Decree No. 560	Decree of the President of the Russian Federation No. 560, "On the application of certain special economic measures to ensure security of the Russian Federation", dated 6 August 2014
Decree No. 643	Decree of the President of the Russian Federation No. 643, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 30 December 2017
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EaEU	Eurasian Economic Union
EaEU Treaty	Treaty on the Establishment of the Eurasian Economic Union, done at Astana, 29 May 2014, retrieved from: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf
EU-Ukraine Association Agreement	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 161, Vol. 57, 29 May 2014, ISSN 1977-0677
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GLONASS	Global Navigation Satellite System (Russian translation: Globalnaya Navigazionnaya Sputnikovaya Sistema)
Helms-Burton Act	Cuban Liberty and Democratic Solidarity (LIBERTAD) Act
ICJ	International Court of Justice
Import Licensing Agreement	Agreement on Import Licensing Procedures

Abbreviation	Description
ITO	International Trade Organization
LA/MSF	Launch aid / member State financing
PJSC Notice	Public Joint-Stock Company "Russian Railways" Notice on assessing the fee for placing/removal of GLONASS seals at Moskovskaya, Privolzhskaya, Yugo-Vostochnaya (South-Eastern) Railways, dated 17 May 2016
PJSC Order	Public Joint-Stock Company "Russian Railways" Order No. 529r, "On approval of the procedure for installing (removing) of the identification means (seals) operating on the basis of the technology GLONASS", dated 28 March 2016
Plant Instruction	Instruction No. FS-AS-3/22903 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 21 November 2014
Ramírez – López Treaty	Treaty on Maritime Delimitation in the Caribbean Sea
Resolution No. 1	Resolution No. 1 of the Government of the Russian Federation, "On measures related to the implementation of the Decree of the President of the Russian Federation No. 1 of 1 January 2016", dated 1 January 2016
Resolution No. 778	Resolution of the Government of the Russian Federation No. 778, "On measures for implementation of the Decree of the President of the Russian Federation No. 560 of 6 August 2014 'On the application of certain special economic measures to ensure security of the Russian Federation'", dated 7 August 2014
Rosselkhoznadzor	Russian Federal Service for Veterinary and Phytosanitary Surveillance
Russia's Accession Protocol	Protocol of the Accession of the Russian Federation, WT/MIN(11)/24; WT/L/839, 17 December 2011
Russia's Working Party Report	Report of the Working Party on the Accession of the Russian Federation to the WTO, WT/ACC/RUS/70 and WT/MIN(11)/2, dated 11 November 2011
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TPRM	Trade Policy Review Mechanism
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
Ukraine's 2016 Trade Policy Review Report	Trade Policy Review Body, Trade Policy Review, Ukraine, Government Report prepared by Ukraine, WT/TPR/G/334
UN Charter	Charter of the United Nations, done at San Francisco, 24 October 1945, UN Treaty Series Vol. 1, p. XVI
UN General Assembly	General Assembly of the United Nations
US Draft Charter	United States, Department of State, "Suggested Charter for an International Trade Organization of the United Nations", Publication 2598, Commercial Policy Series 93, September 1946
Veterinary Instruction	Instruction No. FS-NV-7/22886 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 21 November 2014
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 115, p. 331

Abbreviation	Description
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

EXHIBITS CITED IN THIS REPORT

Panel Exhibit	Short Title (where applicable)	Full Title
UKR-1, RUS-1	Decree No. 1	Decree of the President of the Russian Federation No. 1, "On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 1 January 2016
UKR-2, RUS-2	Decree No. 319	Decree of the President of the Russian Federation No. 319, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure the economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 1 July 2016
UKR-3, RUS-4	Resolution No. 1	Resolution of the Government of Russian Federation No. 1, "On measures related to the implementation of the Decree of the President of the Russian Federation No. 1 of 1 January 2016", dated 1 January 2016
UKR-4	Resolution No. 732	Resolution of the Government of the Russian Federation No. 732, "On amendments to some acts of the Government of the Russian Federation", dated 1 August 2016
UKR-5	Resolution No. 388	Resolution of the Government of the Russian Federation No. 388, "On introduction of amendments to Appendix to the Resolution of the Government of the Russian Federation No. 1 of 1 January 2016", dated 30 April 2016
UKR-6, RUS-5	Resolution No. 147	Resolution of the Government of the Russian Federation No. 147, "On approval of requirements to the identification means (seals) including the ones functioning on the basis of the technology of global satellite navigation system GLONASS", dated 27 February 2016
UKR-7	PJSC Order	Order of PJSC "Russian Railways" No. 529r, "On approval of the procedure for installing (removing) of the identification means (seals) operating on the basis of the technology GLONASS", dated 28 March 2016
UKR-8, RUS-6	Resolution No. 276	Resolution of the Government of the Russian Federation No. 276, "On the procedure of exercising control over the international road and rail cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic through the territory of the Russian Federation", dated 6 April 2016
UKR-9, RUS-3	Decree No. 560	Decree of the President of the Russian Federation No. 560, "On the application of certain special economic measures to ensure security of the Russian Federation", dated 6 August 2014
UKR-10, RUS-7	Resolution No. 778	Resolution of the Government of the Russian Federation No. 778, "On measures for implementation of the Decree of the President of the Russian Federation No. 560 of 6 August 2014 'On the application of certain special economic measures to ensure security of the Russian Federation'", dated 7 August 2014
UKR-11	Resolution No. 830	Resolution of the Government of the Russian Federation No. 830, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 20 August 2014
UKR-12	Resolution No. 625	Resolution of the Government of the Russian Federation No. 625, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 25 June 2015

Panel Exhibit	Short Title (where applicable)	Full Title
UKR-13	Resolution No. 842	Resolution of the Government of the Russian Federation No. 842, "On amendments to the Resolutions of the Government of the Russian Federation dated 7 August 2014 No. 778 and dated 31 July 2015 No. 774", dated 13 August 2015
UKR-14	Resolution No. 981	Resolution of the Government of the Russian Federation No. 981, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 16 September 2015
UKR-15	Resolution No. 1397	Resolution of the Government of the Russian Federation No. 1397, "On amendment of Item 1 of Resolution No. 778 of the Government of the Russian Federation dated 7 August 2014", dated 21 December 2015
UKR-16	Resolution No. 157	Resolution of the Government of the Russian Federation No. 157, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 1 March 2016
UKR-17	Resolution No. 472	Resolution of the Government of the Russian Federation No. 472, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 27 May 2016
UKR-18	Resolution No. 608	Resolution of the Government of the Russian Federation No. 608, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 30 June 2016
UKR-19	Resolution No. 897	Resolution of the Government of the Russian Federation No. 897, "On amendment to Annex to the Russian Federation Government Resolution dated 7 August 2014 No. 778", dated 10 September 2016
UKR-20	Resolution No. 1086	Resolution of the Government of the Russian Federation No. 1086, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 22 October 2016
UKR-21, RUS-10	Veterinary Instruction	Instruction No. FS-NV-7/22886 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 21 November 2014
UKR-22, RUS-11	Plant Instruction	Instruction No. FS-AS-3/22903 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*) dated 21 November 2014
UKR-47		Federal Law No. 410-FZ of the Russian Federation, "On Suspending by the Russian Federation of the Treaty on a Free Trade Area with respect to Ukraine", dated 30 December 2015
UKR-53	European Commission Press Release	Press release "The trade part of the EU-Ukraine Association Agreement becomes operational on 1 January 2016", dated 31 December 2015, European Commission, available at: http://europa.eu/rapid/press-release_IP-15-6398_en.htm
UKR-58		Treaty on the Establishment of the Eurasian Economic Union, done at Astana, 29 May 2014, available at: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf
UKR-70	Resolution No. 790	Resolution of the Government of the Russian Federation No. 790, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 4 July 2017
UKR-71	Decree No. 293	Decree of the President of the Russian Federation No. 293, "On extending certain special economic measures in the interest of ensuring the security of the Russian Federation", dated 30 June 2017
UKR-75		Instruction No. FS-EN-7/19132 of the Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*), dated 10 October 2016

Panel Exhibit	Short Title (where applicable)	Full Title
UKR-76		Decree of the President of the Russian Federation No. 628, "About suspension of validity by the Russian Federation of the free trade area concerning Ukraine", dated 16 December 2015
UKR-78	UNIAN Information Agency Article	UNIAN Information Agency, "Putin signed and amended the law on the suspension of the FTA with Ukraine", dated 30 December 2015, available at: https://economics.unian.net/finance/1226612-putin-podpisal-zakon-o-priostanovlenii-zst-s-ukrainoy.html
UKR-80	RBK article	RBK, "Putin suspended the free trade agreement with Ukraine", dated 16 December 2015, available at: http://www.rbc.ru/politics/16/12/2015/567178fe9a7947944e73b0a4
UKR-84		Print-screen of the website of the President of the Russian Federation, "The law on suspension of the FTA agreement with Ukraine is signed", dated 30 December 2015, available at: kremlin.ru/acts/news/51091
UKR-88		Official Site of the *Rosselkhoznadzor*, "Regarding Regulation by Rosselkhoznadzor of Quarantined Plant Products Transit", dated 24 November 2014
UKR-89	UN General Assembly Resolution No. 68/262, 27 March 2014	UN General Assembly Resolution No. 68/262 "Territorial integrity of Ukraine", 27 March 2014, A/RES/68/262
UKR-91	UN General Assembly Resolution No. 71/205, 19 December 2016	UN General Assembly Resolution No. 71/205 "Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)", 19 December 2016, A/RES/71/205
UKR-94	Resolution No. 1292	Resolution of the Government of the Russian Federation No. 1292, "On amendments to the Annexes to Resolution of the Government of the Russian Federation of 7 August 2014 No. 778", dated 25 October 2017
UKR-98, RUS-13	Decree No. 643	Decree of the President of the Russian Federation No. 643, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 30 December 2017
UKR-102	The Regions of Central Asia, Eastern Asia and Caucasus	Map of Central Asia, Map of the Caucasus and Central Asia, and the UN Classification of Countries by Region, Income Group, and Subregion of the World
UKR-111	EU-Ukraine Association Agreement	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 161, Vol. 57, 29 May 2014, ISSN 1977-0677
UKR-112		Notice concerning the provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 311/1, 31 October 2014
RUS-8	Federal Law No. 281-FZ	Federal Law No. 281-FZ of the Russian Federation, "On the Special Economic Measures", dated 30 December 2006
RUS-12	Federal Law No. 390-FZ	Federal Law No. 390-FZ of the Russian Federation, "On Security", dated 28 December 2010
RUS-14		Telegram of "Ukrzaliznytsia" (Ukrainian Railways) No. CZM-14/946, dated 6 June 2014

Panel Exhibit	Short Title (where applicable)	Full Title
RUS-15		Print-screen of the website of the State Border Guard Service of Ukraine, retrieved from: https://dpsu.gov.ua/ua/news/na-lyganshhini-stvorjujutsja-zagoni-prikordonnoi-samooboroni/
RUS-16		Resolution of the Cabinet of Ministers of Ukraine No. 20, "On approval of the list of checkpoints through the state border of Ukraine, through which the goods are imported in transit mode", dated 20 January 2016
RUS-17		Regulation of the Cabinet of Ministers of Ukraine No. 106-r, "On the closure of checkpoints across the state border", dated 18 February 2015
RUS-18		Telegram of "Ukrzaliznytsia" (Ukrainian Railways) No. CZM-14/1134, dated 8 July 2014
RUS-19		Resolution of the Cabinet of Ministers of Ukraine No. 1147, "On the prohibition of importation of products originating in the Russian Federation into the customs territory of Ukraine", dated 30 December 2015
RUS-20		Decree of the President of Ukraine No. 133/2017, "On the Decision of the National Security and Defense Council of Ukraine 'On application of personal special economic and other restrictive measures (sanctions)'", dated 28 April 2017
RUS-22		Decree of the President of Ukraine No. 58/2018, "On the decision of the Ukrainian National Security and Defense Council 'Urgent measures on security of the national interests of the state in the sphere of aircraft engine building'", dated 1 March 2018
RUS-23		Decree of the President of Ukraine No. 57/2018, "On entry into force of the Decision of the Council on National Security and Defense of Ukraine of 1 March 2018, 'On application of personal special economic and other restrictive measures (sanctions)'", dated 6 March 2018
RUS-24	Resolution No. 959	Resolution of the Russian Federation No. 959, "On imposition of import customs duties in respect of goods, originating from Ukraine", dated 19 September 2014

1 INTRODUCTION

1.1 Complaint by Ukraine

1.1. On 14 September 2016, Ukraine requested consultations with the Russian Federation (Russia) pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 10 November 2016 between Ukraine and Russia. These consultations failed to resolve the dispute.[2]

1.2 Panel establishment and composition

1.3. On 9 February 2017, Ukraine requested the establishment of a panel pursuant to Article 4.7 and Article 6 of the DSU, and Article XXIII of the GATT 1994 with standard terms of reference.[3] At its meeting on 21 March 2017, the Dispute Settlement Body (DSB) established a panel pursuant to Ukraine's request in document WT/DS512/3, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Ukraine in document WT/DS512/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 22 May 2017, Ukraine requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 6 June 2017, the Director-General accordingly composed the Panel as follows[6]:

Chairperson:	Professor Georges Abi-Saab
Members:	Professor Ichiro Araki Dr Mohammad Saeed

1.6. Australia, Bolivia, Brazil, Canada, Chile, China, the European Union, India, Japan, Korea, Moldova, Norway, Paraguay, Saudi Arabia, Singapore, Turkey and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. The Panel held an organizational meeting with the parties on 28 June 2017.

1.8. After consultation with the parties, the Panel adopted its Working Procedures[7] and timetable[8] on 12 July 2017.

1.9. The Panel held a first substantive meeting with the parties on 23 and 25 January 2018. A session with the third parties took place on 25 January 2018. The Panel held a second substantive meeting with the parties on 15 May 2018.

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[1] WT/DS512/1 and WT/DS512/1/Corr.1.
[2] WT/DS512/3.
[3] Ibid.
[4] See WT/DSB/M/394.
[5] WT/DS512/4.
[6] Ibid.
[7] The Panel's Working Procedures were revised on 11 January 2018. See the Panel's Working Procedures, adopted on 12 July 2017, as revised on 11 January 2018, in Annex A-1.
[8] The timetable for the Panel proceedings was revised on 31 January 2018 and on 17 January 2019.

1.10. On 31 July 2018, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 January 2019. The Panel issued its Final Report to the parties on 28 March 2019.

1.3.2 Additional Working Procedures for the Protection of Business Confidential Information

1.11. After consultation with both parties, the Panel adopted Additional Working Procedures concerning the protection of Business Confidential Information (BCI), on 25 August 2017.[9]

1.3.3 Request for enhanced third party rights by certain third parties

1.12. On 10 November 2017, Australia, Canada and the European Union jointly requested the Panel to grant to all of the third parties certain additional third-party rights in these proceedings. The Panel invited the parties and other third parties, on 20 November 2017, to comment on the joint request. On 1 December 2017, Ukraine, Russia and certain of the other third parties (Brazil, China, Japan, Singapore and the United States) provided comments on the joint request. In a communication dated 9 January 2018, the Panel informed the parties and third parties that it had decided to grant the following enhanced third-party rights to all of the third parties:

a. The right to attend the portions of the party session of the first substantive meeting at which the parties deliver their opening oral statements, and closing oral statements, respectively; and

b. The right to receive the provisional written versions of the parties' opening oral statements and closing oral statements, respectively, at the portions of the party session of the first substantive meeting at which those statements are delivered, as well as the final versions of such oral statements at the end of the day on which they are delivered.

1.13. The Panel's decision is set out in Annex B-1.

1.3.4 Russia's request for a preliminary ruling

1.14. In its first written submission, Russia requested that the Panel issue a ruling, no later than the date for filing the parties' second written submissions, that the category of measures identified in Ukraine's first written submission as the "2014 transit bans and other transit restrictions" is outside the Panel's terms of reference.[10]

1.15. On 13 March 2018, the Panel issued a communication to the parties in which it advised that it had decided to address the issue of whether the 2014 transit bans and other transit restrictions are outside the Panel's terms of reference, together with the merits, and would therefore defer its ruling on that issue until the issuance of the Report.[11]

1.16. The Panel's ruling on whether the 2014 transit bans and other transit restrictions are outside the Panel's terms of reference, and other issues concerning the Panel's terms of reference, is addressed in Section 7.7 of this Report.

1.3.5 Russia's complaint of alleged breaches of confidentiality by a third party

1.17. In a letter to the Panel dated 14 March 2018, Russia complained that the European Union, a third party in this dispute, had violated confidentiality obligations under various provisions of the DSU and of the Working Procedures by publishing the European Union's third-party submission and third-party statement on the website of the European Commission's Directorate-General for Trade.[12] By communication dated 16 March 2018, the Panel invited the European Union and any other third parties, as well as Ukraine, to provide any comments on Russia's complaint by 21 March 2018. Accordingly, on 21 March 2018, the European Union, Australia, Brazil, Canada, the United States

[9] See the Panel's additional Working Procedures concerning BCI in Annex A-2.
[10] Russia's first written submission, para. 31.
[11] Communication of the Panel to the parties, dated 13 March 2018.
[12] Russia's letter to the Chair of the Panel, dated 14 March 2018.

and Ukraine each provided comments on Russia's complaint. On 23 March 2018, the Panel invited Russia to respond to these comments by 4 April 2018. On that date, Russia provided its response.

1.18. On 16 May 2018, the Panel issued a ruling in which it declined to take any action in respect of the published European Union third-party submission and third-party statement on the grounds that it did not consider that such publication violated the confidentiality obligations under Article 18.2 of the DSU, the Working Procedures or any other applicable confidentiality obligations. Particularly, the Panel did not agree with the proposition that legal arguments and opinions of parties in WTO dispute settlement proceedings were inherently confidential, or capable of designation as confidential information under the third sentence of Article 18.2 of the DSU. The Panel's ruling is set out in Annex B-2.

1.3.6 Other procedural complaints

1.19. In an email message dated 28 March 2018, Ukraine alleged that Russia had failed to file Exhibit RUS-20 (UKR) in accordance with paragraph 25 of the Working Procedures because it filed this exhibit by means of reference to a web link. In a communication to the parties dated 6 April 2018, the Panel noted that Russia had promptly submitted a paper version of Exhibit RUS-20 (UKR) by 5:00 p.m. on the due date for submission, and that in accordance with paragraph 25(b) of the Working Procedures, Exhibit RUS-20 (UKR) therefore formed part of the factual record in this dispute. The Panel also noted that, due to the size of the exhibit, the PDF file containing Exhibit RUS-20 (UKR) could not be attached to an email message. The Panel therefore requested Russia to provide Exhibit RUS-20 (UKR) to Ukraine in one of the other formats set forth in paragraph 25(b) of the Working Procedures, namely, on a USB key, a CD-ROM or a DVD.

1.20. In an email message dated 18 May 2018, Russia complained that Ukraine had failed to file Exhibits UKR-106 (BCI) through UKR-115 in accordance with subparagraph (a) of the Panel's invitation to the second substantive meeting dated 27 April 2018. Russia submitted that, owing to this failure, the Panel should not accept and consider these exhibits. In a communication to the parties dated 22 May 2018, the Panel declined Russia's request, observing that while the electronic versions of the exhibits were not provided to Russia or submitted to the Dispute Settlement Registry until 18 May 2018, Ukraine had previously served paper copies of Exhibits UKR-106 (BCI) to UKR-115 on Russia and on the Panel on 15 May 2018, at the second substantive meeting. The paper copies of those exhibits constitute the official versions of those exhibits for purposes of the record of the dispute under paragraph 25(b) of the Working Procedures.

1.21. During the second substantive meeting on 15 May 2018, Russia alleged that Ukraine had untimely filed Exhibit UKR-106 (BCI) in a manner inconsistent with paragraph 7 of the Working Procedures. Russia rejected Ukraine's assertion that Exhibit UKR-106 (BCI) was "necessary for purposes of rebuttal" and requested, in a letter dated 13 June 2018, that the Panel strike Exhibit UKR-106 (BCI) from the record. In a communication to the parties dated 23 July 2018, the Panel granted Russia's request, observing that, in the first round of arguments, Ukraine's arguments concerning the existence of the measures in question related to the legal existence of the measures in Russia's legal system without reference to any specific instances of application, i.e., Ukraine's arguments related to the existence of the measures "as such". At the second substantive meeting, Ukraine reiterated its "as such" argument while also submitting the contested exhibit concerning the application of the measure, in one instance, as evidence in support of its main argument. In the Panel's view, this did not make such evidence "necessary for the purposes of rebuttal" within paragraph 7 of the Working Procedures. The Panel's ruling is set out in Annex B-3.

2 FACTUAL ASPECTS

2.1. This dispute concerns various measures imposed by Russia on transit by road and rail through the territory of Russia, as well as the publication and administration of those measures. Additional information concerning the measures and the factual background against which they were adopted is set forth in Sections 7.3 and 7.7 of this Report.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Ukraine requests that the Panel find that the measures at issue are inconsistent with Russia's obligations under the first sentence of Article V:2, the second sentence of Article V:2, Article

V:3, Article V:4 and Article V:5 of the GATT 1994, and with paragraph 2 of Part I of the Protocol of Accession of the Russian Federation (Russia's Accession Protocol)[13], which incorporates commitments in paragraph 1161 of the Report of the Working Party on the Accession of the Russian Federation to the WTO (Russia's Working Party Report)[14]; as well as Article X:1 of the GATT 1994 and commitments in paragraph 1426 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference; Article X:2 of the GATT 1994 and commitments in paragraph 1428 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference; commitments in paragraph 1427 of Russia's Working Party Report, as incorporated into its Accession Protocol by reference; and Article X:3(a) of the GATT 1994. Ukraine further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that Russia bring its measures into conformity with its WTO obligations.

3.2. Russia invokes Article XXI(b)(iii) of the GATT 1994 and requests the Panel, for lack of jurisdiction, to limit its findings to recognizing that Russia has invoked a provision of Article XXI of the GATT 1994, without engaging further to evaluate the merits of Ukraine's claims. Russia considers that the Panel lacks jurisdiction to evaluate measures in respect of which Article XXI of the GATT 1994 is invoked.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes C-1 and C-4). They are also reiterated where relevant in the Panel's analysis.

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, China, the European Union, Japan, Moldova, Singapore, Turkey and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1 through D-10). Turkey made oral arguments to the Panel but did not submit written arguments. Bolivia, Chile, India, Korea, Norway, Paraguay and Saudi Arabia did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. The Panel issued its Interim Report to the parties on 29 January 2019. Both parties submitted written requests for review of precise aspects of the Interim Report on 14 February 2019. Neither party requested an interim review meeting. On 28 February 2019, both parties submitted written comments on each other's written requests for review.

6.2. The parties' requests made at the interim stage, as well as the Panel's discussion and disposition of those requests, are set out in Annex E-1.

7 FINDINGS

7.1 Overview of Ukraine's complaints

7.1. Ukraine's main complaints may be succinctly stated as follows:

a. Since 1 January 2016, Ukraine has not been able to use road or rail transit routes across the Ukraine-Russia border for all traffic in transit destined for Kazakhstan. Rather, under Russian law, such traffic may only transit from Ukraine across Russia from the Belarus-Russia border, and is also subject to additional conditions related to identification seals and registration cards, both on entering and on leaving Russian territory, at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border respectively. As of 1 July 2016, all traffic in transit destined for the Kyrgyz Republic has been subject to the same restrictions.

[13] WT/MIN(11)/24 and WT/L/839, dated 17 December 2011.
[14] WT/ACC/RUS/70 and WT/MIN(11)/2, dated 17 November 2011.

b. Since 1 July 2016, traffic in transit by road and rail from Ukraine, which is destined for Kazakhstan and the Kyrgyz Republic, is not permitted to transit across Russia at all (i.e. not even via the Belarus-Russia border) for particular categories of goods. The categories of goods are: (i) those subject to customs duties greater than zero according to the Common Customs Tariff of the Eurasian Economic Union (EaEU), and (ii) goods listed in an annex to Resolution No. 778 of the Government of the Russian Federation (Resolution No. 778)[15] and which originate in specific countries that have imposed economic sanctions on Russia.[16] Although there is a procedure which exceptionally permits transit of these goods from Ukraine to Kazakhstan and to the Kyrgyz Republic (through a derogation procedure involving a request by the Governments of Kazakhstan or the Kyrgyz Republic and an authorization granted by Russian authorities), it is unclear how this derogation procedure operates and to date, no such derogations have been granted.

c. The transit restrictions referred to in paragraph 7.1(a) above, and the transit bans referred to in paragraph 7.1(b) above, are also applied by Russian authorities to traffic in transit by road or rail from Ukraine which is destined not only for Kazakhstan and the Kyrgyz Republic, but also for Mongolia, Tajikistan, Turkmenistan and Uzbekistan.

d. Finally, as of 30 November 2014, transit from Ukraine of goods subject to veterinary surveillance which are listed in Resolution No. 778 is not permitted through Belarus. Rather, such goods with a final destination of Kazakhstan and third countries may transit across Russia only from specific checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and pursuant to permits issued by the Russian Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*). Transit to third countries (including Kazakhstan) of plant goods which are listed in Resolution No. 778 shall also, as of 24 November 2014, take place exclusively through the checkpoints on the Russian state border.[17]

7.2. Ukraine claims that the above-referenced transit restrictions and bans are inconsistent with Russia's obligations under Article V of the GATT 1994 and related commitments in Russia's Accession Protocol. Ukraine also claims that Russia has failed to publish and administer

[15] Resolution No. 778 of the Government of the Russian Federation bans the importation of various agricultural products, raw materials and foodstuffs, as listed in the Resolution, which originate from the United States, EU Member States, Canada, Australia and Norway, which had imposed economic sanctions on Russia. (Resolution of the Government of the Russian Federation No. 778, "On measures for implementation of the Decree of the President of the Russian Federation No. 560 of 6 August 2014 'On the application of certain special economic measures to ensure security of the Russian Federation'", dated 7 August 2014, (Resolution No. 778), (Exhibits UKR-10, RUS-7).)

[16] On 13 August 2015, the import bans imposed by Resolution No. 778 were extended to the listed goods originating from Albania, Montenegro, Iceland, Liechtenstein and Ukraine. (See Resolution of the Government of the Russian Federation No. 842, "On amendments to the Resolutions of the Government of the Russian Federation dated 7 August 2014 No. 778 and dated 31 July 2015 No. 774", dated 13 August 2015, (Resolution No. 842), (Exhibit UKR-13).) On 13 August 2015, the Russian Government adopted Resolution No. 842 which, among other things, amends Resolution No. 778 to add further countries to the list of countries whose exports are subject to the Resolution No. 778 import bans, including Ukraine. However, with respect to Ukraine, Resolution No. 842 provides that the import bans shall be applied as of 10 days from the date on which the Russian Government is notified of action by Ukraine to implement the economic part of the EU-Ukraine Association Agreement (referred to in Resolution of the Russian Federation No. 959 "On imposition of import customs duties in respect of goods, originating from Ukraine", dated 19 September 2014, (Resolution No. 959), (Exhibit RUS-24)), but by no later than 1 January 2016. Another resolution of the Russian Government, enacted on 21 December 2015, specified that the import prohibitions in respect of the goods listed in Resolution No. 778 would apply to goods of Ukrainian origin as of 1 January 2016. (See Resolution of the Government of the Russian Federation No. 1397, "On amendment of Item 1 of Resolution No. 778 of the Government of the Russian Federation dated 7 August 2014", dated 21 December 2015, (Resolution No. 1397), (Exhibit UKR-15).) The duration of the import bans has been extended a number of times, most recently by Resolution No. 790, which extends the import bans until 31 December 2018. (See Resolution of the Government of the Russian Federation No. 790, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 4 July 2017, (Resolution No. 790), (Exhibit UKR-70).) For other amendments to Resolution No. 778, see fn 385 below.

[17] For an explanation of the measures as identified by Ukraine in its panel request and as subsequently identified in its first written submission, see paras. 7.264-7.275 below.

various instruments through which these measures are implemented in the manner required by Article X of the GATT 1994 and by commitments in Russia's Accession Protocol.

7.2 Russia's response

7.3. Russia does not specifically address the factual evidence or legal arguments adduced by Ukraine in support of its substantive claims under the GATT 1994 and Russia's Accession Protocol. Rather, Russia argues that certain claims and measures are outside the Panel's terms of reference, on the bases that: (a) Ukraine's panel request does not comply with the requirements of Article 6.2 of the DSU, and (b) Ukraine has failed to establish the existence of one of the challenged measures.

7.4. Principally, however, Russia asserts that the measures are among those that Russia considers necessary for the protection of its essential security interests, which it took, "[i]n response to the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests".[18] Russia invokes the provisions of Article XXI(b)(iii) of the GATT 1994, arguing that, as a result, the Panel lacks jurisdiction to further address the matter. Accordingly, Russia submits that the Panel should limit its findings in this dispute to a statement of the fact that Russia has invoked Article XXI(b)(iii), without further engaging on the substance of Ukraine's claims.[19]

7.3 Factual background

7.5. The issues that arise in this dispute must be understood in the context of the serious deterioration of relations between Ukraine and Russia that occurred following a change in government in Ukraine in February 2014. Both parties have avoided referring directly to this change in government and to the events that followed it. It is not this Panel's function to pass upon the parties' respective legal characterizations of those events, or to assign responsibility for them, as was done in other international fora. At the same time, the Panel considers it important to situate the dispute in the context of the existence of these events.

7.6. Ukraine had, since 18 October 2011, been a party to the Treaty on a Free Trade Area between the members of the Commonwealth of Independent States (CIS-FTA)[20], with Russia, Belarus, Kazakhstan, the Kyrgyz Republic, Tajikistan, Moldova and Armenia.[21] On 29 May 2014, Russia, Belarus and Kazakhstan signed the Treaty on the Establishment of the Eurasian Economic Union (EaEU Treaty)[22], with Armenia and the Kyrgyz Republic joining in January and August of 2015, respectively. The EaEU Treaty entered into force on 1 January 2015.[23]

7.7. While it took part in the initial negotiations to establish the EaEU, Ukraine decided, following on the "*Euromaidan* events", not to join the EaEU Treaty. Instead, it elected to seek economic integration with the European Union.[24] Accordingly, on 21 March 2014, the newly sworn-in Ukrainian Government signed the political part of the "Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part" (EU-Ukraine Association Agreement).[25] The objectives of the EU-Ukraine Association Agreement are to facilitate Ukraine's closer political and economic integration with Europe.[26] The economic part of the EU-Ukraine

[18] Russia's first written submission, paras. 16, 19, 33 and 74; and closing statement at the first meeting of the Panel, para. 6.

[19] Russia's opening statement at the first meeting of the Panel, paras. 45-47.

[20] Treaty on a Free Trade Area between the members of the Commonwealth of Independent States, done at St Petersburg, 18 October 2011, retrieved from: http://rtais.wto.org/rtadocs/762/TOA/English/FTA%20CIS_Text%20with%20protocols.docx.

[21] Ukraine's first written submission, para. 19. The CIS-FTA entered into force on 20 September 2012. (Ibid.)

[22] Treaty on the Establishment of the Eurasian Economic Union, done at Astana, 29 May 2014, retrieved from: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf, (Exhibit UKR-58).

[23] Ukraine's first written submission, para. 21.

[24] Ibid. paras. 16, 20 and 24.

[25] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 161, Vol. 57, 29 May 2014, ISSN 1977-0677, (EU-Ukraine Association Agreement), (Exhibit UKR-111), p. 170. See also Ukraine's first written submission, para. 24.

[26] EU-Ukraine Association Agreement, (Exhibit UKR-111), p. 6.

Association Agreement provides for a Deep and Comprehensive Free Trade Area (DCFTA) between the European Union and Ukraine.[27] This part of the EU-Ukraine Association Agreement was signed on 27 June 2014.

7.8. In March 2014, Ukraine, along with certain other countries, introduced a resolution in the General Assembly of the United Nations (UN General Assembly), which welcomed the continued efforts by the UN Secretary-General and the Organization for Security and Cooperation in Europe, as well as other international and regional organizations, to support "de-escalation of the situation with respect to Ukraine".[28] The UN General Assembly recalled "the obligations of all States under Article 2 of the Charter to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and to settle their international disputes by peaceful means".[29] A subsequent UN General Assembly Resolution in December 2016 condemned the "temporary occupation of part of the territory of Ukraine", i.e. the "Autonomous Republic of Crimea and the city of Sevastopol" by the Russian Federation, and reaffirmed the non-recognition of its "annexation".[30] This resolution makes explicit reference to the Geneva Conventions of 1949, which apply in cases of declared war or other armed conflict between High Contracting Parties.[31]

7.9. The events in Ukraine in 2014 were followed by the imposition of economic sanctions against Russian entities and persons by certain countries.

7.10. On 7 August 2014, Russia imposed import bans on specified agricultural products, raw materials and food originating from countries that had imposed sanctions against it (initially, the United States, European Union Member States, Canada, Australia and Norway).[32] Russia also imposed certain restrictions in connection with the transit of goods subject to these import bans, prohibiting their transit through Belarus, and permitting their transit across Russia only through

[27] The DCFTA is contained in Title IV of the EU-Ukraine Association Agreement. (EU-Ukraine Association Agreement, (Exhibit UKR-111), pp. 13-137.) This part of the EU-Ukraine Association Agreement provides for the progressive formation of a free trade area covering goods and services. (Ibid. Article 25, p. 13.) In its opening statement at the second meeting of the Panel, Ukraine explains that the "economic part" of the EU-Ukraine Association Agreement contains a "free trade agreement establishing the Deep and Comprehensive Free Trade Area (DCFTA)". (Ukraine's opening statement at the second meeting of the Panel, para. 60.) The Panel refers to the DCFTA unless it specifically means the economic part of the EU-Ukraine Association Agreement.

[28] UN General Assembly Resolution No. 68/262 "Territorial Integrity of Ukraine", 27 March 2014, A/RES/68/262, (UN General Assembly Resolution No. 68/262, 27 March 2014), (Exhibit UKR-89), p. 2. This Resolution—introduced by Ukraine, Germany, Poland, Lithuania, Canada and Costa Rica—was supported by 100 UN Member States, with 11 voting against (including Russia), 58 abstentions and 24 absent. (UN General Assembly Official Records, A/68/PV.80, 80th meeting, 27 March 2014, p. 17.)

[29] UN General Assembly Resolution No. 68/262, 27 March 2014, (Exhibit UKR-89), p. 1.

[30] UN General Assembly Resolution No. 71/205 "Situation of Human Rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)", 19 December 2016, A/RES/71/205, (UN General Assembly Resolution No. 71/205, 19 December 2016), (Exhibit UKR-91). This Resolution received 70 votes in favour, 26 against (including Russia) and 77 abstentions. (UN General Assembly Official Records, A/71/PV.65, 19 December 2016, pp. 40-41.)

[31] Ibid. p. 2. The specific reference is to the prohibitions on the occupying Power compelling protected persons to serve in its armed or auxiliary forces. (See Article 130 of the Convention relative to the Treatment of Prisoners of War, done at Geneva, 12 August 1949, UN Treaty Series, Vol. 75, p. 135; and Article 147 of the Convention relative to the Protection of Civilian Persons in Time of War, done at Geneva, 12 August 1949, UN Treaty Series, Vol. 75, p. 287.)

[32] These import bans are imposed by Resolution No. 778, (Exhibits UKR-10, RUS-7). The import bans had been authorized by the President of the Russian Federation the previous day through Decree of the President of the Russian Federation No. 560, "On the application of certain special economic measures to ensure the security of the Russian Federation", dated 6 August 2014, (Decree No. 560), (Exhibits UKR-9, RUS-3). Decree No. 560 established the original parameters for the Russian Government to impose import bans on certain agricultural products, raw materials and foodstuffs originating in the countries that had decided to impose economic sanctions against Russian legal entities or individuals, or joined in such a decision. Decree No. 560 was subsequently extended by Decree No. 320 of 24 June 2015, Decree No. 305 of 29 June 2016 and Decree No. 293 of 30 June 2017. Decree No. 560 was in force until 31 December 2018. (Decree of the President of the Russian Federation No. 293, "On extending certain special economic measures in the interest of ensuring the security of the Russian Federation", dated 30 June 2017, (Decree No. 293), (Exhibit UKR-71).) Both parties advised in the interim review stage that Decree No. 560 has since been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018.

designated checkpoints on the Russian side of the external border of the EaEU. These 2014 transit restrictions are among those challenged by Ukraine in this dispute.[33]

7.11. In September 2014, following discussions with Russia, both the European Union and Ukraine agreed to postpone the application of the economic part of the EU-Ukraine Association Agreement until 31 December 2015.[34] Also in September 2014, the Russian Government adopted Resolution No. 959, which provided that Ukrainian goods would be subject to tariffs at the EaEU rates as of 10 days from the date on which the Russian Government was notified of action by Ukraine to implement the economic part of the EU-Ukraine Association Agreement.[35]

7.12. On 13 August 2015, the Russian Government adopted Resolution No. 842 which, among other things, amended Resolution No. 778 to add further countries to the list of countries whose exports are subject to the Resolution No. 778 import bans, including Ukraine. However, with respect to Ukraine, Resolution No. 842 provided that the import bans would be applied from the effective date of Resolution No. 959 (referred to above), but no later than 1 January 2016.[36] Subsequent negotiations between the European Commission, Ukraine and Russia, aimed at achieving solutions to Russia's concerns about the DCFTA, had failed by December 2015.[37] On 21 December 2015, the Russian Government adopted Resolution No. 1397, which provided that the import bans in respect of the goods listed in Resolution No. 778 would apply to goods of Ukrainian origin as of 1 January 2016.[38] The European Union and Ukraine have provisionally applied the DCFTA as of 1 January 2016.[39]

7.13. In response to the provisional application by the European Union and Ukraine of the economic part of the EU-Ukraine Association Agreement, the Russian State *Duma* passed a law on 22 December 2015, effective as of 1 January 2016, purporting to suspend the CIS-FTA with respect to Ukraine.[40] The Russian State Legal Department stated that Russia's suspension of the CIS-FTA with respect to Ukraine was due to the entry into force of the economic part of the EU-Ukraine Association Agreement "without reaching a legally binding agreement that would meet

[33] See para. 7.1.d above.

[34] RBK, "Putin suspended the free trade agreement with Ukraine", dated 16 December 2015, available at: http://www.rbc.ru/politics/16/12/2015/567178fe9a7947944e73b0a4, (RBK article), (Exhibit UKR-80); and Press Release, "The trade part of the EU-Ukraine Association Agreement becomes operational on 1 January 2016", dated 31 December 2015, European Commission, available at: http://europa.eu/rapid/press-release_IP-15-6398_en.htm (European Commission Press Release), (Exhibit UKR-53). As stated above in fn 27, the "economic part" of the EU-Ukraine Association Agreement contains a free trade agreement establishing the DCFTA. (See Ukraine's opening statement at the second meeting of the Panel, para. 60.) The EU-Ukraine Association Agreement entered into force on 1 September 2017, following the deposit of the last instrument of ratification or approval. (See Official Journal of the European Union L 193/1, 25 July 2017.) In October 2015, the Russian Prime Minister was reported as stating that Russia's position was that Ukraine could not simultaneously participate in free trade areas with both Russia and the European Union. Russia considered that this situation would pose a threat of re-export of European goods in the guise of Ukrainian goods. (RBK article, (Exhibit UKR-80).)

[35] Resolution No. 959, (Exhibit RUS-24), p. 2. A Ukrainian news agency report in December 2015 also referred to statements by the Russian Prime Minister that, if Ukraine chose to belong to a trade zone different from the CIS-FTA, it would lose the zero-tariff benefits of the FTA with Russia and that, as of 1 January 2016, tariffs on imports into Russia of Ukrainian goods would be 6% on average. (UNIAN Information Agency, "Putin signed and amended the law on the suspension of the FTA with Ukraine", dated 30 December 2015, available at: https://economics.unian.net/finance/1226612-putin-podpisal-zakon-o-priostanovlenii-zst-s-ukrainoy.html, (UNIAN Information Agency Article), (Exhibit UKR-78).)

[36] Resolution No. 842, (Exhibit UKR-13).

[37] RBK article, (Exhibit UKR-80); and UNIAN Information Agency Article, (Exhibit UKR-78).

[38] Resolution No. 1397, (Exhibit UKR-15).

[39] Ukraine's first written submission, para. 25. Ukraine refers to the European Commission Press Release, (Exhibit UKR-53). The political part of the EU-Ukraine Association Agreement, which was signed on 21 March 2014, has been provisionally applied since 1 November 2014. (Notice concerning the provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, L 311/1, 31 October 2014, (Exhibit UKR-112).)

[40] Federal Law No. 410-FZ of the Russian Federation, "On Suspending by the Russian Federation of the Treaty on a Free Trade Area with respect to Ukraine", dated 30 December 2015, (Exhibit UKR-47); and Decree of the President of the Russian Federation No. 628, "About suspension of validity by the Russian Federation of the free trade area concerning Ukraine", dated 16 December 2015, (Exhibit UKR-76). See also UNIAN Information Agency Article, (Exhibit UKR-78).

the interests of Russia" and the fact that "such an act constitutes a fundamental change of circumstances, which were essential for Russia at the conclusion of the [CIS-FTA]."[41]

7.14. Russia is also alleged by Ukraine to have banned imports of various Ukrainian goods since 2013, according to a request for consultations filed by Ukraine in October 2017[42], in connection with the following alleged Russian measures:

a. a general ban on the importation of Ukrainian juice products, including baby food (since July 2014);

b. a ban on the importation of alcoholic beverages, beer and beer beverages produced by three Ukrainian producers (since August 2014);

c. a ban on the importation of confectionary products produced by a specific confectionary producer (since July 2013) as well as a more general ban on imports of all Ukrainian confectionary products (since September 2014); and

d. a ban on the importation of wallpaper and wall coverings produced by four Ukrainian producers (since April 2015).[43]

7.15. In the same request for consultations, Ukraine also challenges what it refers to as transit bans on Ukrainian juice products and confectionary products, which are said to apply as a result of the import bans, "separately and in addition to" the transit bans at issue in this dispute, which also affect the same products.[44]

7.16. Also, as of 1 January 2016, Russia:

a. imposed customs duties at the EaEU rates on imports of goods from Ukraine[45];

b. included goods of Ukrainian origin within the import bans on agricultural products, raw materials and food that it had imposed since August 2014 under Resolution No. 778 in response to countries that had imposed sanctions against it[46]; and

c. imposed certain restrictions and bans on transit, namely: (i) restrictions on transit by road and rail from Ukraine, destined for Kazakhstan (and subsequently, for the Kyrgyz Republic), requiring that such transit from Ukraine across Russia may occur only from Belarus and subject to additional conditions related to identification seals and registration cards, both on entering and on leaving Russian territory, at specified control points on the Belarus-Russia border and the Russia-Kazakhstan border, respectively[47]; and (ii) "temporary" bans on transit by road and rail from Ukraine of:

   i. goods which are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and

[41] Print-screen of the website of the President of the Russian Federation, "The law on suspension of the FTA Agreement with Ukraine is signed", dated 30 December 2015, available at: kremlin.ru/acts/news/51091, (Exhibit UKR-84). See also fn 34 above.

[42] WT/DS532/1, dated 19 October 2017. The Panel refers to Ukraine's request for consultations in WT/DS532/1 solely as factual background but does not link it to Ukraine's complaint in the present dispute. (See Article 3.10 of the DSU).

[43] See WT/DS532/1, dated 19 October 2017, paras. 1, 13, 16, 23, 34, 48 and 55. The alleged WTO-inconsistencies include Articles I:1, V, X and XI:1 of the GATT 1994, various provisions of the Agreement on Technical Barriers to Trade (TBT Agreement), provisions of Russia's Accession Protocol, and the Agreement on Trade Facilitation. (Ibid. paras. 13, 15, 22, 31, 33, 43, 45, 47, 54, 65 and 67.)

[44] WT/DS532/1, dated 19 October 2017, paras. 17 and 49.

[45] Resolution No. 959, (Exhibit RUS-24).

[46] Resolution No. 1397, (Exhibit UKR-15).

[47] See para. 7.1.a above.

ii. goods which fall within the scope of the import bans on agricultural products, raw materials and food imposed pursuant to Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic.

7.17. The 2016 transit restrictions and bans in item (c) above are among the measures that are challenged by Ukraine in this dispute.[48]

7.18. Russia, for its part, has separately alleged that Ukraine has imposed economic sanctions against Russia since 2015, as is evident from the following:

a. A request for consultations filed by Russia in May 2017[49], which alleges that Ukraine has imposed import bans on Russian food products, spirits and beer, cigarettes, railway and tram track equipment, diesel-electric locomotives, chemicals and certain plant products, which were allegedly adopted by Ukraine on 30 December 2015.[50] The consultations request also covers a number of other measures allegedly adopted by Ukraine in 2016, including: (i) restrictions on the importation or distribution of printed materials, motion pictures, TV programs and other video products originating from Russia[51]; (ii) the exclusion of Russian-used vehicles from an excise duty reduction on used vehicles[52]; (iii) a number of personal, economic, and other sanctions in respect of Russian persons (e.g. preventing movement of capital from Ukraine in respect of legal entities with Russian shareholding, blocking of assets, bans on doing business)[53]; and

[48] See para. 7.1.b above.

[49] WT/DS525/1, dated 1 June 2017. The alleged WTO-inconsistencies include Articles I:1, III:4, X and XI:1 of the GATT 1994; Articles II, III, XI, XVI and XVII of the General Agreement on Trade in Services (GATS); and various provisions of the Agreement on Import Licensing Procedures (Import Licensing Agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the TBT Agreement as well as aspects of Ukraine's WTO Accession Protocol. (Ibid. paras. 2 and 4-8.) The Panel refers to Russia's request for consultations in WT/DS525/1 solely as factual background but does not link it to Ukraine's complaint in the present dispute. (See Article 3.10 of the DSU.)

[50] WT/DS525/1, p. 1. Russia refers in its consultations request to Resolution of the Cabinet of Ministers of Ukraine No. 1147, "On the prohibition of importation of products originating in the Russian Federation into the customs territory of Ukraine", dated 30 December 2015, (Exhibit RUS-19), as amended; and Resolution No. 28 of 20 January 2016 "On Amendments to the List of Goods Originating in the Russian Federation and Prohibited for Imports into Ukraine", which has not been submitted as an exhibit in this dispute. (Ibid. p. 1.)

[51] Ibid. pp. 2 and 7. Russia's consultations request refers to Law No. 1780-VII of 8 December 2016, "On Amendments to Certain Laws of Ukraine in relation to Restricting Access to Foreign Printed Materials with Anti-Ukrainian Content to the Ukrainian Market" and Law No. 159-VIII of Ukraine, dated 5 February 2015 and Law No. 1046-VIII of Ukraine, dated 29 March 2016 "On Amendments to Article 15-1 of Law of Ukraine "On Cinematography"". (Ibid.)

[52] Ibid. pp. 3-4. Russia's consultations request refers to Law No. 1389-VIII of 31 May 2016, "On Amendments to Subsection 5 of Section XX "Transitional Provisions" of the Tax Code of Ukraine regarding the Promotion of Development of the Used Vehicles Market". (Ibid. p. 3.)

[53] Ibid. pp. 4-7. Russia's consultations request refers to (a) Resolution No. 829-R of the Cabinet of Ministers of Ukraine, dated 11 September 2014, "On Proposals for application of Personal Special and Other Restrictive Measures"; (b) Law No. 1005-VIII of 16 February 2016 "On Enactment of Certain Laws of Ukraine Aimed at the Improvement of the Privatization Process"; (c) Decree No. 756 of the Ministry of Economic Development and Trade of Ukraine, dated 28 April 2016, "On Application of Special Economic Sanctions – Temporary Suspension of Foreign Economic Activity within the Territory of Ukraine – In Respect of Foreign Economic Entities"; (d) Decree No. 63/2017 of the President of Ukraine, dated 16 March 2017, "On Decision of the National Security and Defence Council of Ukraine of 15 March 2017 'On Application of Personal Special Economic and other Restrictive Measures (Sanctions)'"; (e) Resolution No. 12 of the Board of the National Bank of Ukraine, dated 21 February 2017, "On Amendments to Certain Regulations of the National Bank of Ukraine"; (f) Resolution No. 25 of the National Bank of Ukraine, dated 21 March 2017, "On Amendments to Resolution of the National Bank of Ukraine of 1 October 2015 No. 654"; and (g) Resolution No. 399 of the National Bank of Ukraine, dated 1 November 2016, "On Amendments to Resolution [of] the National Bank of Ukraine of 1 October 2015 No. 654". Russia's consultations request also refers to Decree No. 133/2017 of the President of Ukraine, dated 15 May 2017, "On Decision of the National Security and Defence Council of Ukraine of 28 April 2017 "On Application of Personal Special Economic and Other Restrictive Measures (Sanctions)"". (WT/DS525/1, pp. 4-7.) In its second written submission in this dispute, Russia refers to Decree of the President of Ukraine No. 133/2017, "On the Decision of the National Security and Defense Council of Ukraine 'On application of personal special economic and other restrictive measures (sanctions)'", dated 28 April 2017, (Exhibit RUS-20). Russia states that this Decree contains a consolidated list of special economic measures (i.e. sanctions) applied by Ukraine in respect of Russian legal and natural persons. (Russia's second written submission, para. 28.)

(iv) the suspension of accreditation of journalists and representatives of certain Russian mass media.[54]

b. Russia's contentions that Ukraine has restricted transit of banned Russian goods through designated checkpoints at the Russia-Belarus border.[55]

c. Russia's contentions that sanctions imposed by Ukraine in respect of Russia have expanded in 2018, with Ukraine allegedly banning the exportation of certain Ukrainian civil aviation products, among other things.[56]

7.19. Russia also asserts that Ukraine suspended traffic through certain railway corridors on the Ukraine-Russia border in June 2014, and suspended traffic through certain checkpoints on the Ukraine-Russia border in May and July of 2014 and then in February 2015.[57]

7.4 Order of analysis

7.20. This is the first dispute in which a WTO dispute settlement panel is asked to interpret Article XXI of the GATT 1994 (or the equivalent provisions in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)).[58]

7.21. Ukraine presents its case as an ordinary trade dispute in which Russia has imposed measures that are inconsistent with certain of its obligations under the GATT 1994 and commitments in Russia's Accession Protocol.

7.22. Russia, on the other hand, considers that the dispute involves obvious and serious national security matters that Members have acknowledged should be kept out of the WTO, an organization which is not designed or equipped to handle such matters. Russia cautions that involving the WTO in political and security matters will upset the very delicate balance of rights and obligations under the WTO Agreements and endanger the multilateral trading system.

7.23. Consistent with this position, Russia does not present arguments or evidence to rebut Ukraine's specific claims of inconsistency with Articles V and X of the GATT 1994, or commitments in Russia's Accession Protocol. Russia's case is confined to arguments that certain measures and claims are outside the Panel's terms of reference, and its overarching argument that the Panel lacks

[54] WT/DS525/1, dated 1 June 2017, p. 7. Russia's consultations request refers to Resolution No. 185-VIII of the Verhovna Rada, "On the Temporary Accreditation Suspension of Journalists and Representatives of Certain Russian Mass Media by Public Authorities", dated 12 February 2015. (Ibid.)

[55] Russia's second written submission, para. 27 (referring to Resolution of the Cabinet of Ministers of Ukraine No. 20, "On approval of the list of checkpoints through the state border of Ukraine, through which the goods are imported in transit mode", dated 20 January 2016, (Exhibit RUS-16).)

[56] Ibid. para. 29 (referring to Decree of the President of Ukraine No. 58/2018, "On the decision of the Ukrainian National Security and Defense Council 'Urgent measures on security of the national interests of the state in the sphere of aircraft engine building'", dated 1 March 2018, (Exhibit RUS-22); and Decree of the President of Ukraine No. 57/2018, "On entry into force of the Decision of the Council on National Security and Defense of Ukraine of 1 March 2018 'On application of personal special economic and other restrictive measures (sanctions)'", dated 6 March 2018, (Exhibit RUS-23)).

[57] Ibid. para. 25. Ukraine suspended traffic through railway corridor 8 "Chervona Mohyla" (or "Krasnaya Mogila") by way of a telegram from the Ukrainian railway company *Ukrzaliznytsia*, in which the latter invoked Article 29 of the Railway Code of Ukraine, on the basis of "force majeure circumstances". (Ibid. (referring to "Telegram of "Ukrzaliznytsia" (Ukrainian Railways) No. CZM-14/946", dated 6 June 2014, (Exhibit RUS-14).) Ukraine suspended traffic through the Izvaryne checkpoint by the Ministry of Revenue and Duties of Ukraine. (Ibid. (referring to "Print-screen of the website of the State Border Guard Service of Ukraine", retrieved from: https://dpsu.gov.ua/ua/news/na-lyganshhini-stvorjujutsja-zagoni-prikordonnoi-samooboroni/, (Exhibit RUS-15).) Ukraine suspended traffic through the checkpoint Uspenskaya-Kvashino in accordance with the telegram of *Ukrzaliznytsia*, also on the basis of "force majeure circumstances". (Ibid. (referring to "Telegram of 'Ukrzaliznytsia' (Ukrainian Railways) No. CZM-14/1134", dated 8 July 2014, (Exhibit RUS-18).) Finally, the Cabinet of Ministers of Ukraine suspended traffic through 23 checkpoints on the Ukraine-Russia border. (Ibid. (referring to Regulation of the Cabinet of Ministers of Ukraine No. 106-r, "On the closure of checkpoints across the state border", dated 18 February 2015, (Exhibit RUS-17).)

[58] See Article XIV*bis* of the GATS and Article 73 of the TRIPS Agreement.

jurisdiction to address any of the issues in this dispute owing to Russia's invocation of Article XXI(b)(iii) of the GATT 1994.

7.24. The novel and exceptional features of this dispute, including Russia's argument that the Panel lacks jurisdiction to evaluate the WTO-consistency of the measures, owing to Russia's invocation of Article XXI(b)(iii) of the GATT 1994, require that the Panel first determine the order of analysis that it deems most appropriate for the present dispute.[59] Accordingly, the Panel considers that it must address the jurisdictional issues first before going into the merits.

7.25. The Panel must therefore determine, first, whether it has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994.[60] If the Panel finds that it does not, then it will be unable to make findings on Ukraine's claims of inconsistency with Articles V and X of the GATT 1994 and with commitments in Russia's Accession Protocol.

7.26. As the Panel explains in greater detail in Section 7.5.3 below, Russia's argument that the Panel lacks jurisdiction to address the matter is based on its interpretation of Article XXI(b)(iii) of the GATT 1994, i.e. as being totally "self-judging". Consequently, in order to address Russia's jurisdictional objection, the Panel must first interpret Article XXI(b)(iii) of the GATT 1994.

7.5 Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.5.1 Main arguments of the parties

7.27. Russia asserts that there was an emergency in international relations that arose in 2014, evolved between 2014 and 2018, and continues to exist.[61] Russia asserts that this emergency presented threats to Russia's essential security interests.[62] Russia argues that, under Article XXI(b)(iii), both the determination of a Member's essential security interests and the determination of whether any action is necessary for the protection of a Member's essential security interests are at the sole discretion of the Member invoking the provision.[63]

7.28. While Russia acknowledges that the Panel was established with standard terms of reference under Article 7.1 of the DSU[64], it argues that the Panel nevertheless lacks jurisdiction to evaluate measures taken pursuant to Article XXI of the GATT 1994.[65] In Russia's view, the explicit wording of Article XXI confers sole discretion on the Member invoking this Article to determine the necessity, form, design and structure of the measures taken pursuant to Article XXI.[66] Russia considers that

[59] The Appellate Body has stated that panels are free to structure the order of their analysis as they see fit, unless there is a "mandatory sequence of analysis which, if not followed, would amount to an error of law" or would "affect the substance of the analysis itself". (Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.5.)

[60] See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

[61] Russia's first written submission, para. 16; and opening statement at the second meeting of the Panel, para. 26.

[62] Russia's first written submission, para. 16. Russia characterizes the situation that gave rise to the need to impose the transit measures at issue in this dispute as an internationally wrongful act, or an unfriendly act of a foreign state or its bodies and officials, which involved unilateral actions applied in respect of Russia, particularly by the European Union and Ukraine "in violation of the UN Charter and that are impairing the authority of the UN Security Council". (Russia's second written submission, paras. 19 and 21.) Russia also maintains that the original circumstances that led to the imposition of the challenged measures "were publicly available and known to Ukraine". (Russia's opening statement at the first meeting of the Panel, para. 30. See also Russia's second written submission, para. 18.)

[63] Russia's first written submission, para. 47; and closing statement at the first meeting of the Panel, para. 16. See also Russia's opening statement at the second meeting of the Panel, paras. 22-23; and response to Panel question No. 1 after the second meeting of the Panel, paras. 1-3.

[64] Russia's opening statement at the first meeting of the Panel, para. 45. Moreover, Russia alleges that certain measures and claims are outside the Panel's terms of reference owing to alleged defects in Ukraine's panel request and in Ukraine's demonstration of the existence of certain measures. (See ibid. paras. 6-28.)

[65] Russia's opening statement at the first meeting of the Panel, para. 46. See also Russia's first written submission, para. 7.

[66] Russia's opening statement at the first meeting of the Panel, para. 46.

the issues that arise from its invocation of Article XXI(b)(iii) go beyond the scope of trade and economic relations among Members and are outside the scope of the WTO:

> [T]he WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international relations, and whether such emergency exists in a particular case.[67]

7.29. Russia regards Article XXI(b) of the GATT 1994 as preserving the "right" of each Member to react to wars and other emergencies in international relations in the way that the Member itself considers necessary. Any other interpretation of Article XXI(b) would "result in interference in [the] internal and external affairs of a sovereign state".[68] Accordingly, it is sufficient for a Member to state that the measures taken are actions that it considers necessary for the protection of its essential security interests, taken in time of war or other emergency in international relations. A Member's subjective assessment cannot be "doubted or re-evaluated by any other party" or judicial bodies as the measures in question are not ordinary trade measures regularly assessed by WTO panels.[69]

7.30. Russia therefore submits that the Panel should limit its findings to recognizing that Russia has invoked Article XXI of the GATT 1994, "without engaging in any further exercise, given that this panel lacks jurisdiction to evaluate measures taken with a reference to Article XXI of the GATT".[70]

7.31. Ukraine interprets Article XXI of the GATT 1994 as laying down an affirmative defence for measures that would otherwise be inconsistent with GATT obligations.[71] Ukraine rejects the notion that Article XXI provides for an exception to the rules on jurisdiction laid down in the GATT 1994 or the DSU.[72] Ukraine considers that the Panel has jurisdiction to examine and make findings and recommendations with respect to each of the provisions of the covered agreements cited by either Ukraine or Russia, in keeping with the Panel's terms of reference under Article 7 of the DSU and the general standard of review under Article 11 of the DSU.[73] Ukraine also considers that, if Article XXI of the GATT 1994 were non-justiciable, it would imply that in a dispute involving a measure that is WTO-inconsistent, the invoking Member, rather than a panel, would decide the outcome of the dispute by determining that the WTO-inconsistent measure is nonetheless justified. In Ukraine's view, such unilateral determination by an invoking Member would be contrary to Article 23.1 of the DSU.[74]

7.32. Ukraine argues that Russia, by merely referring to an emergency in international relations that occurred in 2014, fails to discharge its burden to show the legal and factual elements of a defence under Article XXI(b)(iii) of the GATT 1994, namely, that there was a serious disruption in international relations constituting an emergency that is alike a war that is sufficiently connected to Russia so as to result in a genuine and sufficiently serious threat to its essential security interests and therefore to justify each and every measure at issue as being necessary to protect those

[67] Russia's closing statement at the first meeting of the Panel, para. 6. Russia also argues that the Panel, and the WTO more generally, "being trade mechanisms are not in a position to determine whether sovereign states are at war. Similar logic applies to 'other emergency in international relations'. Only sovereign states may declare the status of their relations with other sovereign states." (Ibid. para. 13.)

[68] Ibid. para. 12.

[69] Russia's opening statement at the second meeting of the Panel, para. 23. See also Russia's second integrated executive summary, para. 31. Russia therefore considers that Article XXI(b) of the GATT 1994, as well as Article XXI(a) are "self-judging". (Russia's closing statement at the first meeting of the Panel, para. 11.)

[70] Ibid. para. 20.

[71] Ukraine's opening statement at the first meeting of the Panel, para. 95. Ukraine points to the fact that the phrase "[n]othing in this Agreement", which introduces Article XXI, is the same phrase that introduces the general exceptions provision in Article XX. (Ibid.)

[72] Ibid. para. 96. Ukraine also notes that the DSU does not contain a provision providing for a security exception, nor does any other provision of the GATT 1994 or of the other WTO covered agreements offer a basis for excluding Article XXI from the jurisdiction of WTO panels and the Appellate Body. (Ibid.)

[73] Ibid. paras. 98-99.

[74] Ibid. paras. 103-107.

interests.[75] Ukraine also argues that Russia's allegation that the basis for the measures and the original circumstances leading to their imposition were publicly available and known to Ukraine is of no consequence in determining whether Russia has satisfied its burden of proof.[76] Ukraine submits that the facts before the Panel show that Decree No. 1 was adopted due to the entry into force of the economic part of the EU-Ukraine Association Agreement, and that the text of the instruments implementing the 2014 measures shows that these were taken "[i]n view of detection of gross violations during the transit of such goods through the territory of the Republic of Belarus".[77] Finally, Ukraine argues that the determination of whether the action was taken in time of war or other emergency in international relations under subparagraph (iii) of Article XXI(b) is to be objectively made by the Panel.[78]

7.33. Ukraine argues that, although the text of Article XXI(b) expressly states that it is for the invoking Member to decide what action it considers necessary for the protection of its essential security interests, this does not mean that the Member enjoys "total discretion".[79] Had the standard been "total discretion", there would have been no reason to include separate paragraphs in Article XXI and to distinguish between different types of security interests that may be invoked in order to justify a measure that is otherwise inconsistent with the GATT 1994.[80] Furthermore, a panel's objective assessment must include an examination of whether a Member invoking Article XXI has done so in good faith, notwithstanding the absence of an introductory paragraph similar to the chapeau to Article XX.[81]

7.34. As to the standard of review under Article XXI(b)(iii), Ukraine argues that a panel's objective assessment must include an examination of whether the invoking Member has applied Article XXI in good faith and therefore has not abused the invocation "to pursue protectionist objectives or to apply a disguised restriction on trade".[82] Ukraine argues that, based on the ordinary meaning of the text of Article XXI(b) and similar to the analysis under the subparagraphs of Article XX, justification under Article XXI also requires that there be a rational relationship between the action and the protection of the essential security interest at issue.[83] This analysis involves a consideration of the structure, content and design of the challenged measures. The phrase "for the protection of its essential security interests" should be interpreted in the light of the case law on Article XX of the GATT 1994 (in particular, regarding Article XX(a) on the protection of public morals) to mean that "all WTO Members have the right to determine their own level of protection of essential security interests", from which it would follow that a panel must not second-guess that level of protection.[84] However, it is for panels rather than for Members to interpret the phrases "for the protection of its essential security interests" and "which it considers necessary" in accordance with customary rules of interpretation of public international law.[85] In light of those interpretations, a panel must then establish: (i) whether the interests or reasons advanced by a defendant in connection with the measures at issue can reasonably be considered as falling within the meaning of the phrase "its essential security interests" and (ii) whether the measures at issue are directed at safeguarding

[75] Ukraine's opening statement at the first meeting of the Panel, paras. 150 and 158; and opening statement at the second meeting of the Panel, para. 64. See also Ukraine's second written submission, paras. 133-136 and 138.

[76] Ukraine's closing statement at the first meeting of the Panel, para. 6; and second written submission, para. 137. Moreover, Ukraine argues that Russia may not rely on Article XXI(a) of the GATT 1994 to evade its burden of proof under Article XXI(b)(iii) of the GATT 1994. (See Ukraine's closing statement at the first meeting of the Panel, para. 11; and second written submission, paras. 159-163.)

[77] Instruction No. FS-NV-7/22886 of the *Rosselkhoznadzor*, dated 21 November 2014, (Veterinary Instruction), (Exhibits UKR-21, RUS-10). See also Ukraine's first written submission, paras. 27, 32-33, and 58; and second written submission, para. 138.

[78] Ukraine's opening statement at the first meeting of the Panel, paras. 148-149.

[79] Ibid. para. 135.

[80] Ibid. paras. 109-110; and Ukraine's response to Panel question No. 1 after the second meeting, para. 5.

[81] Ukraine's opening statement at the first meeting of the Panel, paras. 122-123.

[82] Ibid. paras. 122 and 125. (fn omitted)

[83] Ibid. paras. 137-139.

[84] Ibid. para. 141. Ukraine submits that it is "not contested in these proceedings that it is for each WTO Member to define what matters affect its national security and what level of protection it pursues. Each WTO Member's position might be different and may evolve over time. Both matters fall outside the scope of review of a panel." (Ukraine's response to Panel question No. 2 following the second meeting of the Panel, para. 78.)

[85] Ukraine considers that not every security interest will be an "essential" security interest. (Ukraine's opening statement at the first meeting of the Panel. paras. 143-145.)

the defendant's security interests, meaning that there is a rational relationship between the action taken and the protection of the essential security interest at issue.[86] If a panel finds that the Member's measure is taken "for the protection of its essential security interests", a panel would then review whether, based on the facts available, the defendant "could reasonably arrive at the conclusion that the measures taken are necessary for protecting its essential security interests".[87]

7.5.2 Main arguments of the third parties

7.35. Australia argues that Article 7 of the DSU vests the Panel with jurisdiction to examine and make findings with respect to each of the relevant provisions in the covered agreements that Ukraine and Russia have cited.[88] Russia's invocation of Article XXI(b)(iii) of the GATT 1994, which Australia considers to be an exception to Members' obligations under the GATT 1994, places the provision squarely within the Panel's jurisdiction.[89]

7.36. Australia regards the language "which it considers necessary" in the first part of Article XXI(b) to indicate that it is for a Member to determine both its essential security interests and the actions it considers necessary for their protection. However, this deference to the determinations of a Member does not preclude a panel from undertaking any review of a Member's invocation of Article XXI(b).[90] Rather, in reviewing the "necessity" of an action under Article XXI(b), a panel is limited to determining whether the Member in fact considers the action necessary, for example, by reference to the Member's statements and conduct. Australia considers that although the nature and scope of review of the "necessity" aspect is limited, a panel does have a broader role in determining whether that (necessary) action was taken "*for the protection of*" a Member's essential security interests. In Australia's view, to arrive at such a determination, a panel should examine if there is a "sufficient nexus" between the action taken and the Member's essential security interests.[91]

7.37. Brazil argues that, by invoking Article XXI, Russia did the opposite of excluding the Panel's jurisdiction: it obliged the Panel to examine the provision by bringing it into the "matter" at hand.[92] Moreover, an exclusion of jurisdiction would deprive the complainant of its right to a decision and would be contrary to Article 3.3 of the DSU.[93] Brazil considers Article XXI to be an affirmative defence. Brazil interprets Article XXI(b) as containing both a "subjective" component, i.e. a judgment regarding the necessity of a measure, and an "objective component", which relates to the presence of at least one of the circumstances listed in subparagraphs (i) through (iii).[94] Although the language "which it considers" in the first part of Article XXI(b) confers a great deal of

[86] Ukraine's response to Panel question No. 2 following the first meeting of the Panel, paras. 76-80. See also Ukraine's response to Panel question No. 1 following the second meeting of the Panel, paras. 8 and 10.

[87] Ukraine's response to Panel question No. 2 following the first meeting of the Panel, para. 81. Ukraine submits that the wording of the phrase "which it considers necessary" suggests that the standard of review cannot be the same as the standard of review with respect to the necessity test under Article XX of the GATT 1994. (Ibid.) In its closing statement at the second meeting of the Panel (at para. 5) and in its response to Panel question No. 1 following the second meeting of the Panel (at para. 11), Ukraine uses the term "plausibly" (rather than reasonably) to describe this standard of review.

[88] Australia's third-party submission, paras. 8-10.

[89] Australia's third-party statement, paras. 2 and 9.

[90] Ibid. para. 11.

[91] Ibid. paras. 15 and 17. (emphasis original) Australia submits that, if action taken by a Member is not capable of making some contribution to protecting its essential security interests, it would be reasonable for a panel to determine that the action was *not in fact* taken for such a purpose under Article XXI(b). (Ibid. para. 18.)

[92] Brazil's third-party statement, para. 8.

[93] Ibid. para. 9. Brazil refers to "the negotiation history" of Article XXI of the GATT 1994 and state practice to argue that it was never the intention of the Members that the WTO in general or the WTO dispute settlement mechanism in particular would be the proper venue to "discuss security matters". (Brazil's third-party submission, para. 5.) However, Brazil notes that Members were at the same time mindful that Article XXI could be "improperly used to prevent measures of a strictly commercial nature from being challenged in the dispute settlement mechanism". (Ibid. para. 6.) Brazil concludes that, in order to strike a balance, "there was an option to limit the circumstances in which Article XXI may be invoked, which seems to indicate that it was a common understanding that differences regarding the application of Article XXI would not necessarily fall outside the purview of a Panel, should a Member consider that those circumstances were not in place." (Ibid.)

[94] Brazil's third-party statement, para. 16. Brazil argues that a panel should begin its analysis by determining whether one or more of the circumstances in subparagraphs (i) through (iii) are present. If none are present, then the panel need not proceed with the rest of the analysis. (Ibid. para. 17.)

discretion on the Member regarding the necessity of the measure, a panel must nevertheless review the Member's motivation for invoking Article XXI(b)(iii) to ensure that there is some connection between the measure and the state of war or other emergency in international relations, and whether there is a "plausible link" between the measure and the purpose stated in the Member's motivation for imposing the measure.[95]

7.38. Brazil considers that, unlike the determination of whether an action relates to fissionable materials, traffic in arms, or war, in subparagraphs (i), (ii) and (iii) of Article XXI(b), the question of what constitutes an emergency in international relations is "quite subjective and quite difficult to discern without entering into a discussion on what constitutes a Member's national security interest".[96] Nevertheless, Brazil considers that the invoking Member bears the burden of adducing evidence that the challenged measures constitute action taken in time of war or other emergency in international relations.[97] An invoking Member must also demonstrate some degree of connection between the measure and the state of war or other emergency in international relations, and whether there is a plausible link between the measure that the Member wishes to justify and the purpose stated in its motivation.[98]

7.39. Canada argues that if Article XXI of the GATT 1994 is invoked by a Member in a dispute, then its applicability is justiciable unless consideration of the Article has been excluded from a panel's terms of reference.[99] Canada further observes that the DSU provides that panels do not have the discretion to decline to exercise the jurisdiction conferred on them by their terms of reference, nor do they have the discretion not to discharge the obligations imposed on them by Article 11 of the DSU.[100] While Canada considers that Article XXI is an exception which can be invoked by a Member to justify measures that would otherwise not be consistent with its WTO obligations, it also regards Article XXI as "structurally and textually different from Article XX".[101] It therefore cautions against importing tests developed in the jurisprudence to interpret provisions such as Article XX.[102]

7.40. Canada interprets Article XXI(b)(iii) as providing for a "subjective" standard, according to which the invoking Member determines the interests, actions and necessity of actions, as well as the satisfaction of the conditions in subparagraph (iii).[103] While Canada considers the subjective standard and the particularly sensitive nature of the subject matter of Article XXI to mean that an invoking Member must be accorded a "high level of deference" by a panel, it also considers that an invoking Member must substantiate (albeit at a low standard) its good faith belief that the elements for its invocation of Article XXI(b)(iii) exist.[104]

7.41. China argues that the Panel has jurisdiction to review Russia's invocation of Article XXI of the GATT 1994 on the basis of the Panel's standard terms of reference and Articles 7.1 and 7.2 of the DSU.[105] China considers that Russia has invoked Article XXI as a defence to Ukraine's claims of inconsistency.[106] China urges the Panel to exercise extreme caution in its assessment of Russia's invocation of Article XXI(b)(iii), in order to maintain the delicate balance between preventing abuse of Article XXI and evasion of WTO obligations, on the one hand, and not prejudicing a Member's right to protect its essential security interests, including a Member's "sole discretion" regarding its own security interests, on the other hand.[107] China refers to the principle of good faith

[95] Brazil's third-party submission, paras. 28-30.
[96] Ibid. para. 8. For this reason, and in light of the absence of a common understanding of the scope of rights and obligations under Article XXI, Brazil cautions the Panel against "any interpretation that could impair a Member's ability to decide on the need to adopt the measures necessary to protect its national security". (Ibid. para. 9.)
[97] Brazil submits that Article XXI(a) of the GATT 1994 should not be interpreted as precluding the need for a Member to motivate its recourse to the exceptions of Article XXI(b). (Brazil's third-party statement, para. 26.)
[98] Ibid. paras. 28-29.
[99] Canada's third-party statement, para. 4.
[100] Canada's letter to the Chairman of the Panel, dated 14 November 2017.
[101] Canada's third-party statement, para. 6.
[102] Ibid. para. 5.
[103] Ibid. para. 6.
[104] Ibid. para. 8.
[105] China's third-party statement, paras. 3-5.
[106] Ibid. para. 6.
[107] China's third-party statement, para. 18.

embodied in Article 26 of the Vienna Convention on the Law of Treaties and argues that Members invoking Article XXI(b) should adhere to the principle of good faith.[108]

7.42. The European Union argues that Article XXI of the GATT 1994 does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and XXIII of the GATT 1994.[109]

7.43. Given the absence in Article XXI of an equivalent to the chapeau in Article XX, the analysis of Article XXI should consider whether a measure addresses the particular interest specified, and that there is a sufficient nexus between the measure and the interest protected.[110] The European Union argues that the terms "which it considers" in the first part of Article XXI(b) qualify only the term "necessary". Therefore, the existence of a war or other emergency in international relations in subparagraph (iii) should be interpreted to refer to objective factual circumstances which can be fully reviewed by panels.[111] While "essential security interests" should be interpreted so as to allow Members to identify their own security interests and their desired level of protection, a panel should, on the basis of the reasons provided by the invoking Member, review whether the interests at stake can "reasonably" or "plausibly" be considered essential security interests.[112] A panel must also review whether the action is "capable" of protecting a security interest from a threat. The European Union considers that the terms "which it considers" imply that "in principle" each Member may determine for itself whether a measure is "necessary" for the protection of its essential security interests.[113] A panel should nevertheless review this determination, albeit with due deference, to assess whether the invoking Member can plausibly consider the measure necessary and whether the measure is "applied" in good faith. This requires the invoking Member to provide the panel with an explanation as to why it considered the measure necessary.[114] Finally, the European Union argues that, when assessing the necessity of the measure and the existence of reasonably available alternatives, a panel should ascertain whether the interests of third parties which may be affected were properly taken into account.[115]

7.44. Japan argues that consideration of Russia's invocation of Article XXI of the GATT 1994 is within the Panel's terms of reference.[116] However, Japan also considers that Article XXI of the GATT 1994 is an "extraordinary provision" in that it recognizes the vital importance of Members' essential security interests, and the fundamental nature of their sovereign right to pursue such vital interests. This is reflected in the "deferential language" used in the provision. This being so, it may impose an "undue burden" on the WTO dispute settlement system to require panels to review a Member's invocation of Article XXI. Japan therefore urges the parties to make every effort to seek a mutually acceptable solution "in order to maintain the effective functioning of the WTO".[117]

7.45. Japan also notes the critical importance of national security interests to Members' fundamental sovereignty and the risk of the Panel adopting any interpretation that could impair a Member's ability to decide on the need to adopt measures necessary to protect its national security.[118] Japan therefore urges the Panel to "grant appropriate deference to the Members' judgement as to the necessity of taking actions to protect their essential security

[108] China's third-party statement, para. 19.

[109] European Union's third-party submission, para. 14; and third-party statement, para. 4. The European Union argues that the "matter" before the Panel in this case includes the defence under Article XXI invoked by Russia, as the Panel does not have special terms of reference. (European Union's third-party statement, para. 4.) The European Union further argues that it would be contrary to the objectives of the DSU reflected in Articles 3.2 and 23 to interpret Article XXI of the GATT 1994 as being non-justiciable because it would mean that the invoking Member would unilaterally decide the outcome of a dispute. (Ibid. para. 5.)

[110] Ibid. para. 11.

[111] Ibid. para. 14.

[112] Ibid. para. 17.

[113] Ibid. para. 21. The European Union submits that the term "necessary" in Article XXI(b) should be given the same meaning as in Article XX. (Ibid.)

[114] Ibid.

[115] Ibid. para. 23. The European Union argues that this is required by the preamble of the Decision Concerning Article XXI of the General Agreement (1982 Decision). (Ibid.)

[116] Japan's third-party submission, para. 30.

[117] Japan's third-party statement, paras. 7-8.

[118] Ibid. para. 10 (referring to Australia's third-party submission, para. 25; and Brazil's third-party submission, para. 9).

interests".[119] At the same time, Japan acknowledges that subparagraph (b)(iii) carefully circumscribes the situations that would allow Members to invoke a defence based on each Member's essential security interests. In addition, in Japan's view, considering the object and purpose of the GATT 1994 and the preparatory work for the ITO Charter, the discretion accorded to Members in deciding upon the actions that are necessary to protect their essential security interests is "not unbounded and must be exercised with extreme caution".[120]

7.46. Moldova disagrees with Russia's argument that the mere invocation of Article XXI(b)(iii) prevents WTO panels from reviewing trade issues that would otherwise be WTO-inconsistent.[121] Moldova therefore considers that, while Members have the right to define for themselves their essential security interests, and declare the necessity of protecting those interests, WTO panels have the right to review whether such Members apply WTO-inconsistent measures in good faith and in accordance with the requirements of Article XXI.[122]

7.47. Moldova considers that the Panel needs to assess whether the invoking Member "genuinely believes" that the measure taken is necessary to protect such Member's essential security interests. Moldova argues that the jurisprudence concerning the "necessity" of a measure sought to be justified under Articles XX(a), (b) or (d) of the GATT 1994 could be relevant to a panel's assessment of the necessity of action under Article XXI(b). Accordingly, Moldova argues that a panel assessing whether an action is "necessary" for purposes of Article XXI(b) should undertake a "weighing and balancing exercise", which considers the importance of the essential security interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness, complemented by an analysis of whether the measure is "apt to make a material contribution to the achievement of its objective".[123] Such an exercise should also include a determination of whether a WTO-consistent alternative measure is reasonably available to the invoking Member.[124] A panel should also determine if the measures at issue protect "essential security interests", which must meet a higher standard than, and can be distinguished from, "non-essential security interests".[125] Moldova considers that the invoking Member should demonstrate to a panel that "in addition to establishing the objective prerequisites in Article XXI(b)[] regarding the existence of an essential security interest", the measure does not "intentionally serve protectionist purposes".[126]

7.48. Singapore argues that the Panel has jurisdiction to consider Russia's invocation of Article XXI, on the basis of the Panel's standard terms of reference and Articles 7.1 and 7.2 of the DSU.[127] Singapore considers that the language "it considers necessary" in the first part of Article XXI(b) indicates that the invoking Member is allowed to determine "with a significant degree of subjectivity" what action it considers necessary to protect its essential security interests.[128] Singapore contrasts this "self-judging" aspect of Article XXI(b) with the text of Article XX.[129] Singapore argues that the "key" phrase "it considers necessary" in the first part of Article XXI(b) has been deliberately drafted to give a Member wide latitude to determine both the action necessary for the protection of its

[119] Japan's third-party statement, para. 10.
[120] Ibid. para. 11.
[121] Moldova's third-party submission, para. 18.
[122] Ibid. para. 21. Moldova points to the creation of the WTO as an international organization with a binding dispute settlement system administered by the DSB and the fact that the only mechanism for "opting-out" of the application of the obligations under the covered agreements is through the mechanism envisaged in Article XIII:1 of the WTO Agreement, which Russia did not invoke when it acceded to the WTO. (Ibid. paras. 23-24.)
[123] Moldova's third-party statement, para. 19.
[124] Ibid. para. 22.
[125] Ibid. para. 20.
[126] Ibid. para. 21.
[127] Singapore's third-party statement, paras. 8-11.
[128] Ibid. paras. 13-14. Singapore argues that WTO provisions which involve some margin of appreciation for a Member, such as the determination of the appropriate level of protection under the SPS Agreement, are not "anywhere close" to being as express and definitive regarding their "self-judging" nature as Article XXI(b). Therefore, a higher level of deference—i.e. a "significant margin of appreciation"—should be accorded to a Member's chosen level of protection, assessment of risk and the necessity of the measure taken for the protection of its essential security interests. (Ibid. paras. 18-19.)
[129] Given the textual differences between Articles XX and XXI, Singapore does *not* agree with an interpretation of Article XXI(b) which seeks to apply to that provision the analytical framework or necessity test developed under Article XX. (Singapore's third-party statement, para. 15.)

essential security interests (including the nature, scope and duration of the measure) and the necessity of the measure.[130] Singapore argues that a "significant margin of appreciation" should be accorded to a Member's assessments of its chosen level of protection and risk, as well as the necessity of a measure taken for the protection of its essential security interests.[131]

7.49. On the other hand, Singapore considers that Members should exercise their discretion under Article XXI(b) in accordance with the principle of good faith and the doctrine of abuse of rights. Thus, a Member must, in good faith—albeit subjectively—consider that there is a threat to its essential security interest and that its chosen action is necessary for the protection of that essential security interest.[132] Singapore also argues that the determination of the existence of an "emergency in international relations" under subparagraph (iii) of Article XXI(b) is "inherently subjective", with the sensitivities implicated in a Member's assessment of its security threats being equally applicable to a determination of whether an "emergency in international relations" exists.[133] Singapore submits that, even if the Panel were to conduct a "more intrusive" review of a Member's invocation of Article XXI(b), it should be limited to an examination of whether the disputed measure was implemented in a "non-capricious manner", rather than conducting an examination that "approximates an objective substantive review".[134]

7.50. Turkey argues that the text of Article XXI(b), especially the clause "which it considers necessary" means that "to a very large extent", it is left to the judgment of the invoking Member to determine which measures it considers necessary for the protection of its essential security interests. However, while the language of Article XXI leaves the determination of whether action is necessary for the protection of essential security interests to the Member taking the action, this discretion is not unqualified. Turkey regards the term "essential", which qualifies "security interests", to indicate an intention to draw a boundary to prevent abuses of power such as sheltering commercial measures behind the security exception.[135] Suggesting that the Panel should be guided by the general exception rules of the GATT 1994, Turkey considers that a complaining Member should make its *prima facie* case of inconsistency, and then the responding Member should put forward, *inter alia*, its argument that the measure can be justified under Article XXI. A panel, when reviewing the responding Member's invocation of Article XXI, should consider the "large margin of discretion" accorded to the invoking Member.[136]

7.51. The United States, in a letter to the Chair of the Panel submitted on the due date for third-party submissions, argues that the Panel "lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute".[137] The reason advanced is that every WTO Member retains the authority to determine for itself those matters that it considers necessary for the protection of its essential security interests, as "reflected" in the text of Article XXI of the GATT 1994.[138] The United States describes this as an "inherent right" that has been repeatedly recognized by GATT contracting parties and WTO Members.[139]

7.52. In its subsequent submissions, the United States clarifies that it considers the Panel to have jurisdiction in the context of this dispute "in the sense that the DSB established it, and placed the matter raised in Ukraine's complaint within the Panel's terms of reference under Article 7.1 of the DSU".[140] However, it considers that the dispute is "non-justiciable" because there are no legal criteria

[130] Singapore's third-party statement, para. 13.
[131] Ibid. para. 19.
[132] Ibid. para. 21. Singapore also argues that responses to threats to essential security interests involve the subjective judgment of a Member and depend on the particular context and circumstances involved. (Ibid. paras. 16-17.)
[133] Ibid. para. 23.
[134] Ibid. para. 22.
[135] Turkey's third-party statement, para. 7.
[136] Ibid. para. 8.
[137] Letter from the United States to the Chair of the Panel, dated 7 November 2017, para. 4.
[138] Ibid. para. 2.
[139] In addition, the United States asserts that "[i]ssues of national security are political matters not susceptible for review or capable of resolution by WTO dispute settlement." (Ibid.)
[140] United States' third-party statement, para. 4; and response to Panel question No. 1, para. 17. The United States distinguishes between "jurisdiction"—meaning, in the present context, the "extent of power of the Panel under the DSU to make legal decisions in this dispute"—and "justiciability", in the sense of whether an issue may be subject to findings by the Panel under the DSU. The United States also defines "justiciability"

by which the issue of a Member's consideration of its essential security interests can be judged.[141] The United States bases its position on its interpretation of the text of Article XXI, specifically, the "self-judging" language of the chapeau in Article XXI(b) "*which it considers necessary for* the protection of its essential security interests".[142] For the United States, the "self-judging" nature of Article XXI(b)(iii) establishes that its invocation by a Member is "non-justiciable", and "is therefore not capable of findings by a panel", obviating the possibility of making recommendations under Article 19.1 of the DSU in this dispute.[143]

7.5.3 Whether the Panel has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.53. The Panel recalls that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction which derives from the exercise of their adjudicative function.[144] One aspect of this inherent jurisdiction is the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction.[145]

7.54. Article 1.1 of the DSU provides that the rules and procedures of the DSU shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 (the covered agreements). The covered agreements include, *inter alia*, the Multilateral Agreements on Trade in Goods, including the GATT 1994, more particularly Articles XXII and XXIII, as elaborated and applied by the DSU. Article 1.2 of the DSU provides that the rules and procedures of the DSU shall apply subject to such special or additional rules on dispute settlement contained in the covered agreements as are identified in Appendix 2 to the DSU. Appendix 2 of the DSU does not refer to any special or additional rules of procedure applying to disputes in which Article XXI of the GATT 1994 is invoked.

7.55. The Panel recalls that Ukraine requested the DSB to establish a panel pursuant to the provisions of the DSU and Article XXIII of the GATT 1994. On 21 March 2017, the DSB established the Panel in accordance with Article 6 of the DSU, with standard terms of reference as provided in Article 7.1 of the DSU. Article 7.2 of the DSU requires that the Panel address the relevant provisions in any covered agreements cited by the parties to the dispute.[146]

7.56. Given the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994, Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU.

7.57. Russia argues, however, that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii). For Russia, the invocation of Article XXI(b)(iii) by a Member renders its actions immune from scrutiny by a WTO dispute settlement panel. Russia's argument is based on its

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as whether a matter is capable of being adjudicated, or suitable for adjudication. (United States' third-party statement, para. 3; and response to Panel question No. 1, paras. 16-19.)

[141] United States' response to Panel question No. 1, paras. 18 and 22.

[142] United States' third-party statement, paras. 5, 11-12 and 34-36. (emphasis original) Additionally, in response to a question from the Panel, the United States argues that Members agreed to remove the invocation of the essential security exception from multilateral judgment *when they agreed to the "self-judging" text included in Article XXI*. (United States' response to Panel question No. 1, para. 22; and General US Answer to questions from the Panel and the Russian Federation, paras. 1-15.)

[143] United States' response to Panel question No. 1, para. 17. See also United States' third-party statement, paras. 2-3, 5 and 7.

[144] See International Court of Justice, Questions of Jurisdiction and/or Admissibility, *Nuclear Tests Case* (Australia v. France) (1974) ICJ Reports, pp. 259-260; and International Court of Justice, Preliminary Objections, *Case Concerning the Northern Cameroons* (Cameroon v. United Kingdom) (1963) ICJ Reports, pp. 29-31. The Appellate Body has stated that WTO panels have certain powers that are inherent in their adjudicative function. (See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.)

[145] This is known as the principle of *Kompetenz-Kompetenz* in German, or *compétence de la compétence* in French. The Appellate Body has held that panels have the power to determine the extent of their jurisdiction. (See Appellate Body Reports, *US – 1916 Act*, fn 30 to para. 54; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.)

[146] See also Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49. The Appellate Body has also stated that, as a matter of due process and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute. (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.)

interpretation of Article XXI(b)(iii) as "self-judging".[147] According to this argument, Article XXI(b)(iii) carves out from a panel's jurisdiction *ratione materiae* actions that a Member considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations. Russia's jurisdictional plea is that, based on its interpretation of Article XXI(b)(iii), it has met the conditions for invoking the provision.

7.58. As previously noted, the Panel's evaluation of Russia's jurisdictional plea requires it, in the first place, to interpret Article XXI(b)(iii) of the GATT 1994 in order to determine whether, by virtue of the language of this provision, the power to decide whether the requirements for the application of the provision are met is vested exclusively in the Member invoking the provision, or whether the Panel retains the power to review such a decision concerning any of these requirements.

7.5.3.1 Meaning of Article XXI(b)(iii) of the GATT 1994

7.59. The Panel begins by recalling that Article 3.2 of the DSU recognizes that interpretive issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well established—including in previous WTO disputes—that these rules cover those codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention). Article 31(1) provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

7.60. Article XXI(b)(iii) of the GATT 1994 is part of the "Security Exceptions" set forth in Article XXI, which provides:

> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

7.61. The introduction to Article XXI states that "[n]othing in this Agreement shall be construed" followed by three paragraphs that are separated by the conjunction "or". Paragraph (a) of Article XXI describes action that may not be required of a Member, and paragraphs (b) and (c) describe action which a Member may not be prevented from taking, notwithstanding that Member's obligations under the GATT 1994.

[147] See Russia's first written submission, paras. 5-6 and 40-48; opening statement at the first meeting of the Panel, para. 46; and closing statement at the first meeting of the Panel, paras. 8 and 12.

7.5.3.1.1 Whether the clause in the chapeau of Article XXI(b) qualifies the determination of the matters in the enumerated subparagraphs of that provision

7.62. Paragraph (b) of Article XXI includes an introductory part (chapeau), which qualifies action that a Member may not be prevented from taking as that "which [the Member] considers necessary for the protection of its essential security interests".

7.63. The text of the chapeau of Article XXI(b) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause "which it considers". The adjectival clause can be read to qualify only the word "necessary", i.e. the necessity of the measures for the protection of "its essential security interests"; or to qualify also the determination of these "essential security interests"; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well.

7.64. The Panel starts by testing this last, most extensive hypothesis, i.e. whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies the determination of the sets of circumstances described in the enumerated subparagraphs of Article XXI(b). The Panel will leave for the moment the examination of the two other interpretive hypotheses, which bear exclusively on the chapeau.[148]

7.65. As mentioned above, the mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the adjectival clause "which it considers" qualifies the determinations in the three enumerated subparagraphs. But if one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances. Does it stand to reason, given their limitative function, to leave their determination exclusively to the discretion of the invoking Member? And what would be the use, or *effet utile*, and added value of these limitative qualifying clauses in the enumerated subparagraphs of Article XXI(b), under such an interpretation?

7.66. A similar logical query is whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective discretionary determination. In answering this last question, the Panel will focus on the last set of circumstances, envisaged in subparagraph (iii), to determine whether, given their nature, the evaluation of these circumstances can be left wholly to the discretion of the Member invoking the provision, or is designed to be conducted objectively, by a dispute settlement panel.

7.67. As previously noted, the words of the chapeau of Article XXI(b) are followed by the three enumerated subparagraphs, which are relative clauses qualifying the sentence in the chapeau, separated from each other by semicolons. They provide that the action referred to in the chapeau must be:

i. "relating to fissionable materials or the materials from which they are derived";

ii. "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment";

iii. "taken in time of war or other emergency in international relations".

7.68. Given that these subject matters—i.e. the "fissionable materials …", "traffic in arms …", and situations of "war or other emergency in international relations" described in the enumerated subparagraphs—are substantially different, it is obvious that these subparagraphs establish alternative (rather than cumulative) requirements that the action in question must meet in order to fall within the ambit of Article XXI(b).

7.69. The connection between the action and the materials or the traffic described in subparagraphs (i) and (ii) is specified by the phrase "relating to". The phrase "relating to", as used

[148] See Section 7.5.6 below.

in Article XX(g) of the GATT 1994, has been interpreted by the Appellate Body to require a "close and genuine relationship of ends and means" between the measure and the objective of the Member adopting the measure.[149] This is an objective relationship between the ends and the means, subject to objective determination.

7.70. The phrase "taken in time of" in subparagraph (iii) describes the connection between the action and the events of war or other emergency in international relations in that subparagraph. The Panel understands this phrase to require that the action be taken *during* the war or other emergency in international relations. This chronological concurrence is also an objective fact, amenable to objective determination.

7.71. Moreover, as for the circumstances referred to in subparagraph (iii), the existence of a war, as one characteristic example of a larger category of "emergency in international relations", is clearly capable of objective determination. Although the confines of an "emergency in international relations" are less clear than those of the matters addressed in subparagraphs (i) and (ii), and of "war" under subparagraph (iii), it is clear that an "emergency in international relations" can only be understood, in the context of the other matters addressed in the subparagraphs, as belonging to the same category of objective facts that are amenable to objective determination.

7.72. The use of the conjunction "or" with the adjective "other" in "war *or other* emergency in international relations" in subparagraph (iii) indicates that war is one example of the larger category of "emergency in international relations". War refers to armed conflict. Armed conflict may occur between states (international armed conflict), or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict). The dictionary definition of "emergency" includes a "situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action", and a "pressing need … a condition or danger or disaster throughout a region".[150]

7.73. "International relations" is defined generally to mean "world politics", or "global political interaction, primarily among sovereign states".[151]

7.74. The Panel also takes into account, as context for the interpretation of an "emergency in international relations" in subparagraph (iii), the matters addressed by subparagraphs (i) and (ii) of Article XXI(b), which cover fissionable materials, and traffic in arms, ammunition and implements of war, as well as traffic in goods and materials for the purpose of supplying a military establishment. While the enumerated subparagraphs of Article XXI(b) establish alternative requirements, the matters addressed by those subparagraphs give rise to similar or convergent concerns, which can be formulated in terms of the specific security interests that arise from the matters addressed in each of them. Those interests, like the interests that arise from a situation of war in subparagraph (iii) itself, are all defence and military interests, as well as maintenance of law and public order interests. An "emergency in international relations" must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b).

7.75. Moreover, the reference to "war" in conjunction with "or other emergency in international relations" in subparagraph (iii), and the interests that generally arise during war, and from the matters addressed in subparagraphs (i) and (ii), suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international

[149] Appellate Body Reports, *US – Shrimp*, para. 136; *China – Raw Materials*, para. 355; and *China – Rare Earths*, para. 5.90.

[150] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press 2007), Vol. 2, p. 819. The Panel observes that in the GATT 1994, the term "emergency" is used in only two places. First, the term is employed in Article XXI(b)(iii) as part of the phrase "other emergency in international relations". Second, the term appears in the title of Article XIX, which refers to "emergency action on imports of particular products". The word "emergency" is not, however, used in the text of Article XIX itself.

[151] *Black's Law Dictionary*, 8th edn, B.A. Garner (ed.) (West Group 2004), p. 836. The same concept is used in Article 2(4) of the UN Charter, which provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." (Charter of the United Nations, done at San Francisco, 26 June 1945, 1 UN Treaty Series XVI, available at: https://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/un_charter.pdf.)

relations for purposes of subparagraph (iii). Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be "emergencies in international relations" within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests.

7.76. An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.[152] Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.[153]

7.77. Therefore, as the existence of an emergency in international relations is an objective state of affairs, the determination of whether the action was "taken in time of" an "emergency in international relations" under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination.

7.78. As a next step, the Panel considers whether the object and purpose of the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) also supports an interpretation of Article XXI(b)(iii) which mandates an objective review of the requirements of subparagraph (iii).

7.79. Previous panels and the Appellate Body have stated that a general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade.[154] At the same time, the GATT 1994 and the WTO Agreements provide that, in specific circumstances, Members may depart from their GATT and WTO obligations in order to protect other non-trade interests. For example, the general exceptions under Article XX of the GATT 1994 accord to Members a degree of autonomy to adopt measures that are otherwise incompatible with their WTO obligations, in order to achieve particular non-trade legitimate objectives, provided such measures are not used merely as an excuse to circumvent their GATT and WTO obligations. These concessions, like other exceptions and escape clauses built into the GATT 1994 and the WTO Agreements, permit Members a degree of flexibility that was considered necessary to ensure the widest possible acceptance of the GATT 1994 and the WTO Agreements. It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member.

7.80. In the Appendix to this Report, the Panel surveys the pronouncements of the GATT contracting parties and WTO Members to determine whether the conduct of the GATT contracting parties and the WTO Members regarding the application of Article XXI reveals a common understanding of the parties as to the meaning of this provision. The Panel's survey reveals differences in positions and the absence of a common understanding regarding the meaning of Article XXI. In the Panel's view, this record does not reveal any subsequent practice establishing an

[152] This interpretation of an emergency in international relations is consistent with the preparatory work, referred to in paragraph 7.92 below, which indicates that the United States, when proposing the provision of the Geneva Draft of the ITO Charter that was carried over into Article XXI of the GATT 1947, and in referring to an "emergency in international relations", had in mind particularly the situation that existed between 1939 and 1941. During this time, the United States had not yet participated in the Second World War, yet owing to that situation, had still found it necessary to take certain measures for the protection of its essential security interests.

[153] This understanding is well-entrenched historically in diplomatic practice. See, e.g. Article 11 of the Covenant of the League of Nations: "Any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League … [i]n case any such emergency should arise …". (Covenant of the League of Nations, done at Paris, 28 June 1919, League of Nations Treaty Series, Vol. 108, p. 188.)

[154] See Appellate Body Reports, *EC – Computer Equipment*, para. 82; *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US*), para. 433; *Argentina – Textiles and Apparel*, para. 47; and *EC – Chicken Cuts*, para. 243.

agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention.[155]

7.81. It is notable, however, that a significant majority of occasions on which Article XXI(b)(iii) was invoked concerned situations of armed conflict and acute international crisis, where heightened tensions could lead to armed conflict, rather than protectionism under the guise of a security issue. It therefore appears that Members have generally exercised restraint in their invocations of Article XXI(b)(iii), and have endeavoured to separate military and serious security-related conflicts from economic and trade disputes. The Panel does not assign any legal significance to this observation, but merely notes that the conduct of Members attests to the type of circumstance which has historically warranted the invocation of Article XXI(b)(iii).

7.82. In sum, the Panel considers that the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.[156]

7.5.3.1.2 Negotiating history of Article XXI of the GATT 1947

7.83. This conclusion that the Panel has reached based on its textual and contextual interpretation of Article XXI(b)(iii), in the light of the object and purpose of the GATT 1994 and WTO Agreement, is confirmed by the negotiating history of Article XXI of the GATT 1947.[157]

7.84. The Panel recalls that the GATT 1947 arose out of a proposal by the United States to establish an International Trade Organization (ITO), an organization through which the United States and other countries would harmonize policies in respect of international trade and employment.[158] The

[155] It is to be noted that statements of position of individual GATT contracting parties made prior to April 1989 should be understood in the context of the positive consensus rule that then applied to the establishment of dispute settlement panels, the setting of their terms of reference, and the adoption of panel reports. In a Decision of the GATT CONTRACTING PARTIES taken in April 1989, the contracting parties agreed to implement a number of improvements to the GATT dispute settlement rules and procedures, including the establishment of panels or working parties at the Council meeting following that at which the request first appeared on the Council's regular agenda, unless at that meeting the Council decided otherwise. (See Improvements to the GATT Dispute Settlement System Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989, section F(a) (the April 1989 Decision). See also ibid. section F(b) on the establishment of panels and working parties with standard terms of reference.) For the application of the April 1989 Decision to a 1991 request by Yugoslavia for the establishment of a panel to examine certain measures imposed by the European Communities, see paras. 1.63-1.66 of the Appendix to this Report.

[156] The Panel notes that Ukraine and Russia both referred to the interpretations of the International Court of Justice (ICJ) of security exceptions in bilateral treaties between Nicaragua and the United States (in *Case of Military and Paramilitary Activities in and Against Nicaragua*), and between the Islamic Republic of Iran and the United States (in *Case Concerning Oil Platforms*) in the course of their arguments. (Ukraine's second written submission, paras. 81-91; and Russia's opening statement at the second meeting of the Panel, paras. 28-40.) The Panel considers that the conclusions of the Court in both cases were limited to the specific provisions of the bilateral treaties under consideration. In *Case of Military and Paramilitary Activities in and Against Nicaragua,* the Court did not purport to interpret Article XXI of the GATT 1947, but merely referred to the provision *a contrario* in order to highlight the absence of the adjectival clause "which it considers" from the security exception at issue (International Court of Justice, Merits, *Case of Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (1986) ICJ Reports, p. 116.) Similarly, in *Case Concerning Oil Platforms,* the Court's conclusions were limited to a security exception lacking the same adjectival clause. (International Court of Justice, Merits, *Case Concerning Oil Platforms*, (Islamic Republic of Iran v. United States of America) (2003) ICJ Reports, p. 183.) Consequently, the Panel does not consider these cases to be material to its interpretation of Article XXI(b)(iii) of the GATT 1994.

[157] The Appellate Body has previously had recourse to the preparatory work of the ITO Charter as a supplementary means of treaty interpretation in order to confirm the meaning of corresponding provisions in the GATT 1994. (See, e.g. Appellate Body Reports, *Japan –Alcoholic Beverages II,* fn 52, DSR 1996:I, 97, p. 104; *Canada – Periodicals,* p. 34, DSR 1997:I, p. 449; and *US – Line Pipe,* para. 175.)

[158] Preparatory work on the ITO Charter began in November 1945 with the issuance by the United States of a document entitled "Proposals for Expansion of World Trade and Employment". (See United States, Department of State, "Proposals for Expansion of World Trade and Employment", Publication 2411, Commercial Policy Series 79, November 1945, p. 1.) In February 1946, the Economic and Social Council of the United Nations adopted a resolution calling for an international conference on trade and

text of the ITO Charter was negotiated over four sessions between October 1946 and March 1948. Towards the end of the first negotiating session (held in London between October and November 1946), the Preparatory Committee decided to give prior effect to the tariff provisions of the ITO Charter by means of a general tariff agreement which would provisionally apply among a subset of ITO members until the ITO Charter entered into force.[159] The provisions of the general tariff agreement were to be taken from the provisions of the ITO Charter then being negotiated.[160] The texts of the ITO Charter and of the general tariff agreement were negotiated in parallel through the second negotiating session (held in New York between January and February 1947) and the third negotiating session (held in Geneva between April and October 1947).

7.85. The United States originally proposed, in a draft submitted to the Preparatory Committee in September 1946, the inclusion of a single general exceptions clause that would apply to the General Commercial Policy chapter of the ITO Charter.[161] The clause began with "[n]othing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures" followed by paragraphs that included a number of the general exceptions later appearing in Article XX of the GATT 1947, as well as others later reflected in Article XXI of the GATT 1947 (specifically paragraphs (c), (d), (e), and (k)).[162]

7.86. The draft of the ITO Charter prepared at the New York negotiating session in February 1947 (the New York Draft) similarly contained a single general exceptions clause in the chapter on General Commercial Policy.[163] Article 37 of the New York Draft provided that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures:

employment, and established a Preparatory Committee of 19 countries to prepare a draft charter of the ITO. (See United States, Department of State, "Suggested Charter for an International Trade Organization of the United Nations", Publication 2598, Commercial Policy Series 93, September 1946, foreword (US Draft Charter).)

[159] See, e.g. Preparatory Committee on the International Conference on Trade and Employment, Procedures for Giving Effect to Certain Provisions of the Proposed ITO Charter by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee, Report of the Sub-Committee on Procedure to Committee II, E/PC/T/C.II/58, pp. 12-14.

[160] Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Annexure 10, "Multilateral Trade-Agreement Negotiations, Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee", section B, p. 48 and section K, p. 51. According to the Report, the General Agreement on Tariffs and Trade "should conform in every way to the principles laid down in the Charter and should not contain any provision which would prevent the operation of any provision of the Charter". (Ibid.)

[161] Article 32 of the US Draft Charter. (US Draft Charter, Chapter IV "General Commercial Policy", section I "General Exceptions", "General Exceptions to Chapter IV", Article 32, p. 24.)

[162] Ibid. The US Draft Charter also included a clause in Chapter VI "Intergovernmental Commodity Arrangements" providing that any "justiciable issue" arising specifically from any ruling of the Conference interpreting Article 32, paragraphs (c), (d), (e) or (k), dealing with security, could be referred as a dispute to the ICJ. (Ibid. Article 76, pp. 45-46.)

[163] The first draft of the ITO Charter resulting from the London round of negotiations in November 1946, the London Draft, merely included a placeholder for a general exceptions clause to Chapter V on General Commercial Policy, Article 37, which was "[t]o be considered and drafted at a later stage". (Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Appendix "Charter of the International Trade Organization of the United Nations", p. 33.) The London Draft did, however, contain a general security exception clause in Chapter VII on Inter-Governmental Commodity Arrangements, as well as a clause providing for referral to the ICJ on the security paragraphs of Article 37 specifically. (Ibid. Article 59, p. 37 and Article 86, p. 41.) The partial draft of the general tariff agreement concluded at this stage also included a placeholder envisaging the possibility of a general exceptions clause modelled after Article 37 of the ITO Charter. (Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, Annexure 10, "Multilateral Trade-Agreement Negotiations, Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee", Article IV, p. 52.)

(a) Necessary to protect public morals;

(b) For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country;

(c) Relating to fissionable materials;

(d) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member;

…

(k) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.[164]

7.87. The separation of these exceptions into two distinct clauses was first suggested during the third negotiating session in Geneva. In May 1947, the United States proposed that the security exceptions that appeared in the clause be moved to the end of the ITO Charter so that they would be general exceptions to the whole Charter and not just the chapter on General Commercial Policy.[165] The United States also proposed that this new provision contain the introductory language "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures", which would then be followed by the list of paragraphs transferred from Article 37.[166]

7.88. The specific language for the new security exceptions that would apply throughout the whole of the Charter was developed from a proposal submitted by the United States delegation at the Geneva negotiating session in July 1947.[167]

7.89. According to Vandevelde's study of the internal documents of the United States delegation negotiating the ITO Charter, the US delegation arrived at the language of this proposal after deliberating as to whether an ITO member should effectively be able to avoid any Charter obligation by the unilateral invocation of its essential security interests, or whether any element of the security exceptions should be subject to review by the Organization.[168] The members of the delegation were

[164] Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34, pp. 31-32. The New York Draft also retained a slightly modified version of the security exception to the chapter on Inter-Governmental Commodity Arrangements, as well as the clause providing for referral to the ICJ on a provisional basis. (Ibid. Article 59, pp. 43-44 and Article 86, pp. 51-52.) The draft of the general tariff agreement concluded at this stage contained substantially the same general exceptions clause in relation to the chapter on General Commercial Policy. (Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft General Agreement on Tariffs and Trade, E/PC/T/C.6/85, Article XX, pp. 31-32.) The draft of the general tariff agreement did not, however, contain a clause providing for referral of security issues to the ICJ. (Ibid. Article XXIV, p. 34.)

[165] United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, p. 5; and United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft Charter, E/PC/T/W/153, Article XIX, p. 9.

[166] United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, p. 5. The draft of the general tariff agreement concluded as of 24 July 1947 reflected these developments, including a general exceptions clause separated into two subsections, one containing those justifications later reflected in Article XX of the GATT 1947 (including the language of the chapeau to Article XX of the GATT 1947) and the other containing those justifications later reflected in Article XXI of the GATT 1947 and preceded by the new introductory language proposed by the United States. (Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135, Article XIX, pp. 53-54.)

[167] United States Delegation, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, p. 5.

[168] See K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), pp. 145-154. Vandevelde's study of the history of US postwar FCN Treaties includes a chapter on the ITO Charter. As stated in the introduction to his book,

divided between those who wanted to preserve the United States' freedom of action in relation to its security interests by providing that each ITO member would have independent power to interpret the language of the exception[169], and those who believed that such a means for unilateral action would be abused by some countries and destroy the efficacy of the entire Charter.[170] At issue was whether the proposed draft should provide that nothing in the Charter would preclude any action "which [a member] may consider to be necessary and to relate to" the various enumerated topics, such as fissionable materials, traffic in arms or an emergency in international relations, or whether the original language from Article 37 of the New York Draft, which used the phrase "relating to" should be retained.[171]

7.90. Those favouring the position that some elements of the security exceptions should be subject to review by the Organization considered that the risk of abuse by some countries outweighed concerns regarding the scope of action left to the United States by the Charter.[172] One delegate advocating this position stated that "it would be far better to abandon all work on the Charter" than to place a provision in it that would, "under the simple pretext that the action was taken to protect the national security of the particular country, provide a legal escape from compliance with the provisions of the Charter".[173]

7.91. After a vote, those favouring the above position prevailed.[174] Their position, that the scope of unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the

Vandevelde's research relied on materials on the negotiating histories of US postwar FCN Treaties and of the ITO Charter which are maintained in the US National Archives and Research Administration (NARA) facility in College Park, Maryland, USA. (K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), pp. 5-9.)

[169] Vandevelde recounts that the US delegation considered and rejected a proposal drafted by the US War Department's representative on the US delegation to add a new paragraph to the proposed security exception. The new paragraph would have provided that each ITO member would have independent power of interpretation of the language of the exception, and that the provisions of Article 86 of the Charter relating to disputes concerning the interpretation and application of the Charter would not apply to the security exception. (K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), p. 148 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").)

[170] Ibid. p. 149 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").

[171] The language, "and to relate to", was considered to make clear that the invoking member could take unilateral action, while the original language from Article 37 of the New York Draft, which used the phrase "relating to", was considered to indicate that the determination to be made by an ITO member was limited to whether a measure it adopted was necessary, and not also whether the measure related to the enumerated topics. (Ibid. p. 148 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").)

[172] Ibid. p. 149 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").

[173] Ibid. (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").

[174] Ibid. p. 149 (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947"). Vandevelde records that some members of the US delegation reasoned that, as a practical matter, the United States would not need a right to engage in unfettered unilateral action. (Ibid. (referring to Second Meeting of the UN Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes US Delegation (Geneva 1947) April-June 20, 1947").)

provision, was reflected in the United States' proposal of 4 July 1947. The proposed Article 94 of the ITO Charter provided that:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action which it may consider to be necessary to such interests:
>
> a) Relating to fissionable materials or their source materials;
>
> b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
>
> d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.[175]

7.92. The United States delegation's interpretation of its proposal for the security exception is reflected in discussions of the provision during the Geneva negotiating session on 24 July 1947. In response to a question from the delegate for the Netherlands as to the meaning of the term "essential security interests" and "emergency in international relations"[176], the delegate for the United States replied:

> I suppose I ought to try and answer that, because I think the provision [subparagraph (e) of Article 37 of the New York Draft] goes back to the original draft put forward by us and has not been changed since.
>
> We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests" because, that would permit anything under the sun. Therefore we thought it well to draft provisions which would take care of real essential security interests and, *at the same*

[175] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Draft Charter, E/PC/T/W/236, Annex A, p. 13. The United States proposed that this new article replace the national security exceptions applicable to both the chapter on General Commercial Policy and the chapter on Inter-Governmental Commodity Arrangements. (Ibid.)

[176] The delegate's specific questions were:

> What do we mean—"emergency in international relations"? Is that "immediate", through a war?—or what is the "emergency in international relations"?
>
> The second point that is troubling me here is, what are the "essential security interests" of a Member? I find that kind of exception very difficult to understand, and therefore possibly a very big loophole in the whole Charter.
>
> For instance, I might say that at present we have a time of emergency as a number of Peace Treaties have not yet been signed and that therefore it might still be essential to have as much food in my country as possible. This would then force us to do everything to develop our agriculture, notwithstanding all of the provisions of this Charter. This example might be a little far fetched, but I only give it here to prove what is really worrying me about this subparagraph of which I still cannot get the proper meaning.

(Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 19 (as corrected by Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.2).)

> *time, so far as we could, to limit the exception* so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.
>
> With regard to subparagraph (e), the limitation, I think, is primarily in the time. First, "in time of war". I think no one would question the need of a Member, or the right of a Member, to take action relating to its security interests in time of war and to determine for itself—which I think we cannot deny—what its security interests are.
>
> As to the second provision, "or other emergency in international relations," we had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter. Our exports and imports were under rigid control. They were under rigid control because of the war then going on.[177]

7.93. Ultimately, the delegate for the United States emphasized the importance of the draft security exceptions, which would allow ITO members to take measures for security reasons, but not as disguised restrictions on international trade:

> I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.
>
> We have given considerable thought to it and this is the best we could produce to preserve that proper balance.[178]

7.94. During that same discussion, the delegate for Australia questioned the possible effect of moving the security exceptions to the end of the Charter, away from the provisions providing for consultations and dispute settlement. In particular, the delegate questioned whether this would mean that the security exceptions would not be subject to consultations and dispute settlement. The delegate for the United States responded as follows:

> … I think that the place of an Article in the Charter has nothing to do with whether or not it comes under Article 35 [predecessor to Articles XXII and XXIII of the GATT 1947]. Article 35 is very broad in its terms, and I think probably covers any action by any Member under any provision of the Charter. It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the terms of Article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands. In other words, there is no exception from the application of Article 35 to this or any other Article.[179]

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[177] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, pp. 20-21 (as corrected by Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.3, pp. 20-21). (emphasis added) See also Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.1; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.2.

[178] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 21.

[179] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, pp. 26-27. See also ibid. p. 30; and Second Session of the Preparatory Committee of the

7.95. The delegate for Australia stated that it should be clear that the terms of the proposed Article 94 would be subject to the provisions of paragraph 2 of Article 35 (predecessor to Article XXIII:1 of the GATT 1947) and on the basis of the assurance from the delegate for the United States that this was so, stated that Australia did not wish to make any reservation to Article 94.[180]

7.96. The version of Article 94 of the Geneva Draft of the ITO Charter, adopted on 22 August 1947, was entitled "General Exceptions" and contained wording nearly identical to that appearing in Article XXI of the GATT 1947:

> Nothing in this Charter shall be construed
>
> (a) to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or
>
> (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[181]

7.97. By September 1947, these developments were also reflected in the draft text of the general tariff agreement in a separate provision entitled "Security Exceptions", which mirrored the language of Article 94 of the Geneva Draft of the ITO Charter.[182]

United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.3, p. 1 (referring to p. 29 of the Verbatim Report).

[180] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, p. 28; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 33rd Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/SR/33, pp. 4-5. Later in July 1947, the Sub-Committee on Chapters I, II and VII also deleted the clause providing for referral to the ICJ on the security subparagraphs. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee on Chapters I, II and VIII (Part A – Introduction), E/PC/T/139, pp. 23-34.) Throughout August 1947, the proposed text was subject to several additional amendments by a Legal Drafting Committee and then by Commission A, including restructuring the provision to introduce the three subparagraphs to paragraph (b), as well as adding the words "directly or indirectly" to subparagraph (b)(ii). (See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee on Chapters I, II and VIII (Including Noting and Membership of the Executive Board), E/PC/T/159, pp. 41-42; Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the Thirty-Sixth Meeting of Commission A Held on Tuesday, 12 August 1947, E/PC/T/A/PV/36, pp. 16-21; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 40th (2) Meeting of Commission A Held on Friday, 15th August 1947, E/PC/T/A/SR/40(2), pp. 9-11.)

[181] Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/186, p. 56.

[182] The draft of the general tariff agreement prepared as of 30 August 1947 included a general exceptions clause separated into two subsections, one containing those justifications later reflected in Article XX of the GATT 1947 (including the language of the chapeau to Article XX) and the other containing language identical to that in Article 94 of the Geneva Draft of the ITO Charter. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Legal Drafting Committee of the Tariff Agreement Committee on Part II of the General Agreement, E/PC/T/189, Article XIX, pp. 47-49.) In September 1947, these subsections were separated into Articles XX and XXI, and entitled "General Exceptions" and "Security Exceptions", respectively. (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Tariff Agreement Committee, Redraft

7.98. The Panel considers that the foregoing negotiating history demonstrates that the drafters considered that:

a. the matters later reflected in Article XX and Article XXI of the GATT 1947 were considered to have a different character, as evident from their separation into two articles;

b. the "balance" that was struck by the security exceptions was that Members would have "some latitude" to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b); and

c. in the light of this balance, the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the Charter.

7.99. The Panel is also mindful that the negotiations on the ITO Charter and the GATT 1947 occurred very shortly after the end of the Second World War. The discussions of "security" issues throughout the negotiating history should therefore be understood in that context.

7.100. The negotiating history therefore confirms the Panel's interpretation of Article XXI(b) of the GATT 1994 as requiring that the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself. In other words, there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny.

7.5.3.1.3 Conclusion on whether the clause "which it considers" in the chapeau of Article XXI(b) qualifies the determination of the matters in the enumerated subparagraphs of that provision

7.101. The Panel concludes that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not extend to the determination of the circumstances in each subparagraph. Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.

7.5.3.2 Conclusion on whether the Panel has jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994

7.102. It follows from the Panel's interpretation of Article XXI(b), as vesting in panels the power to review whether the requirements of the enumerated subparagraphs are met, rather than leaving it to the unfettered discretion of the invoking Member, that Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging" in the manner asserted by Russia.

7.103. Consequently, Russia's argument that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii) must fail. The Panel's interpretation of Article XXI(b)(iii) also means that it rejects the United States' argument that Russia's invocation of Article XXI(b)(iii) is "non-justiciable", to the extent that this argument also relies on the alleged totally "self-judging" nature of the provision.[183]

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of the Final Act, General Agreement on Tariffs and Trade and Protocols in Light of Discussions Which Have Taken Place in the Committee, E/PC/T/196, pp. 50-53. See also Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the Eleventh Meeting of the Tariff Agreement Committee, E/PC/T/TAC/PV/11, pp. 23-26.)

[183] Another way of making the argument that a Member's invocation of Article XXI(b)(iii) is non-justiciable is by characterizing the problem as a "political question", as was also advanced by the United States. The ICJ has rejected the "political question" argument, concluding that, as long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue. (See, for example, International Court of Justice, Advisory Opinion, *Certain Expenses of the United Nations*, (United Nations) (1962) I.C.J. Reports, p. 155. See also International Criminal Tribunal for the Former

7.104. Russia's invocation of Article XXI(b)(iii) being within the Panel's terms of reference under Article XXIII of the GATT 1994, as further elaborated and modified by the DSU, the Panel finds that it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied.

7.5.4 The measures at issue and their existence

7.105. In the preceding Section, the Panel found that it has jurisdiction to review Russia's invocation of Article XXI(b)(iii). The Panel recalls that Russia also argues that certain measures and claims are outside the Panel's terms of reference because Ukraine's panel request does not comply with the requirements of Article 6.2 of the DSU.

7.106. For presentational purposes, and in order not to interrupt the analysis of Article XXI, the Panel defers the exposition of its examination of the terms of reference to Section 7.7 of the Report. For the reasons provided in that Section, the Panel finds that the following measures are within its terms of reference (the measures at issue):

a. 2016 Belarus Transit Requirements: Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.[184]

b. 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods: Bans on all road and rail transit from Ukraine of: (i) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (ii) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic.[185] Transit of such goods may only occur pursuant to a derogation requested by the Governments of Kazakhstan or the Kyrgyz Republic which is authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (above).

c. 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods: Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods take place exclusively through the checkpoints across the Russian state border.[186]

7.107. Ukraine has presented evidence of the existence of the above-referenced measures, and the Panel is satisfied that these measures exist.[187] This being so, the next question is whether these measures are inconsistent with Russia's obligations under Articles V and X of the GATT 1994 and commitments in Russia's Accession Protocol, or whether there can be no such inconsistency in the circumstances, because the measures were "taken in time of war or other emergency in international relations", and meet the other possible conditions of the chapeau of Article XXI(b).

Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić* (1995), Case No. IT-94-1-A, paras. 23-25.) Moreover, the Panel notes that in *Mexico –Taxes on Soft Drinks*, the Appellate Body expressed the view that a panel's decision to decline to exercise validly established jurisdiction would not be consistent with its obligations under Articles 3.2 and 19.2 of the DSU, or the right of a Member to seek redress of a violation of obligations within the meaning of Article 23 of the DSU. The Panel therefore considers that this way of characterizing the problem as a basis for the Panel to decline to review Russia's invocation of Article XXI(b)(iii) is also untenable. (Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.)

[184] See para. 7.357.a below.

[185] See para. 7.357.b below.

[186] See para. 7.357.c below.

[187] See fns 381-383, 385 and 387 below, and paras. 7.265-7.267, 7.269.a and 7.353 below.

7.108. The Panel notes in this regard the particularity of the exception specified in Article XXI(b)(iii). This provision acknowledges that a war or other emergency in international relations involves a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated. The Panel considers that an evaluation of whether measures are covered by Article XXI(b)(iii), as measures "taken in time of war or other emergency in international relations" (unlike measures covered by the exceptions under Article XX) does not necessitate a prior determination that they would be WTO-inconsistent if they had been taken in normal times, i.e. if they were not taken in time of war or other emergency in international relations. This is because, for the reasons explained in Section 7.5.6, there is no need to determine the extent of the deviation of the challenged measure from the prescribed norm in order to evaluate the necessity of the measure, i.e. that there is no reasonably available alternative measure to achieve the protection of the legitimate interests covered by the exception which is not violative, or is less violative, of the prescribed norm.

7.109. The Panel thus considers that, once it has found that the measures at issue are within its terms of reference and that Ukraine has demonstrated their existence, the most logical next step in its analysis is to determine whether the measures are covered by subparagraph (iii) of Article XXI(b), i.e. whether the measures were in fact taken during time of war or other emergency in international relations. Only if the Panel finds that the measures were not taken in time of war or other emergency in international relations would it become necessary to determine the consistency of the measures with the provisions of Articles V and X of the GATT 1994, which are the subject of Ukraine's claims.

7.110. Accordingly, the Panel next determines whether the measures at issue fall within the scope of subparagraph (iii) of Article XXI(b), as measures taken in time of war or other emergency in international relations.

7.5.5 Whether the measures were "taken in time of war or other emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b)

7.111. The Panel recalls its interpretation of "emergency in international relations" within the meaning of subparagraph (iii) of Article XXI(b) as a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.[188]

7.112. Russia, in its first written submission, refers to an emergency in international relations that occurred in 2014, which led Russia to take various actions, including imposing the measures at issue.[189] Russia affirms that the events constituting the emergency in international relations are well known to Ukraine and that this dispute raises issues concerning politics, national security and international peace and security.[190] It also explains that one reason for formulating its invocation of Article XXI(b)(iii) in such general terms is that it is trying to "keep the issues such as wars, insurrections, unrests, international conflicts outside the scope of the WTO which is not designed for resolution of such crises and related matters".[191]

7.113. Ukraine argues that Russia has not adequately identified or described the 2014 emergency, and has therefore not discharged its burden of proof.[192]

7.114. In its opening statement at the second meeting of the Panel, Russia posed a "hypothetical question" as to whether circumstances similar to those listed would amount to an

[188] See para. 7.76 above.
[189] Russia's first written submission, para. 16.
[190] See, e.g. Russia's closing statement at the first meeting of the Panel, para. 6; and closing statement at the second meeting of the Panel, para. 3.
[191] Russia's closing statement at the second meeting of the Panel, para. 5.
[192] Ukraine professes not to know what Russia means when it refers to an emergency in international relations that arose in 2014, stating that Ukraine and the Panel "are still left in the dark as to what particular emergency in international relations causes the Russian Federation to adopt the measures at issue in order to protect its essential security interests". (Ukraine's second written submission, para. 142. See also Ukraine's opening statement at the second meeting of the Panel, para. 64.) Russia, on the other hand, insists that Ukraine knows very well what emergency it is referring to. (Russia's opening statement at the first meeting of the Panel, para. 30; and closing statement at the second meeting of the Panel, para. 4.)

emergency in international relations under subparagraph (iii) of Article XXI(b).[193] These hypothetical circumstances, as formulated by Russia, are:

a. Unrest within the territory of a country neighbouring a Member, occurring in the immediate vicinity of the Member's border;

b. The loss of control by that neighbouring country over its border;

c. Movement of refugees from that neighbouring country to the Member's territory; and

d. Unilateral measures and sanctions imposed by that neighbouring country or by other countries, which are not authorized by the United Nations, similar to those imposed against Russia by Ukraine.[194]

7.115. When asked by the Panel how closely the hypothetical situation described above reflected the actual situation on the ground, the Russian representative explained that Russia had referred to the hypothetical "in order not to introduce again some information that Russia cannot disclose".[195] The Russian representative then referred to a paragraph from Ukraine's 2016 Trade Policy Review Report[196] which, according to the Russian representative, explains, in Ukraine's words, "what is going on and how real these whole hypothetical questions are".[197] The paragraph refers to "the annexation of the Autonomous Republic of Crimea and the military conflict in the east" as factors that had adversely affected Ukraine's economic performance in 2014 and 2015.[198]

7.116. Ukraine objects to Russia's use of Ukraine's 2016 Trade Policy Review Report, noting that prior panels have refused to attach importance to the Trade Policy Review Mechanism (TPRM) of Members in considering the arguments of a party in dispute settlement proceedings.[199]

7.117. Paragraph A(i) of the TPRM states that the TPRM is "not … intended to serve as a basis for the enforcement of specific obligations under the covered Agreements or for dispute settlement procedures". In two prior disputes, panels have rejected a complainant's reference to the report drawn up by the WTO Secretariat as part of the respondent's Trade Policy Review. In both instances, the reference was used as the basis for an argument that a measure was WTO-inconsistent.[200]

[193] Russia's opening statement at the second meeting of the Panel, para. 24.

[194] Ibid.

[195] Russian representative's oral response to the second question at the second meeting of the Panel.

[196] Trade Policy Review Body, Trade Policy Review, Ukraine, Government Report prepared by Ukraine, WT/TPR/G/334. Trade Policy Reviews are conducted by the Trade Policy Review Body based on two documents: a policy statement (report) by the Member under review and a comprehensive report drawn up by the WTO Secretariat on its own responsibility.

[197] Russian representative's oral response to the second question at the second meeting of the Panel.

[198] Trade Policy Review Body, Trade Policy Review, Ukraine, Government Report prepared by Ukraine, WT/TPR/G/334, para. 1.13.

[199] Ukrainian representative's oral comments on Russian representative's oral response to the Panel's second question at the second meeting of the Panel; and Ukraine's combined response to Panel question Nos. 2 and 3 after the second meeting, para. 16 (referring, in particular, to paragraph A(i) of Annex 3 to the WTO Agreement).

[200] In *Canada – Aircraft*, the complainant referred to the report drawn up by the WTO Secretariat in connection with Canada's Trade Policy Review to argue that *Investissement-Québec* assistance to the regional aircraft industry conferred a "benefit" by "provid[ing] export guarantees for projects considered too risky by private financial institutions". Recounting the objective in paragraph A(i) of the TPRM, the panel "attach[ed] no importance to the [TPR] of Canada in considering [the complainant's] arguments concerning *Investissement-Québec* assistance to the regional aircraft industry". (Panel Report, *Canada – Aircraft*, paras. 9.267 (quoting Trade Policy Review Body, Trade Policy Review, Canada, Report by the Secretariat, WT/TPR/S/53, p. 59), and 9.274-9.275). In *Chile – Price Band System*, the complainant argued that the Price Band System at issue was in the nature of a variable tariff, and for this purpose, referred to the report drawn up by the WTO Secretariat in connection with Chile's Trade Policy Review, which stated that "[t]he price stabilization mechanism works as a variable levy since the duty imposed on these goods varies according to their import price." (Panel Report, *Chile – Price Band System*, para. 4.47.) The panel stated that, in the light of paragraph A(i) of the TPRM, "such a Report should not be taken into account in the context of dispute settlement proceedings." (Ibid. fn 664 to para. 7.95.)

7.118. The Panel notes that the Russian representative referred to the relevant paragraph from Ukraine's 2016 Trade Policy Review Report in order to show that the hypothetical situation put forward in Russia's opening statement at the second meeting of the Panel has been referred to by Ukraine—in another context, it is true—as being "the annexation of the Autonomous Republic of Crimea and the military conflict in the east". Russia therefore used the reference to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report solely to further identify the situation that it had presented in its first written submission in the following general terms: "the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests".[201] Russia had also previously asserted that the circumstances that led to the imposition of the measures at issue were publicly available and known to Ukraine.[202] Russia did *not* refer to the relevant paragraph of Ukraine's 2016 Trade Policy Review Report as evidence that Ukraine (or Russia, for that matter) characterizes that situation as an emergency in international relations for the purposes of the present proceedings. The Panel therefore does not consider that paragraph A(i) of the TPRM applies to this situation, or that the Panel is thereby precluded from taking into account Russia's reference to paragraph 1.13 of Ukraine's 2016 Trade Policy Review Report.

7.119. Accordingly, Russia has identified the situation that it considers to be an emergency in international relations by reference to the following factors: (a) the time-period in which it arose and continues to exist, (b) that the situation involves Ukraine, (c) that it affects the security of Russia's border with Ukraine in various ways, (d) that it has resulted in other countries imposing sanctions against Russia, and (e) that the situation in question is publicly known. The Panel regards this as sufficient, in the particular circumstances of this dispute, to clearly identify the situation to which Russia is referring, and which it argues is an emergency in international relations.

7.120. Therefore, the Panel must determine whether this situation between Ukraine and Russia that has existed since 2014 constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b).

7.121. The Panel notes that it is not relevant to this determination which actor or actors bear international responsibility for the existence of this situation to which Russia refers. Nor is it necessary for the Panel to characterize the situation between Russia and Ukraine under international law in general.

7.122. There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community.[203] By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict.[204] Further evidence of the gravity of the situation is the fact that, since 2014, a number of countries have imposed sanctions against Russia in connection with this situation.[205]

7.123. Consequently, the Panel is satisfied that the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

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[201] Russia's first written submission, para. 16.

[202] Russia's opening statement at the first meeting of the Panel, para. 30.

[203] UN General Assembly Resolution No. 68/262, 27 March 2014, (Exhibit UKR-89).

[204] UN General Assembly Resolution No. 71/205, 19 December 2016, (Exhibit UKR-91). This resolution makes explicit reference to the Geneva Conventions of 1949, which apply in cases of *declared war or other armed conflict* between High Contracting Parties. (Ibid. p. 2.)

[205] Russia responded to these actions on 7 August 2014 by passing Resolution No. 778 and imposing sanctions on countries that had imposed sanctions against Russia. (Resolution No. 778, (Exhibits UKR-10, RUS-7).) Decree No. 560 established the original parameters for the Russian Government to impose import bans on certain agricultural products, raw materials and foodstuffs originating in the states that had decided to impose economic sanctions against Russian legal entities or individuals, or joined in such a decision. (Decree No. 560, (Exhibits UKR-9, RUS-3).) Resolution No. 778 originally imposed import bans on listed agricultural products, raw materials and food originating from the United States, EU Member States, Canada, Australia and Norway. Decree No. 560 was subsequently extended by Decree No. 320 of 24 June 2015, Decree No. 305 of 29 June 2016 and Decree No. 293, (Exhibit UKR-71). It was in force until 31 December 2018. Both parties advised in the interim review stage that Decree No. 560 has since been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018.

7.124. It thus remains for the Panel to determine whether the measures taken by Russia with respect to Ukraine were "taken in time of" the emergency in international relations. In this regard, the Panel notes that the 2016 Belarus Transit Requirements were introduced by Russia on 1 January 2016, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were introduced on 1 July 2016, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were introduced by Russia in November 2014. All of the measures were therefore introduced during the emergency in international relations and thus were "taken in time of" such emergency for purposes of subparagraph (iii).

7.125. On the basis of the foregoing considerations, the Panel concludes that each of the measures at issue was "taken in time of" an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

7.5.5.1 Conclusion

7.126. The Panel finds as follows:

a. As of 2014, there has existed a situation in Russia's relations with Ukraine that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994; and

b. each of the measures at issue was taken in time of this emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.

7.5.6 Whether the conditions of the chapeau of Article XXI(b) of the GATT 1994 are satisfied

7.127. The Panel recalls that, in paragraph 7.63 above, it posited that the adjectival clause "which it considers" in the chapeau of Article XXI(b) can be read to qualify only the "necessity" of the measures for the protection of the invoking Member's essential security interests, or also the determination of these "essential security interests", or finally and maximally, to qualify as well the determination of the sets of circumstances described in each of the subparagraphs of Article XXI(b). In paragraph 7.101 above, the Panel rejected the last of these possible interpretations.

7.128. The Panel has yet to address the remaining two possible interpretations of Article XXI(b). In other words, the question remains whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies both the determination of the invoking Member's essential security interests *and* the necessity of the measures for the protection of those interests, or simply the determination of their necessity.

7.129. Russia argues that the adjectival clause means that both the determination of a Member's essential security interests, and the determination of the necessity of the action taken for the protection of those interests, is left entirely to the discretion of the invoking Member. Several of the third parties also consider that Members have wide discretion to identify for themselves their essential security interests.[206] Ukraine argues that, while all Members have the right to determine their own level of protection of essential security interests, that does not mean that a Member may unilaterally define what are essential security interests.[207] According to Ukraine, it is for panels, rather than for Members, to interpret the term "essential security interests", which forms part of the WTO covered agreements, in accordance with customary rules of interpretation of public international law.[208] Consistent with its interpretation of Article XXI(b)(iii), Ukraine argues

[206] See Australia's third-party statement, paras. 9-21; Brazil's third-party submission, paras. 4-5 and 8-9; third-party statement, paras. 21-30; and response to Panel question No. 6; Canada's third-party statement, paras. 6-8; and response to Panel question No. 6, para. 8; China's third-party statement, paras. 18-19; and response to Panel question No. 6, para. 6; Japan's third-party submission, paras. 32-38; Singapore's third-party statement, paras. 14-19; United States' third-party statement, paras. 1, 11-12, 34-35; and response to Panel question No. 6, para. 31.

[207] Ukraine's opening statement at the first meeting of the Panel, paras. 141-142.

[208] Ibid. para. 142. For similar views expressed by third parties, see European Union's third-party submission, paras. 49-55 and 61-63; and third-party statement, paras. 17-23; Moldova's third-party

that Russia has failed to identify the essential security interests that are threatened by the 2014 emergency, and has not explained or demonstrated the connection between the measures and its essential security interests.[209] While Russia also argued that, pursuant to Article XXI(a) of the GATT 1994, it cannot be required to further explain its actions, beyond what it has declared in its first written submission and opening statement at the first meeting of the Panel, Ukraine considers that Russia cannot invoke Article XXI(a) of the GATT 1994 to evade its burden of proof under Article XXI(b)(iii).[210]

7.130. "Essential security interests"[211], which is evidently a narrower concept than "security interests", may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.

7.131. The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.

7.132. However, this does not mean that a Member is free to elevate any concern to that of an "essential security interest". Rather, the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ("[a] treaty shall be interpreted in good faith …") and Article 26 ("[e]very treaty … must be performed [by the parties] in good faith") of the Vienna Convention.[212]

7.133. The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system[213] simply by re-labelling trade interests that it had agreed to protect and promote within the system, as "essential security interests", falling outside the reach of that system.

submission, paras. 21, 27-35 and 37-41; third-party statement, paras. 10-18 and 20-22; and response to Panel question No. 6, paras. 18 and 20-24.

[209] Ukraine's second written submission, para. 156. Ukraine argues that it is not enough for Russia to assert that, as measures affecting transit rather than imports, there is no protectionist motive behind the measures. According to Ukraine, Russia must show that the issues are designed to protect Russia's essential security interests. (Ukraine's second written submission, para. 158.)

[210] See Russia's opening statement at the first meeting of the Panel, paras. 43-44; closing statement at the first meeting of the Panel, paras. 6, 10-11 and 18; and opening statement at the second meeting of the Panel, paras. 21-23. See also Ukraine's second written submission, para. 161. Ukraine notes also that none of the measures which Russia seeks to justify under Article XXI(b)(iii) was notified to Members in accordance with paragraph 1 of the 1982 Decision. (Ibid. para. 162.) The 1982 Decision is discussed in para. 1.28 of the Appendix to this Report.

[211] The term "essential security interests" appears in Article XXI of the GATT 1994, Article XIV*bis* of the GATS, Article 73 of the TRIPS Agreement, Article 10.8.3 of the TBT Agreement and Article III:1 of the Revised Agreement on Government Procurement. The term "national security" appears in Articles 2.2, 2.10, 5.4 and 5.7 of the TBT Agreement, and Article III:1 of the Revised Agreement on Government Procurement.

[212] See generally, Appellate Body Reports, *US – Shrimp*, para. 158; *US – FSC*, para. 166; *US – Cotton Yarn*, para. 81; and *US – Hot-Rolled Steel*, para. 101. The Appellate Body has provided specific examples of the reflection of the principle of good faith, for example, in the chapeau to Article XX of the GATT 1994 (Appellate Body Report, *US - Shrimp*, para. 158); in the exercise of a Member's judgment in good faith under Articles 3.7 and 3.10 of the DSU (Appellate Body Reports, *Peru – Agricultural Products*, paras. 5.15-5.28; and *US – FSC*, para. 166); in the concept of reasonableness in paragraph 2 of Annex II of the Anti-Dumping Agreement (Appellate Body Report, *US – Hot-Rolled Steel*, para. 101); and in the general applicability of Article 26 of the Vienna Convention to all WTO obligations (Appellate Body Report, *US – Cotton Yarn*, para. 81).

[213] See the third recital of the preamble of the WTO Agreement and the second recital of the preamble of the GATT 1994.

7.134. It is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.

7.135. What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. In particular, the Panel considers that the less characteristic is the "emergency in international relations" invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict.

7.136. In the case at hand, the emergency in international relations is very close to the "hard core" of war or armed conflict. While Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect, it did refer to certain characteristics of the 2014 emergency that concern the security of the Ukraine-Russia border.[214]

7.137. Given the character of the 2014 emergency, as one that has been recognized by the UN General Assembly as involving armed conflict, and which affects the security of the border with an adjacent country and exhibits the other features identified by Russia, the essential security interests that thereby arise for Russia cannot be considered obscure or indeterminate.[215] Despite its allusiveness, Russia's articulation of its essential security interests is minimally satisfactory in these circumstances. Moreover, there is nothing in Russia's expression of those interests to suggest that Russia invokes Article XXI(b)(iii) simply as a means to circumvent its obligations under the GATT 1994.

7.138. The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.

7.139. The Panel must therefore review whether the measures are so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency.

7.140. The Panel recalls that the 2016 measures (i.e. the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods): (a) restrict transit by road and rail from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic from transiting directly across the Ukraine-Russia border, requiring instead that such traffic detour through Belarus, and meet additional conditions relating to identification seals and registration cards at specific control points; and (b) prohibit altogether such transit for certain classes of goods unless such transit is exceptionally authorized.[216]

[214] See para. 7.114 above.

[215] Russia also attempts to show that it genuinely has national security interests that it considers to be under threat. For example, Russia emphasizes that the 2016 measures were expressly enacted in accordance with a 2006 law authorizing the imposition of economic sanctions for national security reasons, Federal Law No. 281-FZ. This 2006 law, entitled "On the Special Economic Measures" authorizes the President of the Russian Federation, acting on the basis of proposals of the Security Council of the Russian Federation, to impose economic sanctions where circumstances require the "immediate reaction to an internationally wrongful act or to an unfriendly act of a foreign state …, when such act poses a threat to the interests and security of the Russian Federation". (Federal Law No. 281-FZ of the Russian Federation, "On the Special Economic Measures", dated 30 December 2006, (Federal Law No. 281-FZ), (Exhibit RUS-8).) The Panel considers that this demonstrates that the 2016 measures were adopted by Russia as a response to acts considered by the President of the Russian Federation and the Security Council of the Russian Federation to pose a threat to Russia's interests and security.

[216] See paras. 7.1.a, 7.1.b, 7.16.c, 7.106.a and 7.106.b above.

7.141. Ukraine characterizes the 2016 measures as retaliation by Russia for Ukraine's decision to pursue economic integration with the European Union (through the EU-Ukraine Association Agreement which includes a DCFTA) rather than with Russia through the EaEU. Ukraine does not indicate whether it considers that decision, and consequently the 2016 measures, to be related also to the emergency in international relations that had arisen in early 2014.[217] While the evidence presented by Ukraine establishes that the 2016 measures were direct or immediate responses to the entry into force of the DCFTA between the European Union and Ukraine, this is only a partial explanation of the background to Russia's adoption of the 2016 measures.

7.142. The Panel considers that there is a clear correlation between the change in government in Ukraine in early 2014, the newly sworn-in government's decision to sign the EU-Ukraine Association Agreement in March 2014, the deterioration in Ukraine's relations with Russia (as evidenced by the March 2014 UN General Assembly resolution concerning the territorial integrity of Ukraine), and the sanctions that have been imposed against Russia by several countries.[218] In other words, Ukraine's decision to pursue economic integration with the European Union rather than with the EaEU cannot reasonably be seen as unrelated to the events that followed, and led to the emergency in international relations, during which Russia took a number of actions in respect of Ukraine, including the adoption of the 2016 measures.

7.143. The 2014 measures (i.e. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods) operate to ban transit of goods subject to Russian sanctions from transiting across Russia from its border with Belarus.[219] These bans were imposed specifically to prevent circumvention of the import bans that Russia had imposed under Resolution No. 778.[220] The Resolution No. 778 import bans were responses taken by Russia in August 2014 to the sanctions that other countries had imposed against it earlier in 2014 in response to the emergency in international relations.

7.144. Moreover, all of the measures at issue restrict the transit from Ukraine of goods across Russia, particularly across the Ukraine-Russia border, in circumstances in which there is an emergency in Russia's relations with Ukraine that affects the security of the Ukraine-Russia border and is recognized by the UN General Assembly as involving armed conflict.

7.145. In these circumstances, the measures at issue cannot be regarded as being so remote from, or unrelated to, the 2014 emergency, that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of that emergency. This conclusion is not undermined by evidence on the record that the general instability of the Ukraine-Russia border did not prevent some bilateral trade from taking place along parts of the border.[221]

7.146. This being so, it is for Russia to determine the "necessity" of the measures for the protection of its essential security interests. This conclusion follows by logical necessity if the adjectival clause "which it considers" is to be given legal effect.[222]

7.147. The Panel has been referred to *EC – Bananas III (Ecuador) (Article 22.6 – EC)* in which the arbitrators interpreted the phrase "if that party considers" in Articles 22.3(b) and 22.3(c) of the DSU as providing a margin of appreciation to the party which was nevertheless subject to review by the arbitrators.[223] The arbitrator's decision regarding the scope of review under Article 22.3 of the DSU was based on the fact that the discretion accorded to the complaining party under the relevant subparagraphs of that provision was subject to the obligation in the introductory words to Article 22.3 of the DSU, which provides that "[i]n considering what concessions or other obligations

[217] Ukraine's first written submission, paras. 24 and 26-31.
[218] See paras. 7.7-7.12 above.
[219] For a description of the 2014 measures, see para. 7.106.c. above and paras. 7.326-7.327 below.
[220] For an explanation of the relationship between the sanctions imposed against Russia and the Resolution No. 778 import bans, see paras. 7.9-7.12 and 7.16.b and fns 15, 16 and 32 above.
[221] See, e.g. Ukraine's opening statement at the second meeting of the Panel, para. 36; and response to Panel question No. 4 after the second meeting of the Panel, para. 27.
[222] This is also confirmed by the negotiating history of Article XXI. (See para. 7.92 above.)
[223] Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*. See Ukraine's opening statement at the first meeting of the Panel, para. 133; and second written submission, para. 168; European Union's third-party submission, paras. 62-64; and third-party statement, paras. 21-22; and United States' third-party statement, para. 16.

to suspend, the complaining party shall apply the following principles and procedures".[224] There is no equivalent obligation anywhere in the text of Article XXI that expressly conditions the discretion accorded to an invoking Member under the chapeau of Article XXI(b).

7.5.6.1 Conclusion

7.148. The Panel finds that Russia has satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994.

7.5.7 Overall conclusion

7.149. Accordingly, the Panel finds that Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994 in relation to the measures at issue, and therefore the measures are covered by Article XXI(b)(iii) of the GATT 1994.

7.6 Ukraine's claims of WTO-inconsistency of the measures at issue

7.6.1 Introduction

7.150. In this Section, the Panel addresses Ukraine's claims of inconsistency with Articles V and X of the GATT 1994 and commitments in Russia's Working Party Report, as incorporated into its Accession Protocol by reference.

7.151. Russia does not present rebuttal arguments or evidence regarding Ukraine's claims, as it considers that the measures at issue are "consistent with the provisions of the WTO Agreement, including the GATT and the Accession Protocol" on the basis of its invocation of Article XXI(b)(iii) of the GATT 1994.[225]

7.152. The Panel recalls the statement of the Appellate Body in *US – Wool Shirts and Blouses* that nothing in the DSU requires panels to consider or decide issues that are not "absolutely necessary to dispose of the particular dispute" between the parties.[226] Indeed, the Appellate Body cautioned that to do so would "not be consistent with the aim of the WTO dispute settlement system" to secure a "positive solution to a dispute" under Article 3.7 of the DSU.[227]

7.153. Having found that the measures were taken in time of an "emergency in international relations" (and meet the other conditions of Article XXI(b)), the Panel does not consider it necessary to additionally examine their WTO-consistency in a different factual context and on a different legal basis, i.e. as if the measures at issue had not been taken in time of an "emergency in international relations".

7.154. However, the Panel is mindful that, should its findings on Russia's invocation of Article XXI(b)(iii) be reversed in the event of an appeal, it may be necessary for the Appellate Body to complete the analysis. Accordingly, in Section 7.6.2, the Panel proceeds to analyse those aspects of Ukraine's claims which, were it not for the fact that the measures were taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), would enable the Appellate Body to complete the legal analysis.[228]

7.155. Additionally, Russia has invoked Article XXI(b)(iii) of the GATT 1994 in relation to all contested provisions of the WTO Agreement, including commitments in its Accession Protocol. Accordingly, in Section 7.6.4, the Panel addresses whether Article XXI(b)(iii) may be invoked by Russia in relation to commitments in its Accession Protocol.[229]

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[224] See Decision by the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 52.
[225] Russia's first written submission, paras. 9 and 76. See ibid. paras. 33, 37, 48 and 74.
[226] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1996:I, 323, p. 339.
[227] Ibid.
[228] See, e.g. Appellate Body Reports, *US – Shrimp*, para. 124; and *EC – Asbestos*, para. 78.
[229] In this Section, when referring to Ukraine's claims of inconsistency with particular commitments in Russia's Accession Protocol, the Panel will, for ease of reference, refer to such claims according to the paragraph of Russia's Working Party Report which sets forth the commitment. Paragraph 2 of Part I of

7.6.2 Article V:2 of the GATT 1994

7.6.2.1 Article V:2, first sentence

7.6.2.1.1 Main arguments of the parties

7.156. Ukraine argues that the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods do not guarantee freedom of transit through the territory of Russia for traffic in transit coming from Ukraine and/or going to Kazakhstan or the Kyrgyz Republic, and therefore, that the measures are inconsistent with the first sentence of Article V:2.

7.157. Ukraine argues that the measures at issue violate the first sentence of Article V:2 of the GATT 1994 by restricting freedom of transit in an "absolute manner".[230] In Ukraine's view, where a Member completely prohibits traffic in transit from a neighbouring country from transiting through its territory, such a measure will "necessarily" be inconsistent with the first sentence of Article V:2.[231] Ukraine additionally contends that the 2016 Belarus Transit Requirements and 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods preclude the use of all routes across the Ukraine-Russia border, routes that are "direct" and therefore necessarily qualify as "routes most convenient for international transit".[232] Ukraine considers that the following factors may be relevant to the determination of which routes are most convenient for international transit: (a) the mode of transport; (b) the length of the transit route; (c) access to the transit route; (d) any administrative formalities and charges associated with the route; (e) the operator's right to choose a mode of transport; (f) the cost of using a transit route; and (g) the provenance, destination and characteristics of the goods.[233]

7.158. Ukraine also claims that the restriction on entry and exit through certain checkpoints along the Belarus-Russia border and the Russia-Kazakhstan border under the 2016 Belarus Transit Requirements is inconsistent with the first sentence of Article V:2. Ukraine argues that the restriction on entry and exit removes the "freedom to choose the most convenient route".[234] Ukraine also considers that the additional conditions related to identification seals and registration cards that form part of the 2016 Belarus Transit Requirements "impose an additional burden" on traffic in transit and thereby do not guarantee freedom of transit as required by the first sentence of Article V:2.[235]

7.159. Ukraine similarly considers that the authorization requirement under the derogation procedure of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods does not guarantee freedom of transit as required by the first sentence of Article V:2.[236] Ukraine considers that transit of the non-zero duty goods and Resolution No. 778 goods "is as good as prohibited" due to the burdensome nature of this requirement.[237] Ukraine also argues that the restriction on entry and exit through certain checkpoints along the Estonia-Russia, Finland-Russia and Latvia-Russia borders under the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods is inconsistent with the first sentence of Article V:2 because it makes "certain most convenient routes unavailable for traffic in transit".[238]

7.160. Finally, the Panel notes Ukraine's interpretive argument, developed at the first meeting of the Panel, that "where a measure is applied to goods transiting via the most convenient routes of

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Russia's Accession Protocol incorporates by reference the paragraphs of Russia's Working Party Report that are listed in paragraph 1450 of that Report, including paragraphs 1161, 1426, 1427 and 1428.

[230] Ukraine's first written submission, para. 236.

[231] Ibid. paras. 237 and 240.

[232] Ibid. paras. 237-238; and Ukraine's opening statement at the first meeting of the Panel, para. 77. Ukraine recalls Canada's statement that what constitutes the most convenient route(s) "can … only be determined having regard to all of the circumstances relevant to the traffic in transit, including, for example, the 'conditions of the traffic'". (Ukraine's opening statement at the first meeting of the Panel, para. 78.)

[233] Ibid.

[234] Ukraine's first written submission, para. 249.

[235] Ibid. para. 252.

[236] Ibid. paras. 253-255.

[237] Ibid. para. 254.

[238] Ibid. para. 246.

passage and is found to violate other parts of Article V of the GATT 1994, including the second sentence of Article V:2, then such a measure is also inconsistent with the obligation of a Member to guarantee the freedom of transit via the most convenient routes" pursuant to the first sentence of Article V:2.[239] Ukraine has nonetheless advanced several independent arguments alleging inconsistency with the first sentence of Article V:2.

7.161. As previously noted[240], Russia does not present any arguments in response to Ukraine's specific claims of inconsistency with the first sentence of Article V:2.

7.6.2.1.2 Main arguments of third parties

7.162. Brazil disagrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V of the GATT 1994.[241] For example, Brazil suggests that inconsistency with the obligation in Article V:4 to ensure that "[a]ll charges and regulations … shall be reasonable" will not necessarily entail inconsistency with the first sentence of Article V:2.[242] Brazil also does not believe that the imposition of certain procedural controls or restrictions on traffic in transit will automatically result in inconsistency with Article V:2.[243]

7.163. Canada agrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V, as these other paragraphs "more precisely define the scope and limits of the right, and therefore the corresponding obligations embodied in that freedom".[244] Canada submits that Article V:2 does not prevent Members from imposing certain restrictions and burdens on traffic in transit, and does not equate to an unqualified right of free passage.[245] Canada also considers that it is at least "conceivable" that a transit route that involves entry and transit via the territory of a third country could nevertheless amount to a route that is the "most convenient" route.[246]

7.164. The European Union disagrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V, and points to disparities in scope between the first sentence of Article V:2 and other paragraphs of Article V.[247] The European Union also considers that the Panel need not, and should not, decide this question in the abstract for the purpose of resolving this dispute.[248] The European Union considers that the following factors may be relevant to the determination of which routes are "most convenient for international transit": geography; the mode of transport (by road, rail, water, air, or pipelines); the specificity of the different types of goods that are in transit; the total number of transit routes; their varying convenience for international transit from the perspective of a reasonable trader; and criteria such as distance, time, safety, as well as road and infrastructure quality.[249] The European Union also states that the first sentence of Article V:2 not only requires the availability of the most convenient routes but also the absence of restrictions for using these routes.[250] Finally, the European Union considers it to be "hardly conceivable" that an indirect route requiring a detour through Belarus for Ukrainian carriers destined for Kazakhstan and the Kyrgyz Republic could qualify as a route "most convenient for international transit".[251]

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[239] Ukraine's second written submission, para. 32. See also Ukraine's opening statement at the first meeting of the Panel, para. 72; and first written submission, para. 191.
[240] See paras. 7.3 and 7.22-7.23 above.
[241] Brazil's response to Panel question No. 8, p. 5.
[242] Ibid.
[243] Brazil's third-party submission, paras. 13-14.
[244] Canada's third-party submission, paras. 10 and 17; and response to Panel question No. 8, para. 10.
[245] Canada's third-party submission, para. 21.
[246] Canada's third-party statement, para. 12. Canada additionally stated that a determination of which route constitutes the "most convenient" route should have regard to all of the circumstances, such as the means of transit, the products in transit, differentials in the distances using different routes, any resulting differentials in cost and time, and any other "conditions of traffic". (Ibid. para. 11 (referring to Japan's third-party submission, para. 12).)
[247] European Union's response to Panel question No. 8, paras. 25-28.
[248] Ibid. para. 29.
[249] European Union's third-party statement, paras. 31-38.
[250] Ibid. para. 37.
[251] Ibid. para. 38.

7.165. Japan disagrees with Ukraine that a finding of inconsistency with the first sentence of Article V:2 will necessarily follow from a finding of inconsistency with any other paragraph of Article V.[252] However, Japan agrees with Ukraine that a measure that blocks all access into the territory of a Member would likely be inconsistent with Article V:2 unless the measure could be justified on some basis other than Article V of the GATT 1994.[253] Japan clarifies, however, that the first sentence of Article V:2 does not require unqualified, unrestricted access, but only guarantees freedom of transit via those routes most convenient for international transit.[254] Japan also proposes that once a complaining Member makes a *prima facie* case that there are other routes that are more convenient than those designated by the respondent Member, the burden of proof should shift to the respondent Member to explain why it considers the designated routes "most convenient" for international transit.[255] Japan submits that whether a given route is "most convenient" must be determined having regard to objective factors such as "the means of transit, available routes, distances or costs".[256]

7.6.2.1.3 Analysis

7.166. The first sentence of Article V:2 of the GATT 1994 provides that:

> There shall be freedom of transit through the territory of each [Member], via the routes most convenient for international transit, for traffic in transit to or from the territory of other [Members].

7.167. Ukraine advances several arguments in support of its claims of inconsistency with the first sentence of Article V:2 of the GATT 1994.[257] The Panel will only address those arguments necessary to enable the Appellate Body to complete the analysis.[258] The Panel first examines Ukraine's argument that "where a WTO Member prohibits traffic in transit from the territory of another country with which it shares a border, such a measure necessarily does not guarantee freedom of transit" as required by the first sentence of Article V:2.[259]

7.168. The Panel notes that the first sentence of Article V:2 creates an obligation for each Member to guarantee freedom of transit "through the territory of each [Member] … for traffic in transit to *or* from the territory of other [Members]".[260] The use of the conjunction "or" logically creates two separate obligations under the first sentence of Article V:2. Namely, each Member is required to

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[252] Japan's response to Panel question No. 8, para. 17.
[253] Japan's third-party submission, para. 4.
[254] Ibid. para. 5.
[255] Ibid. para. 9.
[256] Ibid. para. 12.
[257] Ukraine advances the following alternative arguments:
(a) inconsistency with any other paragraph of Article V of the GATT 1994 will necessarily result in inconsistency with Article V:2 (Ukraine's first written submission, paras. 198 and 224);
(b) the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods preclude the use of the "direct" and therefore "most convenient" routes (Ukraine's first written submission, paras. 230, 232 and 236-238);
(c) the cumulative effect of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods is to block all transit over the Belarus-Russia border (Ukraine's first written submission, para. 238);
(d) the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods are, in effect, bans on all traffic in transit because the scope of the bans and the government authorization requirement are so burdensome as to render such transit near impossible (Ukraine's first written submission, paras. 253-255);
(e) the requirement to enter via certain checkpoints under each measure makes certain "most convenient routes" unavailable for traffic in transit (Ukraine's first written submission, paras. 246 and 249);
(f) the additional conditions related to identification seals and registration cards attached to the 2016 Belarus Transit Requirements impose an additional "burden" on traffic in transit and thereby do not guarantee freedom of transit (Ukraine's first written submission, paras. 251-252); and
(g) the authorization requirement attached to the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods does not guarantee freedom of transit. (Ukraine's first written submission, para. 254.)
[258] The Panel recalls that a panel has the "discretion to address only those *arguments* it deems necessary to resolve a particular claim". (Appellate Body Report, *EC – Poultry*, para. 135. (emphasis original) See also Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, paras. 124-125; and *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 134-135.)
[259] Ukraine's first written submission, para. 237.
[260] Emphasis added.

guarantee freedom of transit through its own territory for traffic in transit *to* the territory of any other Member, or *from* the territory of any other Member.

7.169. The immediate context provided by the other provisions of Article V also informs the interpretation of the first sentence of Article V:2. The Panel recalls that Article V:1 defines the term "traffic in transit" as any "goods … [whose] passage across such territory … is only a portion of a complete journey beginning and terminating beyond the frontier of the [Member] across whose territory the traffic passes". This informs the scope of Article V:2 by suggesting that each Member incurs obligations in relation to "traffic in transit" only during the portion of the journey when such traffic passes through that Member's territory.

7.170. Similar to Article V:2, Articles V:3, V:4 and V:5 also employ the terms "traffic in transit" and the terms "to" or "from" in relation to the territory of other Members.[261] However, Article V:6 distinctly creates an obligation to accord to "products which have been in transit" treatment no less favourable than that which would have been accorded had the products been transported "from their place of origin to their destination". The difference in terminology between Article V:6 and the other paragraphs of Article V suggests that the terms "from" and "to" as used in Articles V:2 through V:5 have a distinct meaning from the terms "from [the] place of origin" and "to [the place of] destination" as used in Article V:6. This is also supported by the text of the second sentence of Article V:2, which draws an explicit distinction between places of "origin", "departure", "entry", "exit" and "destination".

7.171. The text and context of Article V:2 thus suggest that the phrases "from the territory" and "to … the territory" in the first sentence of Article V:2 should be construed as referring to the place of *entry* and place of *exit* of the traffic in transit, and not the place of *origin* or *destination*.

7.172. Accordingly, under the first sentence of Article V:2:

a. Each Member is required to guarantee freedom of transit through its territory for any traffic in transit *entering from* any other Member, and

b. Each Member is required to guarantee freedom of transit through its territory for traffic in transit *to exit* to any other Member.

7.173. To establish inconsistency with the first sentence of Article V:2, it will consequently be sufficient to demonstrate either that a Member has precluded transit through its territory for traffic in transit entering its territory from any other Member, or exiting its territory to any other Member, via the routes most convenient for international transit.

7.174. As a result, where a measure prohibits traffic in transit from another Member from entering at *all point*s along a shared land border, the measure will necessarily be inconsistent with the first sentence of Article V:2.

7.175. The 2016 Belarus Transit Requirements mandate that all international cargo transit by road or rail from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic shall be carried out exclusively from Belarus and comply with a number of additional conditions related to identification

[261] See Article V:3 ("traffic coming from or going to the territory" of other Members), Article V:4 ("traffic in transit to or from the territories" of other Members) and Article V:5 ("traffic in transit to or from the territory" of other Members) of the GATT 1994.

seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.[262]

7.176. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods ban road and rail transit departing from Ukraine and destined for Kazakhstan or the Kyrgyz Republic of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778 of the Government of the Russian Federation, unless such transit is requested by Kazakh or Kyrgyz authorities and authorized by Russian authorities, in which case such transit is subject to the 2016 Belarus Transit Requirements.[263]

7.177. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods ban the transit of all goods subject to veterinary and phytosanitary surveillance and that fall within the scope of the import bans imposed by Resolution No. 778 through Russia from checkpoints in Belarus, and instead require that such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints along the external border of the EaEU and be subject to clearance by the appropriate Kazakh or Russian authorities, and that such plant goods destined for Kazakhstan or third countries enter Russia exclusively through the same checkpoints.[264]

7.178. For reasons explained in Section 7.7, the only aspect of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods within the Panel's terms of reference is the application of the bans to transit from Ukraine.[265] The Panel recalls that all transit departing from Ukraine and destined for Kazakhstan and the Kyrgyz Republic has, since 2016, been subject to the 2016 Belarus Transit Requirements. Nevertheless, the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods would still, according to the terms of the instruments implementing the measure, apply to transit from Ukraine and destined for places other than Kazakhstan and the Kyrgyz Republic.

7.179. Applying the aforementioned definition of "traffic in transit" as outlined in Article V:1[266], the goods covered by the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods qualify as "traffic in transit" for the purposes of Article V:2 of the GATT 1994.

7.180. Addressing next whether the measures prohibit traffic in transit from another Member from entering at *all point*s along a shared land border, the 2016 Belarus Transit Requirements, by

[262] See para. 7.357.a below. For additional information regarding these measures, see paras. 7.265-7.267 below. The primary legal instruments implementing these measures are Decree of the President of the Russian Federation No. 1, "On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 1 January 2016, (Decree No. 1), (Exhibits UKR-1, RUS-1) as amended by Decree of the President of the Russian Federation No. 319, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure the economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation'", dated 1 July 2016, (Decree No. 319), (Exhibits UKR-2, RUS-2). Section 1(a) of Decree No. 1, as amended by Decree No. 319, applies to road and rail cargo transportation "from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic through the territory of the Russian Federation". The Panel construes section 1(a) of Decree No. 1 as applying to both (a) transiting cargo via road or rail which begins its journey in the territory of Ukraine and is destined for Kazakhstan or the Kyrgyz Republic, and (b) transiting cargo via road or rail which begins its journey in another country and then transits through the territory of Ukraine, and is destined for Kazakhstan or the Kyrgyz Republic.

[263] See para. 7.357.b below. For additional information regarding these measures, see paras. 7.266-7.267 and paras. 7.347-7.349 below. As the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods also apply to road and rail transit "from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic", the Panel similarly construes this measure as applying to both: (a) transiting cargo via road or rail which begins its journey in the territory of Ukraine and is destined for Kazakhstan or the Kyrgyz Republic; and (b) transiting cargo via road or rail which begins its journey in another country and then transits through the territory of Ukraine, and is destined for Kazakhstan or the Kyrgyz Republic. (See fn 262 above.)

[264] See para. 7.357.c below. For additional information regarding these measures, see paras. 7.269.a, 7.326-7.328 and 7.341-7.354 below, as well as fns 385, 387, 456, 458 and 482 below.

[265] See paras. 7.354-7.355 and 7.357.c below.

[266] See para. 7.169 above.

mandating that traffic in transit may only enter Russia from Belarus, expressly prohibit traffic in transit from entering Russia from Ukraine.

7.181. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods expressly prohibit traffic in transit from entering Russia from Ukraine. Additionally, even where transit is exceptionally authorized under the derogation procedure, such traffic in transit is still required to enter Russia exclusively from Belarus, and is therefore expressly prohibited from entering Russia from Ukraine.

7.182. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, as applied to traffic in transit from Ukraine of Resolution No. 778 goods, prohibit traffic in transit from entering Russia from the territory of any Member other than those countries from which entry is exclusively permitted, as listed in the measure.[267]

7.6.2.1.4 Conclusions

7.183. The Panel concludes that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the following measures were inconsistent with the first sentence of Article V:2 of the GATT 1994:

a. the 2016 Belarus Transit Requirements, because these measures prohibit traffic in transit from entering Russia from Ukraine;

b. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because these measures prohibit traffic in transit from entering Russia from Ukraine; and

c. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, because these measures prohibit traffic in transit from Ukraine from entering Russia from any Member other than those countries from which entry is exclusively permitted, as listed in the measure.

7.184. The Panel declines to address Ukraine's additional arguments that the measures are inconsistent with the first sentence of Article V:2.

7.6.2.2 Article V:2, second sentence

7.6.2.2.1 Main arguments of the parties

7.185. Ukraine argues that the second sentence of Article V:2 prohibits Members from making any distinction which is based on the place of "origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or other means of transport".[268] Ukraine argues that the 2016 Belarus Transit Requirements violate the second sentence of Article V:2 by impermissibly making distinctions based on the place of departure and entry (the Ukraine-Russia border), the place of exit (the Russia-Kazakhstan border), and the place of destination (Kazakhstan and the Kyrgyz Republic) of the traffic in transit.[269] Ukraine argues that the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods violate the second sentence of Article V:2 by impermissibly making distinctions based on the place of origin (goods originating from countries listed in Resolution No. 778, as amended to include Ukraine, and goods that are subject to an import duty other than zero under the Common Customs Code of the EaEU), the place of departure and entry (the Belarus-Russia border, under the derogation procedure), the place of exit (the Russia-Kazakhstan border), and the place of destination (Kazakhstan and the Kyrgyz Republic) of the traffic in transit.[270] Ukraine also considers that the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods violate the second sentence of Article V:2 because they make

[267] Under the Veterinary Instruction, (Exhibits UKR-21, RUS-10), entry for such goods is exclusively permitted at nine identified checkpoints on the border between Russia, on the one hand, and Finland, Estonia, Latvia and Ukraine, on the other hand. For more detail, see paras. 7.269.a and 7.341-7.354 below and fns 456 and 458 below.

[268] Ukraine's first written submission, para. 259.

[269] Ibid. paras. 281-282.

[270] Ukraine's first written submission, paras. 283-284.

impermissible distinctions based on the place of origin (goods originating from countries listed in Resolution No. 778, as amended to include Ukraine)[271], the place of entry (a limited number of checkpoints on the external border of the EaEU), and the place of destination (imposing different permit requirements depending on whether the goods are destined for Kazakhstan or third countries) of the traffic in transit.[272]

7.186. As previously noted[273], Russia does not present any arguments in response to Ukraine's specific claims of inconsistency with the second sentence of Article V:2.

7.6.2.2.2 Main arguments of third parties

7.187. Canada agrees with Ukraine that the second sentence of Article V:2 prohibits Members from making any distinction which is based on the place of origin, departure, entry, exit, destination and any circumstances relating to the ownership of goods, vessels, or other means of transport.[274] Canada additionally submits that the closed list in the second sentence of Article V:2 suggests that any measures that discriminate based on *other* criteria should instead be dealt with under Article V:5.[275]

7.188. Japan also agrees with Ukraine that the second sentence of Article V:2 prohibits Members from making any distinction which is based on the place of origin, departure, entry, exit, destination and any circumstances relating to the ownership of goods, vessels or other means of transport.[276] Japan also proposes that the objective structure, design and operation of the measure, and not the subjective judgment of the Member imposing the measure, should be examined to conclude whether any such distinctions have been made.[277]

7.6.2.2.3 Analysis

7.189. The second sentence of Article V:2 provides that:

> No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or of other means of transport.

7.190. The 2016 Belarus Transit Requirements mandate that all international cargo transit by road or rail departing from Ukraine and destined for Kazakhstan or the Kyrgyz Republic must enter Russia exclusively from Belarus and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.

7.191. The 2016 Belarus Transit Requirements expressly apply only to traffic in transit departing from Ukraine (thereby making distinctions based on the place of departure) which is destined for Kazakhstan or the Kyrgyz Republic (thereby making distinctions based on the place of destination) and require that such traffic enter Russia only from Belarus (thereby making distinctions based on the place of entry). The additional conditions related to identification seals and registration cards apply only to traffic in transit that is subject to the 2016 Belarus Transit Requirements. These conditions also involve the same prohibited distinctions.

7.192. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods ban road and rail transit departing from Ukraine and destined for Kazakhstan or the Kyrgyz Republic of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU; and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, unless

[271] Ukraine's first written submission, paras. 275 and 280.
[272] Ibid. paras. 276-279; and response to Panel question No. 12 after the first meeting of the Panel, para. 135.
[273] See paras. 7.3 and 7.22-7.23 above.
[274] See Canada's third-party submission, para. 24.
[275] Ibid. para. 25.
[276] Japan's third-party submission, paras. 18-19.
[277] Ibid. para. 19.

such transit is requested by Kazakh and Kyrgyz authorities and authorized by Russian authorities, in which case such transit is subject to the 2016 Belarus Transit Requirements.

7.193. The 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods expressly apply only to traffic in transit departing from Ukraine (thereby making distinctions based on the place of departure) which is destined for Kazakhstan or the Kyrgyz Republic (thereby making distinctions based on the place of destination). The 2016 Transit Bans apply to the transit of particular goods, namely, goods that are subject to customs duties on their importation to the EaEU and goods that originate in countries that are listed in Resolution No. 778, as amended to include Ukraine (thereby making distinctions based on the place of origin). Additionally, even if traders exceptionally receive authorization, such traffic in transit is still subject to the 2016 Belarus Transit Requirements and thus required to enter Russia exclusively from Belarus (thereby making distinctions based on the place of entry).

7.194. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods ban the transit of all goods subject to veterinary and phytosanitary surveillance and that fall within the scope of the import bans imposed by Resolution No. 778 through Russia from checkpoints in Belarus, and instead require that such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints along the external border of the EaEU and be subject to clearance by the appropriate Kazakh or Russian authorities, and that such plant goods destined for Kazakhstan or third countries enter Russia exclusively through the same checkpoints. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods (to the extent that they fall within the Panel's terms of reference) apply to traffic in transit from Ukraine and destined for places other than Kazakhstan and the Kyrgyz Republic.[278]

7.195. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, as applied to traffic in transit from Ukraine of Resolution No. 778 goods, require such traffic in transit to enter Russia from certain countries on the external border of the EaEU (thereby making distinctions based on the place of entry).[279] The measure applies to goods originating from countries listed in Resolution No. 778, as amended to include Ukraine (thereby making distinctions based on the place of origin). The additional conditions relating to entry through designated checkpoints and clearance apply only to traffic in transit subject to the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods. These conditions also involve the same prohibited distinctions.

7.6.2.2.4 Conclusions

7.196. The Panel concludes that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the following measures were inconsistent with the second sentence of Article V:2 of the GATT 1994:

a. the 2016 Belarus Transit Requirements, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit;

b. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit; and

c. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, because these measures make distinctions based on the place of entry (certain countries from which entry is exclusively permitted, as listed in that measure) and the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) of the traffic in transit.

[278] See paras. 7.177-7.178 above. For more detail, see paras. 7.341-7.353 below.
[279] See fn 267 above.

7.6.3 Remaining claims under the GATT 1994 and Russia's Accession Protocol

7.6.3.1 Introduction

7.197. Having found that the measures were taken in time of an "emergency in international relations" (and meet the other conditions of Article XXI(b)), the Panel has not considered it necessary to examine the WTO-consistency of the measures as if they had been taken in a different factual context or on a different legal basis.[280] However, in the event of the Panel's findings on Article XXI(b)(iii) being reversed on appeal, the Panel has considered those aspects of Ukraine's claims which would enable the Appellate Body to complete the legal analysis.

7.198. In particular, the Panel has examined whether, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures at issue were inconsistent with the first and second sentences of Article V:2 of the GATT 1994. The Panel has outlined the key features of the measures at issue, and concluded that the measures would have been *prima facie* inconsistent with these provisions, for the reasons outlined in Section 7.6.2.

7.199. The Panel has already concluded that, had the measures been taken in normal times, every aspect of them would have been *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both. Ukraine's claims under Articles V:3, V:4 and V:5 challenge the same aspects of the measures.[281] The Panel considers that addressing these claims would not add anything to the ability of the Appellate Body to complete the analysis, nor add anything to the ability of the DSB to make "sufficiently precise recommendations and rulings"[282] in the event that the Appellate Body were to make findings of inconsistency with either the first or second sentence of Article V:2, or both.

7.200. In relation to Ukraine's remaining claims, the Panel recalls the statement of the Appellate Body in *Argentina – Import Measures* that it failed to see how a finding relating to "the publication of [a] WTO-inconsistent measure would contribute to securing a positive solution to this dispute".[283] Accordingly, where a measure is found to be WTO-inconsistent, findings relating to the publication or administration of the same measure are unlikely to be necessary or useful in resolving the matter.[284] Ukraine's claims under Articles X:1, X:2 and X:3(a) of the GATT 1994 challenge the same measures, or constituent legal instruments implementing aspects of these measures. The Panel considers that addressing these claims would not add anything to the ability of the Appellate Body to complete the analysis, nor add anything to the ability of the DSB to make "sufficiently precise recommendations and rulings"[285] in the event that the Appellate Body were to make findings of inconsistency with the first or second sentence of Article V:2, or both. These considerations are equally applicable to Ukraine's claims under paragraphs 1426, 1427 and 1428 of Russia's Working Party Report, which all relate to the publication or administration of the same contested measures.

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[280] See paras. 7.153-7.154 above.

[281] See summary of Ukraine's arguments below.

[282] Appellate Body Report, *Australia – Salmon,* para. 223 (quoted in Appellate Body Reports, *US – Wheat Gluten,* para. 180; and *US – Lamb,* para. 191). See also Appellate Body Report, *Argentina – Footwear (EC),* para. 98.

[283] Appellate Body Reports, *Argentina – Import Measures*, para. 5.200. The panel in *Argentina – Import Measures* elected to exercise judicial economy in respect of Japan's claims under Article X:1 of the GATT 1994 in circumstances where it had already determined that the challenged measures were inconsistent with Articles III:4 and XI:1 of the GATT 1994*,* reasoning that it did not consider additional findings of inconsistency in relation to the same measure under Article X:1 "necessary or useful in resolving the matter at issue". (See ibid. para. 5.188.) The Appellate Body upheld the panel's exercise of judicial economy and the panel's reasoning, noting that as Argentina would "have to modify or withdraw the TRRs measures to comply with the recommendations under Articles III:4 and XI:1, the TRRs measure—in its current form and with its current content—will cease to exist". (Ibid. para. 5.200.)

[284] Since *Argentina – Import Measures,* several panels have exercised judicial economy over claims under Article X:3(a) where a measure has already been held to violate other substantive provisions of the GATT 1994. (See, e.g. Panel Reports, *Peru – Agricultural Products,* para. 7.501; and *Russia – Railway Equipment,* para. 7.939.)

[285] See fn 282 above.

7.201. As a result, the Panel does not consider it necessary to address Ukraine's remaining claims under Articles V:3, V:4, V:5, X:1, X:2 and X:3(a) of the GATT 1994 and paragraphs 1426, 1427 and 1428 of Russia's Working Party Report. Accordingly, the Panel has only summarized the relevant arguments of the parties and third parties in the following Section of the Report.[286]

7.6.3.2 Article V:3

7.6.3.2.1 Main arguments of the parties

7.202. Ukraine argues that the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods impose "unnecessary delays or restrictions" on traffic in transit, and therefore, that these measures are inconsistent with Article V:3.

7.203. In Ukraine's view, a measure will be inconsistent with Article V:3 whenever it subjects traffic in transit to any delays or restrictions which that are go beyond what is necessary "to put traffic in transit under a transit procedure in order to ensure that the goods move through the territory (and eventually leave the territory)".[287] Ukraine contends that, in examining whether such delays or restrictions are "unnecessary", the Panel should consider: (a) the trade restrictiveness of the measure, (b) the degree of contribution of the measure to the achievement of its objective, and (c) whether less restrictive alternative measures are reasonably available.[288]

7.204. Ukraine consequently argues that the following aspects of the measures at issue subject traffic in transit to "unnecessary delays or restrictions" in the sense of Article V:3.[289] First, Ukraine argues that the limitation to certain designated checkpoints under the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods is unnecessary to ensure that goods are put under an appropriate transit procedure, as this objective could be equally achieved at other existing control points.[290] Second, Ukraine argues that the requirement of government authorization under the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods is an "unnecessary" restriction because it has no clear relationship to the objective of ensuring that goods undergo an appropriate transit procedure.[291] Finally, Ukraine argues that the identification seals and registration card conditions attached to the 2016 Belarus Transit Requirements constitute "unnecessary" restrictions and delays because such traffic in transit must already undergo the identification procedures required by the EaEU.[292]

7.205. As previously noted[293], Russia does not present any arguments in response to Ukraine's specific claims of inconsistency with Articles V:3, V:4 and V:5 of the GATT 1994.

7.6.3.2.2 Main arguments of third parties

7.206. Brazil proposes that whether delays or restrictions are "necessary" under Article V:3 must be examined on a case-by-case basis, including assessing "the trade restrictiveness of the procedures, its degree of contribution to the public interest at stake and the risk of non-fulfilment".[294] Brazil also considers that restrictions or delays can be "necessary" to achieve legitimate objectives that are not exclusively related to transit regulation, such as in "force majeure" circumstances.[295]

[286] The Panel has, however, addressed the relationship between paragraph 1161 of Russia's Working Party Report and Article V:2 of the GATT 1994 in Section 7.6.4.2.2. Nonetheless, the relevant arguments of the parties and third parties in relation to this paragraph are summarized in the following section.

[287] Ukraine's first written submission, para. 303. See also Ukraine's second written submission, para. 46.

[288] Ukraine's first written submission, para. 319.

[289] Ukraine argues that each of the measures place "restrictions" on transit and cause "delays" related to re-routing. (Ibid. paras. 342-344.)

[290] Ibid. paras. 345-349.

[291] Ibid. para. 350.

[292] Ibid. paras. 351-364. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.

[293] See paras. 7.3 and 7.22-7.23 above.

[294] Brazil's third-party submission, paras. 14-15.

[295] Brazil's third-party submission, para. 14; and response to Panel question No. 10.

7.207. Canada disagrees with Ukraine's interpretation of the scope of Article V:3.[296] Canada argues that the delays and restrictions covered under Article V:3 are those imposed as part of requiring "that traffic in transit be registered with [Members'] customs authorities", including "the formalities and documentation requirements that are part of entering the traffic at the proper customs house".[297]

7.208. The European Union also disagrees with Ukraine's interpretation of the scope of Article V:3. The European Union argues that the delays and restrictions covered under Article V:3 are those that specifically result from the application of customs laws and regulations.[298]

7.6.3.3 Article V:4

7.6.3.3.1 Main arguments of the parties

7.209. Ukraine's claims of inconsistency with Article V:4 are confined to one aspect of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Specifically, Ukraine argues that the authorization requirement under the derogation procedure of the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods constitutes an "unreasonable regulation" imposed on traffic in the sense of Article V:4.[299]

7.210. In Ukraine's view, whether a regulation is "unreasonable" should involve an analysis of: (a) the rationale or purpose of the measure, and (b) whether the means used to achieve that rationale are "adequate and fair".[300] Ukraine consequently argues that: (a) it is unreasonable to make access for traffic in transit entirely dependent on the discretion of the government of the country of destination, (b) it is unreasonable to implement a measure that does not provide any information about what conditions need to be satisfied in order to secure authorization, and (c) the measure goes beyond what is required to ensure that goods move through and eventually leave the territory of the transit Member.[301]

7.6.3.4 Article V:5

7.6.3.4.1 Main arguments of the parties

7.211. Ukraine argues that the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods accord less favourable treatment to traffic in transit from Ukraine compared to third countries, and therefore, that the measures are inconsistent with Article V:5.

7.212. Ukraine proposes that, to establish inconsistency with Article V:5, it must be shown that: (a) the measure is a "regulation" that is "related to or associated with" traffic in transit; (b) there has been differential treatment accorded to traffic in transit from or to any Member as compared to third countries; (c) there has been "less favourable treatment", or a detrimental impact on the conditions of competition, for traffic in transit from the contesting Member; and (d) there is a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities.[302]

7.213. Applying the foregoing analysis, Ukraine argues that each of the measures is inconsistent with Article V:5. Ukraine argues that the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods accord differential treatment on the basis of whether the traffic in transit has come from Ukraine and is going to Kazakhstan and the Kyrgyz Republic.[303] Ukraine also argues that the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods

[296] Canada's third-party submission, paras. 31-32.
[297] Ibid. paras. 33 and 36. (footnotes omitted)
[298] European Union's response to Panel question No. 10, para. 32.
[299] Ukraine's first written submission, paras. 366 and 393.
[300] Ibid. paras. 384-385.
[301] Ibid. paras. 400-404.
[302] See ibid. paras. 409-431.
[303] Ukraine's first written submission, paras. 444 and 448-449.

accord differential treatment on the basis of whether the traffic in transit has originated from a Resolution No. 778 country, as amended to include Ukraine, or is destined for Kazakhstan.[304] Ukraine argues that this differential treatment alters the conditions of competition for traffic in transit from Ukraine as compared to third countries, and therefore accords "less favourable treatment" by: (a) creating delays and additional costs related to rerouting, (b) imposing additional costs such as those related to identification and registration cards, and (c) impeding access to the export market for which the goods are destined.[305]

7.6.3.5 Article X of the GATT 1994

7.6.3.5.1 Main arguments of the parties

7.214. Ukraine's claims of inconsistency with Article X of the GATT 1994 are confined to certain instruments that implement aspects of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that these measures fall within the scope of Article X:1 because they affect the transportation of goods, and fall within the scope of Article X:2 because they have "regard to" or are "connected with" importation or exportation.[306]

7.215. More specifically, Ukraine claims that the following legal instruments implementing aspects of the measures above were not published promptly as required by Article X:1 of the GATT 1994:

a. Public Joint-Stock Company "Russian Railways" Order No. 529r of 28 March 2016 (PJSC Order)[307] and the Public Joint-Stock Company "Russian Railways" Notice of 17 May 2016 (PJSC Notice)[308], both of which implement aspects of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that these legal instruments were inadequately published for the purposes of Article X:1, as they were only published on the website and print version of the business magazine "RZD-Partner Documents", to which only paying subscribers have access.[309]

b. Decree No. 319[310], which extended the geographical scope of the 2016 Belarus Transit Requirements to traffic in transit from Ukraine destined for the Kyrgyz Republic, and imposed the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that this legal instrument was not published promptly for the purposes of

[304] Ukraine's first written submission, paras. 445-447 and 449.

[305] Ibid. paras. 451 and 453-454. The Panel also notes that Ukraine initially proposed that any inconsistency with the second sentence of Article V:2 would necessarily demonstrate "less favourable treatment" for the purposes of Article V:5; however, Ukraine later appears to have withdrawn this argument. (See Ukraine's second written submission, para. 61.)

[306] Ukraine's first written submission, paras. 521, 523-524 and 564.

[307] Order of PJSC "Russian Railways" No. 529, "On approval of the procedure for installing (removing) of the identification means (seals) operating on the basis of the technology GLONASS", dated 28 March 2016, (PJSC Order), (Exhibit UKR-7). The PJSC Order implements the requirements of the 2016 Belarus Transit Requirements (set forth in paragraph 1(b) of Decree No. 1) to affix identification seals on road and railway transport of traffic in transit from Ukraine destined for Kazakhstan (and the Kyrgyz Republic) on entry into Russia and to remove such seals on exit from Russia, as elaborated by Resolution of the Government of the Russian Federation No. 276, "On the procedure of exercising control over the international road and rail cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan or the Kyrgyz Republic through the territory of the Russian Federation", dated 6 April 2016, (Resolution No. 276), (Exhibits UKR-8, RUS-6) (as amended by Resolution of the Government of the Russian Federation No. 732, "On amendments to some acts of the Government of the Russian Federation", dated 1 August 2016, (Resolution No. 732), (Exhibit UKR-4)). (Ukraine's first written submission, para. 107.) See also Decree No. 1, (Exhibits UKR-1, RUS-1).

[308] This notice sets forth the fee for the placement and removal of the GLONASS identification seals, as required by the instruments listed in fn 307 above. (Ukraine's first written submission, para. 105.)

[309] See ibid. paras. 530-539.

[310] Decree No. 319, (Exhibits UKR-2, RUS-2).

Article X:1, as this instrument was brought into effect on 1 January 2016, while it was published only on 3 July 2016.[311]

7.216. Ukraine claims that the following legal instruments were enforced prior to their official publication, contrary to Article X:2 of the GATT 1994:

a. The PJSC Order[312], because this legal instrument was inadequately published for the purposes of Article X:2, as it was only published on the website and print version of the business magazine "RZD-Partner Documents", to which only paying subscribers have access.[313]

b. Decree No. 319[314], because this instrument was enforced on 1 January 2016, while it was officially published only on 3 July 2016.[315]

c. Decree No. 643[316], which amended Decree No. 1[317], so as to extend the duration of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because this instrument was enforced on 30 December 2017, while it was only officially published on 4 January 2018.[318]

7.217. Ukraine claims that the following legal instruments are administered in an unreasonable manner, contrary to Article X:3(a) of the GATT 1994:

a. Decree No. 1, as amended by Decree No. 319 and Decree No. 643, which imposes the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, because Russia has administered these instruments at the Belarus-Russia border without providing reasoned explanations to traders.[319]

b. Decree No. 319[320], because the derogation procedure under this instrument contains no criteria governing the exercise of Russia's discretion to permit derogations from the bans, thereby permitting the possibility of arbitrary administration.[321]

7.218. Russia argues that the scope of Article X is limited to "issues of importation, exportation, internal sale and transportation", and does not intersect with "the scope of Article V of the GATT which is limited to issues of transit".[322]

[311] See Ukraine's first written submission. paras. 541-543. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.
[312] PJSC Order, (Exhibit UKR-7).
[313] Ukraine's first written submission, para. 581.
[314] Decree No. 319, (Exhibits UKR-2, RUS-2).
[315] Ukraine's first written submission, paras. 583-584.
[316] Decree of the President of the Russian Federation No. 643, "On amendments to the Decree of the President of the Russian Federation No. 1 of 1 January 2016 'On measures to ensure economic security and national interests of the Russian Federation in international cargo transit from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation", dated 30 December 2017, (Decree No. 643), (Exhibits UKR-98, RUS-13). Decree No. 643 extended the duration of Decree No. 1, and therefore the duration of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods.
[317] Decree No. 1, (Exhibits UKR-1, RUS-1).
[318] Ukraine's opening statement at the first meeting of the Panel, paras. 61-63; and second written submission, para. 64. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.
[319] Ukraine's first written submission, paras. 643-647.
[320] Decree No. 319, (Exhibits UKR-2, RUS-2).
[321] Ukraine's first written submission, paras. 648-650 and 653-654. See also Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.
[322] Russia's response to Panel question No. 11 after the first meeting of the Panel, p. 4.

7.6.3.5.2 Main arguments of third parties

7.219. Brazil argues that measures within the scope of Article V will typically qualify as "requirements, restrictions or prohibitions on imports or exports" within the sense of Article X:1.[323]

7.220. Canada argues that the term "affecting their … transportation" in Article X:1 should be construed as referring to measures affecting the transportation of "products", as included in the phrase "classification or the valuation of products for customs purposes", not "imports or exports" as included in the preceding phrase "requirements, restrictions or prohibitions on imports or exports".[324] Canada argues that this broader construction of Article X:1 is supported by the object and purpose of Article X, which is to promote transparency in relation to measures of general application relating to trade.[325]

7.221. The European Union also argues that the term "affecting their … transportation" in Article X:1 should be construed as referring to measures affecting the transportation of "products", not "imports or exports".[326] The EU agrees that this broader construction of Article X:1 is supported by the object and purpose of Article X, which is to promote transparency in relation to measures of general application relating to trade.[327] The European Union notes in support of this proposition the title of Article X, which reads "Publication and Administration of Trade Regulations".[328] The European Union additionally argues that, in the specific context of Article X, the term "imports" should be interpreted as "covering any goods that physically enter into the territory of the Member concerned", although conceding that in other provisions of the GATT, the term "imports" must be understood as excluding traffic in transit.[329]

7.222. Japan argues that measures within the scope of Article V will typically qualify as "requirements, restrictions or prohibitions on imports or exports" within the sense of Article X:1, or alternately, as measures affecting the "distribution" or "transportation" of imports or exports.[330]

7.6.3.6 Russia's Accession Protocol

7.6.3.6.1 Paragraph 1161 of Russia's Working Party Report

7.6.3.6.1.1 Main arguments of the parties

7.223. Ukraine argues that the first sentence of paragraph 1161 of Russia's Working Party Report "confirms the application of Article V of the GATT 1994" to any Russian measures governing the transit of goods.[331] Consequently, Ukraine argues that it will be sufficient to establish that Russia has acted inconsistently with Article V to demonstrate inconsistency with paragraph 1161.[332]

7.224. Russia does not present any arguments in response to Ukraine's claims of inconsistency with paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report.

7.6.3.6.2 Paragraph 1426 of Russia's Working Party Report

7.6.3.6.2.1 Main arguments of the parties

7.225. Ukraine argues that paragraph 1426 of Russia's Working Party Report applies to a broader category of legal instruments than Article X:1 of the GATT 1994 in that it applies to any measures "pertaining to or affecting trade in goods, services, or intellectual property rights".[333] Nonetheless,

[323] Brazil's response to Panel question No. 14, p. 7.
[324] Canada's response to Panel question No. 14, paras. 22-23.
[325] Ibid. para. 24.
[326] European Union's response to Panel question No. 14, para. 42.
[327] Ibid. paras. 37 and 40.
[328] Ibid. para. 39.
[329] Ibid. para. 43.
[330] Japan's response to Panel question No. 14, para. 33.
[331] Ukraine's first written submission, para. 164.
[332] Ibid.
[333] Ibid. paras. 490-491 and 517.

Ukraine submits that measures that fall within the scope of Articles V and X:1 of the GATT 1994 necessarily pertain to or affect "trade in goods" within the scope of paragraph 1426.[334] Ukraine further argues that paragraph 1426 of Russia's Working Party Report and Article X:1 of the GATT 1994 "contain the same substantive obligation of prompt publication", and consequently that inconsistency with Article X:1 of the GATT 1994 will automatically imply inconsistency with paragraph 1426 of Russia's Working Party Report.[335]

7.6.3.6.3 Paragraph 1427 of Russia's Working Party Report

7.6.3.6.3.1 Main arguments of the parties

7.226. Ukraine argues that Russia has violated the commitments in paragraph 1427 of Russia's Working Party Report because it has failed to publish, prior to their adoption, 20 legal instruments that implement aspects of the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods.

7.227. More specifically, Ukraine claims that the following legal instruments were not published before adoption as required by paragraph 1427 of Russia's Working Party Report:

a. The PJSC Order[336], which implements aspects of the 2016 Belarus Transit Requirements and the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods. Ukraine argues that this legal instrument was inadequately published for the purposes of paragraph 1427, as it was only published on the website and print version of the business magazine "RZD-Partner Documents", to which only paying subscribers have access.[337]

[334] Ukraine's first written submission, para. 518; and response to Panel question No. 11 after the first meeting of the Panel, para. 127.
[335] Ukraine's first written submission, paras. 499 and 516-518.
[336] PJSC Order, (Exhibit UKR-7).
[337] Ukraine's first written submission, paras. 603 and 605.

b. Several resolutions implementing the measures at issue[338], as well as Decree No. 643.[339] These instruments implement various aspects of the 2016 Belarus Transit Requirements, the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, and the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods. Ukraine argues that each of these legal instruments was published either after or on the date of their adoption, which Ukraine defines as the date on which the finalized measures were approved within the territory of the Russian Federation.[340]

7.6.3.6.4 Paragraph 1428 of Russia's Working Party Report

7.6.3.6.4.1 Main arguments of the parties

7.228. Ukraine argues that, as with paragraph 1426 of Russia's Working Party Report, measures that fall within the scope of Article V and Article X:1 of the GATT 1994 necessarily pertain to or affect "trade in goods" within the scope of paragraph 1428.[341] Ukraine further claims that paragraph 1428 "expands the scope of application and the substantive publication requirement of Article X:2 of the

[338] These resolutions are:
(a) Resolution No. 778, (Exhibits UKR-10, RUS-7);
(b) Resolution of the Government of the Russian Federation No. 830, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 20 August 2014, (Resolution No. 830), (Exhibit UKR-11);
(c) Resolution of the Government of the Russian Federation No. 625, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 25 June 2015, (Resolution No. 625), (Exhibit UKR-12);
(d) Resolution No. 842, (Exhibit UKR-13);
(e) Resolution of the Government of the Russian Federation No. 981, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 16 September 2015, (Resolution No. 981), (Exhibit UKR-14);
(f) Resolution No. 1397, (Exhibit UKR-15);
(g) Resolution of the Government of the Russian Federation No. 1 "On measures related to the implementation of the Decree of the President of the Russian Federation No. 1 of 1 January 2016" , dated 1 January 2016, (Resolution No. 1), (Exhibits UKR-3, RUS-4);
(h) Resolution of the Government of the Russian Federation No. 147, "On approval of requirements to the identification means (Seals) including the ones functioning on the basis of the technology of global satellite navigation system GLONASS", dated 27 February 2016, (Resolution No. 147), (Exhibits UKR-6, RUS-5) (as amended by Resolution No. 732, (Exhibit UKR-4);
(i) Resolution of the Government of the Russian Federation No. 157, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 1 March 2016, (Resolution No. 157), (Exhibit UKR-16);
(j) Resolution No. 276, (Exhibits UKR-8, RUS-6);
(k) Resolution of the Government of the Russian Federation No. 388, "On introduction of amendments to Appendix to the Resolution of the Government of the Russian Federation No. 1 of 1 January 2016", dated 30 April 2016, (Resolution No. 388), (Exhibit UKR-5);
(l) Resolution of the Government of the Russian Federation No. 472, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 27 May 2016, (Resolution No. 472), (Exhibit UKR-17);
(m) Resolution of the Government of the Russian Federation No. 608, "On amendments to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 30 June 2016, (Resolution No. 608), (Exhibit UKR-18);
(n) Resolution No. 732, (Exhibit UKR-4);
(o) Resolution of the Government of the Russian Federation No. 897, "On amendment to Annex to the Russian Federation Government Resolution dated 7 August 2014 No. 778", dated 10 September 2016, (Resolution No. 897), (Exhibit UKR-19);
(p) Resolution of the Government of the Russian Federation No. 1086, "On amendment of the Annex to the Resolution of the Government of the Russian Federation dated 7 August 2014 No. 778", dated 22 October 2016, (Resolution No. 1086), (Exhibit UKR-20);
(q) Resolution No. 790, (Exhibit UKR-70); and
(r) Resolution of the Government of the Russian Federation No. 1292, "On amendments to the Annexes to Resolution of the Government of the Russian Federation of 7 August 2014 No. 778", dated 25 October 2017, (Resolution No. 1292), (Exhibit UKR-94).

[339] Decree No. 643, (Exhibits UKR-98, RUS-13). (Ukraine's response to Panel question No. 12 after the first meeting of the Panel, para. 135.)

[340] Ukraine's first written submission, paras. 595 and 604-606; and opening statement at the first meeting of the Panel, para. 63.

[341] Ukraine's first written submission, para. 548.

GATT 1994" because paragraph 1428 prohibits measures from becoming "effective" prior to publication while Article X:2 prohibits measures from being "enforced" prior to "official" publication.[342] As Ukraine considers that a measure can only be "enforced" once it has been made "effective", Ukraine consequently contends that "a violation of Article X:2 automatically implies a violation of paragraph 1428."[343] Ukraine proceeds to argue that the contested instruments are inconsistent with paragraph 1428 of Russia's Working Party Report for the same reasons that they are inconsistent with Article X:2 of the GATT 1994.[344]

7.6.4 Applicability of Article XXI(b)(iii) of the GATT 1994 to commitments in Russia's Accession Protocol

7.6.4.1 Introduction

7.229. Ukraine makes several claims of inconsistency with Russia's Accession Protocol based on commitments contained in paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report.[345] The Panel has already concluded that the measures at issue are covered by Article XXI(b)(iii), and consequently that it is not necessary to address each of Ukraine's claims of inconsistency with Articles V and X of the GATT 1994. The applicability of Article XXI(b)(iii) to those provisions of the GATT 1994 is explicitly contemplated by the introduction to Article XXI, which provides that "[n]othing in this Agreement shall be construed".

7.230. Conversely, neither panels nor the Appellate Body have previously considered the applicability of Article XXI(b)(iii) of the GATT 1994 to commitments in the Accession Protocol of any acceding Member.[346] Several disputes have, however, previously considered the applicability of Article XX of the GATT 1994 to individual commitments in China's Accession Protocol. The Panel considers these disputes to be relevant insofar as they inform its analysis of the relationship between a Member's Accession Protocol and provisions of the GATT 1994.

7.231. The Appellate Body has held that the relationship between provisions in China's Accession Protocol and provisions in the WTO Agreement must be determined on a case-by-case basis.[347] In some disputes, this analysis has led to a determination that Article XX of the GATT 1994 could be invoked to justify a breach of an independent obligation under China's Accession Protocol[348], while in others, the same analysis led to a determination that Article XX could not be invoked in relation to the contested provision.[349] In *China – Rare Earths,*

[342] Ukraine's first written submission, paras. 569-570.
[343] Ibid. para. 571.
[344] Ibid. para. 585.
[345] As noted in footnote 229, these paragraphs are incorporated into Russia's Accession Protocol by reference. (See Russia's Accession Protocol, para. 2 of Part I; and Working Party Report, para. 1450.)
[346] The Panel recalls that in prior disputes involving the interpretation of China's Accession Protocol, panels and the Appellate Body proceeded on the assumption that paragraph 1.2 of that Protocol served to make certain obligations enforceable under the DSU where this issue was not contested by the parties. (Appellate Body Reports, *China – Rare Earths,* fn 422. See also Appellate Body Reports, *China – Auto Parts,* paras. 213-214; and Panel Reports, *China – Rare Earths,* para. 7.85.) The Panel observes that paragraph 2 of Part I of Russia's Accession Protocol is identical in all relevant respects to paragraph 1.2 of China's Accession Protocol. Both paragraphs provide that the WTO Agreement to which each Member accedes "shall be the WTO Agreement" as "rectified, amended or otherwise modified by such legal instruments as may have entered into force" before the relevant date of accession, and also provide that the Protocol "shall be an integral part of the WTO Agreement". Moreover, neither Ukraine nor Russia has contested the enforceability of the provisions of Russia's Accession Protocol and Working Party Report under the DSU. Consequently, the Panel proceeds on the premise that the commitments in paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report are enforceable under the DSU.
[347] Appellate Body Reports, *China – Rare Earths,* paras. 5.50 and 5.57.
[348] For instance, in *China – Publications and Audiovisual Products,* the Appellate Body addressed whether Article XX(a) of the GATT 1994 applied to a provision on trading rights in paragraph 5.1 of China's Accession Protocol. (Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 214-215.) The Appellate Body concluded that China could rely upon the introductory clause of paragraph 5.1 of its Accession Protocol to justify any violation as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994. (Ibid. para. 233.) For the analysis of the Appellate Body on this issue, see ibid. paras. 216-233.
[349] For instance, in *China – Raw Materials,* the Appellate Body examined whether Articles XX(b) and XX(g) of the GATT 1994 applied to paragraph 11.3 of China's Accession Protocol, which obliged China to eliminate export taxes and charges. (Appellate Body Reports, *China – Raw Materials*, para. 278.) The

the Appellate Body held that the specific relationship between individual provisions in China's Accession Protocol and provisions of the GATT 1994 must be ascertained "through scrutiny of the provisions concerned, read in the light of their context and object and purpose, *with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations*, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments".[350] The Appellate Body also noted that such an assessment must be predicated on a "thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation, as well as the circumstances of each dispute".[351]

7.232. The Panel considers that the approach outlined by the Appellate Body in *China – Rare Earths* is equally applicable to the relationship between Russia's Accession Protocol and Article XXI(b)(iii) of the GATT 1994. In the Panel's view, the architecture of the WTO system confers a single package of rights and obligations upon Russia, of which the GATT 1994 and its Accession Protocol are constituent parts. In particular, where obligations under Russia's Accession Protocol are closely linked to obligations under the GATT 1994, the Panel considers that this constitutes a strong argument for the applicability of Article XXI(b)(iii) to such commitments.

7.233. The Panel proceeds to apply the analytical framework outlined by the Appellate Body to determine the applicability of Article XXI(b)(iii) to the commitments in individual provisions of Russia's Working Party Report.[352] In doing so, the Panel considers: (a) the text of each provision, as well as any express textual references, or lack thereof, to the GATT 1994 or other covered agreements; (b) the context provided by other relevant provisions in Russia's Accession Protocol and Working Party Report; (c) the content of each provision and its relationship to obligations under the GATT 1994; (d) the overall architecture of the WTO system as a single package of rights and obligations; and (e) the specific circumstances of this dispute.[353]

7.6.4.2 Paragraph 1161 of Russia's Working Party Report

7.6.4.2.1 Paragraph 1161 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.234. Paragraph 1161 of Russia's Working Party Report provides, in relevant part, that:

> The representative of the Russian Federation confirmed that the Russian Federation would apply all its laws, regulations and other measures governing transit of goods (including energy), such as those governing charges for transportation of goods in transit by road, rail and air, as well as other charges and customs fees imposed in connection with transit, including those mentioned in paragraphs 1155 and 1156 in conformity with the provision of Article V of the GATT 1994 and other relevant provisions of the WTO Agreement.

7.235. Paragraph 1161 requires Russia to apply certain measures in "conformity with the provisions of Article V of the GATT 1994 *and other relevant provisions of the WTO Agreement*".[354] The explicit textual reference to "other relevant provisions of the WTO Agreement" provides support for the applicability of other provisions of the covered agreements. Additionally, the ordinary meaning of the term "relevant" is whether such provisions have a "bearing on" or are "connected with" the matter, or are "legally pertinent or sufficient".[355] Applying this definition, the Panel considers that other provisions of the covered agreements will be "relevant" to paragraph 1161 provided that they have a demonstrable legal bearing upon Article V of the GATT 1994. Article XXI(b)(iii) clearly falls

Appellate Body concluded that China could not rely on Articles XX(b) and XX(g) in relation to paragraph 11.3. (Appellate Body Reports, *China – Raw Materials*, para. 307.) For the analysis of the Appellate Body on this issue, see ibid. paras. 279-306.

[350] Appellate Body Reports, *China – Rare Earths,* para. 5.55. (emphasis added)

[351] Ibid. para. 5.57.

[352] Ibid. paras. 5.50 and 5.57.

[353] Ibid. para. 5.74.

[354] Emphasis added.

[355] *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.), (Oxford University Press, 2003), Vol. 2, p. 2522.

within this definition, as it is directly applicable to Article V of the GATT 1994 through the phrase "[n]othing in this Agreement shall be construed".

7.236. The immediate context provided by the other provisions of Russia's Working Party Report also informs the interpretation of paragraph 1161, particularly those discussions under the shared subheading "Regulation of Trade in Transit". The Panel observes that, for instance, in paragraph 1160 of Russia's Working Party Report, the representative for Russia confirmed that in relation to certain bans on transit, "in general, such provisions were applied for reasons of safety, health or *national security*."[356] There is no record of any Members contesting or objecting to this assertion.

7.237. Finally, the content of paragraph 1161 of Russia's Working Party Report and its relationship to obligations under the GATT 1994 is also relevant to the Panel's analysis.[357] The Panel observes that the commitments in paragraph 1161 and obligations under the GATT 1994 are closely linked in that paragraph 1161 requires Russia to apply measures governing transit of goods "in conformity" with Article V of the GATT 1994. If Article XXI(b)(iii) were inapplicable to this provision, this could thus potentially allow Ukraine to succeed on a claim of inconsistency with commitments in Russia's Accession Protocol, and not an identical claim under the GATT 1994.

7.238. For these reasons, the Panel considers that Russia can rely on the phrase "other relevant provisions of the WTO Agreement" in order to justify any inconsistency with the commitments in paragraph 1161 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.6.4.2.2 Paragraph 1161 of Russia's Working Party Report and Article V:2 of the GATT 1994

7.239. The Panel recalls its conclusion that, had the measures been taken in normal times, every aspect of them would have been *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both. Based on the foregoing analysis, the Panel considers that paragraph 1161 of Russia's Working Party Report merely reiterates Russia's commitments under Article V of the GATT 1994. Moreover, the Panel recalls that Ukraine's claims under paragraph 1161 of Russia's Working Party Report are substantively identical to Ukraine's claims under Article V.[358]

7.240. The Panel therefore considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), the measures would have also been *prima facie* inconsistent with paragraph 1161 of Russia's Working Party Report to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both.

7.6.4.3 Paragraph 1426 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.241. Paragraph 1426 of Russia's Working Party Report provides, in relevant part, that:

> The representative of the Russian Federation confirmed that from the date of accession, all laws, regulations, decrees, decisions, judicial decisions and administrative rulings of

[356] Emphasis added.

[357] The Panel recalls that in *China – Publications and Audiovisual Products*, the Appellate Body observed the close interlinkage between the obligations assumed under paragraph 5.1 of China's Accession Protocol and the GATT 1994, given that paragraph 5.1 was "clearly concerned with trade in *goods*". (Appellate Body Report, *China – Publications and Audiovisual Products,* para. 226. (emphasis original)) The Appellate Body additionally noted that paragraph 5.1 should not "be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures". (Ibid. para. 229.) This was material to the Appellate Body's conclusion that China could rely on Article XX(a) as a defence to its obligations under paragraph 5.1 of its Accession Protocol. (Ibid. para. 233.)

[358] Ukraine's only argument of inconsistency with paragraph 1161 of Russia's Working Party Report is that a demonstration of inconsistency with Article V of the GATT 1994 will also demonstrate inconsistency with paragraph 1161. (See Ukraine's first written submission, para. 164.)

> general application pertaining to or affecting trade in goods, services, or intellectual property rights, whether adopted or issued in the Russian Federation or by a competent body of the CU, would be published promptly in a manner that fulfils applicable requirements of the WTO Agreement, including those of Article X of the GATT 1994, WTO GATS Agreement, and the WTO TRIPS Agreement.

7.242. Paragraph 1426 requires Russia to publish certain measures promptly in a manner that "*fulfils applicable requirements of the WTO Agreement*, including those of Article X of the GATT 1994".[359] The explicit textual reference to "applicable requirements of the WTO Agreement" provides support for the applicability of other provisions of the covered agreements. The text of paragraph 1426 also explicitly refers to Article X of the GATT 1994 as an example of a provision containing such "applicable requirements". The ordinary meaning of the term "applicable" is whether such requirements are "able to be applied (*to* a purpose etc.)", or are "relevant", "suitable" or "appropriate".[360] The ordinary meaning of the term "requirement" is "[s]omething called for or demanded", or "a condition which must be complied with".[361] In the Panel's view, just as Article X of the GATT 1994 is specified to contain "applicable requirements" to paragraph 1426, Article XXI(b)(iii) clearly contains "applicable requirements" to Article X of the GATT 1994. This follows from the fact that Article X is subject to Article XXI(b)(iii) through the phrase "[n]othing in this Agreement shall be construed".

7.243. Other provisions of Russia's Working Party Report also inform the Panel's interpretation of paragraph 1426. In particular, the Panel contrasts the language used in paragraph 1426 with that used in paragraph 1427. Paragraphs 1426 and 1427 both create obligations relating to the publication of certain measures "pertaining to or affecting trade in goods, services, or intellectual property rights". However, unlike paragraphs 1161, 1426 and 1428, paragraph 1427 specifically omits any textual reference to "relevant provisions" or "applicable requirements" of the "WTO Agreement", and instead includes its own specific reference to "cases of emergency" and "measures involving national security". In the Panel's view, the absence of any equivalent textual reference in paragraph 1427 further underpins the significance of the phrase "applicable requirements of the WTO Agreement" in paragraph 1426.

7.244. Finally, the content of paragraph 1426 and its relationship to obligations under the GATT 1994 are also relevant to the Panel's analysis. The Panel observes that the commitments in paragraph 1426 and obligations under the GATT 1994 are closely linked in that paragraph 1426 contains the same requirement to ensure that measures relating to trade in goods are "published promptly" as that contained in Article X:1 of the GATT 1994.[362] If Article XXI(b)(iii) were inapplicable to this provision, this could thus potentially allow Ukraine to succeed on a claim of inconsistency with commitments in Russia's Accession Protocol, and not an identical claim under the GATT 1994.

7.245. For these reasons, the Panel considers that Russia can rely on the phrase "in a manner that fulfils applicable requirements of the WTO Agreement" in order to justify any inconsistency with the commitments in paragraph 1426 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

[359] Emphasis added.

[360] *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.) (Oxford University Press, 2003), Vol. 1, p. 102. (emphasis original)

[361] Ibid. Vol. 2, p. 2542.

[362] Paragraph 1426 creates a commitment to publish promptly "all laws, regulations, decrees, decisions, judicial decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights", whereas Article X:1 of the GATT 1994 creates an obligation to publish promptly "[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use". While the scope of the provisions differs, both impose obligations on Russia relating to the publication of measures concerning trade in goods.

7.6.4.4 Paragraph 1427 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.246. Paragraph 1427 of Russia's Working Party Report provides, in relevant part, that:

> The representative of the Russian Federation further confirmed that, except in cases of emergency, measures involving national security, specific measures setting monetary policy, measures the publication of which would impede law enforcement, or otherwise be contrary to the public interest, or prejudice the legitimate commercial interest of particular enterprises, public or private, the Russian Federation would publish all laws, regulations, decrees (other than Presidential decrees), decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights, prior to their adoption and would provide a reasonable period of time, normally not less than 30 days, for Members and interested persons to comment to the responsible authorities before the relevant measure was finalized or submitted to the competent CU bodies.

7.247. Paragraph 1427 omits any reference to "relevant provisions" or "applicable requirements" of "the WTO Agreement" or the GATT 1994, but instead refers specifically to exceptions to the obligations undertaken in that paragraph for "cases of emergency" and "measures involving national security".

7.248. The context provided by the other provisions of the Multilateral Trade Agreements informs the Panel's interpretation of paragraph 1427.[363] In particular, paragraph 1427 creates obligations relating to measures "pertaining to or affecting trade in goods, services, or intellectual property rights". Consequently, the Panel considers the use of the term "emergency" across those covered agreements relating to trade in goods, services and intellectual property rights to be material to its understanding of the phrase "cases of emergency" in paragraph 1427. In this respect, Panel notes that the only context in which the word "emergency" is consistently used across the GATT 1994, the GATS and the TRIPS Agreement is in creating a general exception for actions taken by a Member which it considers necessary for the protection of its essential security interests "taken in time of war or other emergency in international relations".[364] This suggests that an "emergency in international relations" is the type of "emergency" contemplated in paragraph 1427 of Russia's Working Party Report.

7.249. The content of paragraph 1427 and its relationship to obligations under the GATT 1994 are also relevant to the Panel's analysis. Unlike paragraphs 1161 and 1426, paragraph 1427 distinctly creates several commitments which have no direct counterpart in the GATT 1994.[365] The scope of the measures covered by paragraph 1427 also differs from Articles X:1 and X:2 of the GATT 1994.[366]

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[363] The Panel recalls that, in *China – Rare Earths,* the Appellate Body concluded that paragraph 1.2 of China's Accession Protocol served to make that Protocol and the Multilateral Trade Agreements part of "a single package of rights and obligations with respect to China as a WTO Member". (Appellate Body Reports, *China – Rare Earths,* para. 5.72.) The Appellate Body consequently noted that any analysis of the individual provisions in China's Accession Protocol should take into account "the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretive elements". (Ibid. para. 5.74.)

[364] See Article XXI(b)(iii) of the GATT 1994 ("taken in time of war or other emergency in international relations"); Article 31(b) of the TRIPS Agreement ("in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use"), and Article 73(b)(iii) of the TRIPS Agreement ("taken in time of war or other emergency in international relations"); and Article III:1 of the GATS ("except in emergency situations"), Article X:1 of the GATS ("on the question of emergency safeguard measures"), and Article XIVbis:1(b)(iii) of the GATS ("taken in time of war or other emergency in international relations").

[365] The text of paragraph 1427 creates at least three separate obligations to: (a) publish the covered measures prior to their adoption; (b) provide a reasonable period of time, normally not less than 30 days, for Members and interested persons to comment to responsible authorities before such measures are finalized or submitted to the competent CU bodies; and (c) take any such comments into account. However, in the specific circumstances of this dispute, Ukraine has only argued that Russia has acted inconsistently with its obligation to publish certain legal instruments prior to their adoption. (See Section 7.6.3.6.3 above.)

[366] Paragraph 1427 concerns any "laws, regulations, decrees (other than Presidential decrees), decisions and administrative rulings of general application pertaining to or affecting trade in goods, services, or intellectual property rights", whereas Article X:2 of the GATT 1994 only concerns any measures of general application "effecting an advance in duty, or other charges on imports under an established and uniform practice, or impose a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor". (For the scope of Article X:1 of the GATT 1994, see fn 362 above.)

However, the commitments in paragraph 1427 and obligations under the GATT 1994 are still closely linked to the extent that both impose obligations on Russia relating to the publication of measures concerning trade in goods.

7.250. For these reasons, the Panel considers that Russia can rely on the phrase "except in cases of emergency" in order to justify any inconsistency with paragraph 1427 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.6.4.5 Paragraph 1428 of Russia's Working Party Report and Article XXI(b)(iii) of the GATT 1994

7.251. Paragraph 1428 of Russia's Working Party Report provides that:

> The representative of the Russian Federation confirmed that, from the date of accession, no law, regulation, decree, decision or administrative ruling of general application pertaining to or affecting trade in goods, services, or intellectual property rights, whether adopted or issued in the Russian Federation or by a competent body of the [Customs Union (CU)], would become effective prior to publication, as provided for in the applicable provisions of the WTO Agreement, including the GATT 1994, the WTO GATS Agreement, and the WTO TRIPS Agreement. The Working Party took note of this commitment.

7.252. Paragraph 1428 requires Russia to ensure that certain measures do not become effective before publication "*as provided for in the applicable provisions of the WTO Agreement*, including the GATT 1994".[367] As mentioned above, the ordinary meaning of the term "applicable" is whether such provisions are "able to be applied (*to* a purpose etc.)", or are "relevant", "suitable" or "appropriate".[368] The ordinary meaning of the term "provided" is "on the condition, supposition, or understanding that" or "it being stipulated, or arranged that".[369] Consequently, the Panel considers that the ordinary meaning of the text of paragraph 1428 could support two possible interpretations. First, the phrase "as provided for" could be construed as merely stating that obligations equivalent to paragraph 1428 are *also* stipulated in "applicable provisions of the WTO Agreement". Conversely, the phrase "as provided for" could be construed as specifying that other provisions of the WTO Agreement are "applicable" to the obligations in paragraph 1428.

7.253. Other provisions of Russia's Working Party Report also inform the Panel's interpretation of paragraph 1428. In particular, the Panel has already examined the textual differences between paragraphs 1426 and 1427.[370] The Panel considers that this analysis is equally applicable to the differences between paragraphs 1427 and 1428. In the Panel's view, the absence of any equivalent textual reference in paragraph 1427 underpins the significance of the phrase "the applicable provisions of the WTO Agreement" in paragraph 1428.

7.254. Finally, the content of paragraph 1428 of Russia's Working Party Report and its relationship to obligations under the GATT 1994 is also relevant to the Panel's analysis. Unlike paragraphs 1161 and 1426, paragraph 1428 distinctly commits Russia to ensure that the covered measures are not made effective before publication, which has no explicit counterpart in the GATT 1994. The scope of the measures covered by paragraph 1428 also differs from Articles X:1 and X:2 of the GATT 1994.[371] However, the commitments in paragraph 1428 of Russia's Working Party Report and the obligations under the GATT 1994 are still closely linked to the extent that both impose obligations on Russia relating to the publication of measures concerning trade in goods.

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[367] Emphasis added.
[368] See para. 7.242 and fn 360 above.
[369] *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.) (Oxford University Press, 2003), Vol. 2, p. 2382.
[370] See para. 7.243 above.
[371] Paragraph 1428 concerns any "laws, regulations, decrees, decisions or administrative rulings of general application pertaining to or affecting trade in goods, services or intellectual property rights", whereas Article X:2 of the GATT 1994 concerns any measures of general application "effecting an advance in duty, or other charges on imports under an established and uniform practice, or impose a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor". (For the scope of Article X:1, see fn 362 above.)

7.255. For these reasons, the Panel considers that Russia can rely on the phrase "as provided for in the applicable provisions of the WTO Agreement" in order to justify any inconsistency with the commitments in paragraph 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.6.4.6 Conclusion

7.256. The Panel considers that Russia could justify any inconsistency with the commitments in paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

7.257. The Panel also considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures were inconsistent with paragraph 1161 of Russia's Working Party Report to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both.

7.258. The Panel does not consider it necessary to address further Ukraine's claims based on commitments in paragraphs 1426, 1427 and 1428 of Russia's Working Party Report.

7.7 Panel's terms of reference and the existence of the measures

7.259. In this Section of the Report, the Panel addresses a number of issues related to its terms of reference and to the existence of the measures at issue.

7.7.1 Identification of the measures and claims, and their relationship to each other

7.260. In its opening statement at the first meeting of the Panel, Russia argued that Ukraine's panel request fails to meet the requirements of Article 6.2 of the DSU in a number of respects:

a. Ukraine's panel request fails to make clear how the measures in each of the two distinct groups set forth in the panel request operate together.[372]

b. The panel request does not adequately explain which treaty provisions are alleged to be infringed by each of the challenged measures in the two distinct groups.[373]

c. Ukraine's first written submission presents the challenged measures in a completely different manner from the presentation in its panel request, i.e. "as four individual measures that are not connected and do not operate together". Russia considers that, as respondent, it was placed in an uncertain situation in presenting its defence because it was required to guess what the Panel would identify as the measures at issue on the basis of the Panel's interpretation of the substance of the alleged violation.[374]

7.261. Russia thus argued that Ukraine's panel request, both in general, and in particular with respect to the identification of the specific measures, fails to satisfy the requirements of Article 6.2 of the DSU.[375]

7.262. Ukraine responded that its presentation of the specific measures at issue in two separate sections of its panel request does not necessarily mean that the measures identified within each

[372] Russia's opening statement at the first meeting of the Panel, paras. 15-16. More specifically, Russia argues that Ukraine's panel request fails to establish the "nexus" between the measures within each distinct group. (Ibid. para. 21. See also Russia's opening statement at the second meeting of the Panel, paras. 7-8.)

[373] Russia's opening statement at the first meeting of the Panel, paras. 15-16. See also Russia's opening statement at the second meeting of the Panel, para. 8.

[374] Russia's opening statement at the first meeting of the Panel, paras. 19-20 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 136). See also Russia's opening statement at the second meeting of the Panel, para. 9.

[375] See Russia's opening statement at the first meeting of the Panel, para. 23.

section must be presumed to operate together.[376] Nor is there any requirement in Article 6.2 of the DSU for a complainant to identify how all of the measures at issue operate together unless it is necessary in order to present the problem clearly.[377] In addition, Ukraine argued that Russia's complaint regarding the reorganization of the presentation of the measures in Ukraine's first written submission does not address why the descriptions of the measures in the panel request were not sufficiently clear. Ukraine argued that the measures as described in its first written submission correspond fully to the measures as identified in its panel request.[378] Finally, Ukraine argued that the panel request plainly connects the specific measures at issue with the relevant provisions of the covered agreements that Ukraine claims have been infringed.[379]

7.263. In what follows, the Panel first describes the presentation of the measures and claims in Ukraine's panel request, and in Ukraine's first written submission, respectively, before addressing Russia's arguments that the panel request does not satisfy the requirements of Article 6.2 of the DSU.

7.7.1.1 Presentation of the measures and claims in Ukraine's panel request

7.264. Ukraine's panel request refers separately to a "first group of measures" and the "legal basis for the complaint" in respect of those measures (section II of the panel request), and a "second group of measures" and the "legal basis for the complaint" in respect of those measures (section III of the panel request).

7.265. Section II.A. of Ukraine's panel request, which is entitled "First Group of Measures", states that Russia has imposed measures concerning traffic in transit from the territory of Ukraine to the territory of the Republic of Kazakhstan, through the territory of Russia. These measures mandate that all international cargo transit by road and rail transport from the territory of Ukraine to the territory of the Republic of Kazakhstan, through the territory of Russia, be carried out exclusively from the territory of Belarus and comply with a number of additional conditions related to identification seals and registration cards at specific permanent or mobile checkpoints. It is also noted in this section that the above-referenced measures apply as well to traffic in transit from Ukraine destined for the Kyrgyz Republic, as of 1 July 2016.[380]

7.266. Section II.A. of Ukraine's panel request further identifies as a measure a ban on all road and rail transit of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods falling under the 2014 import bans set forth in the list annexed to Resolution No. 778.[381]

7.267. Section II.A. of Ukraine's panel request then sets forth the legal instruments through which it understands the above-referenced measures to be imposed. These instruments include Russian Presidential Decrees (Decree No. 1 and Decree No. 319, which amends Decree No. 1), as

[376] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 42; and opening statement at the second meeting of the Panel, para. 18.
[377] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 42.
[378] Ibid. para. 63.
[379] Ibid. paras. 65-68.
[380] Request for the establishment of a panel by Ukraine, WT/DS512/3 (Ukraine's panel request), section II.A., p. 2.
[381] Resolution No. 778 imposes bans on the importation of various agricultural products, raw materials and foodstuffs, as listed in the Resolution and originating from the United States, EU Member States, Canada, Australia, and Norway. (See Resolution No. 778, (Exhibits UKR-10, RUS-7).) On 13 August 2015, the import bans imposed by Resolution No. 778 were extended to the listed goods originating from Albania, Montenegro, Iceland, Liechtenstein and Ukraine. (See Resolution No. 842, (Exhibit UKR-13).) Another resolution of the Russian Government, enacted on 21 December 2015, specified that the import prohibitions in respect of the goods listed in Resolution No. 778 would be applied to Ukraine as of 1 January 2016. (See Resolution No. 1397, (Exhibit UKR-15). See also Russia's opening statement at the first meeting of the Panel, para. 6.) On 1 January 2016, the date of the amendment of Resolution No. 778, the European Union and Ukraine had agreed to apply provisions of the DCFTA that are part of the EU-Ukraine Association Agreement. (Ukraine's first written submission, para. 25.) The duration of the import bans has been extended a number of times, most recently by Resolution No. 790, which extends the import ban until 31 December 2018. (See Resolution No. 790, (Exhibit UKR-70).)

well as a resolution of the Russian Government implementing Decree No. 1 (Resolution No. 1, also dated 1 January 2016).[382, 383]

7.268. With respect to the "legal basis of the complaint", section II.B. of Ukraine's panel request states that the measures identified in section II.A. are inconsistent with a number of provisions of Articles V, XI:1 and X of the GATT 1994, along with paragraphs of Russia's Working Party Report, as incorporated into Russia's Accession Protocol by reference.[384] In addition to identifying the claims of WTO-inconsistency, this section of Ukraine's panel request provides a brief explanation as to why the measures in question are considered inconsistent with the cited provisions of the covered agreements.

7.269. Section III.A. of Ukraine's panel request identifies a second group of measures, which it describes as "other measures concerning traffic in transit from the territory of Ukraine through the territory of the Russian Federation". These other measures are further described in three sub-categories.

a. The first sub-category encompasses measures requiring that, from 30 November 2014, transit of goods subject to veterinary and phytosanitary surveillance, and which are included in the list approved by Resolution No. 778, dated 7 August 2014, and subsequent amendments, be generally prohibited through checkpoints of the Republic of Belarus.[385] Additionally, transit of such goods destined for Kazakhstan may only take place upon permits issued by the Committee of Veterinary Control and Surveillance of the Ministry of Agriculture of the Republic of Kazakhstan (indicating the Russian checkpoints on the external border of the EaEU), while transit of the same goods destined for third countries can take place only upon permits issued by the *Rosselkhoznadzor*.[386] Ukraine's panel request then provides a list of the various legal instruments by which it understands Russia to impose the measures in this first sub-category.[387]

b. The second sub-category is described as "restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic".[388]

c. The third sub-category refers to "any other related measures adopted and/or applied by the Russian Federation concerning traffic in transit from the territory of Ukraine to

[382] Decree No. 1, (Exhibits UKR-1, RUS-1); Decree No. 319, (Exhibits UKR-2, RUS-2); Resolution No. 1, (Exhibits UKR-3, RUS-4) (as amended by Resolution No. 388, (Exhibit UKR-5); and Resolution No. 732, (Exhibit UKR-4)).

[383] Section II.A. of Ukraine's panel request also identifies the following legal instruments through which the measures identified in section II.A. are imposed: Decree No. 560, (Exhibits UKR-9, RUS-3), (as subsequently extended by Decree No. 320 of 24 June 2015 and Decree No. 305 of 29 June 2016); Resolution No. 147, (Exhibits UKR-6, RUS-5) (as amended by Resolution No. 732, (Exhibit UKR-4)); PJSC Order, (Exhibit UKR-7); and Resolution No. 276, (Exhibits UKR-8, RUS-6) (as amended by Resolution No. 732, (Exhibit UKR-4)). Both parties advised in the interim review stage that Decree No. 560 has since been further extended until 31 December 2019 by Decree No. 420, which was adopted by the President of the Russian Federation on 12 July 2018. Section II.A also identifies Resolution No. 778, (Exhibits UKR-10, RUS-7) and its amendments. (See fn 385 below for a full list of amendments to Resolution No. 778.)

[384] Ukraine's panel request, section II.B., pp. 3-4.

[385] Resolution No. 778 is amended by the following resolutions of the Government of the Russian Federation: (a) Resolution No. 830, (Exhibit UKR-11); (b) Resolution No. 625, (Exhibit UKR-12); (c) Resolution No. 842, (Exhibit UKR-13); (d) Resolution No. 981, (Exhibit UKR-14); (e) Resolution No. 1397, (Exhibit UKR-15); (f) Resolution No. 157, (Exhibit UKR-16); (g) Resolution No. 472, (Exhibit UKR-17); (h) Resolution No. 608, (Exhibit UKR-18); (i) Resolution No. 897, (Exhibit UKR-19); (j) Resolution No. 1086, (Exhibit UKR-20); and (k) Resolution No. 790, (Exhibit UKR-70).

[386] Ukraine's panel request, section III.A., p. 4.

[387] Ibid. p. 5. Ukraine's panel request identifies the following legal instruments through which Russia imposes these measures: Veterinary Instruction, (Exhibits UKR-21, RUS-10); Instruction No. FS-AS-3/22903 of the *Rosselkhoznadzor* dated 21 November 2014, (Plant Instruction), (Exhibits UKR-22, RUS-11); and any additional measures that prolong, replace, amend, implement, extend or apply these measures, as well as other related measures. (Ukraine's panel request, section III.A., p. 5.)

[388] Ibid.

countries in Central/Eastern Asia and Caucasus through the territory of the Russian Federation, including measures that implement, complement, add to, apply, amend or replace any of the measures mentioned in section II.A. or section III.A".[389] The introductory words to this sub-category of the panel request indicate that this sub-category is necessitated by Russia's alleged "fundamental lack of transparency concerning some of the measures at issue" and "failure to observe the transparency and publication obligations" under the GATT 1994 and its Accession Protocol.[390]

7.270. With respect to the "legal basis of the complaint" for the second group of measures so identified, section III.B of Ukraine's panel request states that these measures are inconsistent with a number of provisions of Articles V, XI:1 and X of the GATT 1994, along with various paragraphs of Russia's Working Party Report, as incorporated into Russia's Accession Protocol by reference.[391] In addition to identifying the claims of WTO-inconsistency, this section of Ukraine's panel request provides a brief explanation as to why the measures in question are considered inconsistent with the cited provisions of the covered agreements.

7.7.1.2 Presentation of the measures and claims in Ukraine's first written submission

7.271. In section IV of its first written submission, Ukraine presents four "categories" of measures, as opposed to the arrangement under two "groups of measures" in its panel request.[392] The four categories of measures in section IV of Ukraine's first written submission (and the terminology chosen by the Panel to describe these categories of measures) are:

a. "2016 general transit ban and other transit restrictions" (the 2016 Belarus Transit Requirements);

b. "2016 product-specific transit ban and other transit restrictions" (the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods);

c. "De facto application of the 2016 general and product-specific transit bans in Decree No. 1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" (the *de facto* measure); and

d. "2014 transit bans and other transit restrictions" (the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods).[393]

7.272. Ukraine considers that the first category of measures, which the Panel refers to as the 2016 Belarus Transit Requirements, corresponds fully to the measures identified in section II.A. of Ukraine's panel request as the requirements that international cargo transit by road and rail from the territory of Ukraine destined for the territories of the Republic of Kazakhstan and the Kyrgyz Republic, through the territory of Russia, be carried out exclusively from the territory of Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific permanent or mobile checkpoints.[394]

7.273. The second category of measures, which the Panel refers to as the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods, Ukraine considers to correspond fully to the measures identified in section II.A. of Ukraine's panel request as the ban on all road and rail transit of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, including the exceptional derogation procedure for such goods.[395]

7.274. The third category of measures, the *de facto* measure, Ukraine considers to correspond to the measures identified in the second sub-category of the second group of measures in section III.A.

[389] Ukraine's panel request, section III.A., p. 5.
[390] Ibid.
[391] Ibid. section III.B., pp. 5-6.
[392] Ukraine's first written submission, section IV, entitled "The measures at issue".
[393] Ibid. para. 54.
[394] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 63.
[395] Ibid.

of Ukraine's panel request, namely, "restrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic".[396]

7.275. The fourth category of measures, which the Panel refers to as the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods, Ukraine considers to correspond to the measures identified in the first sub-category of the second group of measures in section III.A of Ukraine's panel request, namely, the 2014 prohibitions on the "transit of goods subject to veterinary and phytosanitary surveillance and which are included in the list approved by Resolution … No. 778 … through the checkpoints of the Republic of Belarus", along with special checkpoint and permit requirements for such goods destined for Kazakhstan and other countries.[397]

7.276. In section V of its first written submission, Ukraine presents its arguments of WTO-inconsistency of each of the categories of measures.[398] This discussion is arranged on the basis of the claims of inconsistency with: (a) Article V of the GATT 1994 and paragraph 1161 of Russia's Working Party Report; (b) Articles X:1 and X:2 of the GATT 1994 and paragraphs 1426, 1427 and 1428 of Russia's Working Party Report; and (c) Article X:3(a) of the GATT 1994.[399] Within the discussion of the claims of inconsistency with the specific provisions (and subparagraphs of those provisions), Ukraine discusses serially the relevant categories of measures alleged to infringe the specific provisions.[400]

7.7.2 Whether Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU

7.277. The relevant portion of Article 6.2 of the DSU reads:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.278. Article 6.2 of the DSU has two distinct requirements, namely: (a) the identification of the specific measures at issue; and (b) the provision of a brief summary of the legal basis of the complaint.[401] Article 6.2 defines the scope of the dispute between the parties, thereby establishing and delimiting the panel's jurisdiction and serving the due process objective of notifying the respondent, and the third parties, of the nature of the case.[402] Moreover, in order to "present the problem clearly", within the meaning of Article 6.2, a panel request must "plainly connect" the challenged measure(s) with the provision(s) claimed to have been infringed so that a respondent can "know what case it has to answer, and … begin preparing its defence".[403] Compliance with the requirements of Article 6.2 of the DSU must be demonstrated on the face of the panel request. Consequently, defects in the panel request cannot be cured by the subsequent submissions of the parties.[404]

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[396] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 43 and 63.
[397] Ibid. para. 63.
[398] Ukraine's first written submission, section V, entitled "WTO-inconsistency of the measures at issue".
[399] Ukraine did not pursue its claims under Article XI:1 of the GATT 1994 in its first written submission.
[400] Ukraine's first written submission, para. 156 *et seq*.
[401] As the Appellate Body has held in previous disputes, these two requirements constitute the "matter referred to the DSB", which forms the basis of a panel's terms of reference under Article 7.1 of the DSU. (Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Argentina – Import Measures*, para. 5.39.)
[402] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Argentina – Import Measures*, para. 5.39.
[403] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162. (fns omitted)
[404] Nevertheless, subsequent submissions, such as the complainant's first written submission, may be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request. (Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9; *Argentina – Import Measures*, para. 5.42; and *US – Carbon Steel*, para. 127.)

7.279. In what follows, for each of the measures identified in Ukraine's panel request in the first and second groups of measures, the Panel determines whether the identification of the measures and claims satisfies the requirements of Article 6.2.

7.7.2.1 First group of measures – identification of the specific measures at issue and the legal basis of the complaint

7.280. Section II.A. of Ukraine's panel request identifies the following measures:

a. Requirements that international cargo transit by road and rail from the territory of Ukraine destined for the territories of the Republic of Kazakhstan or the Kyrgyz Republic, through the territory of Russia, be carried out exclusively from the territory of Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific permanent or mobile checkpoints.

b. A ban on all road and rail transit of: (i) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (ii) goods that fall within the scope of the import ban imposed by Resolution No. 778.

7.281. The specific measures within this group appear to be connected by the fact that they are implemented through a common set of legal instruments, namely, Decree No. 1, and Decree No. 319, which amended Decree No. 1 in material respects.[405]

7.282. The Panel considers that the identification of each of the measures within the first group of measures in section II.A. satisfies the requirements of Article 6.2 of the DSU.

7.283. Russia contends that the legal basis for the complaint in respect of the above-mentioned measures is provided only in respect of the group of measures, rather than for each of the measures within the group.[406] Russia does not explain why it reads Ukraine's panel request in this manner and the Panel does not share that reading. The opening words of section II.B. of Ukraine's panel request, entitled "Legal Basis for the Complaint", read: "Ukraine considers that the measures identified in section II.A. are inconsistent with the following WTO provisions". Ukraine's use of the term "the measures" rather than "group of measures" makes clear that the claims of WTO-inconsistency that follow are made in relation to *each* of the measures within the first group of measures identified in section II.A. of Ukraine's panel request.

7.284. The Panel therefore considers that the panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section II.B. of Ukraine's panel request.

7.7.2.2 Second group of measures – identification of the specific measures at issue and the legal basis of the complaint

7.285. As previously noted[407], the measures identified in the second group of measures in section III.A. of Ukraine's panel request comprise:

a. 2014 prohibitions on transit, from Ukraine across the territory of Russia and through checkpoints of the Republic of Belarus, of goods that are subject to veterinary and phytosanitary surveillance and that fall within the scope of the import bans imposed by Resolution No. 778, along with requirements that the transit of any such goods destined for Kazakhstan and other third countries occur on the basis of permits issued by the appropriate Kazakh or Russian veterinary and phytosanitary surveillance authorities and through designated checkpoints;

[405] See para. 7.267 above.
[406] Russia's second written submission, para. 10.
[407] See para. 7.269 above.

b. the "de facto application of Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic"; and

c. related transit measures that implement, complement, add to, apply, amend or replace any of the measures identified in both sections II.A and III.A. of Ukraine's panel request, of which Ukraine may not be aware owing to Russia's alleged failure to comply with its transparency and publication obligations.

7.286. The Panel agrees with Russia that it is difficult to discern a relationship among the measures within this second group that would warrant them being grouped together, especially since the third sub-category of measures (in item c. above) also covers measures related to those within the first group of measures in section II.A. of the panel request. However, Ukraine's decision to group these measures together in its panel request does not of itself render the identification of the measures unclear.

7.287. The Panel next considers whether the identification of the measures within each sub-category of the second group of measures in section III.A. of Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU.

7.7.2.2.1 First sub-category of measures

7.288. The first sub-category of the second group of measures (item a. in paragraph 7.285 above) are prohibitions, put in place in November 2014, on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and that are subject to the import ban implemented by Resolution No. 778, along with related requirements that the transit of any such goods destined for Kazakhstan or other third countries occur through designated Russian checkpoints and that all such goods be subject to clearance and on the basis of permits issued by the appropriate Russian or Kazakh veterinary and phytosanitary surveillance authorities. Specifically, Ukraine challenges these measures *as they affect transit from the territory of Ukraine* through the territory of Russia.[408]

7.289. The Panel concludes that Ukraine's panel request clearly identifies the first sub-category of the second group of measures.

7.7.2.2.2 Second sub-category of measures

7.290. In its panel request, Ukraine describes the measure in item b. in paragraph 7.285 above as the de facto application of "Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic". The Panel refers to this measure as the "*de facto* measure" in the remainder of this discussion.

7.291. At the Panel's request, the parties engaged specifically on whether the identification of the *de facto* measure in Ukraine's panel request satisfied the requirements of Article 6.2 of the DSU.[409] Therefore, although the Panel is addressing this issue in the context of evaluating Russia's more general objection that none of the measures or claims was sufficiently precisely identified, it is necessary to refer to arguments that the parties made more specifically about the *de facto* measure.

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[408] See the first sentence in section III.A. of Ukraine's panel request, and the underscored sentence prior to the paragraph beginning "Second" in section III.A. of Ukraine's panel request. (Ukraine's panel request, pp. 4-5.)

[409] The Panel raised this issue on its own motion, through a question that it posed to the parties in advance of the first meeting. (See Communication to the parties, "Request for discussion of specific issues to be included in the parties' oral statements", dated 12 January 2018, Question No. 2.) The Appellate Body has previously referred to the widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any dispute that comes before it. (Appellate Body Reports, *US – 1916 Act*, para. 54 and fn 30 thereto; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; and *EC and certain member States – Large Civil Aircraft*, para. 791; and Panel Reports, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 7.19-7.20; *EC – IT Products*, para. 7.196; *China – Broiler Products*, para. 7.515; and *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.358.)

7.7.2.2.2.1 Arguments of Russia

7.292. Russia argues that Ukraine's description of the *de facto* measure in its panel request is insufficiently clear for purposes of Article 6.2 of the DSU.[410] Russia considers that it is not possible to determine the geographical scope of application of the *de facto* measure from the reference in the panel request to "countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan", taking into account the number of countries covered by such a description.[411] In addition, the description of the *de facto* measure in the second sub-category of the second group of measures (set forth in paragraph 7.269.b above), in combination with the third sub-category of the second group of measures (set forth in paragraph 7.269.c above) does not enable the respondent to discern whether the measure is written or unwritten, or whether it is being challenged on an "as such" or "as applied" basis.[412] Russia considers that the measure in question constitutes "an imprecise open-ended list with the possibility for the claimant to put any new element on the table".[413]

7.7.2.2.2.2 Arguments of Ukraine

7.293. Ukraine argues that the measure that it challenges, which it describes in its first written submission as the "de facto application of the 2016 general and product-specific transit bans in Decree No. 1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan" was identified in its panel request in a manner that satisfies the requirements of Article 6.2 of the DSU.[414] Ukraine argues that there is no requirement under Article 6.2 of the DSU to identify in a panel request whether a measure is written or unwritten, or is challenged on an "as such" or "as applied" basis.[415] Moreover, the measure as described in the second sub-category of the second group of measures (in section III.A. of the panel request) is clearly distinct from the general and product-specific transit bans and other restrictions identified in the first group of measures in section II.A. of the panel request.[416] According to Ukraine, the measure described in the second sub-category of the second group of measures in section III.A. of the panel request, through the phrase "by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic" was clearly identified as a distinct measure comprising "the application in fact of the measures introduced by Decree No. 1 and Resolution No. 1 to traffic in transit destined for territories other than those covered by Decree No. 1 and Resolution No. 1".[417]

7.294. Ukraine also rejects the argument that the reference in the panel request to the legal instruments in question being applied to transit destined for territories in "Central and Eastern Asia and the Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic" amounts to an "open-ended list" of measures that fails to meet the requirements of Article 6.2 of the DSU.[418] In Ukraine's view, on the basis of the United Nation's definitions of the regions in question, the geographical specification in the second sub-category of the second group of measures identified in section III.A. of the panel request clearly referred to traffic destined for "Tajikistan; Turkmenistan; Uzbekistan; China; Hong Kong China; Macao, China; Chinese Taipei; the Democratic People's Republic of Korea; Japan; Mongolia; the Republic of Korea; Georgia; Azerbaijan; and Armenia".[419]

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[410] Russia's opening statement at the first meeting of the Panel, para. 23.
[411] Ibid. para. 22. See also Russia's second written submission, paras. 14-15.
[412] Russia's opening statement at the first meeting of the Panel, para. 22.
[413] Ibid. See also Russia's opening statement at the second meeting of the Panel, para. 13.
[414] Ukraine's opening statement at the first meeting of the Panel, para. 53; and response to Panel question No. 1 after the first meeting of the Panel, para. 12.
[415] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 45.
[416] Ibid. para. 49.
[417] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 51. Ukraine argues that, contrary to Russia's understanding, "the matter before the Panel includes the *de facto* application of Decree No. 1 and Resolution No. 1, and thus the restrictions on traffic in transit imposed by both instruments" and not "any measure affecting traffic in transit from the territory of Ukraine to countries in Central/Eastern Asia and Caucasus". (Ukraine's opening statement at the second meeting of the Panel, para. 24.)
[418] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 58-60. See also Ukraine's opening statement at the second meeting of the Panel, para. 24.
[419] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 59-60; and Map of Central Asia, Map of the Caucasus and Central Asia, and the UN Classification of Countries by Region,

This is not an open-ended list, and the fact that Ukraine elected, in its first written submission, to demonstrate the *existence* of the measure with respect to transit destined for a subset of those destinations, does not affect the conclusion that the geographical specification in the panel request was not open ended.[420]

7.7.2.2.2.3 Analysis

7.295. Section III.A. of Ukraine's panel request identifies the *de facto* measure in the following manner:

> [R]estrictions on the traffic in transit from the territory of Ukraine through the territory of the Russian Federation to countries in Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic.[421]

7.296. This identification refers explicitly to transit restrictions that arise out of the application of Decree No. 1 and Resolution No. 1. The transit restrictions effected through Decree No. 1 and Resolution No. 1 are described in the first three paragraphs of section II.A. of Ukraine's panel request, and concern the requirements that international cargo transit by road and rail from the territory of Ukraine destined for the territory of Kazakhstan, through the territory of Russia, be carried out exclusively from the territory of Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points.

7.297. Before evaluating the description of the *de facto* measure in Ukraine's panel request, the Panel recalls the level of scrutiny that panels must apply in determining whether a panel request meets the specificity requirement under Article 6.2 of the DSU. The Appellate Body has stated that the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures, which would require that a complainant present relevant arguments and evidence in its submissions.[422] While a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need only be framed "with sufficient particularity so as to indicate *the nature of the measure* and *the gist of what is at issue*".[423] Thus, according to the Appellate Body, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement.[424]

7.298. The standard outlined above was developed by the Appellate Body in *US – Continued Zeroing* in the process of reversing the panel's finding in that dispute that an examination of the specificity of a panel request *would* entail a consideration of the types of measures susceptible to WTO dispute settlement. The panel had found that the panel request did not satisfy the requirement in Article 6.2 to identify the specific measures at issue because it failed to "demonstrate the existence and the precise content of the purported measure" and because "the continued application" of anti-dumping duties resulting from 18 anti-dumping duty orders did not constitute a measure for the purposes of WTO dispute settlement proceedings.[425] The Appellate Body considered that the panel request had sufficiently linked together the following three elements in seeking to identify the measures at issue[426]:

Income Group, and Subregion of the World, (The Regions of Central Asia, Eastern Asia and Caucasus), (Exhibit UKR-102).

[420] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 61.
[421] Ukraine's panel request, section III.A., p. 5.
[422] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[423] Ibid. (emphasis added)
[424] Ibid.
[425] Ibid. para. 167 (quoting Panel Report, *US – Continued Zeroing*, para. 7.56).
[426] Ibid. para. 166.

a. The panel request made "explicit reference" to the duties at issue, imposed through 18 anti-dumping duty orders, each on a "specific product" exported from "a specific country"[427];

b. The panel request indicated that the complainant was challenging the "continued application" of the anti-dumping duties pursuant to certain administrative proceedings[428]; and

c. The panel request stated that the duties at issue were calculated at levels "in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement". The complainant stated specifically in its panel request that the respondent's investigating authority "systematically" used the zeroing methodology in all types of reviews pertaining to anti-dumping duties and relied on margins calculated with the zeroing methodology in sunset reviews.[429]

7.299. The Appellate Body concluded that, with these three elements, taken together, the respondent could reasonably have been expected to understand that the complainant was challenging the continued application of the zeroing methodology in successive proceedings, through each of the 18 anti-dumping duty orders.[430]

7.300. Given these facts, the Panel understands the panel request in *US – Continued Zeroing* to have identified the measures at issue "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue" because it explicitly: (a) provided an indication that the measure was applied to determine the duties imposed on products from "specific countr[ies]"; (b) identified the unwritten measure at issue (i.e. the zeroing methodology); (c) specified the basis on which the measure was challenged (i.e. "the continued application of … anti-dumping duties" according to the zeroing methodology and the "systematic[]" use of the zeroing methodology); and (d) identified the legal instruments in which that methodology was used (i.e. "18 anti-dumping duty orders").

7.301. Reading the standard developed by the Appellate Body in *US – Continued Zeroing* as tied to the precise aspects of the panel request in that dispute, the Panel does not consider that Ukraine's identification of the *de facto* measure in its panel request satisfies Article 6.2 of the DSU. As the Panel will explain further below, the panel request in this dispute does not identify with sufficient precision: (a) *the destinations of the goods* that are subject to the *de facto* measure, (b) the nature of the *de facto* measure as an *unwritten* measure, (c) the nature of the *de facto* measure as a *single* measure, (d) the "*as such*" character of its challenge concerning the *de facto* measure, and (e) the *legal instruments* underpinning the *de facto* measure. These aspects of Ukraine's panel request, taken together, lead to the conclusion that Ukraine has not identified the *de facto* measure with requisite sufficient particularity.

7.302. In the present dispute, the *de facto* measure is described as involving the application of the restrictions in Decree No. 1 and Resolution No. 1, to traffic in transit from Ukraine, for third-country destinations in Central and Eastern Asia and Caucasus, other than Kazakhstan and the Kyrgyz Republic. Ukraine considers that the regions of Central Asia, Eastern Asia and the Caucasus cover the following countries: Tajikistan; Turkmenistan; Uzbekistan; China; Hong Kong, China; Macao, China; Chinese Taipei; the Democratic People's Republic of Korea; Japan; Mongolia; the Republic of Korea; Georgia; Azerbaijan; and Armenia.[431] In support, Ukraine submits: (a) a UN map of Central Asia that identifies the countries of Kazakhstan, the Kyrgyz Republic,

[427] Appellate Body Report, *US – Continued Zeroing*, para. 165. The 18 anti-dumping duty orders at issue were also listed in the annex to the European Communities' panel request, and a citation was included for each order. (Ibid.)

[428] Ibid.

[429] Ibid. The complainant also stated in its panel request that it "ha[d] identified in the annex to this request a number of anti-dumping orders where duties are set and/or maintained on the basis of the above-mentioned zeroing practice or methodology with the result that duties are paid by importers … in excess of the dumping margin which would have been calculated using a WTO consistent methodology". (Ibid.)

[430] Ibid. para. 166.

[431] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 60; and The Regions of Central Asia, Eastern Asia and Caucasus, (Exhibit UKR-102).

Tajikistan, Turkmenistan and Uzbekistan as "Central Asia"[432]; (b) a map of "the Caucasus and Central Asia" produced by the U.S. Central Intelligence Agency that identifies, in addition to the Central Asian countries identified in the UN map, the countries of Georgia, Armenia and Azerbaijan[433]; and (c) excerpts from a publication of the Population Division of the UN Department of Economic and Social Affairs that classifies countries by region, income group and sub region. In that publication, the region of "Eastern Asia" is classified to cover China; "China, Hong Kong [special administrative region]"; "China, Macao [special administrative region]"; "China, Taiwan Province of China"; "the Democratic People's Republic of Korea"; "Japan"; "Mongolia" and the "Republic of Korea".[434] That publication also identifies Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan as being part of "Central Asia", which is classified, along with countries in "Southern Asia", as part of "South-Central Asia".[435] However, there is no reference in this publication to the region referred to as "the Caucasus". Rather, the countries of Armenia, Azerbaijan and Georgia are presented as part of "Western Asia", along with Turkey, Cyprus, Iraq and the various Gulf States and countries of the Middle East.

7.303. On the basis of the maps submitted by Ukraine, it appears that the countries included within the regions of "Central Asia, Eastern Asia and the Caucasus" cover those that share land borders with Russia to the Southeast (Georgia and Azerbaijan), and to the East (China, Mongolia and North Korea), as well as those that share land borders with Kazakhstan. Indeed, aside from Ukraine and Belarus, the only countries with which Russia shares land borders that would be specifically excluded from the geographical scope of the *de facto* measure, as identified in Ukraine's panel request, are the European Union (Estonia, Finland, Latvia, Lithuania and Poland) and Norway.

7.304. Transit measures by their nature apply to goods that fall within the definition of "traffic in transit" under Article V:1 of the GATT 1994.[436] Owing to the requirement that the passage of such traffic in transit across the territory of a Member begin and end in a territory other than the territory of that Member, the destination of the goods in question is ordinarily an important component of a transit measure.[437] Moreover, when a Member alleges that a transit measure is *in fact* being applied to traffic in transit destined for countries other than those set forth in the measure itself, and that this application constitutes a separate, unwritten transit measure, it is even more important that the destinations in question be precisely identified.[438]

7.305. Given the nature of the measure as a transit measure, which is unwritten and consists of the *de facto* application of a written measure that applies to transit destined for two countries, to what appears to be potentially as many as 15 countries in regions as large and diverse as "Central and Eastern Asia and Caucasus other than the Republic of Kazakhstan and the Kyrgyz Republic", the

[432] The Regions of Central Asia, Eastern Asia and Caucasus, (Exhibit UKR-102), p. 2. (pagination of PDF file)

[433] Ibid. p. 3. (pagination of PDF file)

[434] Ibid. p. 5. (pagination of PDF file)

[435] Ibid. (pagination of PDF file)

[436] Article V:1 of the GATT 1994 provides that "[g]oods … shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes."

[437] This is particularly so when a complainant brings a claim under the second sentence of Article V:2 of the GATT 1994, which provides that "[n]o distinction shall be made which is based on … the place of … destination."

[438] In *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that, because the very existence and precise contours of a measure that is unwritten may be uncertain, complainants are expected to identify such measures in their panel requests as clearly as possible. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792.) In this appeal, the Appellate Body concluded, on its own motion, that the United States' challenge to an unwritten LA/MSF programme was not identified as a specific measure in the United States' panel request and was therefore outside the panel's terms of reference. The Appellate Body considered that the references in the United States' panel request to individual provisions of LA/MSF could not, at the same time, be read to also refer to a distinct measure consisting of an unwritten LA/MSF Programme. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 790, 792 and 795.)

Panel has serious doubts as to whether Russia would have been able to understand the nature of the measure and the gist of what was at issue.[439]

7.306. Ukraine argues that the reference in its panel request to the countries in Central and Eastern Asia and Caucasus other than those of the Republic of Kazakhstan and the Kyrgyz Republic is not an "open-ended list", but a clear reference to Tajikistan; Turkmenistan; Uzbekistan; China; Hong Kong, China; Chinese Taipei; the Democratic People's Republic of Korea; Japan; Mongolia; the Republic of Korea; Georgia; Azerbaijan; and Armenia.[440] Ukraine states that Mongolia, Tajikistan, Turkmenistan and Uzbekistan are part of the "countries in Central and Eastern Asia and Caucasus", and that the reference to these countries in its first written submission thus confirms the wording used in its panel request.[441] The Panel agrees with Ukraine that it was free, in its first written submission, to elect to show the *existence* of the *de facto* measure with respect to transit destined for only a *subset* of countries that it had previously clearly identified in its panel request. However, the present issue involves the question of whether the superset of destination countries that comprises the *de facto* measure was sufficiently clearly identified in the panel request in the first place. The reference to "countries in Central and Eastern Asia and Caucasus" in Ukraine's panel request operates more like a placeholder for countries that Ukraine would later specify in its first written submission. This vagueness in the description of the destination countries in the panel request renders the identification of the *de facto* measure insufficiently precise to meet the requirements of Article 6.2 of the DSU.

7.307. Additionally, the Panel notes that Ukraine's panel request does not explicitly state whether the *de facto* measure identified in the second sub-category of the second group of measures in section III.A. of its panel request is: (a) an unwritten measure, (b) a single measure (as opposed to multiple measures), or (c) being challenged on an "as such" basis. Those aspects of the measure and the way it is being challenged are not clarified until Ukraine's first written submission. Ukraine's panel request identifies the *de facto* measure by noting that Russia "imposes restrictions" on traffic in transit "by de facto applying Decree No. 1 and Resolution No. 1 to transit from the territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic". The use of the terms "restrictions" and "de facto applying" could reasonably be interpreted to mean that Ukraine challenges individual instances of the *de facto* application of Decree No. 1 and Resolution No. 1. It is not until Ukraine's first written submission that it becomes apparent that Ukraine challenges a single, unwritten measure (consisting of the *de facto* application of Decree No. 1 as amended, beyond the scope of its explicit terms) on an "as such" basis.

7.308. The omission of the "as such" character of Ukraine's challenge concerning the *de facto* measure is particularly important considering the Appellate Body's statements in *US – Oil Country Tubular Goods Sunset Reviews*. In that dispute, the Appellate Body urged complainants to be "*especially diligent*" in setting out "as such" claims in their panel requests "as clearly as possible".[442] The Appellate Body added that it would expect that "as such" claims "state unambiguously" the specific measures of municipal law challenged by the complainant and the legal basis for the allegation that those measures are WTO-inconsistent. Through "such straightforward presentations of 'as such' claims", panel requests should leave respondents "in little doubt" that another Member intends to challenge those measures "as such".[443]

[439] The Panel notes that other panels have found measures to be insufficiently specified for purposes of Article 6.2 of the DSU where they were described too broadly in a panel request. For example, in *Australia – Apples*, New Zealand's panel request referred to both "measures specified in and required by Australia pursuant to the *Final import risk analysis report for apples from New Zealand*" and, "in particular" to a list of 17 requirements spelled out in the report and identified in the panel request through bullet points. (Panel Report, *Australia – Apples*, para. 7.1446.) The panel found that "given the length and complexity of Australia's [report]", the broad reference in New Zealand's panel request to "measures specified in and required by Australia pursuant to the [report]" failed to satisfy the requirement of sufficient clarity in the identification of the specific measures at issue set forth in Article 6.2 of the DSU. (Ibid. para. 7.1449.)

[440] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 58-60. See also Ukraine's opening statement at the second meeting of the Panel, para. 24.

[441] Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 62.

[442] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*s, para. 173. (emphasis original)

[443] Ibid.

7.309. Although the Appellate Body upheld the panel's finding in that dispute that the measure at issue was identified with sufficient precision pursuant to Article 6.2 of the DSU, the Appellate Body did so on the specific basis that: (a) the panel request explicitly stated that it was challenging the "irrefutable presumption" found in "US law *as such*"[444]; (b) the wording and logic of the panel request demonstrated that the complainant would establish the WTO-inconsistency of the specific US legal provisions embodying the "irrefutable presumption"[445]; and (c) the relevant measure was listed under a shared heading with other "as such" claims, so such a heading could not have been limited to "as applied" claims.[446]

7.310. In the present dispute, the panel request does not specify the "as such" challenge concerning the *de facto* measure in such a manner. First, as stated above, the panel request does not specify the "as such" nature of Ukraine's challenge concerning the *de facto* measure. Second, the wording of the relevant section of Ukraine's panel request, as reproduced in paragraph 7.295 above, does not suggest whether Ukraine aims to establish the WTO-inconsistency of the *de facto* measure as a measure of general and prospective application or as individual instances of application. Third, the heading for section III.A. of the panel request, entitled "The Measures at Issue", and the descriptions of the measures above and below the *de facto* measure, do not indicate whether Ukraine intended to challenge any other measures on an "as such" basis.

7.311. Finally, the Panel observes that the *de facto* measure is identified in Ukraine's panel request as comprising the *de facto* application of one set of legal instruments (Decree No. 1 and Resolution No. 1), while it is described in Ukraine's first written submission as comprising the *de facto* application of a different set of legal instruments (Decree No. 1, *as amended*). Decree No. 1 "as amended" can be understood to mean Decree No. 1 *as amended by Decree No. 319*. Decree No. 319 introduced amendments to Decree No. 1, effective as of 1 July 2016, to (a) extend the requirement that all international cargo transit by road and rail from Ukraine destined for Kazakhstan enter Russia via Belarus and be subject to additional conditions related to identification seals and registration cards, to international cargo transit by road and rail destined for the Kyrgyz Republic; and (b) impose a ban on road and rail transit of goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, as well as goods falling within the scope of the import bans imposed by Resolution No. 778.

7.312. Ukraine did not refer to Decree No. 319 in the section of its panel request that identifies the *de facto* measure. The Panel considers that the failure to refer specifically to Decree No. 319 in the identification of the *de facto* measure in the second group of measures in section III.A. of Ukraine's panel request could reasonably have led Russia to conclude that Ukraine was only challenging the *de facto* application of restrictions on transit effected by Decree No. 1 and Resolution No. 1. This is reinforced by the fact that Ukraine's panel request *did* explicitly refer to Decree No. 319 in the first group of measures in section II.A. In the circumstances, Russia could reasonably have inferred that the absence of a reference to Decree No. 319 in the identification of the second group of measures in section III.A. of the panel request was deliberate.[447]

7.313. This is further supported by the fact that the identification of the *de facto* measure in the second sub-category of the second group of measures in section III.A. of the panel request uses the term "restrictions" rather than "bans". The reference to Decree No. 319 in section II.A. of the panel request, by contrast, describes this instrument as involving a "ban". The use of the word "restrictions" rather than "bans" to describe the *de facto* measure could also reasonably have led Russia to conclude that the *de facto* measure was concerned with the *de facto* application of the *restrictions* on transit (i.e. the restrictive conditions requiring that transit from Ukraine occur

[444] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*s, para. 165. (emphasis original)

[445] Ibid. para. 166.

[446] Ibid. para. 167.

[447] Although the third sub-category of the second group of measures described in section III.A. of the panel request refers to amendments to any of the measures mentioned in sections II.A. and III.A., this sub-category is prefaced by the explanation that this inclusion is necessary owing to Russia's failure to comply with the transparency and notification obligations under the GATT 1994 and Russia's Accession Protocol in respect of some of the measures. The existence and content of Decree No. 319 was clearly known to Ukraine at the time of its panel request, as it specifically refers to this instrument in the context of its discussion of the first group of measures in section II.A. Therefore, in the circumstances, it would not have been reasonable for Russia to infer, from the references to amendment measures in the third sub-category of measures described in section III.A., that Ukraine was referring to the amendments to Decree No. 1 effected by Decree No. 319.

exclusively through Belarus and the "additional restrictive conditions" such as the application of identification seals and the use of registration cards, all of which are referred to in Decree No. 1), rather than the ban on transit of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods falling within the scope of the import ban imposed by Resolution No. 778.

7.314. The Panel recognizes that Ukraine's apparent expansion of the scope of the *de facto* measure in its first written submission, to include the *de facto* application of Decree No. 319 in addition to Decree No. 1, does not strictly affect the question of whether the measure was described with the requisite clarity in Ukraine's panel request. As previously noted, compliance with the requirements of Article 6.2 of the DSU must be demonstrated on the face of the panel request. The Panel makes the observations above only to indicate that, even if it had concluded that Ukraine's panel request identified the *de facto* measure with sufficient specificity to meet the requirements of Article 6.2 of the DSU, the Panel considers that the *de facto* measure Ukraine describes in its first written submission is different from the measure it identifies in its panel request.

7.315. The Panel finds that the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.

7.7.2.2.3 Third sub-category of measures

7.316. The third sub-category of the second group of measures (item c. in paragraph 7.285 above) covers any related transit measures that implement, complement, add to, apply, amend or replace any of the measures identified in both sections II.A and III.A. of Ukraine's panel request of which Ukraine may not be aware owing to Russia's alleged failure to comply with its transparency and publication obligations.[448] The legal instruments listed in Ukraine's panel request and of which Ukraine clearly was aware (for example, Decree No. 319, which amended Decree No. 1), would not fall within this sub-category.

7.317. The Panel concludes that Ukraine's panel request clearly identifies the third sub-category of the second group of measures.

7.7.2.2.4 Identification of the legal basis of the complaint

7.318. Russia also contends that the legal basis for the complaint in respect of the measures comprising the second group of measures is provided only in respect of the group, rather than for each of the measures within the group.[449] The opening words of section III.B. of Ukraine's panel request, entitled "Legal Basis for the Complaint", read: "Ukraine considers that the measures identified in section III.A. are inconsistent with the following WTO provisions". As with the similar objection made by Russia in respect of the first group of measures, Ukraine's use of the term "the measures" rather than "group of measures" makes clear that the claims of WTO-inconsistency that follow are made in relation to *each* of the measures within the second group of measures identified in section III.A. of Ukraine's panel request.[450]

7.319. The Panel therefore considers that the panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B. of Ukraine's panel request.

7.7.2.3 Conclusions on whether Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU

7.320. The Panel finds that the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.

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[448] See Ukraine's opening statement at the second meeting of the Panel, paras. 25-26. Ukraine argues that the use of the phrase "related measures" has not changed the essence of the measures that fall within the Panel's terms of reference. (See ibid. para. 27.)

[449] Russia's second written submission, para. 10.

[450] See para. 7.283 above.

7.321. The Panel finds that the identification of the other measures in Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU to identify the specific measures at issue.

7.322. The Panel finds that Ukraine's panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section II.B., and in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B., of Ukraine's panel request.

7.323. The Panel finds that Russia has failed to establish that Ukraine's panel request does not present the problem clearly, as required by Article 6.2 of the DSU, because, in Russia's view, the panel request does not make clear how the measures that comprise each of the two distinct "groups of measures" set forth in the panel request operate together, or adequately explain which treaty provisions are alleged to be infringed by each of the challenged measures in the two groups of measures.

7.7.3 Whether the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods are within the Panel's terms of reference

7.324. In this Section, the Panel addresses Russia's additional argument that the category of measures described in Ukraine's first written submission as the "2014 transit bans and other transit restrictions", and by the Panel as the "2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods" (2014 Belarus-Russia Border Bans)[451], are outside the Panel's terms of reference because these measures were no longer in existence at the time of Ukraine's panel request.

7.325. The 2014 Belarus-Russia Border Bans are the alleged bans identified in the first sub-category of the second group of measures in section III.A. of Ukraine's panel request[452], namely, the 2014 prohibitions on transit from Ukraine across Russia, of goods subject to veterinary and phytosanitary surveillance, and which are included in the list approved by Resolution No. 778, through checkpoints of the Republic of Belarus, along with special checkpoint and permit requirements for such goods destined for Kazakhstan and other countries.[453]

7.326. To recall, in August 2014, the Russian Government passed Resolution No. 778, which temporarily bans the importation into Russia of various agricultural products, raw materials and foodstuffs set forth in a list annexed to the Resolution that originate from certain countries, including the United States, EU Member States, Canada, Australia and Norway, that had imposed sanctions against Russia.[454] The list of products to which the import ban applies has also been modified several times.[455]

7.327. The 2014 Belarus-Russia Border Bans provide that veterinary and plant goods subject to the import bans under Resolution No. 778 may only transit through designated checkpoints located on the Russian side of the external border of the EaEU.[456] The 2014 Belarus-Russia Border Bans are implemented by instructions contained in two letters issued by the *Rosselkhoznadzor*: Instruction No. FS-NV-7/22886, dated 21 November 2014, (the Veterinary Instruction), which

[451] In the previous Sections of this Report, the Panel refers to "2014 transit bans and other transit restrictions" as the "2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods". In this Section, however, for ease of reference, the Panel will refer to these measures as the "2014 Belarus-Russia Border Bans".

[452] See Ukraine's response to Panel question No. 1 after the first meeting of the Panel, para. 63.

[453] For a description of the 2014 measures, see paras. 7.1.d and 7.106.c above, and paras. 7.326-7.327 below.

[454] See para. 7.10 above.

[455] Resolution No. 830, (Exhibit UKR-11); Resolution No. 981, (Exhibit UKR-14); Resolution No. 157, (Exhibit UKR-16); Resolution No. 472, (Exhibit UKR-17); Resolution No. 897, (Exhibit UKR-19); Resolution No. 1086, (Exhibit UKR-20); and Resolution No. 1292, (Exhibit UKR-94).

[456] See para. 7.269.a above. The Panel interprets the Plant Instruction in the context of the contemporaneous Veterinary Instruction, given that both instruments were issued on the same date by the same government authority, in reference to the same ban on products under Resolution No. 778. The Panel therefore considers that "the checkpoints" referred to in the Plant Instruction, properly construed, must be those checkpoints listed in the Veterinary Instruction. This interpretation of the two Instructions was also put forward by Ukraine in its panel request, in which Ukraine asserted that the entry of both veterinary and plant goods was only allowed "through the checkpoints located at the Russian part of the external border of the Customs Union". (Ukraine's panel request, Section III.A., p. 4.) For more detail, see fn 458 below.

applies to veterinary goods covered by Resolution No. 778 as of 30 November 2014[457]; and Instruction No. FS-AS-3/22903, dated 21 November 2014, (the Plant Instruction), which applies to plant goods covered by Resolution No. 778 as of 24 November 2014.[458]

7.328. Russia, in its first written submission, requested a preliminary ruling that the 2014 Belarus-Russia Border Bans are outside the Panel's terms of reference.[459] Russia considers that these alleged bans did not exist at the date of Ukraine's request for consultations (21 September 2016), or at the date of its request for establishment of a panel (10 February 2017).[460] Russia argues that the Veterinary Instruction and the Plant Instruction were "superseded" by Decree No. 1, dated 1 January 2016, and by Resolution No. 1, also dated 1 January 2016.[461] According to Russia, Decree No. 1 therefore "effectively abolished any requirements that were set out in the Letters of *Rosselkhoznadzor* in question in respect of Ukraine".[462] In its opening statement at the first substantive meeting of the Panel, Russia clarified its argument as follows:

a. When the Veterinary Instruction and Plant Instruction were adopted, Ukraine was not included in the list of countries whose goods were subject to Resolution No. 778. Therefore, the 2014 measures "could not [apply] and were not applied to the goods from Ukraine".[463]

b. Resolution No. 778 was amended on 1 January 2016 to add Ukraine to the list of countries whose goods were subject to Resolution No. 778. However, also on 1 January 2016, Decree No. 1 and Resolution No. 1 were adopted to permit the transit of goods from Ukraine across Russian territory only through "the checkpoint situated on the state border of the Russian Federation inside its Russia-Belarus sector".[464]

c. Decree No. 1 and Resolution No. 1, as measures adopted by the Government of the Russian Federation, are superior in the Russian legal hierarchy to the instructions issued

[457] Veterinary Instruction, (Exhibits UKR-21, RUS-10).

[458] Plant Instruction, (Exhibits UKR-22, RUS-11). The Veterinary Instruction specifically prohibits transit across Russia through Belarussian checkpoints, owing to the detection of "gross violations" during the transit of Resolution No. 778 goods through the Republic of Belarus, and limits entry to nine identified checkpoints on the border between Russia, on the one hand, and Finland, Estonia, Latvia and Ukraine, on the other hand. (Veterinary Instruction, (Exhibits UKR-21, RUS-10).) The Plant Instruction, conversely, simply states that the transit of phytosanitary goods covered by Resolution No. 778, destined for third countries including Kazakhstan, will take place "exclusively through the checkpoints across the state border of the Russian Federation". (Plant Instruction, (Exhibits UKR-22, RUS-11).) The Plant Instruction does not, on its face, refer to prohibiting transit across Russia through Belarussian checkpoints, or the nine checkpoints identified in the Veterinary Instruction. However, in an official statement issued by the *Rosselkhoznadzor*, it was explained that the Plant Instruction was intended to prevent the "illegal delivery of quarantined products from the territory of Belarus" and "false transit by the Belarusian and Kazakhstani competent services". (Official Site of the *Rosselkhoznadzor*, "Regarding Regulation by Rosselkhoznadzor of Quarantined Plant Products Transit", dated 24 November 2014, (Exhibit UKR-88).)

[459] Russia's first written submission, para. 31; and opening statement at the first meeting of the Panel, para. 6.

[460] Russia's first written submission, paras. 3, 27 and 30; and opening statement at the first meeting of the Panel, para. 6.

[461] Russia's first written submission, para. 26. Decree No. 1 provides that all road and railway cargo transportation from Ukraine to Kazakhstan, through the territory of Russia, shall be carried out only from the territory of Belarus and shall be subject to additional conditions related to identification seals and registration cards, at specific control points to be established by the Russian Government. Decree No. 1 was amended in various respects by Decree No. 319 on 1 July 2016, including by extending the restrictions on traffic in transit from Ukraine, destined for Kazakhstan, to traffic in transit from Ukraine, destined for the Kyrgyz Republic. Decree No. 319 also imposed a temporary prohibition on the transit from Ukraine, across the territory of Russia, of goods that would be subject to import duties above zero if imported into Russia, as well as goods covered by Resolution No. 778. (Decree No. 1, (Exhibits UKR-1, RUS-1); and Decree No. 319, (Exhibits UKR-2, RUS-2).) Decree No.1 has been extended to apply until 30 June 2018 by Decree No. 643, (Exhibits UKR-98, RUS-13).

[462] Russia's first written submission, para. 26.

[463] Russia's opening statement at the first meeting of the Panel, para. 5.

[464] Ibid. para. 6.

> by the *Rosselkhoznadzor*, which is a Federal Service reporting to the Government of the Russian Federation.[465]

7.329. Accordingly, Russia argues that there has "not been a single day when the measures contained in the Letters of *Rosselkhoznadzor* were applied to the transit of goods from Ukraine".[466]

7.330. Ukraine, in its first written submission, acknowledges that the Veterinary Instruction was formally amended by Instruction No. FS-EN-7/19132 of the *Rosselkhoznadzor* on 10 October 2016, to provide that "traffic in transit of goods that are subject to control by the state veterinary surveillance, from the territory of Ukraine into the territor[ies] of the Republic of Kazakhstan and the Kyrgyz Republic must be carried out according to [Resolution No. 1]".[467] While conceding that veterinary goods covered by Resolution No. 778 "moving specifically from" the territory of Ukraine to the territories of Kazakhstan and the Kyrgyz Republic are accordingly no longer subject to the Veterinary Instruction, Ukraine argues that the Veterinary Instruction continues to apply to traffic in transit *not* covered by Resolution No. 1.[468] Ukraine further argues that if neither instruction ever applied with respect to Ukraine, there would have been no need to adopt Instruction No. FS-EN-7/19132, providing that the traffic in transit of veterinary goods from the territory of Ukraine into the territories of Kazakhstan and the Kyrgyz Republic must be carried out in accordance with Resolution No. 1.[469] Consequently, according to Ukraine, (a) veterinary goods covered by Resolution No. 778 transiting from countries *other than* Ukraine, and (b) veterinary goods covered by Resolution No. 778 transiting from Ukraine but to destinations *other than Kazakhstan and the Kyrgyz Republic*, remain subject to the Veterinary Instruction.[470]

7.7.3.1 Whether the existence of the 2014 Belarus-Russia Border Bans goes to the Panel's terms of reference

7.331. Russia argues that the 2014 Belarus-Russia Border Bans do not have any legal effect with respect to transit from Ukraine, and therefore that the measures do not exist, and are accordingly outside the Panel's terms of reference. Russia's request for a ruling that the 2014 Belarus-Russia Border Bans are outside the Panel's terms of reference relies on what it considers to be a "general rule" in WTO jurisprudence, according to which "the measure covered by a panel's terms of reference must be a measure in existence at the time of the establishment of the panel."[471] It refers to the Appellate Body Report in *EC –Chicken Cuts* in support of this proposition.[472]

7.332. The *EC – Chicken Cuts* dispute involved two original measures that had been explicitly identified in the complaining parties' panel requests. The issue for the panel and Appellate Body was whether two subsequent measures, which had come into existence after the date of the panel requests and therefore had not been explicitly identified in the panel requests, were nevertheless within the panel's terms of reference. In this specific context, the Appellate Body stated that the term "specific measures at issue" in Article 6.2 of the DSU suggests that:

> [A]s a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel. However,

[465] Russia's opening statement at the first meeting of the Panel, para. 6.
[466] Ibid.
[467] Ukraine's first written submission, paras. 59 and 244; and Instruction No. FS-EN-7/19132 of the *Rosselkhoznadzor*, dated 10 October 2016, (Exhibit UKR-75). See also Ukraine's opening statement at the first meeting of the Panel, paras. 9-11.
[468] Ukraine's first written submission, paras. 59 and 244. Ukraine similarly argues that Decree No. 1 and Resolution No. 1 would supersede the Plant Instruction, but only to the extent of a conflict between them, because Presidential decrees and Government resolutions are superior to agency instructions in the Russian legal hierarchy, and in this case, the relevant decree and resolution were also promulgated later in time. (Ukraine's first written submission, para. 60; and opening statement at the first meeting of the Panel, para. 13.)
[469] Ukraine's second written submission, para. 18.
[470] Ukraine's first written submission, para. 244; and opening statement at the first meeting of the Panel, para. 11.
[471] Russia's first written submission, para. 25.
[472] Ibid. (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 156).

> measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference.[473]

7.333. In other words, in *EC – Chicken Cuts*, the terms of reference issue arose because the two subsequent measures had not been explicitly identified in the complainants' panel requests (owing to the fact that they did not then exist). The question was whether they were nevertheless sufficiently identified in the panel requests for purposes of Article 6.2 of the DSU on account of their relationship to two original measures that had been explicitly identified in the panel requests.

7.334. The situation before this Panel is therefore different from the situation in *EC – Chicken Cuts*. The 2014 Belarus-Russia Border Bans *are* identified in Ukraine's panel request.[474] The issue is whether these measures *in fact existed* at the relevant time.

7.335. It is clearly established that the issue of the existence of a measure goes to the merits of a case. It is not a jurisdictional issue. In *EC and certain member States – Large Civil Aircraft*, the European Communities sought a preliminary ruling that alleged launch aid / member State financing (LA/MSF) subsidies to support the development of the Airbus A350 aircraft (A350) were outside the panel's terms of reference because the subsidies did not exist at the time of the United States' panel request for the establishment of a panel. The panel noted that the dispute between the parties concerned the factual question of whether there were any LA/MSF measures in existence with respect to the A350 at the time of the panel request. The panel stated that, where the existence or non-existence of a challenged measure is a disputed question of fact, it is not an appropriate matter for determination in a preliminary ruling. The panel therefore addressed this issue in its evaluation of the United States' substantive claims.[475]

7.336. In *US – Continued Zeroing*, the Appellate Body rejected the panel's view that, in order to successfully raise claims against a measure, the complaining Member must first demonstrate the existence and the precise content of the measure, according to the requirements of Article 6.2 of the DSU.[476] The Appellate Body explained that the identification of the specific measures at issue, pursuant to Article 6.2 of the DSU, is different from a demonstration of the existence of such measures. Only in respect of the latter would the complaining party be expected to present relevant arguments and evidence during the panel proceedings to show the existence of the measures.[477]

7.337. The Appellate Body's approach in *US – Continued Zeroing* was followed by the panel in *US – Orange Juice (Brazil*), which rejected the United States' request for a ruling that Brazil's alleged "continued zeroing" measure was outside the panel's terms of reference because the measure as described in the panel request did not satisfy the requirements of Article 6.2. The panel considered that it was reasonably clear from the description of the measure in its panel request that the complainant challenged the United States' "continued use" of "zeroing procedures" as "ongoing conduct". The panel noted that, in order for it to rule on the United States' request for a preliminary ruling, there was no need for it to go further, and pronounce on whether such "ongoing conduct" was susceptible to challenge in WTO dispute settlement, or decide whether the alleged "ongoing conduct" measure actually existed.[478]

7.338. In *Russia – Tariff Treatment*, Russia sought a preliminary ruling that one of the measures, concerning a particular tariff line, did not exist at the time of the establishment of the panel. The panel quoted the Appellate Body's statement in *US – Continued Zeroing*, adding that a complaining party is not required to establish the existence of a specific measure at issue in its panel

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[473] Appellate Body Report, *EC – Chicken Cuts*, para. 156. (underlining added; footnote omitted)

[474] In its first written submission, Ukraine clarifies that its reference to the Plant Instruction in its panel request contained a typographical error. (See Ukraine's first written submission, fn 77 to para. 55; and opening statement at the first meeting of the Panel, para. 18.) Russia also seems to have understood that particular reference to be a typographical error. (See Russia's first written submission, para. 24.)

[475] See Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.108-7.117.

[476] Panel Report, *US – Continued Zeroing*, para. 7.50.

[477] Appellate Body Report, *US – Continued Zeroing*, para. 169. See also Ukraine's response to Panel question No. 1 after the first meeting of the Panel, paras. 21-22, where, in connection with arguments concerning a different measure, Ukraine refers to the Appellate Body's statement in *US – Continued Zeroing* to support its argument that Article 6.2 of the DSU does not require that the existence of the measures at issue be demonstrated in a panel request.

[478] Panel Report, *US – Orange Juice (Brazil*), paras. 7.41-7.42.

request. Rather, such demonstration is to be made in the complaining party's written submissions and at a panel's meetings with the parties.[479]

7.339. In conclusion, the existence of the 2014 Belarus-Russia Border Bans is an issue that goes to the merits of the case, rather than to the delimitation of the scope of the terms of reference.

7.7.3.2 Whether Ukraine has established the existence of the 2014 Belarus-Russia Border Bans in its panel request

7.340. The Panel next considers whether Ukraine has established that the 2014 Belarus-Russia Border Bans in fact existed at the time of its panel request. The answer to this question depends on whether Ukraine has established that the 2014 Belarus-Russia Border Bans continue to have legal effect with respect to transit from Ukraine, notwithstanding the promulgation of Decree No. 1 and Resolution No. 1 on 1 January 2016. In this respect, Ukraine argues that there is no evidence before the Panel expressly or implicitly of the repeal of the 2014 Belarus-Russia Border Bans, and that, to demonstrate the existence of these measures at the time of the establishment of the Panel, Ukraine is not required to provide evidence of actual application of these transit measures.[480]

7.341. As noted previously, the 2014 Belarus-Russia Border Bans are implemented by two *Rosselkhoznadzor* instruction letters of November 2014.[481] The Veterinary Instruction prohibits, as of 30 November 2014, the transit of veterinary goods covered by Resolution No. 778 and destined for Kazakhstan or third countries across Russian territory through checkpoints in the territory of Belarus. Rather, transit of such goods must take place through specific checkpoints located on the Russian side of the external border of the EaEU.[482] The Plant Instruction does not, on its face, prohibit the transit of plant goods covered by Resolution No. 778 across Russian territory from checkpoints in the territory of Belarus, but instead requires that, as of 24 November 2014, transit of such goods destined for third countries, including Kazakhstan, occur exclusively through "the checkpoints across the state border of the Russian Federation".[483]

7.342. The parties agree that *goods of Ukrainian origin* were not originally subject to Resolution No. 778 and thus, that neither the Veterinary Instruction nor the Plant Instruction originally applied to transit of goods of *Ukrainian origin*. However, the Veterinary Instruction and Plant Instruction by their terms nevertheless applied to the *transit from Ukraine of goods covered by Resolution No. 778* (i.e. specified veterinary and plant goods originating from countries listed in Resolution No. 778).

7.343. The Russian Government subsequently amended Resolution No. 778 so that it also applied to the specified veterinary and plant *goods of Ukrainian origin*, as of 1 January 2016.[484] At the same time, the Russian President promulgated Decree No. 1, which is entitled "On the measures ensuring economic security and national interests of the Russian Federation in the cases of international transit cargo transportation from the territory of Ukraine to the territory of the Republic of Kazakhstan through the territory of the Russian Federation". Decree No. 1 requires that, as of 1 January 2016, *transit from Ukraine* destined for Kazakhstan could only enter Russian territory from

[479] Panel Report, *Russia – Tariff Treatment*, Annex A-1, para. 6.7.
[480] See Ukraine's opening statement at the second meeting of the Panel, paras. 6-7.
[481] See para. 7.327 above.
[482] The introduction to the Veterinary Instruction provides that the prohibition on transit of veterinary Resolution No. 778 goods across Russia from the checkpoints in the territory of Belarus is necessitated by the "detection of gross violations during the transit through the territory of the Republic of Belarus" of veterinary Resolution No. 778 goods. (Veterinary Instruction, (Exhibits UKR-21, RUS-10).)
[483] However, see fns 456 and 458 above.
[484] Russia's opening statement at the first meeting of the Panel, paras. 5-6; and Ukraine's second written submission, para. 14. This was effected through two resolutions of the Government of the Russian Federation: (a) Resolution No. 842, (Exhibit UKR-13), which added Ukraine to the list of countries whose veterinary and plant goods were subject to Resolution No. 778, but with a proviso that the import ban applying to such goods of Ukrainian origin would be applied from the effective date of paragraph 1 of Resolution No. 959 of the Government of the Russian Federation, dated 19 September 2014, but no later than 1 January 2016; and (b) Resolution No. 1397, (Exhibit UKR-15), which amended Resolution No. 778 to provide that the import ban on specified veterinary and plant goods would be applied to Ukraine from 1 January 2016.

the territory of Belarus, and subject to additional conditions related to identification seals and registration cards as well as control points to be established by the Russian Government.[485]

7.344. The parties agree that, to the extent that there is any inconsistency between the Veterinary and Plant Instructions, on the one hand, and Decree No. 1, on the other, the latter would prevail, owing to the fact that it is superior in the Russian legal hierarchy.[486]

7.345. The Veterinary and Plant Instructions concern the transit of goods subject to Resolution No. 778 that are destined for Kazakhstan and other third countries. The requirements in those instructions (i.e. that such goods may not enter Russia through Belarus and can only enter through certain designated checkpoints situated on the Russian state border) would be superseded, as regards *transit from Ukraine* of such goods, by the requirement in Decree No. 1 that *all transit from Ukraine* (which would include goods covered by Resolution No. 778 transiting across Russia from Ukraine) that is destined for Kazakhstan (and from 1 July 2016, the Kyrgyz Republic), be carried out exclusively from the territory of Belarus, and comply with the additional conditions related to identification seals and registration cards, at specific control points, as set out in Decree No. 1.

7.346. Therefore, it is clear that, as of 1 January 2016, the 2014 Belarus-Russia Border Bans did not apply to transit from Ukraine of goods covered by Resolution No. 778 that are destined for Kazakhstan or the Kyrgyz Republic. The question is whether the 2014 Belarus-Russia Border Bans continued to apply to transit from Ukraine of goods covered by Resolution No. 778 that are destined for countries other than Kazakhstan or the Kyrgyz Republic. The Panel considers that the answer to that question depends on the scope of application of the amendment to Decree No. 1 effected by Decree No. 319, namely, the temporary prohibition on the transit of goods covered by Resolution No. 778.

7.347. Decree No. 319 not only expanded the restrictions applying to transit from Ukraine destined for Kazakhstan to apply to transit from Ukraine destined for the Kyrgyz Republic. It also introduced what is referred to as a "temporary" prohibition on the transit of goods covered by Resolution No. 778.[487] The terms of this amendment to Decree No. 1, introduced by Decree No. 319, are as follows:

> To introduce a temporary prohibition for motor road and railroad transportation of goods covered in the Russian Federation by the rates of import customs duties specified in the Common Customs Tariff of the [EaEU] different from zero and the goods included into the list of agricultural produce, raw materials and foodstuffs endorsed by the Government of the Russian Federation in pursuance of Decree of the President of the Russian Federation No. 560 of August 6, 2014 on the Application of Individual Specific Economic Measures for the Purposes of Security of the Russian Federation.[488]

7.348. The prohibition introduced by Decree No. 319 is not, by its express terms, confined to transit *from Ukraine* of goods covered by Resolution No. 778, or to the transit of goods covered by Resolution No. 778 that are destined for any particular countries. If the prohibition applied to the transit of goods covered by Resolution No. 778 regardless of the country from which the goods entered Russia, or the country of destination, the 2014 Belarus-Russia Border Bans would, since 1 July 2016, have been entirely superseded by Decree No. 1, as amended by Decree No. 319.

7.349. However, the title to Decree No. 1 (as amended by Decree No. 319) expressly states that it applies to transit *from Ukraine which is destined for Kazakhstan or the Kyrgyz Republic*. Therefore, the Panel considers that the scope of the prohibition on the transit of goods covered by Resolution No. 778, effected by Decree No. 319 above, is limited to transit *from Ukraine* of such goods where the destination of the goods is either Kazakhstan or the Kyrgyz Republic, and not other destinations.

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[485] Decree No. 1, (Exhibits UKR-1, RUS-1). Decree No. 1 was amended by Decree No. 319 to extend these requirements to Ukrainian traffic in transit destined for the Kyrgyz Republic, as of 1 July 2016. (Decree No. 319, (Exhibits UKR-2, RUS-2).) The control points were established by Resolution No. 1, (Exhibits UKR-3, RUS-4).

[486] See, e.g. Ukraine's first written submission, para. 60; and Russia's first written submission, para. 26.

[487] The temporary prohibition introduced by Decree No. 319 also applies to the transit of goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU. (Decree No. 319, (Exhibits UKR-2, RUS-2).)

[488] Decree No. 1, as amended by Decree No. 319, (Exhibit RUS-1), section 1.1. (underlining original)

7.350. This being so, it appears that Decree No. 1, as amended by Decree No. 319, does not entirely supersede the legal operation of the 2014 Belarus-Russia Border Bans with respect to the transit from Ukraine of goods covered by Resolution No. 778. The 2014 Belarus-Russia Border Bans would continue to apply to the transit from Ukraine of goods covered by Resolution No. 778 that are destined for countries *other than* Kazakhstan or the Kyrgyz Republic.

7.351. The Panel's conclusion that the 2014 Belarus-Russia Border Bans have some residual legal effect as regards transit from Ukraine of goods covered by Resolution No. 778, notwithstanding the promulgation of Decree No. 1 and Decree No. 319, is complicated somewhat by Ukraine's allegation that the Russian authorities are *de facto* applying the measures implemented by Decree No. 1, as amended, to traffic in transit from Ukraine which is destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan. Clearly, if this were the case, the scope of operation of the 2014 Belarus-Russia Border Bans would, in fact, be even more limited owing to the corresponding expansion in the scope of operation of Decree No. 1, as a factual matter.

7.352. However, the Panel has ruled that the *de facto* measure is outside its terms of reference.[489] Therefore, the Panel does not reach any conclusion as to whether Ukraine has established, as an evidentiary matter, that Decree No. 1 is in fact being applied to transit from Ukraine of goods destined for these other countries.

7.353. The Panel therefore concludes that, while Decree No. 1 (as amended by Decree No. 319) supersedes the 2014 Belarus-Russia Border Bans as they apply to the transit from Ukraine of goods covered by Resolution No. 778 that are destined for Kazakhstan or the Kyrgyz Republic, Decree No. 1, as amended, does not by its terms affect the legal operation of the 2014 Belarus-Russia Border Bans as they apply to transit from Ukraine of goods covered by Resolution No. 778 that are destined for countries *other than* Kazakhstan or the Kyrgyz Republic. Accordingly, the Panel finds that Ukraine has established that, as of the date of Ukraine's panel request (10 February 2017), the 2014 Belarus-Russia Border Bans continued to exist, notwithstanding the adoption of Decree No. 1 (as amended by Decree No. 319), in that they had legal effect with respect to transit from Ukraine of goods covered by Resolution No. 778 destined for countries other than Kazakhstan or the Kyrgyz Republic.

7.354. For the sake of clarification, the Panel would add that it is aware that the 2014 Belarus-Russia Border Bans also apply to transit, from countries other than Ukraine, of goods covered by Resolution No. 778. However, Ukraine's panel request confines its challenge to the transit restrictions in the 2014 Belarus-Russia Border Bans to those that apply to "traffic in transit from the territory of Ukraine through the territory of the Russian Federation". This limitation is clear from the underscored paragraph that summarizes the effect of the instruments that implement the first sub-category of the second group of measures in section III.A.:

> As a result of the restrictions imposed by these Instructions combined with the restrictions imposed by Decree No. 1, the goods falling within the scope of these Instructions are prohibited for transit *from the territory of Ukraine* through the territory of the Russian Federation to the territory of the Republic of Kazakhstan and the Kyrgyz Republic.[490]

7.355. Owing to this limitation in Ukraine's panel request, the only aspects of the 2014 Belarus-Russia Border Bans that are within the Panel's terms of reference are those that apply to transit *from Ukraine*.

7.7.4 Summary of the Panel's findings on the measures that are within its terms of reference

7.356. In this Section of the Report, the Panel finds that the *de facto* measure, i.e. the measure referred to in the second sub-category of the second group of measures in section III.A. of Ukraine's panel request as "de facto applying Decree No. 1 and Resolution No. 1 to transit from the

[489] See para. 7.315 above.

[490] Ukraine's panel request, section III.A., p. 5. (underlining original; italics added) See also ibid. section III.A., first sentence, p. 4.

territory of Ukraine to third countries other than the Republic of Kazakhstan and the Kyrgyz Republic", is outside its terms of reference.

7.357. The Panel finds that the following measures are within its terms of reference:

a. The 2016 Belarus Transit Requirements: Requirements that all international cargo transit by road and rail from Ukraine destined for the Republic of Kazakhstan or the Kyrgyz Republic, through Russia, be carried out exclusively from Belarus, and comply with a number of additional conditions related to identification seals and registration cards at specific control points on the Belarus-Russia border and the Russia-Kazakhstan border.

b. The 2016 Transit Bans on Non-Zero Duty Goods and Resolution No. 778 Goods: Bans on all road and rail transit from Ukraine of: (a) goods that are subject to non-zero import duties according to the Common Customs Tariff of the EaEU, and (b) goods that fall within the scope of the import bans imposed by Resolution No. 778, which are destined for Kazakhstan or the Kyrgyz Republic. Transit of such goods may only occur pursuant to a derogation requested by the governments of Kazakhstan or the Kyrgyz Republic which is authorized by the Russian Government, in which case, the transit is subject to the 2016 Belarus Transit Requirements (above).

c. The 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods: Prohibitions on transit from Ukraine across Russia, through checkpoints in Belarus, of goods subject to veterinary and phytosanitary surveillance and which are subject to the import bans implemented by Resolution No. 778, along with related requirements that, as of 30 November 2014, such veterinary goods destined for Kazakhstan or third countries enter Russia through designated checkpoints on the Russian side of the external customs border of the EaEU and only pursuant to permits issued by the relevant veterinary surveillance authorities of the Government of Kazakhstan and the *Rosselkhoznadzor*, and that, as of 24 November 2014, transit to third countries (including Kazakhstan) of such plant goods take place exclusively through the checkpoints across the Russian state border.

8 CONCLUSIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. With respect to the Panel's jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT 1994, the Panel finds that:

   i. it has jurisdiction to determine whether the requirements of Article XXI(b)(iii) of the GATT 1994 are satisfied.

b. With respect to the measures and claims within the Panel's terms of reference, the Panel finds that:

   i. the identification of the *de facto* measure in Ukraine's panel request fails to satisfy the requirements of Article 6.2 of the DSU to identify the specific measures at issue and is therefore outside the Panel's terms of reference.

   ii. the identification of the other measures in Ukraine's panel request satisfies the requirements of Article 6.2 of the DSU to identify the specific measures at issue.

   iii. Ukraine's panel request adequately describes the legal basis of the complaint in relation to the measures identified within the "first group of measures" for each of the claims made in section II.B., and in relation to the measures identified within the "second group of measures" for each of the claims made in section III.B., of Ukraine's panel request.

   iv. Russia has failed to establish that Ukraine's panel request does not present the problem clearly, as required by Article 6.2 of the DSU.

c. With respect to the existence of the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods as of the date of Ukraine's panel request, the Panel finds that:

   i. Ukraine has established that, as of the date of Ukraine's panel request (10 February 2017), the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods continued to exist, notwithstanding the adoption of Decree No. 1 (as amended by Decree No. 319).

d. With respect to whether Russia has met the requirements for invoking Article XXI(b)(iii) of the GATT 1994, the Panel finds that:

   i. as of 2014, there has existed a situation in Russia's relations with Ukraine that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994;

   ii. each of the measures at issue was taken in time of this emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994;

   iii. Russia has satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994; and

   iv. accordingly, Russia has met the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue, and therefore the measures at issue are covered by Article XXI(b)(iii) of the GATT 1994.

8.2. The Panel also concludes as follows:

a. With respect to Ukraine's claims under the first sentence of Article V:2 of the GATT 1994, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that:

   i. the 2016 Belarus Transit Requirements were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine;

   ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from entering Russia from Ukraine; and

   iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the first sentence of Article V:2, because these measures prohibit traffic in transit from Ukraine from entering Russia from any Member other than those countries from which entry is exclusively permitted, as listed in the measure.

b. With respect to Ukraine's claims under the second sentence of Article V:2 of the GATT 1994, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that:

   i. the 2016 Belarus Transit Requirements were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit;

   ii. the 2016 Transit Bans on Non-Zero Duty and Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of departure (Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) and the place of entry (Belarus, where entry is exclusively permitted) of the traffic in transit; and

iii. the 2014 Belarus-Russia Border Bans on Transit of Resolution No. 778 Goods were inconsistent with the second sentence of Article V:2, because these measures make distinctions based on the place of entry (certain countries where entry is exclusively permitted, as listed in that measure) and the place of origin (countries listed in Resolution No. 778, as amended to include Ukraine) of the traffic in transit.

c. With respect to Ukraine's remaining claims under the GATT 1994, the Panel does not consider it necessary to address Ukraine's claims under Articles V:3, V:4, V:5, X:1, X:2 and X:3(a) of the GATT 1994.

d. With respect to Ukraine's claims under Russia's Working Party Report, as incorporated into its Accession Protocol by reference, the Panel considers that:

i. Russia could justify any inconsistency with paragraphs 1161, 1426, 1427 and 1428 of Russia's Working Party Report as necessary for the protection of its essential security interests taken in time of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994; and

ii. With respect to Ukraine's claims under paragraph 1161 of Russia's Working Party Report, the Panel considers that, had the measures been taken in normal times, i.e. had they not been taken in time of an "emergency in international relations" (and met the other conditions of Article XXI(b)), Ukraine would have made a *prima facie* case that the measures were inconsistent with paragraph 1161 to the extent that they would also be *prima facie* inconsistent with either the first or second sentence of Article V:2 of the GATT 1994, or both; and

iii. The Panel does not consider it necessary to address further Ukraine's claims based on commitments in paragraphs 1426, 1427 and 1428 of Russia's Working Party Report.

8.3. Having found that Russia has not acted inconsistently with its obligations under the GATT 1994 or with commitments in Russia's Accession Protocol, the Panel makes no recommendation to the DSB pursuant to Article 19.1 of the DSU.

APPENDIX – SUBSEQUENT CONDUCT CONCERNING ARTICLE XXI OF THE GATT 1947

INTRODUCTION

1.1. Russia has directed the Panel to analyse the "historic perspective" in order to support its interpretation of Article XXI.[1] In particular, Russia has drawn the attention of the Panel to the following documents: (a) statements made by Czechoslovakia in 1949, in the context of its dispute with the United States over certain export controls; (b) statements made by Ghana in 1961, in the context of opposing Portugal's accession to the GATT 1947; (c) statements made by the European Communities and the United States in 1982, in the context of the dispute between the European Communities and Argentina over certain import measures; (d) statements made by the United States in 1985, in the context of its dispute with Nicaragua over an embargo on Nicaraguan goods; and (e) statements made by the European Communities in 1991, in the context of the dispute between the European Communities and Yugoslavia over the withdrawal of certain preferences.[2]

1.2. The Panel recalls that in interpreting the terms of a treaty in accordance with the customary rules of interpretation, it is empowered to consider any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[3] The Panel also recalls that pursuant to Article 13 of the DSU, it is empowered to seek information from "any relevant source" in making its findings.[4] Accordingly, the Panel has conducted a survey of the discussions referred to it by Russia and related documents in order to examine the attitudes of GATT contracting parties and WTO Members on occasions when matters pertaining to Article XXI were addressed in the context of the GATT and WTO.[5] The Panel's conclusions on this survey are contained in paragraphs 7.80 and 7.81 of the Panel Report.

1.3. The Panel wishes to note that it does not consider that certain documents referred to it by Russia establish any relevant conduct of "the parties" in the sense of Article 31(3)(b) of the Vienna Convention. In particular, the Panel notes that statements made by Ghana to justify the imposition of an import ban against Portugal in 1961 were made prior to Portugal's accession, during which the parties had not yet assumed any obligations to one another under the GATT 1947.[6] In the Panel's view, invocations of Article XXI by a contracting party in order to defend measures taken against a non-contracting party, as well as any invocations of Article XXI by non-contracting parties during accession negotiations, cannot establish a pattern of practice between "the parties" in the sense of Article 31(3)(b) of the Vienna Convention. Accordingly, the Panel has omitted from this

[1] Russia's first written submission, para. 40. This Appendix uses the term "European Communities" to refer to both the European Economic Community and the European Community prior to 2009, and the term the "European Union" to refer to the European Union after 2009. On 1 November 1993, the *Treaty on European Union* (done at Maastricht, 7 February 1992) entered into force. On 1 December 2009, *the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

[2] Ibid. paras. 41-46.

[3] Article 31(3)(b) of the Vienna Convention provides that: "[t]here shall be taken into account, together with the context: ... [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

[4] Article 13 of the DSU provides that: "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter."

[5] This document examines the subsequent conduct of GATT contracting parties and WTO Members in GATT and WTO fora from the period of 1 January 1948 (entry into force of the GATT 1947) to 6 June 2017 (composition of the Panel in this dispute). By including documents in this survey, the Panel does not intend to attribute any legal significance to the type of document examined or the contents of any such documents. The Panel notes only that it has examined such documents in order to conclude that this record does not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention. (See para. 7.80 of the Panel Report.)

[6] See, e.g. GATT Contracting Parties, Nineteenth Session, Summary Record of the Twelfth Session held on 9 December 1961, SR.19/12, p. 196.

survey such invocations of Article XXI made in the context of accession negotiations to the GATT 1947 and WTO Agreement.[7]

1.4. Additionally, the Panel observes that on several occasions, GATT contracting parties and WTO Members have unilaterally invoked Article XXI in the context of notifying measures to various GATT and WTO bodies.[8] The Panel recalls the statements of the Appellate Body in *EC – Chicken Cuts* that it is unlikely that a "concordant, common and discernible pattern" of practice can be established from the pronouncements of one or very few parties to a multilateral treaty.[9] The Panel also recalls the Appellate Body's caution about deducing agreement, without more, from "a lack of reaction" or protest by other Members.[10] Accordingly, the Panel does not consider that it can ascribe any weight to the silence of other GATT contracting parties and WTO Members as to these notifications. The Panel has consequently omitted from this survey such unilateral invocations of Article XXI except where they provoked debate.

1.5. The following Section proceeds to summarize the relevant conduct of GATT contracting parties and WTO Members, subsequent to the conclusion of the GATT 1947, when matters pertaining to Article XXI were addressed in the context of the GATT and WTO.

SUBSEQUENT CONDUCT OF GATT CONTRACTING PARTIES AND WTO MEMBERS

United States v. Czechoslovakia (1949)

1.6. In 1948, the United States enforced its "Comprehensive Export Schedule" by imposing export controls on US exports going to certain parts of Europe.[11] At the time, the United States licensed products in short supply or of military significance to Western European countries that were participating in the Marshall Plan, but exports of such products to Eastern European countries that did not participate in the Marshall Plan became subject to export controls. Czechoslovakia fell into the group of non-participating Eastern European countries, for which reason products destined for its borders were subject to export licensing controls. The United States explained that one of the purposes of the export control regime was "to prevent the shipment to Eastern Europe of things that would contribute significantly to the military potential of that region".[12] Czechoslovakia asserted that the United States' use of the term "military potential" referred to "an entirely different thing" than what was covered by the terms of Article XXI(b)(ii), in particular, the term "military establishment". Czechoslovakia claimed that the US export control measure was inconsistent with the basic principles of Articles I and XIII of the GATT. Czechoslovakia also requested all relevant information concerning the administration of restrictions and the distribution of licences by the United States pursuant to Article XIII.[13] In response, the United States referred to Articles XXI(b)(i) and XXI(a) of the GATT. The United States stated that it considered it to be "contrary to its security interest—and to the

[7] See, e.g. GATT Contracting Parties, Twenty-Sixth Session, Report by the Working Party on the Accession of the United Arab Republic, L/3362, paras. 20-22; GATT Contracting Parties, Accession of Thailand, Questions and Replies to the Memorandum on Foreign Trade Regime (L/4803), L/5300, pp. 5 and 18-26; and GATT Contracting Parties, Accession of Saudi Arabia, Questions and Replies to the Memorandum on the Foreign Trade Regime (L/7489 & Add.1), L/7645/Add.1, pp. 27 and 32.

[8] See, e.g. Committee on Technical Barriers to Trade, Notification by Thailand, G/TBT/Notif.95/123, p. 1 (referring to consumer protection and national security as its objective and rationale for undertaking a particular measure); and Committee on Market Access, Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions by the Seychelles, G/MA/QR/N/SYC/1, pp. 23, 25, 35, 36, 45 and 49.

[9] Appellate Body Report, *EC – Chicken Cuts,* para. 259.

[10] Ibid. para. 272.

[11] GATT Contracting Parties, Third Session, Statement by the Head of the Czechoslovak Delegation Mr. Zdenèk AUGENTHALER to Item 14 of Agenda (CP.3/2/Rev.2), GATT/CP.3/33, p. 3 (referring to the official publication of the US Department of Commerce – "Comprehensive Export Schedule" No. 26, issued on 1 October 1948, p. 18.)

[12] Ibid. p. 5. (referring to the statement of Mr. Willard L. Thorp made at the General Assembly in Paris on 4 November 1948).

[13] Ibid. pp. 5-6. Czechoslovakia stated that the notion of "war or military potential" is an extremely elastic notion, embracing the reserves of man-power and economic resources of a country including the extent to which both have been militarized. In addition, this concept also embraces a time element, that is, not only the possibility to develop military strength but also the degree of actual preparedness. Thus, according to Czechoslovakia, Article XXI should be interpreted narrowly so as to avoid a situation in which "practically everything may be a possible element of war potential". (Ibid.)

security interest of other friendly countries—to reveal the names of the commodities that it considers to be most strategic".[14]

1.7. At the June 1949 meeting of the GATT Council, Czechoslovakia requested a decision on whether the United States had failed to carry out its obligations under the GATT through its administration of the export licenses.[15] The United Kingdom expressed the view that "every country must be the judge in the last resort on questions relating to its own security. On the other hand, every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement".[16] Pakistan stated that Article XXI embodied "exceptions to all other provisions of the Agreement, [and] should stand by itself notwithstanding the provisions of other Articles including Article I, and therefore the case called for examination only under the provisions of that Article".[17] Cuba stated that Czechoslovakia's request should be dismissed because it lacked a factual basis. Moreover, Cuba considered that the United States had justified its case under Article XXI "whose provisions overrode those of Article I".[18]

1.8. In response to Czechoslovakia's request for a decision under Article XXIII, only Czechoslovakia voted in the affirmative.[19] Czechoslovakia noted that it did not consider that the contracting parties had made a legally valid decision or correct interpretation of the General Agreement, and that it would regard itself free to take any steps necessary to protect its further interests.[20]

United States – Suspension of Obligations with Czechoslovakia (1951)

1.9. In 1951, the United States requested the GATT Council to formally dissolve its reciprocal obligations with Czechoslovakia under the GATT 1947, and to withdraw the benefits of trade-agreement tariff concessions from Czechoslovakia.[21] The United States justified this request by arguing that the assumption that it was in its and Czechoslovakia's mutual interests to promote the movement of goods, money and people between them was no longer valid.[22] Although the United States did not formally refer to Article XXI of the GATT 1947, it argued that "manifestations of Czechoslovak ill-will" towards the United States and the progressive integration of Czechoslovakia's economy into the Soviet bloc had led the United States to request that the GATT obligations between the two countries be dissolved.[23] Czechoslovakia considered the United States' request to be "another attempt [by the United States] to achieve political ends by means of economic pressure".[24] Czechoslovakia was of the view that the "General Agreement should not be misused for the enforcement of political intentions" and for "forceful, unilateral imposition of a foreign will, by means of the violation of agreements".[25]

[14] GATT Contracting Parties, Third Session, Reply by the Vice Chairman of the United States Delegation, Mr John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 on the Agenda, GATT/CP.3/38, pp. 2-3 and 9-11. In addition, the US delegate provided dollar estimates of approved Czechoslovakian licences for different products such as electrical equipment and machinery to demonstrate that the United States had been highly selective in imposing controls for security reasons and had not denied licences where the product was for peaceful use. (Ibid.) See also GATT Contracting Parties, Third Session, Reply of the Head of the Czechoslovak Delegation, Mr. Zdenèk AUGENTHALER, to the Speech of the Vice-Chairman of the USA Delegation, Mr. John W. Evans, under Item 14 of the Agenda, GATT/CP.3/39, pp. 2-3.

[15] See GATT Contracting Parties, Third Session, Summary Record of the Twenty-Second Meeting held on 8 June 1949, GATT/CP.3/SR.22, p. 4.

[16] Ibid. p. 7; and GATT Contracting Parties, Third Session, Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1.

[17] GATT Contracting Parties, Third Session, Summary Record of the Twenty-Second Meeting held on 8 June 1949, GATT/CP.3/SR.22, p. 6.

[18] Ibid. p. 5.

[19] Ibid. p. 9. The vote was one affirmative, 17 negative, three abstentions and two absents. (Ibid.)

[20] Ibid. p. 10.

[21] GATT Contracting Parties, Sixth Session, Statement by the United States, Termination of Obligations between the United States and Czechoslovakia under the Agreement, GATT/CP.6/5, p. 1.

[22] Ibid. According to the United States, Czechoslovakia had persecuted and harassed American firms, imprisoned American citizens, and confiscated the property of American citizens without justification. (Ibid.)

[23] Ibid.

[24] GATT Contracting Parties, Sixth Session, Termination of Obligations between the United States and Czechoslovakia under the Agreement, Statement by Czechoslovakia, GATT/CP.6/5/Add.1, p. 2.

[25] Ibid. p. 3.

1.10. The GATT CONTRACTING PARTIES declared that the United States and Czechoslovakia were free to suspend, each with respect to the other, the obligations of the GATT.[26]

United States – Imports of Dairy Products (1951)

1.11. In 1951, the Netherlands and Denmark each circulated a memorandum to the GATT contracting parties noting the imposition by the United States of certain import controls on dairy products under Section 104 of the Defense Production Act.[27] Section 104 stated that these import controls were "necessary for the protection of the essential security interests and economy of the United States in the existing emergency in international relations".[28] The Netherlands and Denmark considered these restrictions to be inconsistent with Article XI of the GATT 1947.[29] In response, the United States circulated a memorandum noting that these objections had been formally communicated to Congress.[30] The United States also included two statements made to the Senate Banking and Currency Committee by the Assistant Secretary of State and Under Secretary of Agriculture recommending the repeal of Section 104.[31] The Assistant Secretary of State had asserted to the Committee that "the restrictions required by Section 104 appear to the Department clearly to violate the provisions of the [GATT]."[32] The Under Secretary of Agriculture also noted to the Committee that "[i]t seems unlikely that we will be able to convince these [objecting] countries that certain imports, which would at most have a limited effect on our agriculture, would endanger the essential security interests and economy of the United States."[33] The Under Secretary stated additionally that "if we use the security exception of the [GATT] to justify protection of a few selected products, this would give other countries a good excuse for using the same exception to justify any protective barriers by which they may wish to limit their imports of our farm products."[34]

1.12. At the September 1951 meeting of the GATT contracting parties, the Netherlands and Denmark reiterated their objections to the measure.[35] Denmark also noted that it agreed with the remarks of the Canadian representative in an earlier speech that "it was obvious that defence production and national security would seem to have little connection with the import control of cheese."[36] Italy, New Zealand, Norway, Australia, France, Canada, Finland, the United Kingdom and Sweden also noted their opposition to the measure.[37] Canada asserted that it was difficult "to find any grounds for the action whatsoever".[38] The United States did not contest that the measure infringed the GATT 1947, and responded that Section 104 had been recommended as a last-minute

[26] GATT Contracting Parties, Sixth Session, Item 21 – Termination of Obligations between the United States and Czechoslovakia under the Agreement, Declaration Proposed by the Delegation of the United States, GATT/CP.6/5/Add.2.

[27] GATT Contracting Parties, Sixth Session, Item 30 – Imports Restrictions on Dairy Products into the United States, Memorandum submitted by the Netherlands Delegation, GATT/CP.6/26; GATT Contracting Parties, Sixth Session, Item 30 – Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the United States Delegation, Addendum, GATT/CP.6/28/Add.1, p. 1; and GATT Contracting Parties, Sixth Session, Item 30 – Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the Danish Delegation, GATT/CP.6/28. See also GATT Contracting Parties, Sixth Session, Summary Record of the First Meeting held on 17 September 1951, GATT/CP.6/SR.1, p. 4.

[28] GATT Contracting Parties, Sixth Session, Item 30 - Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the Danish Delegation, GATT/CP.6/28, para. 3.

[29] GATT Contracting Parties, Sixth Session, Item 30 – Imports Restrictions on Dairy Products into the United States, Memorandum submitted by the Netherlands Delegation, GATT/CP.6/26, p. 3; and GATT Contracting Parties, Sixth Session, Item 30 – Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the Danish Delegation, GATT/CP.6/28, para. 3.

[30] GATT Contracting Parties, Sixth Session, Item 30 – Restrictions on Imports of Dairy Products into the United States, Memorandum submitted by the United States Delegation, Addendum, GATT/CP.6/28/Add.1, p. 1.

[31] Ibid. pp. 4 and 7.

[32] Ibid. p. 3.

[33] Ibid. p. 6.

[34] Ibid.

[35] GATT Contracting Parties, Sixth Session, Summary Record of the Tenth Meeting held on 24 September 1951, GATT/CP.6/SR.10, pp. 3-4.

[36] Ibid. p. 4.

[37] Ibid. pp. 4-7. Czechoslovakia also noted that while it did not particularly suffer from the measure in question, it hoped that the contracting parties would always be prepared to defend the spirit of the GATT. (Ibid. p. 7.)

[38] Ibid. p. 6.

amendment by a committee "which had limited acquaintance with international problems".[39] The United States asserted that the measure should be regarded as an "isolated incident and must not be held as an indication of any reorientation of the basic policy of the United States".[40] The United States noted that vigorous efforts were being made by the executive branch to secure the repeal of the measure, and asked that its government be given the opportunity to complete this action.[41] The Council agreed to keep this matter on its agenda.[42]

1.13. At the October 1951 meeting of the GATT contracting parties, a resolution was adopted affording the United States a reasonable period of time to repeal the measure, subject to a reporting obligation.[43] In 1952, the United States provided a report noting that Section 104 had been revised but not repealed.[44] At the October 1952 meeting of the GATT contracting parties, several contracting parties expressed their continuing opposition to the measure.[45] The United States acknowledged that the measure was inconsistent with the GATT 1947 and noted that it would not object to other contracting parties withdrawing reasonably necessary concessions.[46] The GATT CONTRACTING PARTIES agreed to convene a Working Party to examine the issue.[47] In November 1952, the Working Party recommended that the GATT contracting parties authorize the Netherlands to impose a retaliatory quota on wheat flour from the United States.[48] This recommendation was adopted as a resolution at the November 1952 meeting of the GATT CONTRACTING PARTIES.[49]

1.14. The GATT CONTRACTING PARTIES re-authorized this retaliatory quota on an annual basis until 1959, pursuant to the recommendations of subsequent Working Parties.[50]

[39] GATT Contracting Parties, Sixth Session, Summary Record of the Tenth Meeting held on 24 September 1951, GATT/CP.6/SR.10, pp. 7-8.

[40] Ibid. p. 8.

[41] Ibid.

[42] Ibid. p. 9.

[43] GATT Contracting Parties, Sixth Session, Summary Record of the Twenty-Seventh Meeting held on 27 October 1951, GATT/CP.6/SR.27, p. 8. For the draft resolution, see GATT Contracting Parties, Sixth Session, Item 30 – Resolution of the Contracting Parties on the United States Import Restrictions on Dairy Products imposed under Section 104 of the United States Defence Production Act, Proposal by the Chairman after Consultation with Interested Delegations, GATT/CP.6/51. For the adopted resolution, see GATT Contracting Parties, Decisions, Declarations and Resolutions of the Contracting Parties at the Special Session held on March-April 1951 and the Sixth Session held on September-October 1951, GATT/CP/130, pp. 14-15.

[44] See GATT Contracting Parties, United States' Restrictions on Dairy Products, Report by the United States Government pursuant to the Resolution of 26 October 1951, L/19, p. 1. See also GATT Contracting Parties, United States' Restrictions on Dairy Products, Supplementary Report by the United States Government pursuant to the Resolution of 26 October 1951, L/19/Add.1.

[45] See GATT Contracting Parties, Seventh Session, Summary Record of the Tenth Meeting held on 28 October 1952, SR.7/10, pp. 2-8. The Netherlands, New Zealand, Denmark, Canada, Italy, Norway, Cuba, Australia, United Kingdom, India, Czechoslovakia and South Africa expressed objections to the measure, and Pakistan expressed gratitude that the United States had taken some steps to mitigate the effects of the restrictions. (Ibid.)

[46] Ibid. pp. 8-9.

[47] Ibid. p. 9.

[48] Working Party 8 on Netherlands Action under Article XXIII:2, Report to the Contracting Parties, L/61, p. 3. The Netherlands had requested that it be allowed to impose an upper limit of 57,000 metric tons on the import of wheat flour, but the Working Party recommended that the Netherlands impose an upper limit of 60,000 metric tons. (Ibid. pp. 1-3.)

[49] GATT Contracting Parties, United States Import Restrictions on Dairy Products, Draft Resolution, L/59; and GATT Contracting Parties, Seventh Session, Summary Record of the Sixteenth Meeting held on 8 November 1952, SR.7/16, p. 7.

[50] Negotiating Group on Dispute Settlement, Communication from the United States, MTN.GNG/NG13/W/40, fn 4 to p. 9. See also GATT Contracting Parties, United States Restrictions on Dairy Products, Resolution Proposed for Adoption by the CONTRACTING PARTIES, L/154; GATT Contracting Parties, United States Import Restrictions on Dairy Products, Resolution of 5 November 1954, L/280; GATT Contracting Parties, Tenth Session, Report of the Working Party, Waiver Granted to the United States in Connexion with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act, L/464; GATT Contracting Parties, Eleventh Session, Waiver Granted to the United States in Connexion with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act, Report of the Working Party, L/590; GATT Contracting Parties, Twelfth Session, United States Import Restrictions on Agricultural Products, Report by the Working Party on Agricultural Waivers, L/754; and GATT Contracting Parties, Thirteenth Session, United States Import Restrictions on Agricultural Products, Report by the Working Party on Agricultural Waivers, L/918.

United States – Section 232 of the Trade Expansion Act (1968)

1.15. In 1968, the United Kingdom and Japan submitted a notification to the Committee on Trade in Industrial Products expressing concern that certain powers given to the President of the United States under the Trade Expansion Act of 1962 could disrupt foreign trade.[51] During the Committee's first examination of the notified barriers in 1969[52], Japan expressed concern over the "lack of a definition of 'security'" and "the wide discretion as to form of action and the lack of a time-limit for carrying out investigations" under the Trade Expansion Act of 1962.[53] The United States responded that the legislation "was in conformity with Article XXI", and pointed out that "the existence of an institutional framework for national security cases could be regarded as a safeguard, since it ensured full consideration of the merits of each case before action was taken."[54] In 1970, at the next examination of these notifications by a Working Group convened for this purpose, the Working Group concluded that there was a "divergence of view as to the meaning and scope of certain essential concepts in the GATT, in particular … the scope of some of the exceptions … especially Articles XX and XXI".[55]

1.16. In 1970, the Joint Working Group on Import Restrictions was notified of a global quota maintained by the United States on petroleum oil products.[56] At the April 1970 meetings of the Joint Working Group[57], the European Communities and Canada asserted that they considered these restrictions to be inconsistent with the GATT 1947.[58] The European Communities did not accept that these restrictions could be justified by national security considerations and considered that the restrictions had been applied to the benefit of the petroleum industry of the United States.[59] The European Communities also asserted that a recent US Task Force had given arguments against the maintenance of the system for security reasons.[60] The United States responded that the restrictions had been applied under Section 232 of the Trade Expansion Act of 1962 "in accordance with Article XXI", given the "high degree of industrialization of the United States as well as its remoteness from some major oil supplying countries".[61]

See also GATT Contracting Parties, Report of the Working Party on Italian Import Restrictions, L/1468, paras. 5-6. In 1961, a Working Party was convened to examine a variety of Italian import restrictions and prohibitions. Before the Working Party, Italy asserted that prohibitions or restrictions on certain items were justified under the "provisions of Article XX or Article XXI of the General Agreement". (Ibid. para. 5.) The Working Party did not respond specifically to this invocation, but noted in general that they deplored "the continued use of discriminatory restrictions for which no justification could be found". (Ibid. para. 6.)

[51] Committee on Industrial Products, Inventory of Non-Tariff Barriers*,* COM.IND/4, pp. 231-232. The notification referred to "escape clause tariff action", or the powers under the Trade Expansion Act of 1962 to increase the rate of import duty on any item in order to effect additional protection of a domestic industry. (Ibid. p. 231.)

[52] See Committee on Trade in Industrial Products, Note by the Secretariat on the Meeting of the Committee held 19-25 June 1969*,* COM.IND/W/7, para. 1.

[53] Committee on Trade in Industrial Products, First Examination of Part 4 of the Inventory of Non-Tariff Barriers*,* Part 4 – Specific Limitations on Imports and Exports, COM.IND/W/12, p. 269.

[54] Ibid. pp. 269-271.

[55] Committee on Trade in Industrial Products, Draft Report of Working Group 4 on Non-Tariff Barriers, Examination of Items in Part 4 of the Illustrative List (Specific Limitations on Trade), Revision, Spec(70)48/Rev.1, para. 4; and Committee on Trade in Industrial Products, Report of Working Group 4 on Non-Tariff Barriers, Examination of Items in Part 4 of the Illustrative List (Specific Limitations on Trade), COM.IND/W/49, para. 5.

[56] Joint Working Group on Import Restrictions, Import Restrictions, Addendum, Industrial Products, L/3377/Add.2, pp. 1-2; and Committee on Trade in Industrial Products, Working Group 4, Specific Limitations, COM.IND/W/28, p. 4. The United States had limited imports to 12 per cent of domestic production. (See Joint Working Group on Import Restrictions, Notes on Individual Import Restrictions, COM.IND/W/28/Add.1, p. 49.) Notifications could be provided to the Joint Working Group by countries maintaining the restrictions as well as their trading partners. (Joint Working Group on Import Restrictions, Report of the Joint Working Group on Import Restrictions, L/3391, para. 5.)

[57] Ibid. para. 1.

[58] Committee on Trade in Industrial Products, Joint Working Group on Import Restrictions, Notes on Individual Import Restrictions, COM.IND/W/28/Add.1, p. 49. During these meetings, there was also debate on whether certain restrictions maintained by Japan and Switzerland on various fissile chemical elements could be justified under Article XXI. (Ibid. pp. 71 and 73.)

[59] Ibid. p. 49.

[60] Ibid.

[61] Ibid.

1.17. Although the Council agreed that the Joint Working Group on Import Restrictions should continue its review of import restrictions, the Joint Working Group did not meet again after 1970.[62]

Austria – Penicillin and Other Medicaments (1970)

1.18. In 1970, the Joint Working Group on Import Restrictions was notified of certain restrictions maintained by Austria on penicillin, tyrothricin and related medicaments, which took the form of either import licensing restrictions or quotas.[63] At the April 1970 meetings of the Joint Working Group[64], a question was posed to Austria as to "what part of Article XXI might cover this restriction".[65] Austria responded that it regarded the restriction to be necessary under Article XXI(b)(ii) of the GATT 1947 "in order to have available a local source of supply in case of emergency".[66] In 1971, these restrictions were considered again by the Group of Three.[67] The Group of Three noted Austria's explanation that the restrictions were maintained for defence reasons, but concluded that as "other countries find it possible to do without restrictions, it should … be possible for Austria to do the same".[68] In 1972, these restrictions were considered again by the Group on Residual Restrictions.[69] At the January 1972 meeting of the Group, the United States recalled the recommendation of the Group of Three that Austria should eliminate the restrictions on these products "as other countries did not find it necessary to maintain them for security or other reasons".[70] At the July 1972 session of the Committee on Trade and Development, in the context of discussions on the Second Report of the Group of Three[71], Austria asserted that it would not be possible to liberalize imports of these products "for reasons previously stated", but noted that "sympathetic consideration would be given in this connexion to any trade problems faced by developing countries."[72]

[62] See Group on Quantitative Restrictions and Other Non-Tariff Measures, Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures, Background Note by the Secretariat, NTM/W/2, para. 13.

[63] Joint Working Group on Import Restrictions, Import Restrictions, L/3377, pp. 23-24; and Committee on Trade in Industrial Products, Working Group 4, Specific Limitations, COM.IND/W/28, p. 6. The Joint Working Group's documents from April 1970 and November 1970 label these restrictions as "global quotas", but documents from June 1970 label these as "discretionary licensing" restrictions. (Joint Working Group on Import Restrictions, Import Restrictions, L/3377, pp. 23-24; Committee on Trade in Industrial Products, Working Group 4, Specific Limitations, COM.IND/W/28, p. 6; and Committee on Trade in Industrial Products, Joint Working Group on Import Restrictions, Table of Import Restrictions (Chapters 25-99), COM.IND/W/28/Rev.2, p. 8.) Later documents from the Group on Residual Restrictions appear to clarify that these products were subject to *either* import licensing restrictions or global quotas. (See Group on Residual Restrictions, Additional Products Suggested for Examination, Note by the Secretariat, COM.TD/W/140, p. 14; and Group on Residual Restrictions, Proceedings of the Meeting of the Group held on 24-25 January 1972, Note by the Secretariat, COM.TD/85, para. 58.)

[64] Joint Working Group on Import Restrictions, Report of the Joint Working Group on Import Restrictions, L/3391, para. 1.

[65] Joint Working Group on Import Restrictions, Notes on Individual Import Restrictions, COM.IND/W/28/Add.1, p. 95.

[66] Ibid. Although the Council agreed that the Joint Working Group on Import Restrictions should continue to annually or biennially review such import restrictions, the Joint Working Group did not meet again after 1970. (See Group on Quantitative Restrictions and Other Non-Tariff Measures, Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures, Background Note by the Secretariat, NTM/W/2, para. 13.)

[67] See Group on Quantitative Restrictions and Other Non-Tariff Measures, Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures, Background Note by the Secretariat, NTM/W/2, para. 14. The Group of Three was convened by the Committee on Trade and Development, and consisted of the Chairman of the contracting parties, the Chairman of the Council and the Chairman of the Committee on Trade and Development. (See Committee on Trade and Development, Report of the Committee on Trade and Development to the Contracting Parties, L/3487, para. 9.)

[68] Group of Three, Preliminary Report of the Group of Three, W(71)2, p. 23; and Group of Three, Report of the Group of Three, L/3610, p. 21.

[69] Group on Residual Restrictions, Note on Proceedings of the Meeting of the Group held on 24-25 January 1972, Prepared by the Secretariat, COM.TD/85, para. 1.

[70] Ibid. para. 58.

[71] The Group of Three had noted in their Second Report that Austria had not "found it possible so far to liberalize imports of penicillin, tyrothricin and medicaments as recommended in L/3610". (Group of Three, Second Report, L/3710, p. 20.)

[72] Committee on Trade and Development, Proceedings of the Twenty-First Session, Note Prepared by the Secretariat, COM.TD/87, para. 13.

1.19. Austria continued to maintain certain restrictions on penicillin and related medicaments until December 1990, when these were abolished as part of the Uruguay Round negotiations at the request of the United States.[73]

Sweden – Import Restrictions on Certain Footwear (1975)

1.20. In 1975, Sweden notified the GATT Council of its intention to introduce a global import quota system for leather shoes, plastic shoes and rubber boots. Sweden advised that it was introducing this system "in order to allow time to remedy the serious difficulties that have arisen in this sector of the industry", referring to downward trends in the Swedish shoe industry that had begun in the 1960s and had accelerated during the 1970s.[74] Sweden considered that the reasons underlying this development were the relatively high production costs in Sweden, combined with the traditional liberal trade policy pursued by the Swedish Government, which thereby encouraged and made possible a very substantial increase in the volume of imports. Sweden considered that "[t]he continued decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of its security policy."[75] Sweden's security policy necessitated the maintenance of a minimum domestic production capacity in vital industries, such capacity being considered by Sweden to be "indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations".[76] At the October 1975 meeting of the GATT Council, several contracting parties expressed concern at the Swedish decision, taken at a time of high unemployment in their own countries.[77] They noted that Sweden had not provided a detailed economic justification for the measures, and expressed doubts as to the justification for these measures under the GATT.[78] Sweden responded that it considered the measure to be taken in conformity with "the spirit of Article XXI", but added that it did not wish to deprive contracting parties of the possibility to consult and therefore declared its readiness to consult bilaterally with interested contracting parties even if such a consultation was not formally required by Article XXI.[79] Many delegations reserved their rights under the GATT and took note of Sweden's offer to consult.[80]

1.21. In March 1977, Sweden notified the GATT Council that it intended to terminate the quotas in respect of leather shoes and plastic shoes as of 1 July 1977.[81]

European Communities v. Argentina (1982)

1.22. In 1982, Argentina brought to the GATT Council's attention the suspension by the European Communities, Canada and Australia of imports from Argentina.[82] Argentina noted that there had

[73] See Committee on Trade and Development, Action by Governments Relevant to the Provisions of Part IV, Addendum, COM.TD/W/170/Add.7, p. 2; Group on Quantitative Restrictions and Other Non-Tariff Measures, Inventory of Non-Tariff Measures (Industrial Products), Part IV, Specific Limitations, NTM/INV/IV, Inventory Number IV.A.4; Group of Negotiations on Goods, Communication from Austria, Uruguay Round – Market Access, MTN.GNG/NG1/W/63, p. 2; and GATT Council, Trade Policy Review Mechanism, Austria, Report by the Secretariat, C/RM/S/19A, para. 46.

[74] Communication from Sweden, *Sweden – Import Restrictions on Certain Footwear,* L/4250, paras. 1 and 3.

[75] Ibid. para. 4. See also GATT Council, Minutes of Meeting held on 31 October 1975, C/M/109, p. 8; and GATT Council of Representatives, Thirty-First Session, Report on Work since the Thirtieth Session, L/4254, pp. 17-18.

[76] Communication from Sweden, *Sweden – Import Restrictions on Certain Footwear*, L/4250, para. 4. See also GATT Council, Minutes of Meeting held on 31 October 1975, C/M/109, p. 9.

[77] Ibid.

[78] Ibid. See also GATT Council of Representatives, Thirty-First Session, Report on Work since the Thirtieth Session, L/4254, p. 18.

[79] GATT Council, Minutes of Meeting held on 31 October 1975, C/M/109, p. 9.

[80] Ibid. See also GATT Council of Representatives, Thirty-First Session, Report on Work since the Thirtieth Session, L/4254, p. 18.

[81] Communication from Sweden, *Sweden – Import Restrictions on Certain Footwear*, Addendum, L/4250/Add.1. Relatedly, at the December 1983 meeting of the Group on Quantitative Restrictions and Other Non-Tariff Measures, it was recorded by the Secretariat that some delegations wondered "how a discriminatory restriction, such as that imposed by one contracting party on imports of footwear, could be compatible with the provisions of Article XXI". (Group on Quantitative Restrictions and Other Non-Tariff Measures, Meeting held on 5-8 December 1983, Note by the Secretariat, NTM/5, para. 27.)

[82] Communication from Argentina, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5317.

been no pronouncement by the UN Security Council authorizing the application of Article XXI(c) of the GATT.[83] Argentina stated that the measures adopted by the European Communities (other than the United Kingdom), Canada and Australia were entirely without justification, coming from countries with which the Argentine Republic had maintained relations. Such measures therefore constituted a hostile act and "flagrant economic aggression".[84] Further, such measures were not derived from any "economic or commercial issue", but from the unjustified interference in a long-standing territorial dispute in the region of the Malvinas Islands.[85] Argentina stated that the measures adopted by the United Kingdom similarly had no justification, even under Article XXI(b) of the GATT, since the Security Council resolution which had recognized that there was a breach of the peace situated the problem solely in the region of the Malvinas Islands, and consequently the metropolitan territory of the United Kingdom was not affected.[86] The European Communities, Canada and Australia issued a joint communication stating that they had taken the measures at issue in light of the situation addressed in UN Security Council Resolution 502, on the basis of their "inherent rights of which Article XXI of the General Agreement is a reflection".[87]

1.23. At the May 1982 meeting of the GATT Council, Argentina reiterated that the measures were not applied for "economic and trade reasons", but were based on reasons of a "political nature and were meant to exert political pressure on the sovereign decisions of Argentina in order to intervene in a conflict in which only one of the countries was involved".[88] Argentina stressed that UN Security Council Resolution 502 had not asked for or authorized the adoption of any measures such as the trade sanctions taken, nor were the measures justified under Article XXI. Argentina considered that the "concerted coercive action" taken by a number of economically powerful countries violated the letter and the spirit of the GATT.[89] The European Communities stressed that the measures were taken on the basis of their inherent rights, of which Article XXI was a reflection, and did not require notification, justification or approval, as confirmed by 35 years of implementation of the GATT.[90] Canada stated that the situation which had necessitated the measures needed to be resolved by appropriate action outside the GATT, as the GATT had neither the competence nor the responsibility to deal with the political issue that had arisen. Canada also noted that Article XXI did not contain a definition of "essential security interests", and that many contracting parties had taken the same or similar actions for political reasons. In the present case, the action had been taken to encourage a peaceful settlement by temporarily suspending the normal operation of some provisions of the GATT. Canada considered that the fact that the action had been taken was not really unprecedented; what was unprecedented was the examination of the action in the GATT.[91] Australia endorsed the statements of the European Communities and Canada, and stated that the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification.[92]

1.24. Peru, Brazil, Uruguay, Zaire, Colombia, Dominican Republic, Cuba, Pakistan, Romania and Poland expressed opposition to, or concern at, what they considered was a dangerous precedent involving the use by contracting parties of trade and economic measures for non-trade reasons, and which were not justified under the GATT.[93] India, Yugoslavia, Indonesia, Hungary and

[83] Communication from Argentina, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5317, para. III.

[84] Ibid. para. IV.

[85] Ibid. Argentina referred in this regard to UN Resolutions 2065 (XX), 3160 (XXVIII) and 31/49 (XXXI). (Ibid.)

[86] Ibid. para. V.

[87] Communication from the Commission of the European Communities, Australia and Canada, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons*, L/5319/Rev.1, para. 1(b).

[88] GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, p. 2.

[89] Ibid. p. 4.

[90] Ibid. p. 10.

[91] Ibid. pp. 10-11.

[92] Ibid. p. 11.

[93] Ibid. pp. 4-9. For example, Brazil drew attention to subparagraph (iii) of Article XXI(b), and stated that the present case could set a dangerous precedent if the measures were considered necessary for the protection of essential security interests taken in time of war or other emergency in international relations, because such interests had not been demonstrated. While this matter could be considered to be an emergency in international relations, Brazil stressed that this was the case only in respect of the region in question, as defined by the Security Council, whose action had a bearing on the GATT in light of Article XXI(c). Brazil also stated that it was difficult to accept that the countries in question, except for one, were taking this action in protection of their essential security interests. (GATT Council, Minutes of Meeting held on 7 May 1982,

Czechoslovakia considered more generally that the GATT Council should approach the issues in this case with caution.[94] Japan also considered that the interjection of political elements into GATT activities would not facilitate the Organization's carrying out of its functions.[95]

1.25. The Philippines noted that UN Security Council Resolution 502 referred only to Argentina and the United Kingdom, while the joint communication issued by the European Communities, Canada and Australia gave the impression that the European Communities, Canada and Australia had taken these measures in the exercise of their inherent rights, of which Article XXI was a reflection. The Philippines questioned this argument as applied to the European Communities, which was not a contracting party to the GATT 1947.[96] Spain considered that the actions of the United Kingdom could be justified under Article XXI(b)(iii), but had doubts that the same could be said for other States, which were not technically in the same position as the United Kingdom with respect to Argentina.[97]

1.26. The United States considered that, regrettably, contracting parties had in the past used sanctions involving trade in the context of their security interests as they perceived them. However, the GATT had never been the forum for resolution of disputes whose essence was security and not trade, and for good reasons, such disputes had seldom been discussed in the GATT, which had no power to resolve political or security disputes. Trade measures could not be "split off" as if taken in a vacuum, since the specific justification of international measures could not be discussed in the context of broadly embargoed trade.[98] The United States also expressed the view that the GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis. This was wise, since no country could participate in the GATT if in doing so it gave up the possibility of using any measures, other than military, to protect its security interests.[99] New Zealand questioned whether the GATT was the appropriate body in which the circumstances that had led to the imposition of economic sanctions should be debated. New Zealand stated that it has also imposed sanctions on Argentina for reasons similar to those given by the European Communities, Canada and Australia. New Zealand considered that it had an inherent right as a sovereign state to take such action and that such actions were in conformity with New Zealand's rights and obligations under the GATT.[100] Singapore expressed the view that the wording of Article XXI allowed a contracting party the right to determine the need for protection of its essential security interests, while also recognizing the danger of a broad interpretation of Article XXI.[101] Norway also considered that the European Communities, Canada and Australia did not contravene the GATT in taking the measures in question.[102]

1.27. At the June 1982 meeting of the GATT Council, Argentina formally requested an interpretation of Article XXI of the GATT 1947: (a) to know whether Article XXI exempted contracting parties from obligations regarding notification and surveillance procedures; (b) to determine the natural rights which could be inherent for contracting parties and had been invoked in relation to Article XXI in general; (c) to establish whether any contracting party, including one not involved in a problem between two other contracting parties, could interpret "per se" that there existed an emergency in international relations as referred to in Article XXI(b)(iii) and consequently take unilateral measures; and (d) to determine whether one or more contracting parties could take action under Article XXI(c) without the prior existence of a specific provision adopted by the United Nations authorizing the application of restrictive trade measures.[103] This proposal was supported by a number of contracting parties.[104] Canada did not support the proposal, expressing the view that the case of Ghana was the only appropriate precedent for the present case, and asserting that it provided an example of the

C/M/157, p. 5.) Pakistan did not consider the situation addressed by UN Security Council Resolution 502 to be an "extreme" emergency in international relations, of the sort permitted under the spirit of the GATT. (GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, p. 7.)

[94] Ibid. pp. 7-9.
[95] Ibid. p. 9.
[96] Ibid. p. 7.
[97] Ibid. p. 6.
[98] Ibid. p. 8.
[99] Ibid. p. 8.
[100] Ibid. p. 9.
[101] Ibid. p. 7.
[102] Ibid. p. 10.
[103] GATT Council, Minutes of Meeting held on 29-30 June 1982, C/M/159, pp. 15-16.
[104] Brazil, Cuba, India, Uruguay, Colombia, Spain, Peru, Romania, Nigeria, Yugoslavia, the Philippines and the Dominican Republic (with Venezuela and Ecuador as observers). (Ibid. pp. 17-18.)

notion of national security being interpreted in a broad sense by the government of that country.[105] Australia doubted the need for an interpretation of Article XXI, given its infrequent use thus far.[106] The United States considered that debate in the Council would not serve a useful purpose, stressing that the GATT had no role in a crisis of military force.[107] Japan, New Zealand and Norway similarly expressed doubts that a note interpreting Article XXI would lead to useful results.[108] The European Communities suggested that if the Council were to adopt a decision, the proposal should have a chance of obtaining a consensus.[109] The Chair subsequently reported that informal consultations with delegations to arrive at suggestions for resolving the matter had not resulted in conclusions that could lead to such suggestions.[110]

The 1982 Decision regarding Article XXI

1.28. On 29 November 1982, the contracting parties adopted a Ministerial Declaration in which the contracting parties decided, in drawing up their work program and priorities for the 1980s, to "abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".[111] On 30 November 1982, the GATT CONTRACTING PARTIES adopted a Decision Concerning Article XXI of the General Agreement (1982 Decision), setting forth procedural guidelines for the application of Article XXI, until such time as the GATT CONTRACTING PARTIES might decide to make a formal interpretation of Article XXI.[112] Under the 1982 Decision, the GATT CONTRACTING PARTIES noted that: (a) the exceptions envisaged in Article XXI "constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved"; (b) recourse to Article XXI could constitute an element of disruption and uncertainty for international trade, and "affect benefits accruing to contracting parties under the GATT"; and (c) consequently, "in taking action in terms of the exceptions provided in Article XXI", contracting parties should take into consideration the interests of third parties which might be affected. The GATT CONTRACTING PARTIES therefore undertook to ensure that contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI, and noted that all contracting parties affected by actions taken under Article XXI retained their full rights under the GATT.[113]

United States – Imports of Sugar from Nicaragua (1983)

1.29. In 1983, the President of the United States announced that the United States would be reducing Nicaragua's allocation of the total import quota for sugar. The President stated that by denying to Nicaragua a foreign exchange benefit, the United States "hoped to reduce the resources available to [Nicaragua] for financing its military build-up, and its support for subversion and extremist violence in the region".[114] This announcement was subsequently implemented pursuant to the President's authority under the Tariff Schedules of the United States to give due consideration to the interests of domestic producers in the sugar market.[115]

1.30. Following the announcement, Nicaragua requested consultations with the United States, arguing that the measure would create "serious adverse trade effects".[116] The consultations did not achieve a mutually satisfactory solution, and Nicaragua subsequently requested the establishment of a panel.[117] At the July 1983 meeting of the GATT Council, the United States stated that "[t]he motives for the measure were not strictly trade considerations; and it followed that any examination

[105] GATT Council, Minutes of Meeting held on 29-30 June 1982, C/M/159, p. 18. For the statements of Ghana referred to by Canada, see, e.g. GATT Contracting Parties, Nineteenth Session, Summary Record of the Twelfth Session held on 9 December 1961, SR.19/12, p. 196.

[106] GATT Council, Minutes of Meeting held on 29-30 June 1982, C/M/159, p. 19.

[107] Ibid.

[108] Ibid. p. 20.

[109] Ibid. p. 21.

[110] GATT Council, Minutes of Meeting held on 2 November 1982, C/M/162, p. 18.

[111] GATT Contracting Parties, Thirty-Eighth Session, Ministerial Declaration adopted on 29 November 1982, L/5424, p. 3.

[112] Decision Concerning Article XXI of the General Agreement of 30 November 1982, L/5426.

[113] Ibid.

[114] GATT Panel Report, *US – Sugar Quota*, L/5607, para. 2.3.

[115] Ibid.

[116] Communication from Nicaragua, *US – Sugar Quota*, L/5492.

[117] Communication from Nicaragua, *US – Sugar Quota, Recourse to Article XXIII:2 by Nicaragua*, L/5513.

of this matter in purely trade terms would be sterile or disingenuous."[118] The United States also questioned the utility of resolving this issue by establishing a panel, stating that "[a] political solution could resolve the trade aspect of this dispute; but a GATT panel could not appropriately examine or assist in the resolution of the political or security issues that lay at its core."[119] India considered that the Council should follow established GATT practice and establish a panel, as Nicaragua had requested a panel after fulfilling the proper procedures and that "[i]t was not for the Council to judge the merits of the case at this stage."[120]

1.31. The Council agreed to establish a panel[121], and the panel's composition and terms of reference were announced at the October 1983 meeting of the GATT Council.[122]

1.32. Before the panel, Nicaragua argued that the United States had violated Articles II, XI and XIII and Part IV of the GATT 1947 by reducing its sugar quota below the level agreed upon in the United States schedule of concessions.[123] Nicaragua also cited the "fundamental principle" embodied in paragraph 7(iii) of the 1982 Ministerial Declaration that "no contracting party should use trade measures to exert pressure for the purposes of solving non-economic problems."[124] In response, the United States argued that it was "neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms".[125] In the view of the United States, while the action did affect trade, it was not taken for trade-policy reasons.[126] Consequently, any attempt to discuss the issue in purely trade terms, "divorced from the broader context of the dispute", would be disingenuous.[127] The panel considered that within its terms of reference, it could examine the measures "solely in the light of the relevant GATT provisions, concerning itself with only the trade issues under dispute", and therefore did not consider Article XXI.[128] The panel proceeded to conclude that the reduced sugar quota was inconsistent with the United States' obligations under Article XIII:2 of the GATT 1994, and exercised judicial economy over Nicaragua's other claims.[129]

1.33. At the March 1984 meeting of the GATT Council, Nicaragua commended the panel's findings and added that it had been perplexed by "the US reasons for adopting the measure, the refusal to have recourse to exceptions provided under the General Agreement, and the questioning of the GATT's competence to examine this case".[130] Nicaragua "wondered what would the United States consider to be the competent forum for discussing the justification of a measure designed to restrict access to a market which had the effect of reducing export earnings".[131] The United States reiterated its view that examination of the matter in purely trade terms within the GATT was disingenuous, noting that "the reduction in Nicaragua's sugar imports had not secured any economic or trade benefit for the United States."[132] The United States added that while it would not object to the adoption of the report, a resolution of its broader dispute with Nicaragua would be required before it would remove the contested measure.[133] Venezuela, Mexico and Argentina considered that the US measure had contravened the Ministerial Declaration[134], and Cuba, the Dominican Republic and Switzerland criticized the United States for using economic measures to secure political objectives.[135] Several contracting parties including Venezuela, Mexico and Brazil and the United Kingdom, on behalf of Hong Kong reiterated the importance of positively resolving the case through the

[118] GATT Council, Minutes of Meeting held on 12 July 1983, C/M/170, p. 12.
[119] Ibid.
[120] Ibid.
[121] Ibid. p. 13. Colombia, Spain, Brazil, Singapore, Argentina, Switzerland and Finland (on behalf of the Nordic countries) supported Nicaragua's request for a panel. (Ibid.)
[122] GATT Council, Minutes of Meeting held on 3 October 1983, C/M/171, p. 12.
[123] GATT Panel Report, *US –Sugar Quota*, L/5607, para. 3.1.
[124] Ibid. para. 3.9.
[125] Ibid. para. 3.10.
[126] Ibid.
[127] Ibid. para. 3.11.
[128] Ibid. para. 4.1.
[129] Ibid. paras. 4.3-4.6.
[130] GATT Council, Minutes of Meeting held on 13 March 1984, C/M/176, p. 8.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Ibid. p. 9.
[135] Ibid. p. 10.

GATT's dispute settlement system.[136] Argentina added that it could not understand why the Panel had not examined the motivations for the measure outside of trade considerations, and that it "regretted that the United States had been unable to advance any argument based on the General Agreement to justify its measure".[137] Poland stated its firm belief that no measure having adverse trade implications for another contracting party could be dismissed as irrelevant for the GATT.[138]

1.34. The Council took note of these statements and adopted the panel's report.[139]

1.35. At the May 1984 meeting of the GATT Council, Nicaragua noted that the United States had recently increased its total sugar import quota without allocating any share of this increase to Nicaragua.[140] Nicaragua asked the United States to inform the Council of its intentions regarding the recommendations of the contracting parties. The United States maintained its earlier position that the lifting of the measures would first require a "resolution of the broader dispute".[141] At the November 1984 meeting of the GATT Council, Nicaragua noted that not only had the United States failed to implement the panel's recommendations, it had once again applied a measure limiting Nicaragua's sugar quota.[142] Nicaragua noted that "[i]f the measure corresponded to security considerations, Nicaragua wondered why the United States had not invoked Article XXI."[143] The United States maintained its previous position.[144] The Council took note of these statements.[145]

European Communities v. Czechoslovakia (1985)

1.36. In 1985, Czechoslovakia notified the Group on Quantitative Restrictions and Other Non-Tariff Measures that it considered Italy and the United Kingdom to be maintaining a discriminatory embargo on exports of certain electronic products to Czechoslovakia.[146] The United Kingdom and Italy asserted that the measures were maintained under Article XXI(b) of the GATT 1947.[147] In 1986, Czechoslovakia submitted an additional notification, responding to the United Kingdom that "the imports of computers and related equipment … mentioned in the Czechoslovak notification are not related to either fissionable materials or traffic in arms or to traffic in other goods carried on for the purposes of supplying a military establishment."[148] Czechoslovakia also asserted that "[t]he two contracting parties in this case cannot be said to be in a state of belligerency or other emergency situation."[149] Czechoslovakia considered that the United Kingdom had not demonstrated "a genuine causal link between its security interests and the trade action taken", and therefore did not consider the action to be in conformity with the GATT 1947.[150]

[136] GATT Council, Minutes of Meeting held on 13 March 1984, C/M/176, pp. 8-9.
[137] Ibid. p. 9.
[138] Ibid. p. 10.
[139] Ibid. p. 11. Argentina, Australia, Brazil, Cuba, Colombia, Poland, India, Norway on behalf of the Nordic countries, Uruguay, Dominican Republic, United Kingdom on behalf of Hong Kong, Hungary, Portugal, Peru, Jamaica, Austria, Egypt, Romania, Switzerland, Chile, Singapore, Nigeria, Yugoslavia, Canada, Trinidad and Tobago, Senegal and Zaire supported the adoption of the panel's report. (Ibid. p. 9.)
[140] GATT Council, Minutes of Meeting held on 15-16 May 1984, C/M/178, p. 27.
[141] Ibid. Argentina and Cuba expressed their concern with the United States' failure to comply with the recommendations. (Ibid. pp. 27-28.)
[142] GATT Council, Minutes of Meeting held on 6-8 and 20 November 1984, C/M/183, p. 65.
[143] Ibid.
[144] Ibid. Several contracting parties such as Argentina, Brazil, Cuba, Hungary, India, Uruguay and Poland expressed their concern with the United States' ongoing failure to comply with the recommendations. (Ibid. pp. 65-66.)
[145] Ibid. p. 66.
[146] Group on Quantitative Restrictions and Other Non-Tariff Measures, Inventory of Non-Tariff Measures (Industrial Products), Addendum, NTM/INV/I-V/Add.10, Inventory Numbers IV.B.17.1 (p. 59 of PDF file) and IV.B.18 (p. 61 of PDF file). Czechoslovakia characterized the measure maintained by Italy as an "embargo" on exports of electronic systems to Czechoslovakia, and the measure maintained by the United Kingdom as an embargo on exports of computers and related equipment. Italy responded that there was no embargo, but an inter-ministerial Committee which examined each export license application. (Ibid.)
[147] Ibid.
[148] Group on Quantitative Restrictions and Other Non-Tariff Measures, Inventory of Non-Tariff Measures (Industrial Products), Addendum, NTM/INV/I-V/Add.12, Inventory Number IV.B.18 (p. 9 of PDF file).
[149] Ibid.
[150] Ibid.

United States v. Nicaragua (1985)

1.37. In 1985, the United States circulated a communication stating that it had imposed a complete import and export embargo on Nicaragua and declared a national emergency due to the extraordinary threat to national security posed by Nicaragua's policies and actions.[151] At a special meeting of the GATT Council requested by Nicaragua in May 1985, Nicaragua argued that this measure "violated both the general principles and certain specific provisions" of the GATT 1947.[152] Nicaragua argued that the US Administration, in declaring a national emergency to deal with a perceived threat by Nicaragua, seemed to have lost any sense of proportion and was trying to override the principles of international trade.[153] Nicaragua said that it was absurd to suggest that it could pose a threat to the national security of the United States, pointing to the relative power and size of the two countries as well as the absence of any "armed conflict between the United States and Nicaragua".[154] Nicaragua also noted that "the United States, in stating to the Security Council that its measures were principally intended to prevent Nicaragua from having the benefit of trading with the United States, had thereby acknowledged that this was not a matter of national security but one of coercion."[155]

1.38. The United States stated that it took the measures for "national security" reasons and that the measures fell within the exception contained in Article XXI(b)(iii).[156] The United States emphasized that Article XXI left it to each contracting party to judge what measures it considered necessary for the protection of its essential security interests.[157] According to the United States, it was not for the GATT to approve or disapprove this judgement.[158] The United States also considered that GATT, as a trade organization, had "no competence to judge such matters" and that its effectiveness in addressing trade issues would only be weakened if it became a "forum for debating political and security issues".[159] Nicaragua responded that Article XXI "was not to be applied in an arbitrary fashion" and required "some correspondence between the measures adopted and the situation giving rise to their adoption".[160] Nicaragua also considered that "since this matter involved commercial and trade measures, the GATT, as the institution responsible for the conduct of international trade, should express a view on this issue."[161]

1.39. Cuba, Argentina, Peru, Brazil, Spain, Czechoslovakia, Romania, Yugoslavia and Portugal considered that the measures taken by the United States were incompatible with Article 7(iii) of the 1982 Ministerial Declaration[162], and Poland, Chile, Hungary, Austria, Sweden, Switzerland, Jamaica

[151] Communication from the United States*, US – Nicaraguan Trade,* L/5803. The measures were embodied in an Executive Order issued by President Reagan, and comprised: (a) a prohibition on all imports into the United States of goods and services of Nicaraguan origin; (b) a prohibition on all exports from the United States of goods to or destined for Nicaragua; (c) a prohibition on Nicaraguan air carriers engaging in air transport to or from points in the United States, and transactions relating thereto; and (d) a prohibition on vessels of Nicaraguan registration from entering the United States' ports, and a prohibition on transactions related thereto. (Communication from the United States*, US – Nicaraguan Trade,* L/5803, p. 2.)

[152] GATT Council*,* Minutes of Meeting held on 29 May 1985, C/M/188, p. 2. Nicaragua specifically alleged that the US measures contravened Articles I, II, V, XI, XIII, XXXVI, XXXVII and XXXVIII of the GATT 1947. Nicaragua also alleged that US measures violated the spirit and provisions "of the UN Charter, the resolutions of the UN General Assembly and Security Council, the decisions of the [ICJ], the Charter of the Organization of American States, and other international instruments, including the Bilateral Treaty of Friendship, Commerce and Navigation". (Ibid. p. 4.)

[153] Ibid. p. 3.

[154] Ibid. Nicaragua also criticized the refusal from the United States to enter into dialogue, as well as "the US policy of force, serious threats of increased military aggression and disregard of international legal provisions and of the bodies and tribunals responsible for ensuring their observance". (Ibid. p. 2.)

[155] Ibid. p. 4. Nicaragua argued that "the measures had been taken as a form of coercion for political reasons, and formed part of a US policy of political, financial, trade and military aggression against Nicaragua", which included the mining of the country's ports and campaigns to prevent the harvesting of coffee and other products. (Ibid. p. 2.)

[156] Ibid. p. 4.

[157] Ibid. pp. 4-5.

[158] Ibid. p. 5.

[159] Ibid. pp. 4-5.

[160] Ibid. p. 16.

[161] Ibid.

[162] Ibid. pp. 5-7, 9, 10 and 12. See also Ministerial Declaration adopted on 29 November 1982, L/5424 (1982 Ministerial Declaration). Paragraph 7(iii) of the 1982 Ministerial Declaration provides that the GATT CONTRACTING PARTIES, in drawing up the work programme and priorities for the 1980s, undertake,

and China, as an observer, criticized the use of economic measures to secure political objectives.[163] Argentina and Brazil additionally asserted that the measures were incompatible with the Charter of the United Nations (UN Charter), and Argentina cited incompatibility with the 1982 Decision.[164]

1.40. Cuba, Poland and Chile asserted that the GATT was the proper forum for discussing disputes with trade implications.[165] Poland noted that this was required to ensure that "GATT's conciliatory functions and responsibilities have practical meaning."[166] Chile did not consider that an invocation of Article XXI implied that the trade consequences of measures taken under it could not be discussed under the GATT.[167] Hungary noted that while ideally politics and trade should be kept separate, a total separation was not realistic and was "evidenced by the provisions in the General Agreement covering cases in which political and commercial considerations were in opposition".[168]

1.41. Canada conversely considered that "this was fundamentally not a trade issue", and urged the two parties to seek a solution outside of the GATT context.[169] The European Communities stated that its concern was to protect the GATT multilateral system from being damaged by any ill-considered development of a situation that could neither be dealt with nor settled in the GATT framework.[170] The European Communities agreed that the GATT was not the appropriate forum because the US measures were only part of a broader situation and the GATT had never had the authority or competence to settle "disputes essentially linked to security".[171] Japan agreed that even though "the issue now before the Council obviously had a trade aspect, that aspect stemmed from deep roots and it had to be admitted that GATT was not competent to grapple with those roots".[172]

1.42. Spain and Czechoslovakia considered that the measures taken by the United States could not be justified under the provisions of Article XXI.[173] Cuba and Peru argued that Nicaragua could not possibly threaten the security of the United States, and Cuba considered that the United States was "putting forward various political pretexts, including a reference to Article XXI" in order to "punish Nicaragua for not serving US interests".[174] Cuba asserted that "recourse to Article XXI had to be backed by certain facts" to effectively guarantee against an abuse of the GATT system.[175] Brazil noted that the right to invoke Article XXI "should only be exercised in the light of other international obligations such as those assumed under the UN Charter".[176] Czechoslovakia stated that the United States' interpretation of Article XXI would enable any contracting party wanting to justify introduction of certain trade measures against any other contracting party to simply refer to Article XXI and declare that its security was threatened. On the contrary, Czechoslovakia considered that Article XXI "dealt with emergency situations and therefore had to be applied according to the specific provisions in paragraphs b(i), (ii), or (iii)".[177]

1.43. India argued that "a contracting party having recourse to Article XXI(b)(iii) should be able to demonstrate a genuine nexus between its security interests and the trade action taken; the security exception should not be used to impose economic sanctions for non-economic purposes".[178] India did not consider that the United States had established such a nexus.[179]

1.44. Sweden agreed with the United States that it was "up to each country to define its essential security interests under Article XXI", but noted that "contracting parties should be expected to

individually and jointly "to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement".

[163] GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, pp. 5-15.
[164] Ibid. pp. 6-7. The 1982 Decision is discussed in paragraph 1.28 of this Appendix.
[165] Ibid. pp. 5-8.
[166] Ibid. p. 8.
[167] Ibid.
[168] Ibid.
[169] Ibid. p. 12.
[170] Ibid. p. 13.
[171] Ibid.
[172] Ibid. p. 14.
[173] Ibid. pp. 9-10.
[174] Ibid. pp. 5-6.
[175] GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, p. 5.
[176] Ibid. pp. 7-8.
[177] Ibid. p. 10.
[178] Ibid. pp. 10-11.
[179] Ibid. p. 11.

exercise their rights under that Article with utmost prudence."[180] Finland, Switzerland, Norway, Iceland, Egypt and Portugal expressed similar views.[181] Sweden further considered that the United States had not shown such prudence in choosing to give "a too far-reaching interpretation" of Article XXI.[182] The European Communities agreed that Article XXI "left to each contracting party the task of judging what was necessary to protect its essential security interests", but noted that such discretion should be exercised in a spirit of "responsibility, discernment, moderation, ensuring above all that discretion did not mean arbitrary application".[183]

1.45. Australia stated that the United States was permitted under Article XXI "to take action of this kind with no requirement to justify such action", noting that the UN Security Council was the appropriate forum for the discussion of such issues. Nevertheless, Australia believed that contracting parties should avoid any action which could threaten GATT's credibility and undermine attachment to the principles of an open multilateral system. Australia considered that, while in principle, Nicaragua retained its GATT rights, in practical terms the US action had rendered this right inoperative.[184] Canada expressed a similar view.[185]

1.46. Nicaragua circulated a draft decision to the contracting parties for their consideration, but the Council agreed to defer any determination on this matter to its next meeting.[186] Nicaragua subsequently requested consultations with the United States in relation to this matter.[187] At the July 1985 meeting of the GATT Council, Nicaragua requested the establishment of a panel.[188] The United States reiterated the futility of resolving this issue through GATT procedures, as the trade effects of the measure had already been acknowledged and the export embargo had removed any opportunity for Nicaragua to retaliate.[189] The United States considered Nicaragua's request for a panel as "a further attempt … to politicize GATT".[190] The United States also contended that under Article XXI(b) a panel "could neither examine the national security reasons for the US action, nor determine the appropriateness of invoking the security exception".[191] The European Communities considered that each party had to judge on its own whether to invoke Article XXI. The European Communities questioned what a panel could do in this case, since it could not interpret Article XXI and the United States had already recognized trade prejudice.[192] The European Communities said that it could not oppose a contracting party's request for a panel, provided the terms of reference clearly did not include interpretation of Article XXI.[193] Canada expressed full agreement with the United States that only the individual contracting party itself could judge questions involving national security, noting that a panel could not make that judgment.[194] Nevertheless, Canada considered that measures taken under Article XXI could have trade effects which could be considered by a GATT panel. Canada considered that every contracting party had a right to request and to receive a hearing of a panel on any GATT-related issue, even where a panel was unlikely to be able to make a useful finding. Canada agreed that a panel would serve no useful purpose in the present case, since nullification and impairment of benefits had already been admitted and Nicaragua had no means to retaliate under Article XXIII:2.[195] The Council agreed to engage in informal consultations and defer any determination on this matter to its next meeting.[196]

[180] GATT Council, Minutes of Meeting held on 29 May 1985, C/M/188, p. 10.
[181] Ibid. pp. 11-15.
[182] Ibid. p. 10.
[183] Ibid. p. 13.
[184] Ibid. pp. 12-13.
[185] Ibid. p. 12.
[186] Ibid. p. 17.
[187] Communication from Nicaragua, *US – Nicaraguan Trade*, L/5847.
[188] GATT Council, Minutes of Meeting held on 17-19 July 1985, C/M/191, p. 41. Colombia, Argentina, Poland, Uruguay, Peru, Brazil, Cuba, Chile, Spain, Romania, Jamaica, India, Hungary, Yugoslavia, Trinidad and Tobago and Czechoslovakia, as well as Venezuela and Mexico as observers, supported Nicaragua's request to establish a panel. (Ibid. p. 42.)
[189] Ibid. p. 41.
[190] Ibid. p. 42.
[191] Ibid. p. 43.
[192] Ibid. p. 44.
[193] Ibid.
[194] Ibid. p. 45.
[195] GATT Council, Minutes of Meeting held on 17-19 July 1985, C/M/191, p. 45.
[196] Ibid. p. 46.

1.47. At the October 1985 meeting of the GATT Council, the United States agreed to the establishment of a panel on the condition that it "could not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(3) by the United States".[197] At the March 1986 meeting of the GATT Council, the panel was established with the aforementioned carve-out from its terms of reference.[198]

1.48. Before the panel, Nicaragua argued that the embargo imposed by the United States had deprived Nicaragua of benefits under Articles I:1, II, V, XI:1, XIII, XXIV, XXXVI, XXXVII and XXXVIII of the GATT 1947.[199] Nicaragua argued that the embargo therefore constituted a *prima facie* nullification or impairment of benefits accruing to Nicaragua under the General Agreement. Nicaragua stressed that whether the invocation of Article XXI(b)(iii) was justified or not, benefits accruing to Nicaragua under the General Agreement had been seriously impaired or nullified as a result of the embargo. Nicaragua argued that it had been recognized both by the drafters of the General Agreement and by the contracting parties that an invocation of Article XXI did not prevent recourse to Article XXIII. Nicaragua said that it had no reason to expect that an embargo would cut off all trade relations with the United States when the United States' tariff concessions were negotiated (i.e. between 1949 and 1961) and that the embargo had in fact nullified or impaired the benefits accruing to Nicaragua under all of the trade-facilitating provisions of the General Agreement.[200]

1.49. The United States reiterated its position that its actions were valid under Article XXI, but that the panel could not in any event examine the validity of, nor the motivation for, its invocation of Article XXI(b)(iii) within its terms of reference.[201] The United States agreed that a measure not conflicting with obligations under the General Agreement could be found to cause nullification and impairment, and that an invocation of Article XXI did not prevent recourse to the procedure of Article XXIII. However, the United States argued that nullification or impairment could not be presumed in cases in which Article XXI was invoked.[202] Rather, this was dependent on the facts and circumstances of the particular case, including the expectations that the contracting party bringing the complaint could reasonably have had when it negotiated its tariff concessions. The United States did not consider it meaningful for the Panel to propose in the present case a ruling on the question of whether nullification or impairment could be caused through measures under Article XXI.[203]

1.50. The panel stated that it had not considered the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article because this examination was precluded by its mandate.[204] The panel concluded that as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, "it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement."[205] In examining the embargo in the light of Article XXIII:1(b), the panel noted the question of whether the nullification or impairment of the trade opportunities of Nicaragua through the embargo constituted a nullification or impairment of benefits accruing to Nicaragua within the meaning of Article XXIII:1(b). In the panel's view, this question raised basic interpretive issues relating to the concept of non-violation and nullification and impairment which had not been addressed by the drafters of the GATT or decided by the contracting parties. Against this background, the panel felt that it would only be appropriate for it to propose a ruling on these issues if such a

[197] GATT Council, Minutes of Meeting held on 10 October 1985, C/M/192, p. 6.

[198] GATT Council, Minutes of Meeting held on 12 March 1986, C/M/196, p. 7. The agreed terms of reference were as follows: "To examine, in the light of the relevant GATT provisions, of the understanding reached at the Council on 10 October 1985 that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b)(3) by the United States, of the relevant provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/211-218), and of the agreed Dispute Settlement Procedures contained in the 1982 Ministerial Declaration (BISD 29S/13-16), the measures taken by the United States on 7 May 1985 and their trade effects in order to establish to what extent benefits accruing to Nicaragua under the General Agreement have been nullified or impaired, and to make such findings as will assist the CONTRACTING PARTIES in further action in this matter". (Ibid.)

[199] GATT Panel Report, *US – Nicaraguan Trade*, L/6053 (unadopted), para. 4.3.

[200] Ibid. para. 4.8.

[201] Ibid. para. 4.6.

[202] Ibid. para. 4.9.

[203] Ibid.

[204] Ibid. para. 5.3.

[205] Ibid.

ruling would enable the contracting parties to draw practical conclusions from it in the case at hand.[206] The panel reasoned that, as long as the embargo was not found to be inconsistent with the General Agreement, the United States would be under no obligation to follow a recommendation by the contracting parties under Article XXIII:2 to withdraw the embargo.[207] Moreover, even if it were found that the embargo nullified or impaired benefits accruing to Nicaragua independent of whether it was justified under Article XXI, the contracting parties could, in the circumstances of the present case, take no decision under Article XXIII:2 that would re-establish the balance of advantages which had accrued to Nicaragua under the General Agreement prior to the embargo. In the light of all these considerations, the panel decided not to propose a ruling on the basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party.[208] However, the panel noted that embargoes such as those imposed by the United States, independent of whether they were justified under Article XXI, ran counter to the basic aims of the GATT 1994 and encouraged each contracting party to "carefully weigh[] its security needs against the need to maintain stable trade relations".[209]

1.51. At the November 1986 meeting of the GATT Council, Nicaragua expressed disappointment that the panel report had neither determined the level of nullification or impairment of Nicaragua's rights under the GATT 1947, nor made any specific recommendations.[210] Nicaragua also noted that it "remained clear that the United States had imposed the embargo not for reasons of security, but for political coercion" and noted that the case involved a "clear misuse of Article XXI".[211] Nicaragua requested that the Council recommend a removal of the embargo, authorize special support measures to compensate Nicaragua for damage caused by the embargo, and prepare an interpretive note on Article XXI which would reflect the elements of this case.[212] Nicaragua also asked that in making such recommendations, the Council give consideration to the ruling of the International Court of Justice (ICJ) "as proof that the conditions necessary for invoking Article XXI had not been met".[213] Nicaragua added that it could not support the adoption of the report until the Council was in a position to make such recommendations.[214]

1.52. The United States said that the panel had reached sound conclusions in a difficult situation and recommended that the Council adopt the report.[215] The United States stated that it continued to believe that this dispute should never have been brought to GATT. There were and had been many instances of trade sanctions that had been imposed by various contracting parties for reasons, it could be surmised, of national security. Rarely had those situations even been raised in GATT, and never before had a party insisted on a panel, because contracting parties, including those against whom sanctions had been imposed, had tacitly recognized that GATT, by its traditions, its competence, and the terms of Article XXI, could not help resolve such matters, and that pressing the issue would only weaken GATT's intended role.[216] In this regard, the United States observed that "GATT was not a forum for examining or judging national security disputes. When a party judged trade sanctions to be essential to its security interests, it should be self-evident that such sanctions would be modified or lifted in accordance with those security considerations."[217] The United States also agreed with the panel's decision not to address the "novel and delicate question of nullification and impairment in a situation of Article XXI trade sanctions" when the outcome of such question "could create a precedent of much wider ramifications for the scope of GATT rights and obligations

[206] GATT Panel Report, *US –Nicaraguan Trade*, L/6053 (unadopted), para. 5.6.
[207] Ibid. para. 5.9.
[208] Ibid. para. 5.11.
[209] Ibid. para. 5.16.
[210] GATT Council*,* Minutes of Meeting held on 5-6 November 1986, C/M/204, p. 7. Uruguay, Nigeria, Argentina, Colombia, Cuba, Peru, Hungary, Trinidad and Tobago, Czechoslovakia, Yugoslavia, Romania, Poland, India, Mexico and Tanzania, as an observer, supported Nicaragua's request to lift the embargo. Uruguay, Argentina, Colombia, Cuba, Peru, Hungary, Czechoslovakia, Yugoslavia and Romania supported Nicaragua's request to take measures to compensate Nicaragua. Uruguay, Nigeria, Argentina, Colombia, Czechoslovakia, Yugoslavia and Romania supported a re-examination of Article XXI in depth during the Uruguay Round negotiations. (Ibid. p. 10.)
[211] Ibid. p. 8.
[212] Ibid.
[213] Ibid. p. 7.
[214] Ibid. p. 17.
[215] Ibid. pp. 8-10.
[216] Ibid. p. 8.
[217] Ibid.

but which would serve no useful purpose in the particular matter before the [p]anel".[218] The United States considered that nullification or impairment in situations where no GATT violation had been found was a "delicate issue, linked to the question of 'reasonable expectations'."[219] According to the United States, applying the concept of "reasonable expectations" to a case of trade sanctions motivated by national security considerations would be "particularly perilous", since at a broader level, those security considerations would nevertheless enter into expectations.[220]

1.53. Chile noted that "Article XXI should be invoked only when absolutely necessary to protect national security interests, and not to punish another contracting party."[221] Nigeria stated that Article XXI could only be invoked "in cases of a state of war or emergency", and that neither was the case with the US embargo as "[t]he ICJ had found no evidence that Nicaragua's policies threatened the United States and thus had found no justification for the embargo."[222] Argentina asserted that it was clear to the international community at large that Article XXI had been improperly invoked and that "the ICJ had confirmed that the US embargo was not compatible with GATT."[223] Peru rejected the use of trade measures for political coercion "unless such action was approved by the UN Security Council" and noted that the UN General Assembly had condemned the embargo.[224] Colombia, Trinidad and Tobago and Czechoslovakia expressed similar views.[225] Sweden expressed concern that the restricted terms of reference in this dispute should not prejudice the mandate of future panels, noting that panels "should be able to examine all relevant GATT Articles, including Article XXI".[226] Jamaica also expressed concern that the restricted terms of reference had been agreed upon without prior examination by the contracting parties.[227]

1.54. Hungary argued that Article XXI provided discretion to the contracting parties to judge whether circumstances warranted its invocation, but noted that "the most powerful trading nations should demonstrate the greatest self-restraint."[228] The European Communities reiterated its view that the United States "alone had the sovereign right to determine its national security interests", and noted that Article XXI was an "essential safety valve" which the European Communities did not support being subject to further interpretation, discussion, or negotiation either in the Council or in the new round.[229] That said, the European Communities also considered that the discretionary rights inherent in Article XXI should not be arbitrarily invoked.[230] Several GATT contracting parties also reiterated views expressed at earlier meetings of the Council.[231]

1.55. The Council concluded that it could not adopt the panel's report without consensus, but agreed for the Chair to engage in informal discussions and to keep this matter on its agenda.[232]

1.56. At the April 1987 meeting of the GATT Council, Nicaragua reiterated its position that it could not support the adoption of the report until the Council was in a position to make recommendations.[233] It noted that such recommendations would need to consider the decisions of other fora, in particular, the ICJ "which had concluded that the embargo was not necessary to protect any US security interest, as well as Resolutions 40/188 and 41/164 of the United Nations General

[218] GATT Council, Minutes of Meeting held on 5-6 November 1986, C/M/204, p. 9.
[219] Ibid.
[220] Ibid.
[221] Ibid. p. 10.
[222] Ibid. pp. 10-11. Nigeria also noted that "[a]ny action which clearly undermined the United Nations Charter had to be seen as a gross abuse of rights conferred by the General Agreement." (Ibid.)
[223] Ibid. p. 11.
[224] Ibid. p. 13.
[225] Ibid. pp. 12-14.
[226] Ibid. pp. 11-12.
[227] Ibid. p. 15.
[228] Ibid. p. 13.
[229] Ibid. p. 16.
[230] Ibid.
[231] Ibid. pp. 11-15. Sweden reiterated its view that it was the sole prerogative of each GATT contracting party to determine whether or not to invoke Article XXI. Peru and Poland reiterated their opposition to the use of trade measures for political reasons. India reiterated its view that a contracting party having recourse to Article XXI should be able to demonstrate a genuine nexus between its security interests and the trade action taken. Japan reiterated its view that the roots of the present dispute were too deep to be addressed in the context of the General Agreement. (Ibid.)
[232] Ibid. p. 17.
[233] GATT Council, Minutes of Meeting held on 15 April 1987, C/M/208, pp. 17-18.

Assembly which called for the immediate cessation of the embargo".[234] Nicaragua also argued that certain amendments that the United States had proposed to UN document A/C.2/41/L.2 suggested that it did consider the GATT to have competence to rule on this matter.[235] The United States maintained its earlier position that resolution of this matter did not lie within the GATT and that the panel's findings confirmed this position. The United States reiterated that with respect to this and other similar issues brought before the Council in the past, the GATT, by its traditions, its competence, and the terms of Article XXI itself, could not resolve cases where trade sanctions were imposed for national security reasons.[236] The Council agreed to engage in informal consultations and defer any determination on this matter to its next meeting.[237]

1.57. At the July 1987 meeting of the GATT Council, Nicaragua circulated a draft decision adopting the panel report, but recommending that the United States take into consideration the negative trade effects of the embargo and authorizing contracting parties wishing to do so to grant trade concessions to Nicaragua.[238] Nicaragua reiterated its view that "no one believed that Nicaragua was a threat to any country's security" and that it "could not accept that the United States had the right to invoke Article XXI and still less to impose the embargo".[239] The United States maintained its earlier position that resolution of this matter did not lie within the GATT and condemned Nicaragua's draft resolution as politically motivated.[240] The United States also asserted that the panel's report had found that "the United States was under no obligation to remove the embargo", and reiterated its position that the United States "had acted in full conformity with its GATT rights and obligations".[241] The Council agreed to engage in informal consultations and defer any determination on this matter to its next meeting.[242] At the November 1987 meeting of the GATT Council, Nicaragua noted that the President of the United States had proposed that the embargo be renewed for an additional six months.[243] Nicaragua expressed its intention to request that the contracting parties implement paragraph 21 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance at its Forty-Third Session.[244] The Council took note of these statements.[245]

1.58. At the June 1989 meeting of the GATT Council, Nicaragua noted that the President of the United States had sent a message to Congress in April 1989 extending the national emergency and economic sanctions against Nicaragua indefinitely.[246] Nicaragua also read out an official United States document stating that trade sanctions were an essential element of the United States policy regarding Nicaragua, and that, in the United States' view, present conditions in Nicaragua did not justify the lifting of trade sanctions.[247] Nicaragua noted that this document "did not refer to the protection of the United States' essential security interests, but exclusively to Nicaragua's internal matters" and thus "infringed the fundamental principles of the United Nations Charter and other instruments of international law" and could not be justified under Article XXI.[248] Nicaragua called on

[234] GATT Council, Minutes of Meeting held on 15 April 1987, C/M/208, p. 17.
[235] Ibid. p. 18.
[236] Ibid.
[237] Ibid.
[238] GATT Council, Minutes of Meeting held on 15-17 July 1987, C/M/212, pp. 24-25. Cuba supported the adoption of this decision, and the European Communities, Switzerland, Canada, Australia, Austria, Japan, Finland on behalf of the Nordic countries, Israel, Turkey, Singapore, Yugoslavia and Indonesia requested the continuation of informal consultations aimed at seeking a consensus solution to this matter. An alternate text, adopting the panel report but solely recommending that other parties grant trade concessions to Nicaragua, was circulated by six Latin American countries. (Ibid. pp. 25-28. See also Communication from Argentina, Brazil, Colombia, Mexico, Peru and Uruguay, *US –Nicaraguan Trade*, C/W/525.)
[239] GATT Council, Minutes of Meeting held on 15-17 July 1987, C/M/212, p. 28.
[240] Ibid. p. 25.
[241] Ibid. p. 26.
[242] Ibid. p. 29.
[243] GATT Council, Minutes of Meeting held on 10-11 November 1987, C/M/215, p. 40.
[244] Ibid.
[245] Ibid. Several contracting parties including Nicaragua, the United States, Brazil, Cuba, Argentina, Mexico, Colombia, Peru, Romania and Uruguay reiterated their views on the matter at the Fourth Meeting of the Forty-Third Session. (See GATT Contracting Parties, Forty-Third Session, Summary Record of the Fourth Meeting held on 2 December 1987, SR.43/4, pp. 12-16.)
[246] GATT Council, Minutes of Meeting held on 21-22 June 1989, C/M/234, p. 37.
[247] Ibid. The document went on to state that, if Nicaragua fulfilled its *Esquipulas* commitments and held free, fair and open elections, this might resolve the emergency which had led the US Administration to impose trade sanctions. (Ibid.)
[248] Ibid. p. 38.

the contracting parties to "impose a limit on the irresponsibility with which the United States had claimed to interpret the provisions of Article XXI".[249] Nicaragua also noted that it still could not support the adoption of the panel's report, as to do so would create a dangerous precedent by denying Nicaragua the right to have its complaint examined in accordance with Article XXIII:2.[250] The United States expressed surprise that Nicaragua had brought this issue back to the Council some two and a half years after the first consideration of the panel report, and renewed its request for the adoption of the panel's report, as it believed no other resolution of the matter was realistic.[251] The United States also asserted that the panel "had confirmed that the United States was within its rights to invoke Article XXI".[252] The Council took note of these statements.[253]

1.59. In March 1990, Nicaragua circulated a communication noting that the United States had lifted the embargo and other economic measures on Nicaragua.[254] At the April 1990 meeting of the GATT Council, Nicaragua welcomed the removal of the embargo, but noted that the dispute had demonstrated that the GATT "did not have mechanisms to establish a proper balance between rights and obligations".[255] The United States stated that "in light of changed circumstances and recent events, the conditions which had necessitated action under Article XXI of the General Agreement had ceased to exist" and it had consequently terminated the embargo.[256] The United States also noted its intention to restore Nicaragua's sugar allocation.[257] Cuba stated that the embargo "had been imposed for political reasons and its lifting was a reminder of its political nature and coercive character".[258] The Council took note of the statements.[259]

1.60. The panel report in *United States – Trade Measures Affecting Nicaragua* was never adopted.[260]

Negotiating Group on GATT Articles

1.61. The Negotiating Group on GATT Articles also reviewed Article XXI in meetings in November 1987 and June 1988, on the basis of communications submitted by Nicaragua[261], a Secretariat background note[262] and a communication submitted by Argentina.[263] The Negotiating Group was unable to agree on any of the proposals regarding Article XXI, and the Chairman's Report to the Group of Negotiations on Goods did not list Article XXI among the provisions that it was considering.[264]

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[249] GATT Council*,* Minutes of Meeting held on 21-22 June 1989, C/M/234, p. 41.

[250] Ibid. p. 40.

[251] Ibid. p. 38.

[252] Ibid. The European Communities reiterated its view that invocation of Article XXI was at the discretion of governments but that this "did not necessarily mean an arbitrary step or measure". (Ibid. p. 40.)

[253] Ibid. p. 42. In a Decision of the GATT CONTRACTING PARTIES taken in April 1989, the contracting parties agreed to implement a number of improvements to the GATT dispute settlement rules and procedures, including the establishment of panels or working parties at the Council meeting following that at which the request first appeared on the Council's regular agenda, unless at that meeting the Council decided otherwise. (See Improvements to the GATT Dispute Settlement System Rules and Procedures, Decision of 12 April 1989, L/6489, 13 April 1989 (the April 1989 Decision), section F(a). See also ibid., section F(b) on the establishment of panels and working parties with standard terms of reference.) The procedural rules adopted under the April 1989 Decision applied to the GATT Council discussions concerning *European Communities v. Yugoslavia (1991)*, discussed below, and the Helms-Burton legislation in 1996 (see discussion in *United States v. Cuba (including Helms-Burton Act) (1962-2016)*, while the equivalent rules under the DSU applied to the situation involving Nicaragua and Honduras (also discussed further below).

[254] Communication from Nicaragua, *US – Nicaraguan Trade,* L/6661.

[255] GATT Council*,* Minutes of Meeting held on 3 April 1990, C/M/240, p. 31.

[256] Ibid.

[257] Ibid.

[258] Ibid. p. 32. The European Communities reiterated its view that discretionary but not arbitrary use of Article XXI was to be recommended. (Ibid.)

[259] Ibid.

[260] See GATT Council, Status of Work in Panels and Implementation of Panel Reports*,* Report of the Director-General, C/172, p. 1.

[261] Communication from Nicaragua, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/34; and Communication from Nicaragua, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/39.

[262] Article XXI, Note by the Secretariat, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/16.

[263] Communication from Argentina, Negotiating Group on GATT Articles, MTN.GNG.NG7/W/44.

[264] Negotiating Group on GATT Articles, Status of Work in the Negotiating Group, Chairman's Report to the GNG, MTN.GNG/NG7/W/73.

Negotiations Leading to the Adoption of the April 1989 Decision (1988-1989)

1.62. As stated above[265], the GATT CONTRACTING PARTIES jointly agreed, in adopting the April 1989 Decision, that any panel or working party would be established at the GATT Council meeting following the meeting at which the request first appeared on the Council's regular agenda, unless at that meeting the Council decided otherwise.[266] Prior to the adoption of the April 1989 Decision, trade ministers considered a proposal which provided that, where the Council could not agree on whether a matter fell within the scope of Article XXIII of the GATT, a panel would make a recommendation on the jurisdictional issue as a preliminary matter, with bracketed text stating "including the question of whether the matter is appropriate for resolution through the panel process".[267] By 6 December 1998, a Secretariat note stated that this language in the proposal was to be deleted. The final draft text of the report from the Trade Negotiations Committee Meeting omitted this language and included only the text that formed part of the April 1989 Decision; namely, that "a decision to establish a panel or working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda".[268]

European Communities v. Yugoslavia (1991)

1.63. In 1991, the European Communities circulated a communication stating that it had suspended the benefit of certain trade concessions that had been granted to Yugoslavia on a preferential basis.[269] The European Communities referred in this context to its "vigorous efforts over recent months to put a stop to bloodshed in Yugoslavia", including promoting cease-fire agreements which unfortunately had not led to the "full cessation of hostilities".[270] The European Communities stated that the measures had been taken upon consideration of its "essential security interests and based on GATT Article XXI", as it was faced with "continuing risks of political instability in this region of Europe, with potentially destabilizing consequences elsewhere".[271] In response, Yugoslavia circulated a communication noting that it did not presently claim that the measures violated any GATT provisions as "the majority do not relate to the contractual obligations under the GATT or could be justified under Article XXI".[272] However, Yugoslavia did express concerns about the negative trade effects of the measure as well as the use of punitive economic measures to secure political objectives.[273] Yugoslavia also requested that it be notified of any additional measures pursuant to the 1982 Decision, and noted that it reserved its rights under the GATT.[274]

1.64. Following this communication, Yugoslavia requested consultations with the European Communities in relation to these and certain other measures.[275] The consultations did not

[265] See fn 253 of this Appendix.

[266] See the April 1989 Decision, section F(a). See also ibid., section F(b) on the establishment of panels and working parties with standard terms of reference.

[267] Group of Negotiations on Goods, Report to the Trade Negotiations Committee meeting at Ministerial level, Montreal, December 1988, MTN.GNG/13, pp. 59-60.

[268] Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, Trade Negotiations Committee, MTN.TNC/7(MIN), 9 December 1988, p. 29; Mid-Term Meeting, Trade Negotiations Committee, MTN.TNC/11, 21 April 1989, p. 27.

[269] Communication from the European Communities, *Trade Measures Taken by the European Communities against the Socialist Federal Republic of Yugoslavia*, L/6948, p. 1. The measures comprised: (a) the suspension of the bilateral trade agreement between Yugoslavia and the European Communities, (b) the reapplication of certain quantitative limitations on textile products from Yugoslavia, (c) withdrawal of Generalized System of Preferences benefits from Yugoslavia, (d) suspension of the trade concessions granted to Yugoslavia as part of the Treaty establishing the European Coal and Steel Community, and (e) suspension of bilateral trade agreements between Member States of the European Communities and Yugoslavia. (Ibid. p. 2.)

[270] Ibid.

[271] Communication from the European Communities, *Trade Measures Taken by the European Communities against the Socialist Federal Republic of Yugoslavia*, L/6948, p. 2.

[272] Communication from Yugoslavia, *Trade Measures Against Yugoslavia for Non-Economic Reasons*, L/6945, p. 2.

[273] Communication from Yugoslavia, *Trade Measures Against Yugoslavia for Non-Economic Reasons*, L/6945, pp. 2-3.

[274] Ibid. p. 3. Yugoslavia also noted that it reserved its right to propose that the GATT contracting parties issue a "formal interpretation" on Article XXI under this Decision. (Ibid.)

[275] Request for consultations under Article XXIII:1 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/1. In addition to the measures notified by the European Communities, Yugoslavia also challenged a decision to apply selective positive measures in favour of "those parties which

achieve a mutually satisfactory solution, and Yugoslavia subsequently requested the establishment of a panel.[276] In its request, Yugoslavia asserted that the measures were taken "for purely political reasons" and were inconsistent with the GATT and paragraph 7(iii) of the 1982 Ministerial Declaration.[277] Yugoslavia stated that the measures could not be justified under Article XXI, as the situation in Yugoslavia did not correspond to the "notion or meaning" of Article XXI(b) and Article XXI(c), and no relevant UN body had authorized economic sanctions against Yugoslavia.[278] At the February 1992 meeting of the GATT Council, Yugoslavia reiterated its request for a GATT panel.[279] The European Communities queried whether the withdrawal of preferences violated Article I of the GATT, and noted that as the situation was delicate and continually evolving, its primary objective was not to hamper the peace processes that had been engaged in securing a political solution in Yugoslavia.[280] The European Communities stated that it was willing to engage in consultations, but that the establishment of a GATT panel "could only exacerbate the problem".[281] Yugoslavia's request for the establishment of a GATT panel was supported by Chile, Cuba, and Venezuela.[282] India also supported the request. It asserted that trade measures for non-economic reasons should only be taken within the framework of a UN Security Council decision, and noted that Yugoslavia's request "encompassed an issue which was covered by GATT provisions".[283] The Council agreed to revert to this matter at its next meeting.[284]

1.65. At the March 1992 meeting of the GATT Council, Yugoslavia reiterated its request for a panel.[285] Yugoslavia asserted that the continued discrimination by the European Communities was wrong, as the peace process in Yugoslavia was proceeding well and the non-economic reasons underlying the measures had "completely changed".[286] The European Communities acknowledged the right of Yugoslavia to request the establishment of a panel, but considered the timing to be inopportune as the European Communities was "deeply involved" in the ongoing peace process and did not consider that a panel established at the present time would aid that process.[287] The European Communities recognized that under the April 1989 Decision, a panel had to be established at the second Council meeting at which it was requested, unless at that meeting the Council decided otherwise. The European Communities queried whether, given that the measures had been taken for non-economic reasons, a different course of action could be taken, such as establishing the panel but "delaying its activation subject to further clarity in the situation".[288] The European Communities also reserved its right to reflect further on what the standard terms of reference should be in disputes involving measures taken for non-economic reasons.[289] The United States affirmed Yugoslavia's right to request a panel, but noted that the problems that had given rise to the measures were not capable of resolution by the Council and should be resolved politically.[290] Canada expressed similar views.[291] New Zealand noted that while the GATT process needed to be observed, the "trends in the political situation" should be ascertained before any GATT

contribute to progress towards peace". Yugoslavia asserted that this additional measure created a dangerous precedent for GATT practice. (See Recourse to Article XXIII:2 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/2, pp. 1-2.)

[276] Request for consultations under Article XXIII:1 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/1, p. 1. The request for establishment of a GATT panel was made pursuant to Article XXIII:2 and also paragraphs C.1 and F(a) of the April 1989 Decision. (See fn 253 of this Appendix.)

[277] See Recourse to Article XXIII:2 by Yugoslavia, *EEC - Trade Measures Taken For Non-Economic Reasons*, DS27/2, p. 2. Yugoslavia specifically alleged that the measures contravened, *inter alia,* Articles I and XXI of the GATT 1947. (Ibid.)

[278] Ibid. p. 2.

[279] GATT Council, Minutes of Meeting held on 18 February 1992, C/M/254, p. 35. Chile, Cuba, Venezuela and India supported Yugoslavia's request for the establishment of a panel. (Ibid. pp. 35-36.)

[280] Ibid.

[281] Ibid. p. 36.

[282] Ibid.

[283] Ibid.

[284] Ibid.

[285] GATT Council, Minutes of Meeting held on 18 March 1992, C/M/255, p. 14. India, Pakistan, Argentina, Chile, Peru, Cuba, Mexico and Venezuela all made statements supporting Yugoslavia's right to the establishment of a panel. (Ibid. pp. 15-17.)

[286] Ibid. p. 14.

[287] Ibid.

[288] GATT Council, Minutes of Meeting held on 18 March 1992, C/M/255, p. 15. The European Communities asserted that the April 1989 Decision was silent on this issue. (Ibid.)

[289] Ibid. pp. 15 and 18.

[290] Ibid. p. 15.

[291] Ibid.

consideration of the measures.[292] Argentina asserted that Yugoslavia had the right to have a panel examine any question relating to the application of GATT provisions, including "measures taken for non-economic reasons and invoked under Article XXI".[293] Mexico affirmed Yugoslavia's right to request a panel, but noted that the GATT was "perhaps not the most appropriate forum to discuss those issues, much less to solve them".[294] Japan affirmed Yugoslavia's right to request a panel, but noted that the circumstances were "rather unique" and that its preferred approach was for the parties to seek a solution through dialogue.[295] Tanzania affirmed Yugoslavia's right to request a panel, but noted that it would not want to see a peaceful solution in Yugoslavia impaired by GATT dispute settlement procedures.[296]

1.66. The Chair of the GATT Council stated that the Council had to decide on the establishment of a GATT panel in light of the rules in the April 1989 Decision. The Chair recalled a previous understanding that, under the rules in the April 1989 Decision, a contracting party had the right to a panel at the second Council meeting following that at which the request first appeared as an item on the Council's regular agenda, unless at that meeting, the Council decided otherwise. The Chair therefore proposed that the Council agree to establish a panel with standard terms of reference unless, as provided for in the April 1989 Decision, the parties agreed to other terms of reference within 20 days.[297] The GATT Council agreed to establish a panel with standard terms of reference unless otherwise agreed by the parties.[298] The panel did not proceed owing to the subsequent dissolution of the State of Yugoslavia.

Nicaragua v. Honduras and Colombia (1999)

1.67. In 1999, Nicaragua imposed a tax on all goods and services imported, manufactured or assembled, coming from or originating in Honduras and Colombia, and cancelled licences for all fishing vessels under Honduran and Colombian flags, as a response to the ratification of the bilateral Treaty on Maritime Delimitation in the Caribbean Sea (Ramírez-López Treaty) between those states.[299] In January 2000, Colombia requested consultations with Nicaragua in relation to these measures.[300] These consultations did not achieve a mutually satisfactory solution, and in March 2000, Colombia requested the establishment of a panel.[301]

1.68. At the April 2000 meeting of the DSB, Colombia reiterated its request for a panel.[302] Nicaragua responded that the Ramírez-López Treaty infringed its "sovereign rights in the Caribbean Sea by imposing limits unilaterally, illegally and arbitrarily through reciprocal recognition by Honduras and Colombia of their expansionist aims in the Caribbean Sea to the detriment of Nicaragua's territorial rights".[303] Nicaragua considered that Colombia and Honduras had created "serious international tension" in the form of despatching Honduran troops at its northern border and conducting military manoeuvres by deploying war planes and ships in the region of its continental shelf.[304] Nicaragua asserted that the Organization of American States had recognized the "state of serious international tension" by appointing a special envoy to assess the situation.[305] Accordingly, Nicaragua considered that its measures were consistent with "Article XXI of the GATT 1994 and Article XIV*bis* of the GATS, which reflected a state's inherent right to protect its

[292] GATT Council, Minutes of Meeting held on 18 March 1992, C/M/255, p. 17.
[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Ibid. pp. 17-18.
[298] Ibid. p. 18.
[299] Request for the establishment of a panel by Colombia, *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WT/DS188/2, p. 1; and Dispute Settlement Body, Minutes of Meeting held on 7 April 2000, WT/DSB/M/78, p. 12.
[300] Request for consultations by Colombia, WT/DS188/1.
[301] Request for the establishment of a panel by Colombia, WT/DS188/2. Colombia specifically alleged that the measures were inconsistent with Articles I and II of the GATT 1994, as well as Articles II and XVI of the GATS. (Ibid. p. 1.)
[302] Dispute Settlement Body, Minutes of Meeting held on 7 April 2000, WT/DSB/M/78, item 4.
[303] Ibid. para. 51.
[304] Ibid. para. 52. Nicaragua also referred to complaints made by Miskito communities bordering Honduras and the increase in the defence budget of Honduras adopted by the Congress of the Republic. (Ibid.)
[305] Ibid. para. 53.

security, and therefore constituted a general exception to multilateral trade rules".[306] Nicaragua noted that it had not adopted the measures for trade purposes or to protect domestic industry, but rather to safeguard its essential security interests.[307] Nicaragua recognized Colombia's right to request establishment of a panel, but doubted the utility of having a panel examine the matter, asserting that "it had been customary practice in the WTO that the contracting party applying the measure should be the sole judge in matters that concerned its essential security interests, in particular if such interests could be threatened by any actual or potential danger."[308] According to Nicaragua, if the panel "gave itself powers that belonged to political fora that could result in a dangerous and unacceptable precedent".[309] Nicaragua was also of the view that, "before establishing a panel to examine this matter, the General Council should take a decision on the competence of panels to deal with highly political issues and should make a formal interpretation of Article XXI of GATT 1994."[310] Honduras disputed Nicaragua's assertions regarding the movement of troops and military equipment. Honduras also noted that the DSU provided it with the possibility of restoring its rights, but considered the subject of maritime limits to fall outside of the mandate of the WTO.[311] The DSB agreed to revert to this matter at its next meeting.[312]

1.69. At the May 2000 meeting of the DSB, Colombia reiterated its request for a panel.[313] Nicaragua reiterated its position that Article XXI of the GATT 1994 "could not be subjected to an examination by a panel", and asserted that the 1982 Decision had given the Ministerial Conference and General Council "exclusive authority" to interpret Article XXI to the exclusion of any other body.[314] Japan, Canada, the European Communities and Honduras expressed the view that issues of national security were sensitive and should be addressed with great caution.[315] The European Communities asserted that the panel could examine the facts to determine whether the matter concerned a national security issue or a trade policy measure.[316]

1.70. The DSB agreed to establish the panel[317], but the panel was never composed.[318]

1.71. In July 2006, in the context of the Trade Policy Review of Nicaragua, Colombia noted that Nicaragua had suspended the application of the tax to goods and services imported from or originating in Honduras since March 2003. [319] Colombia argued that this made the "discrimination of Nicaragua's trade policy against Colombia much more obvious", and asked to have the trade practice put on record in the conclusions of the Trade Policy Review.[320] Nicaragua maintained that the tax was applied in conformity with Article XXI of the GATT 1994 in order to protect Nicaragua's essential security interests.[321]

India v. Pakistan (2002)

1.72. During the 2002 Trade Policy Review of Pakistan, India asserted that Pakistan had consistently denied MFN status to India in violation of the basic principles of the GATT 1994 and the WTO.[322]

[306] Dispute Settlement Body, Minutes of Meeting held on 7 April 2000, WT/DSB/M/78, para. 54. Nicaragua specifically argued that the measures were fully justified under Article XXI(b)(iii) of the GATT 1994 and Article XIV*bis*:1(b)(iii) of the GATS Agreement. (Ibid. para. 60.)

[307] Ibid. para. 55. Nicaragua also asserted that there had been no nullification or impairment under Article II of the GATT 1994 because Nicaragua had not exceeded its scheduled tariff ceilings. (Ibid. para. 60.)

[308] Ibid. para. 58.

[309] Ibid. para. 59.

[310] Ibid.

[311] Ibid. para. 61.

[312] Ibid. para. 62.

[313] Dispute Settlement Body, Minutes of Meeting held on 18 May 2000, WT/DSB/M/80, para. 26.

[314] Ibid. paras. 29-30.

[315] Ibid. paras. 32-35.

[316] Ibid. para. 35.

[317] Ibid. para. 40.

[318] See Note by the Secretariat, Update of WTO Dispute Settlement Cases, WT/DS/OV/34, p. 60.

[319] Trade Policy Review Body, Trade Policy Review, Nicaragua, Minutes of Meeting held on 24 and 26 July 2006, WT/TPR/M/167, para. 35.

[320] Ibid.

[321] Trade Policy Review Body, Trade Policy Review, Nicaragua, Minutes of Meeting held on 24 and 26 July 2006, WT/TPR/M/167, para. 131.

[322] Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held on 23 and 25 January 2002, Addendum, WT/TPR/M/95/Add.1, p. 21.

Pakistan responded that the India-Pakistan relationship had to be viewed in the context of the "difficult political relations between the two countries over the course of the past 50 years".[323] Pakistan noted that after the 1965 war, trade and diplomatic relations had been terminated by both sides, and the subsequent process of normalization had been slow and on an item-by-item basis through limited trade and shipping routes.[324] Pakistan therefore considered that both India and Pakistan had acted consistently with Article XXI(b)(iii) by treating each other as exceptions to MFN principles.[325]

1.73. At the 2008 Trade Policy Review of Pakistan, India reiterated that Pakistan was denying MFN status to India, to which Pakistan responded that trade relations between India and Pakistan were continuously liberalizing and improving.[326]

United States v. Brazil (2003)

1.74. In 2003, the United States circulated a communication to the Committee on Import Licensing raising concerns about Brazil's import licensing system for certain lithium compounds and the compatibility of the system with the Import Licensing Agreement.[327] The United States disagreed with the inclusion of these lithium compounds in a measure regulating goods related to the production of nuclear energy, as the United States domestic industry had reported that these lithium compounds had no nuclear application but were rather used as a raw material in various commercial products.[328] The United States therefore requested that Brazil provide additional information about the operation of the system.[329] The United States repeated these concerns at the October 2003 meeting of the Committee on Import Licensing.[330] The Committee took note of these statements.[331] In 2004, Brazil circulated a communication responding to the questions of the United States, in which Brazil asserted that the restrictions were maintained because lithium could have an application in the production of nuclear energy.[332] At the September 2004 meeting of the Committee on Import Licensing, the United States observed that the explanation given by Brazil was "tenuous", as it did not demonstrate that the lithium compounds had any nuclear application outside of its "common commercial use".[333] The United States asserted that in practice, these licensing requirements acted as quantitative restrictions and noted that Brazil's response "engendered some suspicion that there might be other more protectionist reasons for the requirement".[334] The United States noted that it would circulate further questions to Brazil in writing, and Brazil responded that such questions would be conveyed to its government.[335] The Committee took note of these statements.[336]

[323] Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held on 23 and 25 January 2002, Addendum, WT/TPR/M/95/Add.1, p. 21.

[324] Ibid.

[325] Ibid.

[326] Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held 16 and 18 January 2008, Addendum, WT/TPR/M/193/Add.1, pp. 101-102. Pakistan expressed similar views at its 2015 Trade Policy Review. (Trade Policy Review Body, Trade Policy Review, Pakistan, Minutes of Meeting held 24 and 26 March 2015, Addendum, WT/TPR/M/311/Add.1, pp. 17 and 52.)

[327] Committee on Import Licensing, Brazil's Import Licensing Requirements for Chemical Products and Goods Related to Nuclear Applications, Questions from the United States to Brazil, G/LIC/Q/BRA/1. Article XXI of the GATT 1994 applies to the Import Licensing Agreement by reference through Article 1.10 of that Agreement.

[328] Ibid. p. 1.

[329] Ibid. p. 2.

[330] Committee on Import Licensing, Minutes of the Meeting held on 2 October 2003, G/LIC/M/18, p. 8.

[331] Ibid.

[332] Committee on Import Licensing, Brazil's Import Licensing Requirements for Chemical Products and Goods Related to Nuclear Applications, Replies from Brazil to Questions from the United States, G/LIC/Q/BRA/2, p. 2.

[333] Committee on Import Licensing, Minutes of the Meeting held on 30 September 2004, G/LIC/M/20, pp. 2-3.

[334] Committee on Import Licensing, Minutes of the Meeting held on 30 September 2004, G/LIC/M/20, p. 3.

[335] Ibid. pp. 3-4. The United States circulated a communication reiterating these concerns and posing further questions in November 2004. (See Committee on Import Licensing, Questions from the United States to Brazil, Brazil's Import Licensing Requirements for Lithium Compounds, G/LIC/Q/BRA/3.)

[336] Ibid. p. 4.

1.75. At the June 2005 meeting of the Committee on Import Licensing, the United States noted that they had not yet received a response to their questions.[337] Brazil reiterated that the restrictions were justified because of the potential risks and uses of lithium compounds "including for nuclear ends".[338] The Committee took note of these statements.[339] At the June 2006 meeting of the Committee on Import Licensing, the United States noted that they had still not received a response to their questions, as recently circulated with supplementary questions.[340] The United States also asserted that "it seemed clear that none of the requests for information that the U.S. was making, involved the national security provisions of Article XXI of the GATT 1994, since the information was requested for commercial purposes."[341] Brazil responded that there had been no change in its policy, but that it had taken note of the concerns of the United States.[342] The Committee took note of these statements.[343] Similar views were expressed at subsequent meetings of the Committee on Import Licensing until 2009.[344] In 2009, Brazil circulated a communication to the Committee on Import Licensing responding to the questions of the United States, in which Brazil reiterated that "since some lithium compounds have an application in the production of nuclear energy", this restriction "was treated as a matter of national security".[345]

1.76. At the October 2009 meeting of the Committee on Import Licensing, the United States thanked Brazil for its response.[346] At the April 2010 meeting of the Committee on Import Licensing, the United States thanked Brazil again and noted that it did not have further questions at the time.[347]

European Union v. Brazil (2013)

1.77. During the 2013 Trade Policy Review of Brazil, the European Union posed a question to Brazil regarding its import licensing restrictions on nitrocellulose.[348] The European Union asserted that industrial nitrocellulose was a different product from military-grade nitrocellulose, and argued that as the former was a safe product which did not pose any problems related to national security, it was not justifiable to impose a *de facto* import ban on the product.[349] Brazil responded that it did not necessarily agree that industrial nitrocellulose posed no problems related to security, as low concentrations of the product could be used as an explosive.[350] Brazil noted that it was however currently reviewing its legislation on controlled products.[351]

1.78. At the April 2014 meeting of the Committee on Import Licensing, the European Union reiterated its concerns about Brazil's import licensing scheme for nitrocellulose.[352] The European Union argued that the Brazilian producer of nitrocellulose benefited from the restrictions as a monopoly supplier in the closed local market.[353] The European Union also stressed that the "essential security exceptions in the provision of Article XXI of the GATT 1994 were to be applied on

[337] Committee on Import Licensing, Minutes of Meeting held on 15 June 2005, G/LIC/M/21, p. 3.
[338] Ibid.
[339] Ibid. p. 5.
[340] Committee on Import Licensing, Minutes of Meeting held on 21 June 2006, G/LIC/M/23, p. 3. See also Committee on Import Licensing, Questions from the United States to Brazil, Brazil's Import Licensing Requirements for Lithium Compounds, G/LIC/Q/BRA/3/Add.1.
[341] Committee on Import Licensing, Minutes of Meeting held on 21 June 2006, G/LIC/M/23, p. 4.
[342] Ibid. p. 3.
[343] Ibid. p. 4.
[344] See, e.g. Committee on Import Licensing, Minutes of Meeting held on 2 April 2007, G/LIC/M/25, p. 3; Committee on Import Licensing, Minutes of Meeting held on 28 April 2008, G/LIC/M/27, pp. 5-6; Committee on Import Licensing, Minutes of Meeting held on 20 October 2008, G/LIC/M/28, pp. 3-4; and Committee on Import Licensing, Minutes of Meeting held on 30 April 2009, G/LIC/M/29, p. 8. Brazil also emphasized that controls on lithium products in other countries were not uncommon, and maintained that this was a matter of national security due to the application of lithium compounds in the production of nuclear energy. (See Committee on Import Licensing, Minutes of Meeting held on 20 October 2008, G/LIC/M/28, p. 4.)
[345] Committee on Import Licensing, Replies from Brazil to Questions from the United States, Brazil's Non-Automatic Import Licensing Procedures, G/LIC/Q/BRA/13, p. 1.
[346] Committee on Import Licensing, Minutes of Meeting held on 19 October 2009, G/LIC/M/30, pp. 6-7.
[347] Committee on Import Licensing, Minutes of Meeting held on 12 July 2010, G/LIC/M/31, pp. 5-6.
[348] Trade Policy Review Body, Trade Policy Review, Brazil, Minutes of Meeting held on 24 and 26 June 2013, Addendum, WT/TPR/M/283/Add.1, p. 103.
[349] Ibid.
[350] Ibid.
[351] Ibid.
[352] Committee on Import Licensing, Minutes of Meeting held on 15 April 2014, G/LIC/M/39, p. 17.
[353] Ibid.

traffic in implements of war and to goods for the purpose of supplying a military establishment, but not to the non-military industrial sector."[354] The European Union requested that Brazil remove the licensing requirements and asked for additional information regarding grants of such licenses over the last five years.[355] Brazil took note of these comments and asked that the European Union provide its comments and questions in writing.[356] The Committee took note of these statements.[357]

1.79. The European Union subsequently circulated a communication to the Committee on Import Licensing containing these questions to Brazil.[358] At the October 2014 meeting of the Committee on Import Licensing, the European Union reiterated its concerns and further asserted that industrial nitrocellulose was only used for "commercial purposes such as for applications like printing inks, wood lacquer, or nail varnish".[359] Brazil responded that it disagreed with the European Union's view that industrial and military nitrocellulose were substantially and chemically different products, as regardless of its intended use, "the product poses risks".[360] The Committee took note of these statements.[361] Brazil contemporaneously circulated a communication responding to the European Union's questions in which Brazil asserted that nitrocellulose was a hazardous material at any concentration, and controls on the product were therefore legitimate for "security and safety reasons".[362] Similar views were expressed at subsequent meetings of the Committee on Import Licensing[363], and the European Union circulated further questions to Brazil in 2016.[364] Discussions between the European Union and Brazil on this issue continued into 2018.[365]

United States v. Cuba (1962-1996)

1.80. In 1962, the United States imposed an embargo prohibiting imports into the United States of all products of Cuban origin, in addition to all goods imported via Cuba, and ordering a continuing prohibition on all exports from the United States to Cuba.[366] In 1968, Cuba submitted a notification to the Committee on Trade in Industrial Products stating that the embargo constituted a non-tariff barrier which adversely affected Cuba's trade.[367] During the Committee's first examination of the notified barriers in 1969[368], Cuba emphasized that the embargo differed from the previously examined trade barriers because it was not limited to particular products or particular commercial interests, but instead was "designed to reduce a small country to submission by starvation".[369] The United States responded that the embargo had been imposed for reasons of "individual and collective self-defense" and to "promote national and hemispheric security", and invoked Article XXI as

[354] Committee on Import Licensing, Minutes of Meeting held on 15 April 2014, G/LIC/M/39, p. 17.
[355] Ibid.
[356] Ibid.
[357] Ibid.
[358] Committee on Import Licensing, Questions from the European Union to Brazil Regarding the Importation of Nitrocellulose, Questions from the European Union to Brazil, G/LIC/Q/BRA/18.
[359] Committee on Import Licensing, Minutes of Meeting held on 20 October 2014, G/LIC/M/40, p. 8.
[360] Ibid. p. 9.
[361] Ibid.
[362] Committee on Import Licensing, Replies from Brazil to Questions from the European Union, Questions from the European Union to Brazil Regarding the Importation of Nitrocellulose, G/LIC/Q/BRA/19, p. 3.
[363] See Committee on Import Licensing, Minutes of Meeting held on 21 April 2015, G/LIC/M/41, p. 6; Committee on Import Licensing, Minutes of Meeting held on 20 October 2015, G/LIC/M/42, pp. 6-7; and Committee on Import Licensing, Minutes of Meeting held on 21 April 2016, G/LIC/M/43, pp. 7-8. Brazil subsequently emphasized the risk that nitrocellulose posed to human health as another justification for the measure. (Committee on Import Licensing, Minutes of Meeting held on 21 April 2015, G/LIC/M/41, p. 6.) Brazil also asserted that nitrocellulose was reportedly employed in certain criminal activities, such as ATM robberies. (Committee on Import Licensing, Minutes of Meeting held on 21 April 2016, G/LIC/M/43, p. 8.)
[364] Committee on Import Licensing, Questions from the European Union to Brazil, G/LIC/Q/BRA/20. For Brazil's response, see Committee on Import Licensing, Replies from Brazil to the European Union, G/LIC/Q/BRA/21.
[365] See, e.g. Committee on Import Licensing, Follow-Up Questions from the European Union to Brazil, Import Licensing System of Brazil, G/LIC/Q/BRA/22; and Committee on Import Licensing, Replies from Brazil to Questions from the European Union, Import Licensing System of Brazil, G/LIC/Q/BRA/23.
[366] GATT Council, Trade Policy Review Mechanism, United States, Statement by Cuba, Spec(90)4, p. 2.
[367] Committee on Industrial Products, Inventory of Non-Tariff Barriers, COM.IND/4, pp. 228-229.
[368] Committee on Trade in Industrial Products, Note by the Secretariat on the Meeting of the Committee held 19-25 June 1969, COM.IND/W/7, para. 1.
[369] Committee on Trade in Industrial Products, First Examination of Part 4 of the Inventory of Non-Tariff Barriers, COM.IND/W/12, p. 311.

justification for its actions.[370] Cuba responded that the invocation of Article XXI was inadequate because the United States had unilaterally adopted coercive measures without securing any authorization from the international legal community, in particular the UN Security Council.[371]

1.81. In 1986, Cuba circulated a communication expressing concern over a measure imposed by the United States removing quotas for sugar imports unless the supplying country guaranteed that it would not import sugar from Cuba for re-export to the United States.[372] At the May 1986 meeting of the GATT Council, Cuba argued that this measure violated the GATT and stated that the United States was undermining free trade, not only by harming Cuba, but also by trying to hamper its normal trade with third countries.[373] The United States responded that the measure was a reflection of the long-standing trade embargo against Cuba which the United States had maintained for national security reasons.[374] Nicaragua, Argentina, Brazil, Hungary, Peru, Czechoslovakia, Poland and Uruguay all opposed the measure, considering it to be politically motivated, coercive and discriminatory.[375] The Council took note of the statements.[376]

1.82. In 1987, in the context of the meetings of the United Nations Conference on Trade and Employment, the Cuban Vice-Minister for Foreign Trade made a statement asserting that the embargo imposed by the United States violated the objectives and principles of the GATT, including those enumerated in Articles I, II and V and Part IV.[377] The Vice-Minister also noted that the United States had unjustifiably invoked Article XXI, "since it is no secret that Cuba has not threatened, is not threatening nor will ever threaten the United States: on the contrary, the latter country has threatened and is threatening our security through sabotage, spying, violation of our land, sea and air frontiers, and has organized and supported armed aggression against our people as on the occasion of the mercenary landing at the Bay of Pigs".[378]

1.83. In 1988, in the context of the discussion of the United States embargo against Nicaragua at the Fourth Meeting of the Forty-Third Session, Cuba noted that the United States had justified its embargoes against both Nicaragua and Cuba on grounds of national security.[379] Cuba responded that "[i]f two small countries could pose a threat to an enormous military and economic power such as the United States, many countries might find themselves subject to similar measures by that country."[380] Cuba called on the contracting parties to recognize the rights of Nicaragua.[381]

1.84. In 1989, in the context of the Trade Policy Review Mechanism, the United States submitted a report to the GATT Council summarizing its domestic trade framework.[382] In this report, the United States cited "U.S. foreign policy and national security goals" and the President's "wartime and national emergency powers" as the justification for the Office of Foreign Assets Control's administration of the economic embargo against Cuba.[383] In response, Cuba circulated a communication stating that the embargo contradicted the United States' commitments under the

[370] Committee on Trade in Industrial Products, First Examination of Part 4 of the Inventory of Non-Tariff Barriers, COM.IND/W/12, p. 311.
[371] Ibid. Cuba based its arguments upon its reading of paragraph (c) of Article XXI. (Ibid. p. 313.)
[372] Communication from Cuba, *United States – Measures Affecting Cuban Sugar Exports*, L/5980.
[373] GATT Council, Minutes of Meeting held on 22 May 1986, C/M/198, p. 33. Cuba specifically argued that the US measures violated Part IV and GATT Articles dealing with quantitative restrictions, non-discrimination and most-favoured-nation treatment. (Ibid.)
[374] Ibid. p. 34.
[375] Ibid. p. 33.
[376] Ibid. The same contracting parties reiterated these views at the First Meeting of the Forty-Second Session in 1986. (See GATT Contracting Parties, Forty-Second Session, Summary Record of the First Meeting on 24 November 1986, SR.42/1, pp. 11-13.)
[377] GATT Contracting Parties, Forty-Third Session, Cuba, Statement by Mr. Alberto Betancourt Roa, Vice Minister, Ministry of Foreign Trade, SR.43/ST/10, p. 7.
[378] Ibid.
[379] GATT Contracting Parties, Forty-Third Session, Summary Record of the Fourth Meeting on 2 December 1987, SR.43/4, p. 14.
[380] Ibid.
[381] Ibid.
[382] GATT Council, Trade Policy Review Mechanism, United States, Report by the United States of America, C/RM/G/3.
[383] Ibid. p. 81.

GATT 1947 and paragraph 7(iii) of the 1982 Ministerial Declaration.[384] Cuba also asserted that the invocation of Article XXI by the United States was inappropriate, "[s]ince Cuba has not provoked any 'national emergency', there is no 'wartime' nor any serious international tension."[385] Cuba expressed similar views on several subsequent occasions between 1990 and 1996.[386]

United States v. Cuba (including Helms-Burton Act) (1996-2016)

1.85. In 1996, Cuba circulated a Communication noting the adoption by the United States of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton Act).[387] Cuba argued that the objective of the Helms-Burton Act was to "intimidate the world business community and prevent it from participating in the ever-widening economic opportunities for foreign investment" in Cuba.[388] Cuba also asserted that the measure constituted a violation of its sovereignty by attempting to legislate on its internal matters, namely, the property of Cuban nationals.[389] At the March 1996 meeting of the Council for Trade in Goods, Cuba argued that the Helms-Burton Act was incompatible with various provisions of the GATT 1994 and other WTO Agreements.[390] The United States responded that it had recognized the need to take strong measures after the recent shooting down of two unarmed US civilian aircraft by the Cuban government, and asserted that "persons who knowingly and intentionally did business in Cuba using confiscated property were furthering wrongs committed against the former owners of this property, and were undermining the interests of the USA and its citizens".[391] Canada stated that the Helms-Burton Act was not a "useful tool" for achieving democratic reform in Cuba and noted that the legislation "was designed to chill investment in Cuba".[392] The Council for Trade in Goods took note of these statements.[393] Several Members reiterated their views at the April 1996 meeting of the General Council.[394]

1.86. In May 1996, the European Communities requested consultations in respect of the extraterritorial application of the United States' trade embargo against Cuba under the Helms-Burton Act and related US legislation and regulations.[395] These consultations did not achieve a mutually satisfactory solution, and the European Communities subsequently requested the establishment of a panel. [396] At the October 1996 meeting of the DSB, the European Communities

[384] GATT Council, Trade Policy Review Mechanism, United States, Statement by Cuba, Spec (90)4, p. 5. Cuba specifically cited incompatibility with Articles II, XI:1, XIII:1, XXXVI and XXXVII of the GATT 1947. (Ibid. pp. 5-6.)

[385] Ibid. p. 5.

[386] See, e.g. GATT Council, Trade Policy Review Mechanism, United States, Minutes of Meeting held on 11-12 March 1992, C/RM/M/23, pp. 26-27; GATT Council, Minutes of Meeting held on 29 September – 1 October 1992, C/M/259, pp. 77-78; GATT Council, Trade Policy Review Mechanism, United States, Minutes of Meeting held on 16-17 February 1994, C/RM/M/45, p. 24; and Communication from Cuba, *Analysis of the Effects of the Embargo Imposed by the Government of the United States of America against Cuba*, L/7525.

[387] Communication from Cuba, *United States - Cuban Liberty and Democratic Solidarity Act of 1996,* WT/L/142. The Helms-Burton Act, amongst other things, empowered the President to "encourage" other countries to restrict their trade and credit relations with Cuba, withheld payments to international financial institutions which approved loans to Cuba, and denied entry into the United States for companies with certain investments and assets in Cuba. (See Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Non-Tariff Barriers - Requests, Communication from Cuba, TN/MA/NTR/2, pp. 6-7.)

[388] Ibid. p. 2.

[389] Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Non-Tariff Barriers-Requests, Communication from Cuba, TN/MA/NTR/2, pp. 2-3.

[390] Council for Trade in Goods, Minutes of Meeting held on 19 March 1996, G/C/M/9, pp. 3-4. Cuba specifically alleged that the measure was incompatible with the principles of MFN treatment, Article XI and Part IV of the GATT 1994, the Agreement on Trade-Related Investment Measures, and the commitments of the United States to ensure freedom of access in trade in services. (Ibid.)

[391] Ibid. p. 6.

[392] Ibid. p. 5. Mexico, Chile, the European Communities, Nicaragua and India also expressed concern about the Helms-Burton Act, and in particular its extra-territorial implications. (Ibid. pp. 5-6.)

[393] Ibid. p. 6.

[394] General Council, Minutes of Meeting held on 16 April 1996, WT/GC/M/11, pp. 5-9. Bolivia, Canada, the European Communities, Mexico, India, Nicaragua, Madagascar, Jamaica, the Philippines, Australia, Switzerland, Norway, Colombia, Trinidad and Tobago, Japan, Sri Lanka and Iceland expressed their concern about the Helms-Burton Act, and in particular its extra-territorial implications. (Ibid. pp. 5-10.)

[395] Request for consultations by the European Communities, *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1.

[396] Request for the establishment of a panel by the European Communities, WT/DS38/2 (European Communities' panel request), pp. 1-2. The other challenged measures included: (a) denial of access to the US

reiterated its request for a panel, noting that its concern with the legislation "was not its objectives, but the extra-territorial means chosen to achieve those objectives".[397] The United States asserted again that the Helms-Burton Act was a response to the shooting down of two civilian aircraft by the Cuban government.[398] The United States described this incident as the latest in a series of actions taken by the Cuban government over the past 35 years that had directly affected US interests, and noted that the Helms-Burton Act, other US laws and regulations, as well as the Cuban embargo which dated from the 1960s "reflected the abiding US foreign policy and security concerns with regard to Cuba pursued by eight US Presidents".[399] The United States asserted that the Helms-Burton Act was "designed to promote a swift transition to democracy in Cuba" and noted that the European Communities had not suggested that the US policy with regard to Cuba generally, or the Helms-Burton Act in particular, was motivated by trade protectionism.[400] The United States noted that several of the challenged measures had been in force for years or decades, and had been expressly justified by the United States under the GATT 1947 as measures taken in pursuit of its essential security interests.[401] The United States questioned the utility and desirability of pursuing this issue through the WTO, arguing that the WTO had been established to manage "trade relations", not "diplomatic or security relations" with negligible trade and investment effects.[402] The United States refused to join a consensus to establish a panel, and urged the European Communities to explore other options.[403] Cuba asserted that the Helms-Burton Act was incompatible with the GATT 1994, but noted that it would reply to the "political statement" by the United States in other fora such as the UN General Assembly.[404] The DSB agreed to revert to this matter at its next meeting.[405]

1.87. At the November 1996 meeting of the DSB, the European Communities reiterated its request for a panel.[406] The United States maintained its earlier position, and noted that it did not believe that a panel would lead to a resolution of the dispute, but rather, would pose serious risks to the WTO as a nascent organization.[407] Cuba responded that unlike the United States, Cuba had never launched an invasion, or initiated any military actions or intelligence operations against the United States.[408] Cuba asserted that if anything, "Cuba would be in a better position than the US to resort to Article XXI of the GATT 1994."[409] Cuba noted, however, that the DSB was not the appropriate forum to enumerate an endless list of such grievances.[410]

1.88. The DSB agreed to establish the panel with standard terms of reference.[411] In 1997, the European Communities requested that the panel suspend proceedings while a mutually agreeable

tariff rate quota for sugar (through a prohibition on the allocation of any of the sugar quota to a country that was a net importer of sugar unless that country certified that it did not import Cuban sugar that could indirectly find its way to the US); (b) denial of transit of EC goods and vessels of EC Member States through US ports where the vessels carried goods or passengers to or from Cuba, or carried goods in which Cuba or a Cuban national had any interest; (c) prohibiting US persons from financing transactions involving confiscated property owned by a US national; (d) a right of action in favour of US citizens to sue EC citizens and companies in US courts to obtain compensation for Cuban properties "trafficked" by such EC citizens or companies and confiscated by the Cuban Government from persons who were US nationals; and (e) denials of visas and exclusion from the US of persons (including the spouses, minor children and agents of such persons) involved in confiscating or "trafficking" in confiscated property owned by US nationals or persons. (European Communities' panel request, pp. 1-2.)

[397] Dispute Settlement Body, Minutes of the Meeting held on 16 October 1996, WT/DSB/M/24, p. 6. Australia, Bolivia, Canada, India and Switzerland also expressed their concern about the potential extra-territorial application of the Helms-Burton Act. (Ibid. pp. 7-9.)

[398] Ibid. p. 6.

[399] Ibid. pp. 6-7.

[400] Ibid. p. 7.

[401] Dispute Settlement Body, Minutes of the Meeting held on 16 October 1996, WT/DSB/M/24, p. 7.

[402] Ibid.

[403] Ibid. p. 7.

[404] Ibid. p. 8.

[405] Ibid. p. 9.

[406] Dispute Settlement Body, Minutes of the Meeting held on 20 November 1996, WT/DSB/M/26, p. 2. New Zealand and Norway expressed their concerns regarding the extraterritorial application of the measures. (Ibid. pp. 2-3.)

[407] Ibid. p. 2.

[408] Ibid. pp. 2-3.

[409] Ibid. p. 3.

[410] Ibid.

[411] Ibid. p. 2.

solution was negotiated.[412] The European Communities and the United States subsequently reached an Understanding that the United States would consult with Congress with a view to obtaining a waiver for the European Communities from the Helms-Burton Act.[413] The panel's authority lapsed in April 1998.[414] At the April 1998 meeting of the DSB, Cuba expressed its continuing conviction that the measures were illegal and reserved its right to revert to this matter.[415]

1.89. Cuba and the United States have reiterated their views about the Helms-Burton Act and the embargo more generally on several subsequent occasions.[416]

CONCLUDING REMARKS

1.90. As discussed in paragraphs 7.80 and 7.81 of the Panel Report, the Panel considers that the foregoing survey of the pronouncements of the GATT contracting parties and WTO Members does not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention.

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[412] Communication from the Chairman of the Panel, WT/DS38/5.

[413] See Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 12 and 14 July 1999, Addendum, Communication by the United States, Outstanding Responses to Questions, WT/TPR/M/56/Add.1, p. 25.

[414] Note by the Secretariat, Lapse of the Authority for Establishment of the Panel, WT/DS38/6.

[415] Dispute Settlement Body, Minutes of the Meeting held on 22 April 1998, WT/DSB/M/45, pp. 15-16.

[416] See, e.g. Dispute Settlement Body, Minutes of the Meeting held on 22 June 1998, WT/DSB/M/46, pp. 17-18; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 12 and 14 July 1999, Addendum, Outstanding Responses to Questions, WT/TPR/M/56/Add.1, p. 25; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 14 and 17 September 2001, Addendum, WT/TPR/M/88/Add.1, p. 242; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 14 and 16 January 2004, Addendum, WT/TPR/M/126/Add.3, p. 117; Negotiating Group on Market Access, Non-Tariff Barriers Imposed by the United States Impeding and Prohibiting Cuba's Trade, Communication from Cuba, TN/MA/W/71, pp. 1-12; Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Non-Tariff Barriers - Requests, Communication from Cuba, TN/MA/NTR/2, pp. 6-7; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 22 and 24 March 2006, Addendum, WT/TPR/M/160/Add.1, pp. 162-166; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 9 and 11 June 2008, Addendum, WT/TPR/M/200/Add.1, p. 165; Trade Policy Review Body, Trade Policy Review, United States, Record of Meeting held on 29 September and 1 October 2010, WT/TPR/M/235, pp. 58-59; Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 16 and 18 December 2014, Addendum, WT/TPR/M/307/Add.1, p. 221; and Trade Policy Review Body, Trade Policy Review, United States, Minutes of Meeting held on 19 and 21 December 2016, Addendum, WT/TPR/M/350/Add.1, pp. 159-160.

STANDARD DRAFT

TREATY OF FRIENDSHIP, COMMERCE

AND NAVIGATION

ARTICLE XXI

General Exceptions

Paragraph 1: General Exceptions

Paragraph 2: Territorial Preferences

Paragraph 3: GATT Exception

Paragraph 4: Restrictions on Employment

Protocol, Paragraph 6: Status of Puerto Rico

General:

Article XXI is essentially a convenient device within the overall scheme of the treaty for grouping in one place exceptions from the provisions of the treaty generally or from groups of related provisions. This technique eliminates the repetitive provision of exceptions and permits a more cohesive presentation. Much the same technique was used in the General Agreement on Tariffs and Trade (61 Stat. (5) and (6); 4 Bevans 639) and the proposed Havana Charter for an International Trade Organization (Department of State Publication 3206).

There are three distinct categories of exceptions in Article XXI. The first, contained in Article XXI(1), consists of a group of exceptions, varied in character, that have become customary in international instruments dealing with establishment and trade matters. The standard version of Article XXI(1) includes the most essential exceptions, as for example, for national security. At various times other exceptions were added at the instance of the treaty partner. A particular example is the exception for measures to protect national treasures of archaeological, historic or artistic value. In a few cases the exception for political activities

was placed in Article XXI rather than in Article VIII(2), in large measure because it belongs in the former as logically as in the latter.

The second category consists of exceptions to the trade provisions of the treaty, specifically for the trade preferences of the treaty partners and for their obligations under GATT. Both of these exceptions touch upon vital elements of United States trade policy, and both tend to become critical issues in negotiations with countries favoring a less liberal approach to world trade. The United States requires Article XXI(2) to maintain the integrity of its existing commitments for preferential trade treatment. On the other hand, it was United States policy to seek to limit bilateral trade preferences generally, in the interest of encouraging freer multilateral trade. It sought to preserve only those preferences which pre-existed and were specifically sanctioned by GATT. Its own preferences came within this category, but in some negotiations the treaty partner endeavored to obtain treaty recognition for prospective trade arrangements that were difficult to justify on any grounds permissible under GATT or the treaty, such as the customs union exception in Article XIV(6).

Adoption in 1974 of the Generalized System of Preferences for trade with developing countries was an exception to the policy of sanctioning only pre-existing preferences, but this action was taken pursuant to a GATT waiver and comes within the terms of the GATT exception.

The GATT exception is essential to preserve freedom of action needed in order to comply with obligations assumed by the United States under GATT, or to enable it to take measures permissible under GATT in furtherance of its multilateral trade objectives. In effect, the GATT exception tends to suspend all but a few lesser features of the trade provisions while the treaty partners are contracting parties to GATT, and most negotiating issues involving Article XXI(3) arose in the context of a hypothetical post-

GATT situation or in the situation that would prevail if one treaty partner withdrew from GATT.

The last category of exceptions involves the provisions of Article XXI(4), which reserve the explicit right of the United States to maintain its labor or occupational controls at the frontier through the application of its immigration laws rather than through work permits or other internal police controls, as in the case of some treaty partners.

Article XXI, Paragraph 1: General Exceptions

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

(a) regulating the importation or exportation of gold or silver(2);

(b) relating to fissionable materials(3), to radioactive by-products(4) of the utilization or processing thereof or to materials that are the source of fissionable materials(5);

(c) regulating(6) the production(7) 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(8);

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace or security[9] or necessary to protect its essential security interests[10][11][12][13]; and

(d) denying to any company in the ownership or direction of which nationals of any third country or countries[14] have directly or indirectly a controlling[15] interest, the advantages[16] of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts[17].

(1) The wording of the introductory clause is intended to make clear that the reservations are discretionary and not automatic or mandatory. The provision, moreover, does not provide any guide to the manner of applying the reservations in a discriminatory manner, as for example, by requiring that the resulting discrimination be subject to the rule of most-favored-nation treatment.

(2) This exception has been customary in United States agreements on trade relations since the inception of the reciprocal trade agreements program. See, for example, Article XII of Reciprocal Trade Agreement

of 1935 with Canada (49 Stat. 3960; 6 Bevans 74); Article 45(a)(iv) of the proposed Havana Charter for an International Trade Organization; and Article XX(I)(b) of the General Agreement on Tariffs and Trade.

The reservation is limited to importation and exportation. The right of an alien national or company to exploit gold or silver as a natural resource would be governed by the provisions of Article VII so long as the product of such exploitation is sold in the domestic market.

It may be noted that this reservation was adopted at a time when the United States maintained restrictions on the holding of monetary gold by private interests pursuant to the Gold Reserve Act of 1934 (48 Stat. 337) and supplementary legislation.

(3) This reservation is derived from Article 99(1)(b)(i) of the proposed ITO Charter and Article XXI(b)(i) of GATT.

(4) This provision was included in the treaty to make the coverage more complete and more consistent in terminology with the provisions of the Atomic Energy Act of 1946 (60 Stat. 755) and subsequent legislation on this subject.

(5) The Atomic Energy Act of 1954, as amended, imposes alienage restrictions with respect to the issuance of licenses for commercial development (42 U.S.C. 2133(d)) and also for medical therapy, research and development (42 U.S.C. 2134(d)). Both the statute and the administrative regulations (10 C.F.R. 50) make provision for piercing the corporate veil.

(6) This reservation is derived from the provisions of reciprocal trade agreements. (See Article XII of the 1935 Agreement with Canada, Article 99(1)(b)(ii) of the proposed ITO Charter, and Article XXI(b)(ii) of GATT.)

(7) The provision extending the reservation to the production of aims, ammunition and implements of war was added to the treaty to make it clear that the reservation applied to matters dealt with in the establishment provisions of the treaty as well as the trade provisions. It is not contained in the corresponding provisions of the proposed ITO Charter or of GATT.

(8) The traffic in other materials for the purpose of supplying a military establishment is intended to include all materials, even if not necessarily of a warlike nature, such as foodstuffs, furniture for an army cantonment, or communications gear. The crucial element is the intended use. There does not appear to have been any consideration of whether this provision extends to supplies for post exchanges, officers' clubs and other amenities, but it might be held that the term "indirectly" could be construed to cover such articles.

(9) The intent of this reservation is to preserve the right of the treaty partners to carry out their obligations under the Charter of the United Nations. It is derived indirectly from Article 99(1)(c) of the proposed ITO Charter and more explicitly from Article XX(1)(c) of GATT.

(10) The national security reservation is broader than the comparable reservations in the proposed ITO Charter (Article 99(1)(b)(iii)) and GATT (Article XXI(c)), which are limited by their terms to times of war or of emergency in international relations. Presumably the reservation would be invoked in most cases in emergency situations but this formulation avoids, for example, such complications as the legal definition of national emergency and the procedural requirements for declaring a state of emergency.

(11) This reservation preserves the right of each treaty partner to depart from national and from most-favored-nation treatment in appropriate circumstances.

(12) This reservation covers export and import regulations on strategic materials, and United States export controls affecting such materials are deemed to be justified by this reservation.

(13) The broad freedom of action extended to each treaty partner by the essential security reservation was explicitly questioned in only one negotiation, where the matter was disposed of by an unwritten understanding to the effect that each treaty partner recognized the potential for discriminatory actions running counter to treaty objectives but would apply the reservation in such a manner as to avoid impairment of the treaty partner's interests to the maximum degree possible.

(14) This reservation is a provision for piercing the corporate veil with the objective of preventing nationals or companies of third parties from obtaining rights under the treaty through the device of obtaining and exercising interests in companies of the treaty partner. Such corporate interests in effect would be obtaining a "free ride" inasmuch as they would be able to obtain advantages for which their own government was unwilling to negotiate. Absent such a provision, such corporate interests could take advantage of the definition of "companies" in Article XXII(3), which establishes place of incorporation as the sole test of the nationality of a corporation. Article XXII(3) does not impose a "seat" test or test based on "siege sociale" or place of principal establishment, which contain some elements of piercing the corporate veil, as the determinant of a company's nationality. Accordingly, third party corporate interests could indirectly but effectively obtain useful treaty rights by taking advantage of liberal incorporation laws in the territories of the treaty partner. This reservation leaves each treaty partner

free to take protective measures against such an eventuality by piercing the corporate veil of companies chartered under the laws of the other treaty partner.

To date the United States has not chosen to exercise its rights under this provision. If it chose to do so, it would be entitled to latitude of interpretation in the sense that it could examine not only the ostensible management and direction of the company but could also look behind the superficialities to ascertain the real control as well as the identity of the interests on behalf of which or for whose actual benefit control was being exercised.

It may be noted that the first four clauses of Article XXI(1) involve matters primarily of Federal responsibility. The fifth clause, however, involves corporation laws, which are enacted mainly by the States.

(15) In this context control means ownership or its equivalent.

(16) The reference to "advantages" is intended to apply to rights that would accrue to companies under the treaty in their capacity as companies. It thus should be distinguished from the provision (Protocol, paragraph 2) relating to the protection of indirect interests in expropriated property. The later provision is stated in terms of property and not of companies, and the nationality of the entity holding or controlling the property is immaterial. The material fact is the ownership of an interest, however indirect, in that property by a United States citizen or company.

(17) The exception to the third party rule is based on the consideration that a company of the treaty partner has a right to be accepted as a legal entity and allowed

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6 May 1947

ECONOMIC AND SOCIAL COUNCIL | CONSEIL ECONOMIQUE ET SOCIAL

SECOND SESSION OF THE PREPARATORY COMMITTEE OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT.

UNITED STATES DELEGATION

The following amendments to Articles 15 to 23 and Article 37 of the New York Draft Charter are proposed by the United States Delegation:

(1) Article 15 should be revised as follows (square brackets [ ] indicate deletions, underlining indicates additions):

"Article 15

National Treatment on Internal Taxation and Regulation

[1. The Members agree that neither internal taxes nor other internal charges nor internal laws, regulations or requirements should be used to afford protection directly or indirectly for any national product.]

[2.] 1. The products of any Member country imported into any other Member country shall be exempt from internal taxes and other internal charges of any kind higher than those imposed, directly or indirectly, on like products of national origin. Moreover, in cases in which there is no substantial domestic production of like products of national origin, no Member shall impose new or higher internal taxes on the products of other Member countries for the purpose of affording protection to the production of competitive products.

/3./ 2. The products of any Member country imported into any other Member country shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations or requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, exhibition or use of any kind whatsoever. The provisions of this paragraph shall be understood to preclude the application of internal requirements restricting the amount or proportion of /an/ any imported product permitted to be mixed, processed, exhibited, or used, Provided that any such requirement in force on the day of the signature of this Charter may be continued until the expiration of one year from the day on which this Charter enters into force, or, in the case of laws, regulations or requirements relating to cinematograph films, until the expiration of three years from the day on which this Charter enters into force. /Which period may be extended/ Such requirements may be continued for additional periods in respect of any product if the Organization /concurs that the requirement concerned is less restrictive of international trade than other measures permissible under this Charter./ , after consultation with the other Members whose trade is substantially affected by the requirement, determines that in the special circumstances alternative measures permissible under this Charter would not be practicable. Requirements permitted to be maintained under /the foregoing proviso/ this paragraph shall be subject to negotiation for their liberalization or elimination in the manner provided for in respect of tariffs and preferences under Article 24.

/4. The provisions of paragraphs 1 and 3 of this Article shall not be construed to prevent the application of internal laws, regulations or requirements, other than taxes, relating to the distribution or exhibition of cinematograph films. Any laws, regulations or requirements so applied shall, however, be subject to negotiation for their liberalization or elimination in the manner provided for in respect of tariffs and preferences under Article 24./

/5/ 3. The provisions of this Article shall not apply to the procurement by governmental agencies of /supplies/ products purchased for governmental /use/ purposes and not for commercial purposes such as resale /nor for/ or use in the production of goods for sale."

(2) A new Article should be inserted between Articles 15 and 16, reading as follows:

"Article 15A

The products of any Member country exported to any other Member country shall not be subject to any measure imposed by either the exporting or the importing country requiring such exports to be financed, shipped or insured by enterprises of any prescribed nationality."

(3) Article 16: Delete the second sentence of paragraph 6.

(4) Article 17:

A. Paragraph 1 of Article 17 should be revised as follows :

"1. No anti-dumping duty or charge shall be imposed on any product of any Member country imported into any other Member country in excess of an amount equal to the margin of dumping under which such product is being imported. For the purposes of this Article, the margin of dumping shall be understood to mean the amount by which the price of the product exported from one country to another is less than [,] (a) the comparable price for the like product [to buyers] for consumption in the domestic market of the exporting country, or, in the absence of such domestic price, is less than either (b) the highest comparable price [at which] for the like product [is sold] for export to any third country [in the ordinary course of commerce], or (c) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit; with due allowance in each case for differences in taxation, and for other differences affecting price comparability in the ordinary course of commerce."

B. The second sentence of paragraph 2 of Article 17 should be revised as follows:

"The term 'countervailing duty' shall be understood to mean an additional or separate duty imposed for the purpose of offsetting any bounty or subsidy..." etc.

C. Delete paragraph 6 of Article 17.

(5) Article 18: Delete sub-paragraph 2(c) and re-letter (d) as (c).

(6) Article 19:

A. At the end of paragraph 1 of Article 19, add the following sentence:

The Organization is authorized to investigate and recommend to Members specific measures for the simplification and standardization of customs formalities and techniques and for the elimination of unnecessary customs requirements.

B. Item (d) of paragraph 4 of Article 19 should be revised as follows:

"(d) Foreign exchange [regulations] transactions;"

C. A new item should be added to the list included in paragraph 4, as follows:

"(i) Port facilities."

This would necessitate transferring the word "and" from sub-paragraph (g) to the end of (h) and changing the period to a comma.

(7) Article 21: In paragraph 3, line 8, add the words "retroactively or" after the word "applied".

(8) Article 37: It is proposed that items (c), (d), (e), (j) and (k) be removed from Article 37, which relates only to Chapter V, and that a new Article be inserted at an appropriate place toward the end of the Charter which would make these items general exceptions to the entire Charter. It is proposed that the new Article contain the following introductory language:

"Nothing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures (the foregoing would be followed by a list of the items transferred from Article 37).

SVol. 9: 5-3

PROPOSED TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND THE ITALIAN REPUBLIC

HEARING

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

EIGHTIETH CONGRESS

SECOND SESSION

ON

A PROPOSED TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND THE ITALIAN REPUBLIC

APRIL 30, 1948

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Subject	Treaty with Italy	Treaty with Norway
36. Loading and unloading of vessels—coasting trade.	Art. XXII. Each party to permit vessels of the other to unload portions of cargo at one port and then to proceed to other ports with remainder. No rights accorded as to coasting trade or inland navigation.	Art. XI. Provisions comparable to those in Italian treaty except that in treaty with Norway, most-favored-nation treatment is to be accorded with respect to the coasting trade and inland navigation.
36. Transit	Art. XXIII. Freedom of transit for persons and property.	Art. XV. Provisions generally comparable to those in Italian treaty.
37. General exceptions	Art. XXIV. The list of exceptions from the coverage of the treaty as a whole, from the most-favored-nation treatment provisions, or from specific provisions of the treaty, is more extensive than in any similar treaty now in force.	Arts. I, VII. The treaty with Norway does not contain an article dealing solely with exceptions, as does the Italian treaty. In Articles I and VII, however, there are a number of exceptions comparable to some of those in the Italian treaty. The list is much less extensive, however.
38. Waiver of immunities of publicly controlled enterprises.	Art. XXIV (6). Immunity from taxation, suit, etc., not to be enjoyed by a publicly owned or controlled enterprise of one party engaged in business in territories of other party.	No comparable provision.
39. Rights of private enterprises in competition with public enterprises.	Protocol (2). Rights of an economic nature enjoyed by public enterprises engaged in business in competition with private enterprises shall, with certain exceptions, be extended to such private enterprises.	No comparable provision.
40. Territorial scope	Art. XXVI. With certain exceptions, treaty to extend to all territory under sovereignty or authority of either party.	Art. XXIII. With certain exceptions, treaty to extend "to all areas of land, water, and air over which the parties respectively claim and exercise dominion as sovereign thereof."
41. Adjudication of disputes	Art. XXVI. Disputes as to interpretation or application of the treaty to be submitted to International Court of Justice, unless parties agree to settlement by other means.	No comparable provision.
42. Duration and termination of treaty.	Art XXVII. Treaty to remain in force initially for 10 years, terminable thereafter on 1 year's notice.	Art. XXIX. Treaty to remain in force initially for 3 years, terminable thereafter upon 1 year's notice.
43. Protocol	Purpose of the provision of protocol is to clarify and construe certain provisions of treaty.	There is no protocol to this treaty.
44. Additional protocol	Purpose of the additional protocol is to relax certain provision of treaty as necessary during period of Italy's economic recovery from the war.	There is no protocol of this nature attached to this treaty.

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CONTROLLING NUCLEAR PROLIFERATION: LEGAL STRATEGIES OF THE UNITED STATES

JONATHAN B. SCHWARTZ*

U.S. efforts to establish a coherent international nuclear policy have resulted in a complex set of treaties, statutes, and regulations designed to curb the proliferation of nuclear weapons and regulate the sharing of nuclear materials and technology for peaceful purposes. This Article examines the legal codification of U.S. nuclear nonproliferation policy. It explores the effectiveness of international arms control measures, export restrictions, and statutory sanctions as means of effectuating U.S. policy. The author concludes that the effectiveness of U.S. legal controls is diminished by exceptions created to accommodate various foreign policy objectives and by intragovernment tension concerning the administration of the law.

INTRODUCTION

President Harry Truman stated prophetically at the dawn of the nuclear age that the world faced a choice between "renunciation of the use and the development of the atomic bomb" and "a desperate armament race which might well end in disaster."[1] American proposals for the complete internationalization of nuclear energy at the end of the Second World War went for naught,[2] however, and it was not until a quarter

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1. President's Special Message to the Congress on Atomic Energy, PUBLIC PAPERS 362, 366 (Oct. 3, 1945) (Harry S. Truman). The bomb dropped on Hiroshima released the energy equivalent of 12,500 tons of TNT and killed over 100,000 people. J. SCHELL, THE FATE OF THE EARTH, 11, 47 (1982). Today's nuclear arsenals contain some 50,000 devices, many with a power one hundred times the Hiroshima bomb. *Id.* at 3.

2. In 1946, the United States proposed the creation of an international authority to assume monopoly control over nuclear energy, a scheme of sanctions against violators by simple majority vote of the United Nations Security Council and eventual relinquishment of the U.S. arsenal (the "Baruch" plan). The Soviet Union blocked this effort fearing that the elimination of its veto in the Security Council would subject it to U.S.-sponsored United Nations (UN) military action, that the control of nuclear energy by a Western-dominated organization would be used to hamper Soviet economic development and breach Soviet security controls, and that the U.S. might not carry out its pledge to

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century had passed and five nuclear weapon states had emerged that a comprehensive nuclear nonproliferation treaty was concluded. That pact, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),[3] has failed to attract the adherence of a number of key states, and its provisions fall short of a complete assurance against further proliferation among its members. Thus, even were the nuclear-weapon states to make significant arms control progress, the danger would persist of both regional and worldwide competition in nuclear armaments.

The United States, perhaps more than any other nation, has agonized over how to control that competition. It was the first nuclear-weapon state, and is still a leader in nuclear technology. After an initial embargo on nuclear exports,[4] the U.S. instituted the 1953 "Atoms for Peace" program,[5] which was accompanied by a significant revision of the Atomic Energy Act in 1954.[6] These initiatives launched a new strategy of sharing the benefits of nuclear energy in exchange for peaceful use undertakings by recipient countries. Central to this strategy was the development in 1957 of the International Atomic Energy Agency (IAEA) to assume the burden of safeguarding U.S.-origin items.[7] With the entry into force of the NPT in 1970, the IAEA was assigned responsibility for safeguarding all nuclear materials in NPT member territories.[8] This legal structure was expanded further in 1978 with Congressional enactment of the Nuclear Non-Proliferation Act (NNPA).[9] The NNPA was responsive to perceived

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disarm. *See* STANFORD ARMS CONTROL GROUP, INTERNATIONAL ARMS CONTROL—ISSUES AND AGREEMENTS 66-72 (1976); 11 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 5 (1968).

3. Nuclear Non-Proliferation Treaty, *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (entered into force March 5, 1970) [hereinafter NPT].

4. Atomic Energy Act of 1946, ch. 724, 60 Stat. 755-75 (codified as amended at 42 U.S.C. §§ 2011-2296 (1982)). Section 1(b)(2) of the original act prohibited information sharing until "effective and enforceable safeguards against its use for destructive purposes can be devised." *Id.* § 1(b)(2) Section 5(a)(2) mandated government ownership of all fissionable material in the U.S., and section 5(a)(3) included embargo measures on the export or import of any fissionable material. *Id.* §§ 5(a)(2)-(3).

5. President's Address Before the General Assembly of the United Nations on Peaceful Uses of Atomic Energy, PUBLIC PAPERS 813 (Dec. 8, 1953) (Dwight D. Eisenhower). For a description of the background and implemention of the "Atoms for Peace" initiative, see B. SCHIFF, INTERNATIONAL NUCLEAR TECHNOLOGY TRANSFER 45-57 (1983).

6. Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919-61 (codified as amended at 42 U.S.C. §§ 2011-2296 (1982)) [hereinafter AEA].

7. Statute of the International Atomic Energy Agency, *opened for signature* October 26, 1956, 8 U.S.T. 1095, T.I.A.S. No. 3873, 276 U.N.T.S. 3 (entered into force July 29, 1957) [hereinafter IAEA Statute].

8. *See* NPT, *supra* note 3, art. III(1) (each nonnuclear weapon state party obligated to conclude safeguards agreement with IAEA to verify fullfilment of its obligations).

9. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120-152 (1978), 22

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loopholes in U.S. law, highlighted by India's so-called "peaceful nuclear explosion" in 1974[10] and the emerging challenges of more mature foreign nuclear programs incorporating sensitive technologies.[11] The NNPA, the NPT, and IAEA safeguards remain today the central legal instruments for advancing U.S. nonproliferation interests.

The great importance of nonproliferation to U.S. national security is not matched by widespread understanding of how these legal instruments address the proliferation threat. The relevant treaties, statutes, and regulations are complex, dealing with a highly technical subject, and are administered by six domestic agencies. The applicable legal principles are almost never tested, analyzed, or explicated by the courts.[12] There is also a relative paucity of legal writing on the subject.[13]

The purpose of this article is to help remedy this shortcoming by surveying current U.S. nonproliferation legal policy in three areas: (1) international arms control measures which seek the renunciation of nuclear weapons or prohibit their deployment in geographical regions; (2) conditions of supply designed to decrease the likelihood of diversion of nuclear

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U.S.C. §§ 3201-82 and 42 U.S.C. §§ 2011-2160(a) (1982) [hereinafter NNPA].

10. *See* ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, 98TH CONG., 1ST SESS., NUCLEAR PROLIFERATION FACTBOOK 2 (Jt. Comm. Print 1985) [hereinafter FACTBOOK]. For its device, India used plutonium derived from a Canadian-supplied research reactor which probably contained U.S.-supplied heavy water. India argued that because its test was part of a program to investigate the uses of nuclear explosives for peaceful purposes, its action was consistent with its peaceful use assurances to Canada and the United States. *See* Betts, *India, Pakistan, and Iran*, in NON-PROLIFERATION AND U.S. FOREIGN POLICY 106-08 (J. Yager, ed. 1980); *see also* ARMS CONTROL AND DISARMAMENT AGENCY, DOCUMENTS ON DISARMAMENT 333-34 (1978) [hereinafter DOCUMENTS ON DISARMAMENT] (testimony of Deputy Under Secretary of State Joseph Nye before a subcommittee of the Senate Foreign Relations Committee on May 24, 1978). For a description of the history of "peaceful nuclear explosives," see Emelyanov, *On the Peaceful Use of Nuclear Explosions*, in STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, NUCLEAR PROLIFERATION PROBLEMS 215 (1974) [hereinafter NUCLEAR PROLIFERATION PROBLEMS].

11. Concern about the spread of sensitive nuclear technologies was heightened in the mid-1970s by European contracts in sensitive areas with South Korea, Pakistan, Argentina and Brazil. FACTBOOK, *supra* note 10, at 2.

12. Illustrative is Cranston v. Reagan, 611 F. Supp. 247 (D.D.C. 1985), which challenged two peaceful nuclear cooperation agreements for alleged inconsistencies with the Atomic Energy Act. The U.S District Court held the case nonjusticiable on political question grounds.

13. The most comprehensive survey of the Nuclear Non-Proliferation Act is found in Bettauer, *The Nuclear Non-Proliferation Act of 1978*, 10 LAW & POL'Y INT'L BUS. 1105 (1978), written by an executive branch participant in the drafting of the NNPA. A thorough analysis of the NPT may be found in Mohamed Shaker's three volume study, THE NUCLEAR NON-PROLIFERATION TREATY (1980). No significant legal studies of U.S. sanctions legislation seem to have appeared in the field of nuclear non-proliferation. For a brief analysis, see L. SCHEINMAN, THE INTERNATIONAL ATOMIC ENERGY AGENCY AND WORLD NUCLEAR ORDER 183-85 (1987).

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materials to nuclear weapons; and (3) coercive sanctions threatened against foreign states to deter actions of special nonproliferation concern. A variety of other approaches to nonproliferation can also be found in U.S. law: security alliances[14] and security assistance programs[15] designed to reduce the incentives for nuclear weapons acquisition; efforts to ensure a reliable supply of nuclear fuel[16] and to assist in waste disposal,[17] to slow the dispersion of sensitive technologies[18]; and, programs to reduce the presence of weapons-usable nuclear materials abroad.[19] In the main, how-

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14. The U.S. alliances most frequently cited as assisting in deterring the acquisition of nuclear weapons are those with NATO, Japan and Korea. North Atlantic Treaty, *opened for signature* April 14, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243 (entered into force August 24, 1949); Treaty of Mutual Cooperation and Security, Jan. 19, 1960, United States-Japan, 11 U.S.T. 1632, T.I.A.S. No. 4509 (entered into force June 23, 1960); Mutual Defense Treaty, Oct. 1, 1953, United States-Korea, 5 U.S.T. 2368, T.I.A.S. No. 3097 (entered into force Nov. 17, 1954). *See, e.g.*, W. POTTER, NUCLEAR POWER AND NONPROLIFERATION—AN INTERDISCIPLINARY PERSPECTIVE 27, 200 (1982).

15. The link between security assistance programs and nuclear non-proliferation ends is best exemplified by § 620E(e) of the Foreign Assistance Act of 1961, which requires an annual Presidential certification that the assistance program to Pakistan will "reduce significantly the risk that Pakistan will possess a nuclear explosive device." Foreign Assistance Act of 1961 § 620E(e), 22 U.S.C. § 2375(e) (1982 & Supp. IV 1986) *amended by* Pub. L. No. 100-202, § 101(e), 101 Stat. 1329-70 (1987).

16. Nuclear Non-Proliferation Act § 101, 22 U.S.C. § 3221 (Congressional policy directing necessary and feasible actions to assure reliable fuel supplies for nations adhering to non-proliferation policies designed to prevent proliferation); Nuclear Non-Proliferation Act § 104(a), 22 U.S.C. § 3223(a) (directing President to discuss creation of international nuclear fuel authority to provide international fuel assurances).

17. Nuclear Non-Proliferation Act § 105, 22 U.S.C. § 3224 (directing President to arrange for international fuel cycle evaluation to consider, among other subjects, methods to deal with spent fuel storage); Atomic Energy Act § 131(f), 42 U.S.C. § 2160(f) (procedures for accepting foreign-spent fuel for storage in the U.S.); Nuclear Waste Policy Act of 1982 § 223, 42 U.S.C. § 10203 (1982) (providing for technical assistance to nonnuclear-weapon states in the storage of spent nuclear fuel).

18. The two sensitive technologies are enrichment—the ability to purify uranium to obtain the fissionable isotope U-235—and reprocessing—the ability to separate plutonium chemically from other fission products in fuel that has been irradiated in a reactor. Highly enriched uranium and separated plutonium can both be used in nuclear weapons. Assurances of fuel supply and assistance in waste disposal address two of the motivations for acquiring these sensitive technologies: the desire to extract as much energy value from existing stocks of nuclear material as possible by enriching or re-enriching uranium or recovering plutonium for use as fuel; and, the desire to reprocess spent fuel to avoid the special health and safety hazards it poses. *See* Gilinsky, *Military Potential of Civilian Nuclear Power*, in NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL 41 (B. Boskey & M. Willrich ed. 1970).

19. For example, the Department of Energy (DOE) and the Arms Control and Disarmament Agency (ACDA) actively assist foreign nations in modifying their research reactors to use lower enriched fuels. DOE also accepts spent highly enriched research reactor fuel for reprocessing and disposal since it still contains highly enriched uranium. *See* Report to the Congress Pursuant to Sec-

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ever, it is through arms control pacts, export restrictions, and statutory sanctions that the United States legally codifies its dedication to stemming the spread of nuclear weapons.

Arms Control Treaties

Although some have argued there may be isolated instances where acquisition of nuclear explosives by additional states could benefit U.S. security interests,[20] both Congress and the Executive have declared all nuclear proliferation a threat to U.S. interests.[21] Reasons commonly cited for this policy are that:

—Even a small nuclear arsenal could pose a direct security threat to the U.S. and its allies. It might counter-balance U.S. conventional superiority and force an intolerable choice between risking nuclear retaliation or using overwhelming force, perhaps including nuclear force, in the first instance;

—The introduction of nuclear explosives into a region could be politically destabilizing, touching off a local nuclear arms race with possible spillover effects in other regions;

—The actual use or threat of use of nuclear explosives or their accidental detonation could escalate a local conflict into one involving the superpowers, with the ever-present risk of global nuclear conflict;

—Additional members of the nuclear club might lack effective command

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tion 601 of the Nuclear Non-Proliferation Act of 1978 (1987) (for the year ending December 31, 1986) at 18-22 [hereinafter Report Pursuant to Section 601].

20. *See, e.g.*, W. Potter, *supra* note 14, at 11 (summarizing commentators who dispute that more nuclear-weapon states would necessarily be hazardous); *see also, Military Implications of the Treaty on the Non-Proliferation of Nuclear Weapons: Hearings Before the Senate Comm. on Armed Services*, 91st Cong., 1st Sess. 54 (1969) (whether acquisition of nuclear weapons by certain additional states would decrease the prospect of nuclear war) [hereinafter *Hearing on Military Implications*].

21. The NNPA contains the following statement of policy:

> The Congress finds and declares that the proliferation of nuclear explosive devices or of the direct capability to manufacture or otherwise acquire such devices poses a grave threat to the security interests of the United States and to continued international progress toward world peace and development.

Nuclear Non-Proliferation Act § 2, 22 U.S.C. § 3201.

President Reagan, upon assuming office, declared that as a basic guideline of U.S. policy, the United States would "seek to prevent the spread of nuclear explosives to additional countries as a fundamental national security and foreign policy objective; . . ." President's Statement on Nuclear Nonproliferation Policy, 17 Weekly Comp. Pres. Doc. 768, 769 (July 20, 1981).

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and control structures or physical security capabilities, increasing the danger of unauthorized use of nuclear weapons;

—Increasing numbers of nuclear-weapon states would make the task of nuclear disarmament substantially more difficult; and

—Given the public commitment by the United States to nonproliferation, acquisition of nuclear weapons by a U.S. ally could undermine U.S. credibility.[22]

The most direct legal means for countering these dangers is for the U.S. to secure nonproliferation undertakings by as many other nations as possible. Thus far, three types of international instruments have been developed for this purpose: treaties barring the transfer or acquisition of nuclear weapons; treaties establishing regional zones free of nuclear weapons; and broader arms control treaties with a secondary restraining effect on proliferation, such as nuclear test bans.

No Transfer or Acquisition Treaties.

The NPT is the most important international instrument outlawing the transfer or acquisition of nuclear weapons by additional states. It divides the community of nations into two categories: those nations having tested a nuclear explosive device prior to January 1, 1967 (the "nuclear-weapon states"—the U.S., the USSR, England, France, and China)[23] and those nations which did not (the "nonnuclear-weapon states"). In the NPT, nuclear-weapon states undertake not to transfer nuclear explosives to any state whatsoever, and not to assist, encourage, or induce any nonnuclear weapon state to manufacture or otherwise acquire explosives.[24] The nonnuclear-weapon state parties undertake not to manufacture or otherwise acquire explosives and not to accept assistance for developing nuclear explosives.[25] Through these twin principles of restraint, the Treaty seeks to

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22. *See* W. POTTER, *supra* note 14, at 12 (increase in numbers of nuclear-weapon states would compound problems of arms control negotiations); *Hearing on Military Implications, supra* note 19, at 54-55 (additional nuclear-weapon states increases chance of nuclear war); COUNCIL ON FOREIGN RELATIONS, BLOCKING THE SPREAD OF NUCLEAR WEAPONS—AMERICAN AND EUROPEAN PERSPECTIVES 7 (1986) (concluding that the spread of nuclear weapons would, among other problems, magnify the destructiveness of regional hostilities, increase the risk of superpower involvement in nuclear war, and create obstacles to arms control).

23. NPT, *supra* note 3, art. IX, para. 3. Theoretically, the five publicly-acknowledged nuclear-weapon states (which are also the permanent members of the United Nations Security Council) could be joined by a state proving it had secretly carried out a nuclear test prior to the cut-off date in the Treaty. M. SHAKER, *supra* note 13, vol. I at 196.

24. NPT, *supra* note 3, art. I.

25. *Id.* art. II.

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freeze the status of nuclear proliferation as of 1967.

The NPT does not provide for acquiescence in the current arms race among nuclear-weapon states, however. All parties, particularly the nuclear-weapon states, are committed under the Treaty "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."[26] Lack of progress in curbing the nuclear arms race has led to increased criticism and could threaten the Treaty's viability after its initial 25-year duration expires in 1995.[27] The United States, among others, has countered that the Treaty serves the security interest of all its parties notwithstanding the level of progress in limiting "vertical proliferation" among the superpowers.[28]

The NPT also does not seek to curtail trade promoting the peaceful applications of nuclear energy, so long as that trade is carried out in conformity with the basic nontransfer and nonacquisition principles of the Treaty relating to nuclear weapons.[29] To verify that those principles are being adhered to, the Treaty requires international "safeguards" under the auspices of the IAEA to be applied to all the peaceful nuclear activities of the nonnuclear weapon state parties.[30] These safeguards consist of independent accounting by the IAEA of nuclear materials, supplemented by physical containment and surveillance techniques including on-site inspections by IAEA representatives.[31] In the event an inspection discovers

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26. *Id.* art. VI.

27. *See* COUNCIL ON FOREIGN RELATIONS, *supra* note 22, at 16. Article X of the NPT provides for a conference in 1995 "to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty." NPT, *supra* note 3. By its terms, this provision would not appear to authorize the Conference to terminate the Treaty, but only to extend the Treaty, even if only for a single, "fixed period" of short duration. *See* M. SHAKER, *supra* note 13, at 863-64.

28. *See, e.g., Third Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons: Hearings Before the Subcomm. on Arms Control, International Security and Science and on International Economic Policy and Trade of the Senate Committee on Foreign Affairs*, 99th Cong., 1st Sess. 50 (1985) (testimony of Lewis Dunn, Assistant Director for Nuclear and Weapons Control, ACDA, and Deputy Chairman of U.S. Delegation to the Review Conference).

29. Article IV of the NPT recognizes an "inalienable right" of the Parties to employ nuclear energy for peaceful purposes, requires the Parties "to facilitate . . . the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy" and requires Parties "in a position to do so" to help develop the peaceful applications of nuclear energy in the territories of nonnuclear-weapon state parties. NPT, *supra* note 3.

30. *Id.* art. III, para. 1.

31. *See* Edwards, *International Legal Aspects of Safeguards and the Non-Proliferation of Nuclear Weapons*, 33 INT'L & COMP. L. Q. 1, 5-8 (1984) (the author, who was Director of the IAEA Legal Division from 1977-79, describes the IAEA safeguards system and its relationship to the NPT).

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noncompliance, under the IAEA's statute its Board of Governors must be notified and must report the noncompliance to the United Nations Security Council and General Assembly.[32] The purpose of this safeguards system is to create a high enough probability that unauthorized uses will be detected to serve as a disincentive for breaching the Treaty. This disincentive provides assurance to other Treaty parties that the terms of the Treaty are being respected and, in the event they are not, that the international community will be apprised in time for an appropriate response.[33]

The Treaty also requires IAEA safeguards to be applied to the export of nuclear materials to nonnuclear weapon states not parties to the Treaty.[34] This mechanism helps ensure that transfers beyond the Treaty regime do not contribute to proliferation among nonparties.[35] It also serves the important function of limiting discriminatory effects *favoring*

The safeguards are applied in accordance with agreements concluded between the parties and the International Atomic Energy Act (IAEA Statute). NPT, *supra* note 3, art. III, para. 4. *See* INTERNATIONAL ATOMIC ENERGY AGENCY, INFORMATION CIRCULAR Doc. INFCIRC/153/Corrected (1972) [hereinafter INFCIRC/153] (this circular outlines a model agreement, approved by the IAEA Board of Governors, to serve as the basis for NPT safeguards negotiations). *See* L. SCHEINMAN, *supra* note 13, at 152-71; B. SCHIFF, *supra* note 5, at 103-06.

32. IAEA Statute, *supra* note 7, art. XII, para. C. Safeguard agreements concluded pursuant to the NPT permit such reports even if a violation is not established but the IAEA determines it "is not able to verify that there has been no diversion of *nuclear material* . . . to nuclear weapons or other nuclear explosive devices." INFCIRC/153, *supra* note 31, para. 19 (emphasis in original).

33. Edwards, *supra* note 31, at 14.

34. NPT, *supra* note 3, art. III, para. 2. Non-party recipients may conclude the necessary safeguards arrangements with the IAEA pursuant to a model agreement developed by the IAEA and approved by the Board of Governors prior to the NPT for the purpose of safeguarding specific projects or facilities, rather than an entire nuclear program. *See* INTERNATIONAL ATOMIC ENERGY AGENCY, INFORMATION CIRCULAR Doc. INFCIRC/66/Rev.2 (1968) (the Agency's Safeguards System) [hereinafter INFCIRC/66]. *See also* L. SCHEINMAN, *supra* note 13, at 127-45; B. SCHIFF, *supra* note 5 at 101-03. To establish a common interpretation of which transfers require safeguards under the NPT, the major NPT suppliers have established a "trigger list" found at INTERNATIONAL ATOMIC ENERGY AGENCY, INFORMATION CIRCULAR, Doc. INFCIRC/209 (1974) *modified by* INFCIRC/209/Add.6/Mod.1 (1978), INFCIRC/209/Mod.2 (1984), INFCIRC/209/Mod.3 (1985) [hereinafter INFCIRC/209]. The twenty-three participants in this arrangement are sometimes referred to as the Zangger Committee after their Swiss chairman, Claude Zangger. *See* Report Pursuant to Section 601, *supra* note 19, at 13.

35. In the case of the nuclear-weapon state parties, Article I explicitly proscribes trade which would assist a nonnuclear-weapon state to acquire nuclear explosives. NPT, *supra* note 3. Nonnuclear-weapon state parties are not under a similar specific injunction, but the United States and the Soviet Union, which jointly drafted the Treaty, agreed during the negotiations that such assistance would give rise to the presumption that the nonnuclear-weapon state party expected to receive explosives-related aid in return, in direct violation of Article II which expressly prohibits receipt of "any assistance in the manufacture of nuclear weapons or other nuclear explosive devices." *See* M. SHAKER, *supra* note 13, at 263-66.

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nonparties, which, unlike the nonnuclear-weapon state parties, otherwise would be permitted to receive nuclear items from NPT parties without accompanying safeguards. Some discrimination is built into the Treaty, however, since nonparties need only accept safeguards on the transferred items themselves, whereas the nonnuclear-weapon state parties accept safeguards on all their peaceful nuclear activities. This differential treatment is sometimes cited, along with the Treaty's central principle of discrimination between weapon states and nonweapon states, as evidence that the burdens of the NPT fall predominantly and unfairly upon its nonweapon parties.[36]

The United States has taken a number of steps in an effort to soften the discriminatory effects of the Treaty. First, the U.S. has sought to alleviate the security concerns of parties which renounce the acquisition of nuclear weapons by providing both "positive" and "negative" security assurances. The "positive" assurance took the form of a declaration, under the umbrella of Security Council Resolution 255, adopted June 19, 1968,[37] that any aggression or threat of aggression with nuclear weapons against a nonnuclear-weapon-state party would create a qualitatively new situation, in which the U.S. would have to act immediately through the Security Council to take measures necessary to counter the aggression or threat of aggression. The Soviet Union and the United Kingdom, the other nuclear-weapon state parties to the NPT, made similar declarations.[38] The value of the positive assurance has been questioned, however. The Security Council's decisions on enforcement measures are subject to veto by any of the permanent members.[39] Since the permanent members are the five declared nuclear-weapon states, it is likely one of them would be responsible for any alleged nuclear aggression and through its veto could frustrate action by the Security Council.[40]

The U.S. supplemented its positive security assurance on June 12, 1978, with the negative assurance that it would not use nuclear weapons against a nonnuclear-weapon-state party unless it was involved in an attack on the United States or its allies in alliance or association with a

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36. *See* Smart, *Non-Proliferation Treaty: Status and Prospects*, in NPT: PARADOXES AND PROBLEMS 22-23 (A. Marks ed. 1975).

37. S.C. Res. 255 at 13 (1968), U.N. Doc. S/INF/23/Rev.1 (1970).

38. 23 U.N. SCOR (1430th mtg.) at 6-7, U.N. Doc. S/PV.1430 (1968).

39. U.N. CHARTER, art. 27, para. 3.

40. *See, e.g.*, Goldblat, *The UN Security Council Resolution of 19 June 1968 and the Security of Non-Nuclear-Weapon States*, in NUCLEAR PROLIFERATION PROBLEMS, *supra* note 10, at 238; Coffey, *Threat, Reassurance and Nuclear Proliferation*, in NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL, at 122-23 (1970).

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nuclear-weapon state.[41] A similar commitment, although geographically limited, was undertaken by the United States through adherence to Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America (the "Treaty of Tlatelolco") in 1971, which requires the United States "not to use or threaten to use nuclear weapons against the Contracting Parties" to that treaty.[42] At the time of adherence, the U.S. explained that it "would have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon state, would be incompatible with the Contracting Party's corresponding obligations under Article I of the Treaty,"[43] implying that this would free the United States of its treaty obligations to that state.[44] The negative assurance under the Protocol therefore parallels the 1978 statement by the United States—nations renouncing nuclear weapons will not be targets of the U.S. nuclear arsenal unless they establish military ties to other nuclear weapon states hostile to U.S. interests.

Another concern expressed by some nonnuclear-weapon states about joining the NPT has been that the required IAEA safeguards might have deleterious commercial effects, either because they interfere in their business operations or because safeguard procedures might lead to the loss of industrial secrets. They have cited the particular fear that the privileged class of nuclear-weapon states, which are not subject to safeguards, might

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41. UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS, 87 (1982) [hereinafter ARMS CONTROL AND DISARMAMENT AGREEMENTS].

> The United States will not use nuclear weapons against any non-nuclear weapons state party to the NPT or any comparable internationally binding commitment not to acquire nuclear explosive devices, except in the case of an attack on the United States, its territories or armed forces, or its allies, by such a state allied to a nuclear weapons state, or associated with a nuclear weapons state in carrying out or sustaining the attack.

Id. (quoting the declaration of President Carter made June 12, 1978).

42. Additional Protocol II to the Treaty of Tlatelolco, Feb. 14, 1967, art. 3, 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 364 (entered into force Dec. 11, 1969; entered into force for the United States May 12, 1971).

43. Proclamation by President Nixon on Ratification of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, *reprinted in* ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 41, at 78.

44. Under the customary law of treaties, a material breach by one party gives rise to a reciprocal right of suspension for other affected parties. This rule is reflected in Article 60 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). The United States is not a party to this Convention; however, it is generally recognized as a codification of customary international law on most points. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE VIENNA CONVENTION ON THE LAW OF TREATIES *reprinted in* S. EXEC. DOC. NO. L, 92d Cong., 1st Sess., 1 (1971).

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obtain commercial advantages over their safeguarded competitors.[45] Similarly, some states have argued that a treaty regime calling for safeguards in only one category of parties is unacceptably discriminatory as a matter of principle.

In response to these concerns, on December 2, 1967, the United States announced that once safeguards were applied under the Treaty, it would voluntarily permit IAEA safeguards "on all nuclear activities in the United States excluding only those with direct national security significance."[46] In 1980, a Treaty between the United States and the IAEA was concluded for this purpose.[47] Under the Treaty, the United States establishes an eligible list of nuclear facilities from which the IAEA may select any number for the application of NPT-type safeguards.[48] The United States, however, remains free to remove facilities from the eligible list at any time for national security reasons, or to transfer nuclear material out of an eligible list facility.[49] The safeguards imposed pursuant to this voluntary offer by the U.S., therefore, have primarily symbolic effect, but they enable the United States to demonstrate its conviction that safeguards are not incompatible with commercial interests, including the protection of proprietary technologies.

The United States, finally, has sought to temper one other discriminatory effect of the NPT—its allowance of exports to nonparties which have not undertaken broad safeguards commitments. Since 1978, United States law has required the maintenance of IAEA safeguards on all of a recipient's peaceful nuclear activities as a condition of export of significant nuclear items.[50] This principle applies to any nonnuclear-weapon state re-

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45. *See, e.g.*, UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, NUCLEAR PROLIFERATION—TOWARD GLOBAL RESTRAINT 4 (1984) [hereinafter TOWARD GLOBAL RESTRAINT].

46. ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 41, at 201 (quoting statement of President Johnson on December 2, 1967).

47. Agreement for the Application of Safeguards in the United States, Nov. 18, 1977, United States-International Atomic Energy Agency, 32 U.S.T. 3509, T.I.A.S. No. 9889 (entered into force December 9, 1980).

48. *Id.* art. 1(b). In practice, the IAEA has selected only a very small portion of eligible U.S. facilities for application of safeguards. *See* Houck, *The Voluntary Safeguards Offer of the United States: A Review of its History and Implementation*, 27 INTERNATIONAL ATOMIC ENERGY AGENCY BULL. 13, 18 (Summer 1985). This practice stems from a decision at the time the Treaty was presented to the IAEA Board of Governors to select facilities of advanced design involved directly in international commercial competition, but not to overwhelm the IAEA's safeguards resources by including all the two hundred or so eligible nuclear facilities in the United States. *See* ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 41, at 204.

49. *Id.* art. I(b)-(c).

50. Nuclear Non-Proliferation Act § 306, 42 U.S.C. § 2157 (adding § 128 of the Atomic Energy

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cipient, whether or not party to the NPT, and thus diminishes the alleged advantage of nonparties in obtaining U.S.-origin nuclear commodities.

Whether or not these palliatives by the United States, and similar steps taken by the other nuclear-weapon-state parties,[51] have been a significant factor, membership in the NPT has grown steadily since 1970. It is the most widely subscribed to arms control treaty in history, with some 139 adherents to date.[52] The NPT is now the cornerstone of U.S. nonproliferation policy, particularly its safeguards undertaking which permits the IAEA to verify compliance with the fundamental commitment of nonnuclear-weapon-state parties not to acquire nuclear explosives.

Despite its unprecedented scope and important achievement in restraining the proliferation of nuclear weapons, from a national security perspective the Treaty still contains a number of weaknesses which, while perhaps inevitable, detract from its role as a security guarantor.

(1) *The Treaty does not serve as a physical or technical barrier to the proliferation of nuclear weapons.* The IAEA safeguards program required by the Treaty is designed to ensure that nuclear material in peaceful activities of the nonnuclear-weapon-state parties is not diverted to nuclear explosives, but the IAEA has neither the authority nor the power to prevent the misuse of materials under safeguards.[53] The Treaty similarly

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51. Both the United Kingdom and the Soviet Union have provided "positive" security assurances pursuant to Security Council Resolution 255, see note 38, *supra*, and, more recently, "negative" security assurances. *See* J. GOLDBLAT, ARMS CONTROL AGREEMENTS: A HANDBOOK 46 (1982). The United Kingdom has entered into a voluntary safeguards agreement with the IAEA comparable in coverage to the United States IAEA Agreement. *See* INTERNATIONAL ATOMIC ENERGY AGENCY, INFORMATION CIRCULAR DOC. INFCIRC/263 (1978) [hereinafter INFCIRC/263]. The Soviet Union also has a voluntary safeguards agreement with the IAEA, but it is limited to a small category of facilities specified by the Soviet Union. *See* INTERNATIONAL ATOMIC ENERGY AGENCY, INFORMATION CIRCULAR DOC. INFCIRC/327 (1985) *reprinted in* 24 I.L.M. 1411 (1985) [hereinafter INFCIR/327].

52. *See* OFFICE OF THE LEGAL ADVISER, UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE 336-37 (1988) [hereinafter TIF] (listing 138 parties as of Jan. 1, 1988, including Taiwan—whose authorities have stated they will continue to abide by the provisions of the Treaty despite their expulsion from the UN and the IAEA—and St. Christopher and Nevis (now called St. Kitts and Nevis), which declared upon independence its intention to abide by the Treaty pending a final decision on whether to succeed or accede). Saudi Arabia joined the Treaty on October 3, 1988, to bring the number of adherents to its requirements to 139. *Iraq Tells Schultz It Won't Use Poison Gas Against Rebel Kurds*, L.A. Times, Oct. 4, 1988, pt. I, 10, col. 1.

53. Under Articles XII(B) and XII(C) of its statute, the IAEA may directly curtail or suspend assistance being provided or call for the return of materials subject to IAEA safeguards. IAEA Statute, *supra* note 7. These are, of necessity, legal restraints rather than physical barriers, and if the non-complying State proves recalcitrant, the only recourse for the IAEA, aside from suspending the

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contains no enforcement mechanism for violations, nor does it restrict the permissible forms of nonexplosive nuclear activities. Thus, under the NPT states may engage in activities allowing access to materials that could rapidly be converted for weapons applications, and the Treaty does not assure any response in the event of a diversion.

(2) *IAEA safeguards have been criticized from time to time as insufficient for detecting diversions in a timely fashion.*[54] In particular, the introduction of sophisticated fuel cycle activities involving large stocks of weapons-usable materials (such as highly enriched uranium or separated plutonium) will severely test the IAEA's technical capabilities.[55] To the extent the IAEA is perceived as unable to detect significant diversions in a timely fashion, the role of the NPT as a confidence-building measure will be eroded.

(3) *Military applications of nuclear energy are not precluded by the NPT.* Except for nuclear weapons or other nuclear explosive devices, the NPT does not proscribe the military application of nuclear energy by nonnuclear-weapon states.[56] This compromise was necessary to allow,

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State's rights and privileges of membership pursuant to Article XIX of the IAEA statute, would be to urge the Security Council to adopt enforcement measures under Chapter VII of the UN Charter for a threat to the peace, breach of the peace, or acts of aggression. *See* notes 36-39 *supra* and accompanying text.

54. *E.g.* TOWARD GLOBAL RESTRAINT, *supra* note 45, at 4. *See generally* L. SCHEINMAN, *supra* note 13, at 230-41. Among the criticisms are that: Only one-third of the IAEA's budget is devoted to safeguards activities since most members prefer technical assistance activities; states which see safeguards as intrusive provide late or incomplete reports to the IAEA; the IAEA employs only a few hundred inspectors for over a thousand sites; geographical distribution requirements for the inspectors take precedence over technical qualifications; there are no unannounced inspections and countries are free to reject any particular inspector; and, actual safeguards arrangements for specific facilities are kept confidential, so other states are unable to evaluate them. *See generally* Scheinman, *Nonproliferation Regime: Safeguards, Controls and Sanctions*, in THE NUCLEAR CONNECTION—A REASSESSMENT OF NUCLEAR POWER AND NUCLEAR PROLIFERATION 193-202 (A. Weinberg, M. Alonso & J. Barkenbus eds. 1985). At the same time, the United States has worked closely with the IAEA to improve the safeguards regime. *See* Nuclear Non-Proliferation Act § 201(a), 22 U.S.C. § 3241 (undertaking to work with other nations to "continue to strengthen the safeguards program of the IAEA"); Report Pursuant to Section 601, *supra* note 19 (describing various U.S. support programs). Since 1980, IAEA inspections have risen by 80%, the tenures of inspectors have lengthened, as have the proportion of their time devoted to inspections, and inspection goal attainment and timeliness of inspection reporting has increased markedly while the number of discrepancies requiring further investigation has decreased. *Id.* at 26-27.

55. *See, e.g., Nuclear Nonproliferation—Law and Policy*, 76 AM. SOC'Y INT'L L. 77, 80 (1982) (remarks by Senator Glenn).

56. NPT, *supra* note 3, art. II

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among other things, for nonweapon parties to develop naval propulsion systems using nuclear power.[57] Since the IAEA does not safeguard nuclear material employed in military activities,[58] the safeguard agreements under the NPT permit unlimited quantities of nuclear material to be withdrawn from safeguards for use in nonexplosive military activities.[59] This right of withdrawal has never been exercised by a party,[60] but it represents a potentially significant exception to the Treaty's verification requirement. Under arrangements with the IAEA, a party could remove large stocks of sensitive nuclear materials from international inspection without contravening the NPT.

(4) *Parties may withdraw from the NPT on three months notice with no residual obligations.* Like several other arms control pacts, the NPT recognizes a right of withdrawal where a party "decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country."[61] Three months advance notice must

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57. *See* M. WILLRICH, NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL 68-69 (1969) (quoting U.S. public interpretation that NPT permits nuclear submarine fuel transfers to nonnuclear-weapon state parties because Treaty applies only to warheads or bombs).

58. The IAEA is chartered "to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world" and to ensure that assistance provided by or through the agency "is not used in such a way as to further any military purpose." IAEA Statute, *supra* note 7, art. II. The statute of the IAEA describes its safeguards as intended to assure items under safeguards "will not further any military purpose." *Id.* XII.A(1). *See* M. WILLRICH, *supra* note 57, at 120 (doubtful IAEA could safeguard military activities).

59. INFCIRC/153, *supra* note 31, para. 14. Prior to the withdrawal of nuclear material from safeguards, the State must make clear to the IAEA that its activities will not be in conflict with the NPT or other peaceful use assurances, and an arrangement must be concluded with the IAEA identifying the period and circumstances of withdrawal. Thereafter, the IAEA which must be kept informed of the quantity and composition of the withdrawn material must be returned to safeguards when it is reintroduced into peaceful use. *Id.*

60. Two other situations potentially involving unsafeguarded nuclear activities by nonnuclear-weapon state parties also have not arisen: (1) the receipt of nuclear material or equipment from another state for military, nuclear use; and (2) the indigenous development of nuclear material or equipment for military use. *See, e.g.*, NPT, *supra* note 3, art. III(1)-(2) (requiring safeguard only on "peaceful nuclear activities" and transfers for "peaceful purposes"). The advent of nuclear propulsion programs by non-weapon parties would necessitate a clearer understanding of how the NPT's broader confidence-building purposes can be fulfilled when material is kept outside of safeguards.

61. NPT, *supra* note 3, art. X(1). *See* Limited Test Ban Treaty, art. iv, *opened for signature* August 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (entered into force Oct. 10, 1963) (three months advance notice required for withdrawal); Seabed Treaty, art. VIII, *opened for signature* February 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337 (entered into force May 18, 1972) (three months notice); Biological Weapons Convention, art. XIII(2), *opened for signature* April 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062, 807 U.N.T.S. 57 (entered into force March 26, 1975) (three months); Treaty on the Limitation of Anti-Ballistic Missile Systems, art. XV(2) May 26, 1972,

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be given by the withdrawing state to the other parties and to the United Nations Security Council, including "a statement of the extraordinary events it regards as having jeopardized its supreme interests."[62] It is not surprising that an escape clause was included in a Treaty dealing with quintessential national security interests. Nevertheless, the effect is that a nonnuclear-weapon state may free itself of its NPT nonexplosives undertaking and, significantly, of its NPT obligation to accept international safeguards, even on material transferred while it remained a party.[63] In the absence of other commitments, the materials could, after withdrawal, be used by the state in contravention of the NPT's most fundamental principles.

(5) *Important nuclear programs remain outside the Treaty regime.* This is perhaps the most serious shortcoming of the Treaty. The NPT has the largest number of parties of any arms control pact, but many of the nuclear programs of greatest nonproliferation concern are still not covered, including those of Argentina, Brazil, India, Israel, Pakistan, and South Africa. Nonnuclear-weapon states refusing to adhere to the Treaty retain the legal flexibility to acquire nuclear weapons and to carry out nuclear programs without IAEA safeguards. All the states listed have retained some of their nuclear facilities outside of the IAEA inspection system and, while giving public assurances that their programs are peaceful in nature or that they have no current intention to develop or introduce nuclear weapons into their region, have refused to enter into binding international commitments against proliferation.[64] (Other nonproliferation treaty regimes, such as nuclear weapons free zones, encompass similar legal undertakings to the NPT,[65] but in practice their membership has not

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United States—U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503 (entered into force Oct. 3, 1972) (six months notice).

62. NPT, *supra* note 3, art. X.

63. The lack of safeguards perpetuity is reflected in NPT safeguards agreements, which provide for a duration identical to the term of NPT membership. *See* INFCIRC/153, *supra* note 31, para. 26. This contrasts with non-NPT safeguards agreements with the IAEA which, since a Board of Governors decision in 1973, continue safeguards until items are no longer of safeguards relevance. *See* INTERNATIONAL ATOMIC ENERGY AGENCY, BOARD OF GOVERNORS Doc. GOV/1621 (1973) [hereinafter GOV/1621].

64. The requirement of such a binding international legal commitment has been the focal point of the IAEA's efforts to establish a consensus on the preconditions of nuclear supply. A "Committee on Assurances of Supply" (CAS) established by the IAEA Board of Governors has spent the last several years discussing the form and content of the desired commitment, with a small number of non-NPT parties generally disclaiming the need for more than unilateral declarations. *See* McGoldrick, *Problems of Assurance of Nuclear Supplies*, DEPT. OF STATE BULL. 48, 52 (Sept. 1987).

65. The Treaty of Tlatelolco, art. 1(1), *opened for signature* Feb. 14, 1967, 22 U.S.T. 762,

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extended beyond that of the NPT.) The nonnuclear-weapon states outside of the NPT system as well as the two nuclear-weapon states which have refused to accede to the NPT (China and France) also retain the legal flexibility to supply nuclear materials and equipment without safeguards, and to assist nonnuclear-weapon states in the manufacture or acquisition of nuclear explosives, although several of them have stated that they will not do so.[66]

In recognition of the shortcomings of the NPT, U.S. law mandates the application of additional layers of bilateral controls as a condition of nuclear cooperation. These will be discussed after first reviewing two other categories of arms control treaties that play a lesser role in U.S. nonproliferation law—nuclear weapons free zone treaties, and superpower arms limitations with secondary nuclear nonproliferation effects.

T.I.A.S. No. 7137, 634 U.N.T.S. 281, *supplemented by* Additional Protocol I, 22 U.S.T. 786, T.I.A.S. No. 10147, 634 U.N.T.S. 360, Additional Protocol II, 22 U.S.T. 755, T.I.A.S. No. 7137, 634 U.N.T.S. 364 requires nuclear materials and facilities to be used by its members "exclusively for peaceful purposes" and proscribes "testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons. . . ." To verify these undertakings, IAEA safeguards are required, *id.* art. 13, and a Council of Tlatelolco members is authorized to carry out supplementary inspections. *Id.* art. 16. Different views have been expressed as to whether the treaty permits members to produce and detonate nuclear explosives for "peaceful" purposes. *See* M. SHAKER, *supra* note 13, at 209-12. The more recent South Pacific Nuclear Free Zone Treaty, *opened for signature* Aug. 6, 1985 (entered in force Dec. 11, 1986), *reprinted in* 24 I.L.M. 1440 [hereinafter South Pacific Treaty], proscribes members from the manufacture or acquisition of "any nuclear explosive device," requires verification by IAEA safeguards, and provides for special inspections at the direction of a Consultative Committee of members. *Id.* at arts. 3(a), 8(2)(c) & 8(2)(d); Annex 4, para. 4. The Treaty also specifically requires the application of IAEA safeguards on exports to nonnuclear-weapon states outside of the treaty regime. *Id.* art. 4(a).

66. France declared in 1968 that it would act as though it were a party to the NPT while refraining from joining the Treaty. *See Disarmament and Related Matters 1968*, 1968 U.N.Y.B. 9. China, South Africa and Argentina have recently announced they will insist upon IAEA safeguards for exports to nonnuclear-weapon states. In part to address the absence of significant nuclear exporters from the NPT, a Nuclear Suppliers Group was formed in 1974 to coordinate policies to ensure commercial rivalries would not lead to a degradation of non-proliferation controls on international transfers. The Group (also referred to as the London Club) established common guidelines in 1976 which call for such controls as the application of IAEA safeguards on exports to nonnuclear-weapon states, physical protection, and special restrictions on the transfer of sensitive technologies. The current guidelines can be found in INTERNATIONAL ATOMIC ENERGY AGENCY, INFORMATION CIRCULAR Doc. INFCIRC/254 (1978) [hereinafter INFCIRC/254]. Those guidelines are followed by two States not currently party to the NPT—France and South Africa, and some twenty-three States in all. *See* Report Pursuant To Section 601, *supra*, note 19, at 13.

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Nuclear Weapons Free Zones

The NPT expressly preserves "the right of any group of states to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories."[67] When the NPT was opened for signature three such treaties existed—The Antarctic Treaty,[68] The Outer Space Treaty,[69] and the Treaty of Tlatelolco.[70] A Seabed Treaty was completed in 1972,[71] and in 1985 the South Pacific Nuclear Free Zone Treaty was concluded.[72] The United States has associated itself with all of

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67. NPT, *supra* note 3, art. VII.

68. The Antarctic Treaty, *opened for signature* Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (entered into force June 23, 1961). Article 1 stipulates that "Antarctica shall be used for peaceful purposes only" and prohibits "any measures of a military nature," including "testing of any type of weapons." *Id.* art. I. Article V extends this ban to include "any nuclear explosions." *Id.* art. V. Parties may dispatch national inspectors throughout the region to verify these undertakings. *Id.* art. VII. *See* ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 41, at 20-21 ("All Contracting Parties . . . have the right to designate observers to carry out inspections in all areas of Antarctica, ...").

69. Outer Space Treaty, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967). Under Article IV, the parties "undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." The moon and other celestial bodies are to be used "exclusively for peaceful purposes" and the testing of any type of weapons on the celestial bodies is prohibited. *Id.* Articles X, XI and XII provide for observation of launchings, dissemination of information about activities carried out in space, and reciprocal visits to projects on the celestial bodies, but do not establish a comprehensive right of inspection to verify the treaty undertakings. *See also* STANFORD ARMS CONTROL GROUP, *supra* note 2, at 98-99 (The Outer Space Treaty exemplified "a trend away from formal inspection toward reliance on intelligence . . . .").

70. Treaty of Tlatelolco, *supra* note 65. Article I of the Treaty obliges parties to "use exclusively for peaceful purposes nuclear material and facilities which are under their jurisdiction, and to prohibit and prevent in their respective territories" any testing, "receipt, storage, installation, deployment and any form of possession of any nuclear weapons." *Id.* art. I. Additional Protocol I requires its adherents to apply Article I of the Treaty "in territories for which, *de jure* or *de facto*, they are internationally responsible and which lie within the limits of the geographical zone established in that Treaty." *Id.* Protocol I. Currently, the Netherlands, the United Kingdom, the United States and France are eligible to adhere to Additional Protocol I, and all but the latter have become parties. *See* TIF, *supra* note 52, at 335. Additional Protocol II embodies the commitment by the nuclear-weapon states parties "not to contribute in any way to the performance of acts involving a violation of the obligations of Article I of the Treaty in the Territories to which the Treaty applies." Treaty of Tlatelolco, *supra* note 65, Protocol II. All five nuclear-weapon States have adhered to Additional Protocol II. TIF, *supra* note 52, at 335.

71. Seabed Treaty, *supra* note 61. Article I bars emplacement of nuclear weapons and other weapons of mass destruction or facilities for storing, testing or using such weapons on the seabed, ocean floor or its subsoil outside the twelve-mile territorial limit. Article III provides for verification by national or multinational means or under United Nations auspices.

72. South Pacific Treaty, *supra* note 65. Article 3 of the Treaty bans acquisition of nuclear

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these nuclear weapons free zones except for the last.[73]

The purpose of nuclear weapons free zones, as the name suggests, is to exclude nuclear weapons from defined geographic regions. In so doing, they seek the benefits of a nontransfer/nonreceipt treaty among the treaty parties, and attempt to rid a region of nuclear weapons altogether so as to remain outside superpower rivalries. In the latter respect these treaties differ from the NPT, which does *not* require nonnuclear-weapon-state parties to exclude nuclear weapons controlled by others from their territories.[74] This feature of the NPT was necessary to accommodate existing security arrangements among the prospective parties.[75] Nuclear weapons free zones, on the other hand, have been established in areas where nu-

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explosives, and Article 5 dictates that "[e]ach party undertakes to prevent in its territory the stationing of any nuclear explosive device." The parties agree in Article 6 to prevent testing of nuclear explosive devices in their territories. A system of IAEA safeguards and *ad hoc* inspections are established by Article 8 and Annex 4 to verify these undertakings. Protocol 1 invites France, the UK and the U.S. to accept the obligations of Articles 3, 5 and 6 for their territories in the geographical zone; Protocol 2 calls upon the five nuclear-weapon states not to contribute to violations of the Treaty or its protocols and not to use or threaten the use of nuclear explosive devices against treaty parties or Protocol 1 territories; and, Protocol 3 requires the nuclear-weapon states not to test nuclear explosive devices in the Treaty Zone.

73. The United States became a party to the Antarctic Treaty on June 23, 1961, *supra* note 68; the Outer Space Treaty on October 10, 1967, *supra* note 69; the Seabed Treaty on May 18, 1972, *supra* note 61; Additional Protocol II to the Treaty of Tlatelolco on June 11, 1971, *supra* note 65; and Additional Protocol I to the Treaty of Tlatelolco on December 4, 1981, *supra* note 65. With respect to the South Pacific Nuclear Free Zone, the State Department spokesman announced on February 5, 1987, that the "U.S. had decided that in view of our global security interests and responsibilities, we are not, under current circumstances, in a position to sign the Protocols." *See also* Roy, *South Pacific Nuclear Free Zone*, DEPT. OF STATE BULL. 52 (Sept. 1987) (implementation of the growing number of nuclear weapons free zones would undermine U.S. ability to meet worldwide security commitments). Previously, the United States had announced seven general critieria for when it would associate itself with nuclear weapons free zones: (1) the initiative is from the nations in the region; (2) all nations whose participation is deemed important participate; (3) adequate verification of compliance is provided; (4) it does not disturb existing security arrangements to the detriment of regional and international security; (5) all parties are barred from developing or possessing any nuclear explosive device for any purpose; (6) it imposes no restrictions on international legal maritime and aerial navigation rights and freedoms; and (7) it does not affect the existing international legal rights of parties to grant or deny other states transit privileges, including port calls or overflights. *See* DOCUMENTS ON DISARMAMENT, *supra* note 10, at 845.

74. Article II of the NPT, *supra* note 3, proscribes receipt, acquisition, and control of weapons by nonnuclear-weapon state parties but does not bar weapons deployment on their territories.

75. As the U.S. noted at the time the NPT was negotiated, the Treaty does "not prohibit NATO consultation and planning on nuclear defense, nor ban deployment of U.S.-owned and -controlled nuclear weapons on the territory of nonnuclear NATO members." The U.S. also noted that the NPT would "not bar succession by a new federated European state to the nuclear status of one of its members." ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 41, at 84-85. *See generally* M. WILLRICH, *supra* note 58, at 71-87.

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clear weapons did not exist.

Even nuclear weapons free zone treaties, unless universally subscribed to, do not completely "denuclearize" a region. Regional states can only legislate among themselves and over areas for which they are sovereign. If one state in a region refuses to join a nuclear free regime the treaty's objective can be defeated.[76] The Antarctic, Seabed, and Outer Space treaties, which regulate areas beyond all national jurisdiction, are binding only among party states.[77] The United States has therefore taken a calculated risk in accepting limitations on its own nuclear deployments in some of these zones without a similar commitment from all other actual or potential nuclear-weapon states.

Moreover, the two nuclear weapons free zone treaties applying to inhabited areas (the Tlatelolco and South Pacific treaties) do not rule out the transient presence of nuclear weapons, even in areas subject to national jurisdiction. In adhering to Additional Protocol II to the Treaty of Tlatelolco, for example, the United States expressly took note of the interpretation set forth in the Final Act, that "governed by the principles and rules of international law, each of the Contracting Parties retains exclusive power and legal competence, unaffected by the terms of the treaty, to grant or deny nonContracting Parties transit and transport privileges."[78]

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76. This lack of uniform participation is recognized in the criteria traditionally relied upon by the United States to determine whether to support a nuclear weapons free zone, *See* DOCUMENTS ON DISARMAMENT, *supra* note 10, at 845, and is thus featured in a number of the treaties. The Treaty of Tlatelolco, for example, will not enter into force until all states eligible to join the Treaty and its Additional Protocols have done so through signature and ratification. Treaty of Tlatelolco, *supra* note 65, art. 28(1). However, the Treaty does permit a State "to waive, wholly or in part" the requirement of full participation so that the Treaty's obligations become immediately effective for that State. *Id.* art. 28(2) (stating that "for those states which exercise this right, this Treaty shall enter into force upon deposit of the declaration, or as soon as those requirements have been met which have not been expressly waived."). All States which have ratified the Treaty, with the exception of Brazil and Chile, have exercised this option. *See* STANFORD ARMS CONTROL GROUP, *supra* note 2, at 295. Also, Cuba has not signed, and Argentina has signed but has not ratified the Treaty, while France has signed but not ratified Additional Protocol I. Thus, of all the eligible States, Argentina, Brazil, Chile and Cuba remain free of the Treaty's obligations, while of the nuclear weapons states, France is not a party to Protocol I. *See* W. POTTER, *supra* note 14, at 203-04; STANFORD ARMS CONTROL GROUP, *supra* note 2, at 293.

77. *See* Vienna Convention on the Law of Treaties, *supra* note 44, art. 26 (treaties binding only on parties). For example, China is not party to the Seabed Treaty. *See* TIF, *supra* note 52, at 355.

78. Arms Control and Disarmament Agreements, *supra* note 41, at 78. The South Pacific Treaty provides:

> Each Party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane

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Thus, the United States retained the option, with host state consent, of transporting nuclear weapons through ports or airfields of Tlatelolco parties and using its own territories in the zone for that purpose.[79]

Nuclear weapons free zones nevertheless are a useful nonproliferation tool in that they serve, in an incremental way, to close off areas of the planet (and, indeed, other planets) to the deployment of nuclear weapons. Zones have been proposed for Africa, Central Europe, Scandinavia, the Balkans, the Middle East, the Mediterranean, the Indian subcontinent, and Southeast Asia.[80] The present reality of U.S. strategic doctrine, however, is that deployment of nuclear weapons outside of U.S. territory is deemed essential.[81] Nuclear weapons free zones therefore provide the United States with only a partial and inherently limited tool for achieving global nonproliferation.

Other Arms Control Measures

Arms control measures directed primarily at superpower rivalries may have the secondary benefit of furthering U.S. nonproliferation interests. One measure pursued in the past was a ban on all nuclear weapons testing. A comprehensive test ban might contribute to the barrier between nonnuclear-weapon and nuclear-weapon states, by making development of a functioning device by additional states more difficult. Universal adherence to the Limited Test Ban Treaty (which applies to tests in the atmosphere, space, and under water)[82] and the eventual completion of a Comprehensive Test Ban Treaty outlawing underground tests[83] could thereby

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passage or transit passage of straits.

South Pacific Treaty, *supra* note 65, art. 5(2).

79. *See* Additional Protocol I to the Treaty The Treaty of Tlatelolco, S. EXEC. REP. No. 23, 97th Cong., 1st Sess. 3-4 (1981).

80. *See* W. POTTER, *supra* note 14, at 203.

81. *See supra* note 73.

82. Limited Test Ban Treaty, *supra* note 61. Among the notable non-parties are China, Cuba, and France. *See* TIF, *supra* note 52, at 336. Pakistan recently became a party with the deposit of its instrument of ratification with the United Kingdom on March 3, 1988. Dept. of State Bull. 68 (June 1988).

83. The preambles to the Limited Test Ban Treaty and the NPT both acknowledge the desirability of a "discontinuance of all test explosions of nuclear weapons for all time" and record the determination of the parties "to continue negotiations to this end." Limited Test Ban Treaty, *supra* note 61; NPT, *supra* note 3. On a bilateral basis, the United States and the Soviet Union are engaged in continuing discussions on verification techniques to permit entry into force of their more limited Treaty on the Limitation of Underground Nuclear Weapon Tests (also known as the Threshold Test Ban Treaty, "TTBT"), with Protocol, July 3, 1974, United States-Union of Soviet Socialist Republics, and Treaty on Underground Nuclear Explosions for Peaceful Purposes (also known as the

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help restrain weapons proliferation. With ever more sophisticated technology and easier access to information about nuclear weapons, however, actual testing of a nuclear device may be less important to potential proliferators today than it was twenty years ago.[84]

A second, indirect approach to nonproliferation is to prohibit the production and stockpiling of further fissionable materials for weapons purposes. The United States historically has made this proposal in the superpower context, arguing that freezing existing stockpiles of the raw materials for nuclear arsenals, subject to international verification, would help cap the arms race and permit subsequent reductions.[85] Like a multilateral test ban treaty, this approach has the nonproliferation advantage of using concrete progress on superpower arms control as a nondiscriminatory incentive for nonnuclear-weapon states to accept restraints on their own programs.[86]

Peaceful Nuclear Explosions Treaty, "PNET"), with Protocol, May 28, 1976, United States-Union of Soviet Socialist Republics, which set maximum yields for underground detonations. ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 41, at 164-89.

84. *See generally* Taylor, *Commercial Nuclear Technology and Nuclear Weapon Proliferation*, in NUCLEAR PROLIFERATION AND THE NEAR-NUCLEAR COUNTRIES 117 (O. Marwah and A. Schulz, ed. 1975) (arguing that the main hindrance to the building of nuclear explosives is the difficulty in producing the required materials whereas the actual designing and building of an explosive is now relatively easy).

85. The call for a prohibition, or cut-off, of further production of fissionable materials for weapons purposes was first put forward by President Eisenhower at the General Assembly of the United Nations in his 1953 "Atoms for Peace" address. *See* B. SCHIFF, *supra* note 5; Epstein, *A Ban on the Production of Fissionable Materials for Weapons*, 243 SCIENTIFIC AMERICAN 43, 44 (July 1980). President Eisenhower originally made such a proposal to Soviet Premier Bulganin in 1956 which also included a proposal to "reduce their nuclear stockpiles by transferring agreed amounts of fissionable materials from military to peaceful purposes." The proposal was rejected by the Soviet Union. STANFORD ARMS CONTROL GROUP, *supra* note 2, at 78. Such proposals have been repeatedly made by succeeding Administrations. *See* Epstein, *supra* note 83, at 45 (tracing the cut-off proposals by the Johnson and Nixon administrations, and analyzing current U.S. attitudes towards such an option).

86. The discriminatory nature of the NPT is often cited as a reason for the intransigence of the remaining non-parties. *See* Smart, *supra* note 36, at 21; Note, *Nuclear Non-Proliferation in the 80's: Carrot and Stick Policy Reexamined*, 13 BROOKLYN J. INT'L L. 25, 40-41 (1987) (explaining the basis for the claim of discrimination made by the nonnuclear states as the reason for their reluctance to ratify such treaties); Rowles, *Nuclear Power and Non-Proliferation: The View from Brazil*, 14 VAND. J. TRANSNAT'L L. 711, 781 (1981) (stating that "[a] non-discriminatory ban would represent a major advance in strengthening the legal commitments by non-nuclear weapons states to forego the development of any nuclear explosive device.") However, it is of course very difficult to determine whether this is simply a convenient ideological posture to mask other reasons for rejecting the NPT

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CONDITIONS OF SUPPLY

Through adherence to the NPT the United States has undertaken to ensure IAEA safeguards are applied to its nuclear exports to nonnuclear-weapon states for peaceful purposes. But U.S. controls go much further, requiring an array of consent rights, guarantees, and assurances of varying scope depending upon the items in question and the credentials of the recipients. These controls are administered by five executive branch agencies[87] and the Nuclear Regulatory Commission and range from specific statutory mandates to discretionary conditions imposed pursuant to broad legislative authority. The result is a highly regulated, enormously complex fabric of U.S. extraterritorial legal restrictions on nuclear exports.

Broadly viewed, these restrictions are necessary adjuncts of the Atoms for Peace program. It was thought at the end of the Second World War that if internationalization of atomic energy proved infeasible, the United States at least could suppress proliferation by withholding its atomic secrets. The successful nuclear weapons tests of both the Soviet Union and the United Kingdom showed the ephemeral nature of the U.S. nuclear monopoly. Thereafter, President Eisenhower's policy decision to share peaceful nuclear technology, as embodied in the Atomic Energy Act of 1954,[88] required maximum assurances that U.S. exports would effect a beneficial influence on the direction and content of foreign nuclear programs. Otherwise, the pragmatic shift to cooperation with foreign nuclear programs, now regarded as inevitable, would simply accelerate the pace of proliferation.

Various U.S. controls have evolved since 1954, the most important resulting from the Nuclear Non-Proliferation Act of 1978.[89] Their success hinges upon sufficient built-in flexibility that will permit a policy of total denial for some, unreliable countries, while permitting sustained, reliable nuclear trade with others that allows U.S. influence over their programs and export practices. The structure of these controls inevitably reflects the tug and pull of the legislative and executive branches. The Congress is suspicious of according too much leeway to a President who may occasionally subordinate nonproliferation interests to other foreign policy interests. The President, on the other hand, must tailor U.S. policies to accommodate the wide diversity of nations with which the U.S. must deal. The trend in the law, as in many other areas of foreign policy, has been to-

87. The five executive branch agencies are the Departments of Energy, Commerce, State, Defense, and ACDA.

88. See generally *supra* note 6.

89. See *supra* note 9.

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ward increasing congressional regulation and concomitant rigidity.

This part of the Article presents an outline of the resulting U.S. nuclear export controls. It first reviews the procedures for exporting nuclear reactors and fuel and surveys the substantive controls applied to them. It then briefly describes the procedures and controls on exporting other items of potential nuclear proliferation significance—nuclear technology, components and moderator material, and dual-use items with possible nuclear applications.

Export Procedures for Nuclear Reactors and Fuel

The key commodities for a nuclear energy program are nuclear reactors ("equipment")[90] and fuel ("special nuclear material").[91] Under U.S. law, neither may be transferred until two procedures have been completed. First, an agreement for peaceful nuclear cooperation must be concluded with the recipient country.[92] This is an executive-legislative agreement[93]

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90. The word "equipment" is used in this article more narrowly than in U.S. law and regulations. Under the NNPA, "equipment" includes utilization facilities (power and research reactors, and the four major components of these reactors), production facilities (reactors for producing nuclear material through irradiation, as well as enrichment and reprocessing plants), and "components" determined to have potential significance for nuclear explosive purposes. Nuclear Non-Proliferation Act § 4(a)(4), 22 U.S.C. § 3203(a)(4). *See* 10 C.F.R. § 110.2 (1988) (NRC definitions).

91. "Special nuclear material" means plutonium, uranium-233 or uranium enriched above 0.711 percent by weight in the isotope uranium-235. *Id.*

92. This is stated indirectly in Section 123 of the Atomic Energy Act 42 U.S.C. § 2153, which provides that "[n]o cooperation" with foreign nations pursuant to various sections of the Atomic Energy Act may be undertaken until an agreement for cooperation is in place. Among the sections referred to are those authorizing exports of equipment and special nuclear material. *See infra* note 99. The Atomic Energy Act's export licensing procedures for equipment and special nuclear material also assure the existence of an agreement since they require the Secretary of State to address "the extent to which the cooperating party has adhered to the provisions of the applicable agreement for cooperation." Atomic Energy Act § 126(a)(1), 42 U.S.C. § 2155(a)(1).

In 1978 Congress directed the President to institute a program to renegotiate existing agreements for cooperation to upgrade their provisions in accordance with the new substantive requirements contained in the NNPA. Nuclear Non-Proliferation Act § 404(a), 42 U.S.C. § 2153c(a). No deadline was fixed for completing the renegotiation program and continued cooperation under existing agreements was expressly authorized. Nuclear Non-Proliferation Act § 405(a), 42 U.S.C. § 2153d(a). Since 1978, new or amended agreements have been entered into with Australia, Bangladesh, Canada, China, Colombia, Egypt, Finland (not yet in force), Indonesia, Japan, Morocco, Norway, Peru, Sweden and the IAEA. *See* REPORT PURSUANT TO SECTION 601, *supra* note 19, at 75; TIF, *supra* note 52, at 44 (China); *see also infra* note 173 (Japan). The pre-1978 agreements still in force which have not been renegotiated are with Argentina, Austria, Brazil, India, Republic of Korea, Philippines, Portugal, South Africa, Spain, Switzerland, Thailand, the European Atomic Energy Community, and Taiwan. *Id.*

93. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 173-76 (1972) (discussion of executive-legislative agreements).

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that is authorized by the Atomic Energy Act so long as it contains delineated provisions;[94] otherwise the Atomic Energy Act calls for the President to obtain specific congressional approval.[95] In either event, the Atomic Energy Act requires the President to determine that performance of a proposed agreement for cooperation "will promote, and will not constitute an unreasonable risk to, the common defense and security,"[96] based upon the recommendations of the Secretaries of Energy and State and the views of the Nuclear Regulatory Commission and the Director of the Arms Control and Disarmament Agency (who also must prepare a "Nuclear Proliferation Assessment Statement").[97] Thereafter, the Act requires the President to submit the agreement to Congress for 90 continuous session days, to afford it the opportunity to prohibit entry into the agreement by enactment of a joint resolution of disapproval, or to specifically approve the agreement if it does not contain all the required provisions.[98]

Exports of nuclear reactors or fuel under an agreement for cooperation are processed through a second, independent licensing procedure. In the normal case, the Nuclear Regulatory Commission issues export licenses based upon specific statutory export criteria after receiving the executive branch's judgment that the proposed export "will not be inimical to the common defense and security."[99] The Secretaries of Energy, State, De-

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94. Atomic Energy Act § 123(a), 42 U.S.C. § 2153(a).

95. Atomic Energy Act § 123(d), 42 U.S.C. § 2153(d). Thus far, no agreements have been submitted under the procedure requiring Congressional approval, although some members of Congress questioned whether the President should have sought Congressional approval for the 1985 agreement with China, *See* REPORT WITH RESPECT TO THE AGREEMENT FOR COOPERATION BETWEEN THE UNITED STATES AND THE REPUBLIC OF CHINA CONCERNING PEACEFUL USES OF NUCLEAR ENERGY, H.R. REP. NO. 382, 99th Cong., 1st Sess. 7 (Nov. 20, 1985), and the 1987 agreement with Japan. *See infra* note 180. It has never been tested whether the President possesses inherent Consitutional authority to conclude an agreement for cooperation; however, any agreement authorized by the President would need to satisfy the export criteria of the Atomic Energy Act in order to have the desired effect of permitting nuclear trade.

96. Atomic Energy Act § 123(b), 42 U.S.C. § 2153(b).

97. Atomic Energy Act § 123(a), 42 U.S.C. § 2153(a).

98. The first 30-day period is for consultation with the foreign affairs committees "concerning the consistency of the terms of the proposed agreement" with the requirements of the Atomic Energy Act § 123(b), 42 U.S.C. § 2153(b); the next 60-day period is for the Congress to decide whether to adopt a joint resolution disfavoring or, in the case of agreements submitted with a Presidential exemption, approving the agreement. Atomic Energy Act § 123(d), 42 U.S.C. § 2153(d); *cf. infra* note 101. Since a joint resolution authorizing entry into an agreement would have the force of law, its enactment would obviate the necessity of waiting the full 90-day statutory period unless otherwise specified.

99. Atomic Energy Act §§ 126(a)(1), 127, 42 U.S.C. §§ 2155(a)(1), 2156. The NRC has established general licenses which obviate the need for export-by-export reviews for some items, *see* 10 C.F.R. § 110.20-.29 (Subpart C), and has exempted other exports of no proliferation significance from licensing requirements. *See* 10 C.F.R. § 110.10-.11. Also, the Department of Energy, the U.S.

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fense, and Commerce and the Director of ACDA are participants in the formulation of the executive branch judgment, pursuant to statutorily-mandated interagency procedures.[100] The criteria applied by the NRC are usually satisfied by the recipient government's undertaking to accept the exports pursuant to the terms of an agreement for cooperation, since the export criteria were adopted in 1978 to reflect existing assurances in agreements for cooperation.[101] However, if the Commission is unable to make the required statutory determinations, the President may still authorize an export by executive order if he "determines that withholding the proposed export would be seriously prejudicial to the achievement of United States nonproliferation objectives, or would otherwise jeopardize the common defense and security."[102]

Government exporter of nuclear materials, with State Department concurrence, is authorized to distribute (transfer without license) limited quantities of special nuclear materials. Atomic Energy Act §§ 53(c), 54, 42 U.S.C. §§ 2073(c), 2074.

100. Atomic Energy Act § 126(a)(1), 42 U.S.C. § 2155(a)(1); Procedures Established Pursuant to the Nuclear Non-Proliferation Act of 1978, 15 C.F.R. Part 378, Supp. 1 (1988), 43 Fed. Reg. 25326 (1978), *amended by* 49 Fed. Reg. 20780 (1984) [hereinafter NNPA Procedures].

101. This was not true in one respect, since pre-1978 agreements for cooperation did not contain the necessary physical security assurances to satisfy the export criteria established by the NNPA. The Executive branch therefore obtained generic assurances from most cooperating partners; in those cases where it did not, it is required to obtain specific assurances for each export. Two agreements for cooperation in force in 1978 did not satisfy other NNPA export criteria: (1) the Agreement with the IAEA, which was amended as necessary in 1980, TIF, *supra* note 52, at 109; and (2) the agreement with the EURATOM, which has still not been amended. Cooperation with EURATOM has continued under a statutory waiver authority accorded to the President where "failure to continue cooperation with any group of nations . . . would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security." Atomic Energy Act § 126(a)(2), 42 U.S.C. § 2155(a)(2). See, for example, Exec. Order No. 12,587, which extended the period of nuclear cooperation with EURATOM to March 10, 1988. 52 Fed. Reg. 7397 (1987).

102. Atomic Energy Act § 126(b)(2), 42 U.S.C. § 2155(b)(2). Prior to any export, the Executive Order, along with an explanation, must be submitted for sixty continuous session days of Congressional review. *Id.* However, the law's provision for a Congressional concurrent resolution veto of the President's action is almost certainly invalid under Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). *See* note 231 *infra*.

Two shipments of fuel to a U.S.-supplied power reactor in India had been authorized by Executive Order when the NRC failed to make its required statutory findings. Exec. Order No. 12,055, 43 Fed. Reg. 18,157 (1978); Exec. Order No. 12,218, 45 Fed. Reg. 41,625 (1980). In both cases the Executive branch argued the NRC had misread the Atomic Energy Act in not finding that the shipments satisfied applicable export criteria in light of a special NNPA grace period for nations not accepting full-scope safeguards. *See, e.g.*, M. NASH, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1392 (1978); *see also* DEP'T STATE BULL. 66-71 (Aug. 1980). The two cases provoked heated Congressional debate, but only one house of Congress voted to override the President's action on each occasion. *See* Schott, *Testing Statutory Criteria for Foreign Policy: The Nuclear Non-proliferation Act of 1978 and the Export of Nuclear Fuel to India*, 14 N.Y.U. J. INT'L L. & POL'Y 419, 457-64 (1982); *Recent Developments, Nuclear Non-Proliferation: Export of Nuclear Fuel to India*, 22

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The requirement of both an agreement for cooperation and a specific export license allows the Government to forbid transfers on national security grounds even when all the nonproliferation controls required as a condition of export are guaranteed by an umbrella agreement for cooperation. Conversely, where he determines that nonproliferation or national security interests so demand, the President may seek congressional authorization to conclude an agreement for cooperation lacking one or more statutory requirements, or, on his own authority, he may exempt exports from the licensing criteria, subject to congressional disapproval. The effect of this regulatory structure is to impose rigid statutory requirements for nuclear cooperation in the first instance, and to authorize flexibility in administering those requirements based upon fundamental national security or nonproliferation concerns. In practice, the political dynamic has tended strongly against using national security or nonproliferation grounds to *permit* exports which fail to satisfy the applicable statutory criteria.

Substantive Export Requirements for Nuclear Reactors and Fuel

De Facto Full Scope Safeguards

In addition to requiring an agreement for cooperation, U.S. law forbids exports of nuclear reactors or fuel to nonnuclear-weapon states unless "at the time of the export" the recipient country maintains IAEA safeguards on all its peaceful nuclear activities.[103] This can be described as a requirement of *de facto* safeguards since it does not depend upon the legal basis for the safeguards but only on their factual existence.[104] The requirement

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HARV. INT'L J. 227, 230-31 (1980).

103. Atomic Energy Act § 128(a)(1), 42 U.S.C. § 2157(a)(1). Post-1978 agreements for cooperation must also stipulate full-scope IAEA safeguards as a condition of cooperation with nonnuclear-weapon States. Atomic Energy Act § 123(a)(2), 42 U.S.C. § 2153(a)(2).

104. It is noteworthy that in some respects non-NPT safeguards agreements are actually more stringent than NPT safeguards agreements for the more limited items they cover. It has been IAEA policy since 1973 that "the duration of the agreement should be related to the period of actual use of the items in the recipient State; . . . ." GOV/1621, *supra* note 60, at 1. This contrasts with NPT safeguards agreements which terminate upon a state's withdrawal from the NPT, which is permitted on three months notice. NPT, *supra* note 3, art. X; INFCIRC/153, *supra* note 30, para. 26. The IAEA has similarly not permitted non-NPT parties a right of withdrawal for military purposes in their safeguards agreements because of the absence of a no-explosives commitment. *See* INFCIRC/66, *supra* note 34, para. 82. One state, Albania, has recently concluded the first *de jure* full-scope safeguards agreement outside of the NPT (and the Treaty of Tlatelolco), which requires safeguards on *all* nuclear activities in Albania for 25 years, and thereafter on all nuclear material and equipment subject to safeguards at the time of the agreement's expiration. *See* INTERNATIONAL ATOMIC ENERGY AGENCY, BOARD OF GOVERNORS Doc. GOV/2247 (1986) [hereinafter GOV/2247] (memorandum

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also can be described as "full-scope" since the safeguards apply to all peaceful nuclear activities in the recipient country at the time of export and not merely to the export itself.

One rationale for requiring full-scope safeguards is the more transparent a recipient's nuclear program is to the international community, the less danger there is of clandestine explosive-related activities or other misuse of an exported item.[105] The full-scope safeguards requirement in U.S. law does not extend so far as to require safeguards on nonpeaceful nuclear activities, however, since then even NPT parties might not be eligible to receive U.S. exports.[106] A second policy basis for demanding full-scope safeguards is the belief that U.S. exports are sufficiently attractive to induce potential recipients to move toward the NPT norm of *de jure* full-scope safeguards.[107] Finally, the *de facto* nature of the U.S. requirement represents a compromise, permitting continued cooperation with nonNPT parties so long as through one or more agreements with the IAEA they arrange for safeguards on their nuclear activities.[108] Allowing continued cooperation with nonNPT parties furthers the commercial interests of U.S. exporters but also permits the U.S. government to maintain some influence over these nuclear programs in furtherance of U.S. nonproliferation interests.

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on safeguards in Albania).

105. *See, e.g.*, CONGRESSIONAL QUARTERLY, THE NUCLEAR AGE 123 (1984); Bettauer, *supra* note 13, at 1136.

106. In fact, no NPT parties have exercised their right to engage in unsafeguarded military activities, although the Canadian government is reported to be considering the construction of ten nuclear-powered submarines for its navy. Watson, *Canada May Build 10 Nuclear Subs*, Wash. Post, May 3, 1987, at A30, col. 1.

107. *See* W. POTTER, *supra* note 14, at 48.

108. When the U.S. *de facto* safeguards requirement was added in 1978, seven countries with active agreements for cooperation with the U.S. were not NPT parties: Argentina, Brazil, India, Indonesia, South Africa, Spain and Turkey. *See* Bettauer, *supra* note 13, at 1137. Indonesia, Spain and Turkey are now NPT parties, TIF, *supra* note 52, at 336-37, but they satisfied the *de facto* requirement shortly before joining the Treaty. *See* Report Pursuant to Section 601, *supra* note 19, at 73 (Spain); Report of the President to the Congress Pursuant to the Nuclear Non-Proliferation Act of 1978, at 86 n.1 (1979) (for the year ending December 31, 1978) (Indonesia and Turkey). Argentina, Brazil, India and South Africa still do not meet the U.S. requirement for full-scope safeguards. Report Pursuant to Section 601, *supra* note 19, at 73. They each have substantial nuclear programs, so the effect of this provision of U.S. law alone or in conjunction with other provisions has been to cut off all significant nuclear cooperation with them. Other potential partners for which the law has had a similar effect are Israel and Pakistan. W. POTTER, *supra* note 14, at 48 (discussion of competing and conflicting foreign policy and non-proliferation objectives regarding Pakistan).

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Peaceful Use Commitment

The remaining controls and guarantees imposed by U.S. law relate only to U.S.-supplied items. Of primary importance is the legal assurance that exports will not be used for any military or explosive purpose.[109] This requirement goes beyond the NPT by excluding all military uses of transferred items. It was a deliberate step by the United States to segregate peaceful and military cooperation in the uses of nuclear energy; military cooperation is provided for in a separate section of the Atomic Energy Act and is subject to its own requirements.[110]

The distinction between military and peaceful activities gives rise to four potential definitional questions.

Atomic Weapons Versus Nuclear Explosive Devices

Early U.S. agreements for civil cooperation precluded the use of transferred items for "atomic weapons."[111] In 1974 India detonated its "peaceful nuclear explosive device," calling into question the applicability of a ban on "atomic weapons" to all nuclear explosive devices.[112] The distinction drawn by India between "peaceful" and other nuclear explosive devices had some validity since international legal instruments appeared to treat the two as distinct categories.[113] The United States argued, however, that it was impossible in practice to distinguish between the two categories

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109. Atomic Energy Act § 127(2), 42 U.S.C. § 2156(2). Agreements for cooperation must also contain a peaceful, no-explosive use commitment. Atomic Energy Act § 123(a)(3), 42 U.S.C. § 2153(a)(3).

110. Section 91(c) of the Atomic Energy Act authorizes exporting nuclear material and equipment for military applications of atomic energy. 42 U.S.C. § 2121(c). Section 144 authorizes transfers of Restricted Data for military applications. 42 U.S.C. § 2164.

111. *E.g.*, Agreement for Cooperation Concerning Civil Uses of Atomic Energy, June 16, 1968, United States-Japan, art. xA.(2), 9 U.S.T. 1383, 1390, T.I.A.S. No. 4133 (terminated July 17, 1988) (hereinafter Agreement for Cooperation with Japan). This formulation implemented the pre-NNPA Atomic Energy Act requirement of an assurance against use "for atomic weapons, or for research on or development of atomic weapons or for any other military purpose." Atomic Energy Act § 123(a)(3), *as amended*, 42 U.S.C. § 2153(a)(3) (1954) (amended by Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120-152).

112. *See supra* note 16 and accompanying text.

113. *See* Treaty of Tlatelolco, *supra* note 65, art. 18(1) (permitting "explosions of nuclear devices for peaceful purposes—including explosions which involve devices similar to those used in nuclear weapons" so long as such explosions are compatible with the treaty's ban on testing or possession of nuclear weapons and the treaty's definition of nuclear weapons); and NPT, *supra* note 3, art. V (giving all parties right to receive potential benefits from any peaceful applications of nuclear explosions under "appropriate international observation and through appropriate international procedures"). *See also* Treaty on Underground Nuclear Explosions for Peaceful Purposes, *supra* note 83, art. II(a) (defining "explosion" as an "underground nuclear explosion for peaceful purposes").

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and that it would interpret a ban on nuclear weapons to cover peaceful nuclear weapons.[114] Since 1978, U.S. law has required an explicit commitment against any explosive applications of items transferred under new or amended agreements for cooperation.[115]

Military versus Peaceful Applications of Nuclear Energy

The exclusion of "military" uses of U.S. exports raises a second definitional issue. Both U.S. law and the NPT distinguish "military" from "peaceful" activities but do not provide criteria for applying the distinction. Definitional criteria might include the user of the items (civil versus military users), the use of the items (combat-related or not), or the national interests served by exports (enhancing military capabilities versus serving civilian needs).[116] In the arena of peaceful nuclear cooperation, this issue has been addressed only through specific examples, as in agreements recording the understanding that transferred items may be used to produce radioisotopes for military hospitals and electrical power for both the civilian and military sectors without contravening the peaceful use undertaking.[117]

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114. The U.S. had told India as early as 1970 that peaceful nuclear explosions were not permitted by the U.S.-India Agreement for Cooperation. *See* DOCUMENTS ON DISARMAMENT, *supra* note 10, at 333; W. POTTER, *supra* note 14, at 55. The U.S. made a general statement to this effect concerning all its agreements for peaceful nuclear cooperation in 1972. *See* Bettauer, *supra* note 13, at 1142.

115. Atomic Energy Act § 127(2), 42 U.S.C. § 2156(2). These export criteria, applied by the NRC, require a no-explosive use assurance with respect to both future and past exports subject to an agreement for cooperation. *Id.* In light of the U.S. interpretation of the phrase "atomic weapons", the diplomatic exchanges initiated by the Executive branch to confirm this point and the membership of most cooperating partners in the NPT, pre-1978 agreements for cooperation have been generally deemed to satisfy this standard. *See* Bettauer, *supra* note 13, at 1142-43.

116. For examples of how this "military versus peaceful use" distinction is drawn in international legal instruments, see Antarctic Treaty, *supra* note 68, art. 1 (limiting use of Antarctica to "peaceful purposes only," which is defined to permit military users in scientific research or other peaceful capacities, but precludes "any measures of a military nature" including weapons testing, military maneuvers, and the introduction of military fortifications); Outer Space Treaty, *supra* note 69, art. III (permitting uses "in accordance with international law"), art. IV (precluding the stationing of nuclear weapons or other weapons of "mass destruction" in outer space and limiting the use of celestial bodies to non-military applications); and Biological Weapons Convention, *supra* note 61, art. I (prohibition on the use of bacteriological agents and toxins that "have no justification for prophylactic, protective or other peaceful purposes").

117. *E.g.*, Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy, Agreed Minute, para. 6, Dec. 19, 1983, United States-Sweden, T.I.A.S. No. 10860 (entered into force April 11, 1984).

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Research and Development Restrictions

U.S. law not only prohibits explosive uses of transferred items, it also bars the use of the items in "research on or development of any nuclear explosive device."[118] Where a program is exclusively directed at production of nuclear weapons, there is little question that preliminary steps short of fashioning an explosive device would run afoul of the U.S. restriction. But, particularly with the development of sensitive fuel cycles employing weapons-usable materials, many activities could have the dual purpose of legitimate peaceful research and acquiring weapons-related expertise.

The United States addressed a similar issue when certain allies expressed concern that the NPT's prohibition on the "manufacture" of nuclear explosive devices would unduly hamper their civil activities. In a memorandum released to the Senate after the NPT negotiations, executive branch officials explained to potential Treaty adherents that the United States did not believe it was possible "to formulate a comprehensive definition or interpretation" of the prohibition on manufacturing nuclear weapons, but that the purpose of an activity and whether it was carried out under safeguards would be relevant.[119] Moreover, according to the memorandum, "clearly permitted would be the development, under safeguards, of plutonium fueled power reactors, including research on the properties of metallic plutonium, nor [sic] would Article II interfere with the development or use of fast breeder reactors under safeguards."[120] Several cooperating partners of the United States are engaged in such research programs under IAEA safeguards, which have been deemed consistent with their peaceful use pledges to the U.S.[121]

Peaceful Use "Contamination" of Non-Transferred Items

The peaceful use guarantee demanded by U.S. law applies not only to transferred equipment and special nuclear material but also to special nuclear material "produced through" their use.[122] This latter concept refers to the nuclear process of converting one element, such as uranium, into another element, such as plutonium, that has possible proliferation signifi-

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118. Atomic Energy Act § 127(2), 42 U.S.C. § 2156(2).

119. *Nonproliferation Treaty: Hearings before the Senate Comm. on Foreign Relations*, 90th Cong., 2d Sess. 39 (1968) (extension of remarks by William C. Foster, Director, U.S. Arms Control and Disarmament Agency).

120. *Id.*

121. For example, the new Agreement for Cooperation with Japan expressly contemplates use of U.S.-origin plutonium for civil energy production. *See* note 180, *infra*.

122. Atomic Energy Act § 123, 42 U.S.C. § 2153(a)(1).

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cance. The application of the peaceful use guarantee to special nuclear material "produced through the use of" transferred items ensures that the causal byproduct of U.S. cooperation does not contribute to nonpeaceful applications of nuclear energy.[123]

To date, the United States has followed a strict principle of "contamination" in applying the peaceful use guarantee to produced material.[124] Whenever U.S. origin fuel is in a foreign reactor, or whenever a U.S. reactor is being used, all the special nuclear material produced in the reactor may only be used for peaceful purposes. In the case of a U.S. reactor, this policy can be defended in simple causal terms, since no material would have been produced without the use of the U.S. reactor. When U.S. material constitutes only part of the fuel in a foreign reactor, a strictly causal argument may be more difficult to sustain; the U.S. material may not be necessary for the production of all the special nuclear material in the reactor, depending upon a variety of technical factors. Nonetheless, the United States has insisted upon peaceful use contamination of all the produced material because otherwise U.S. assistance might contribute to a project with potential nonpeaceful applications, something fundamentally incompatible with the purpose of transfers under agreements for peaceful nuclear cooperation. The contamination principle has the added nonproliferation benefit of increasing the corpus of nuclear material dedicated to peaceful uses beyond that directly supplied by the U.S.

Safeguards on Transferred Items

The peaceful use assurances received by the United States are supported by safeguards designed to detect the diversion of significant quantities of nuclear material to proscribed activities. Current U.S. law requires

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123. This derivation concept is also utilized by the IAEA in its safeguards practice to determine the reach of safeguards in facility or material-specific agreements. *See* INFCIRC/66, *supra* note 34, para. 19. It is called for in both the Guidelines For Nuclear Transfers, INFCIRC/254, *supra* note 66, and the Zangger Group Trigger List, INFCIRC/209, *supra* note 34.

124. In Congressional hearings on the Agreement for Cooperation with Australia, Administration witnesses stated this contamination policy was an immutable aspect of non-proliferation policy. *See United States-Australian Agreement on the Peaceful Uses of Nuclear Energy: Hearing before the Senate Committee on Foreign Relations*, 96th Cong., 1st Sess. 6, 12, 37 (1979) (statements of Thomas R. Pickering, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, and Charles Van Doren, Assistant Director, Nonproliferation, U.S. Arms Control and Disarmament Agency); *Proposed United States-Australia Agreement for Nuclear Cooperation; Hearing Before Subcomm. on International Security and Scientific Affairs and International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 5-6, 18 (1979) (statement of Louis V. Nosenzo, Deputy Assistant Secretary of State for Nuclear Energy and Energy Technology Affairs).

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IAEA safeguards on transferred reactors and fuel as well as on "any special nuclear material used in or produced through the use of transferred items."[125] This coverage satisfies the NPT obligation to require IAEA safeguards on exports to nonnuclear-weapon states. The statutory requirement of safeguards for special nuclear material "used in" transferred items is somewhat anomalous, however, in that it prescribes a potentially broader application of safeguards than the peaceful use assurance in U.S. law that the safeguards address.[126] The executive branch response has been to seek this broader coverage for both safeguards and peaceful use guarantees in agreements for cooperation negotiated since 1978.[127]

Both before and after the establishment of the IAEA safeguards system, the U.S. secured bilateral safeguards rights in its agreements for cooperation with nonnuclear-weapon states, permitting U.S. representatives to verify the nondiversion of U.S. supplied items where necessary.[128] The United States, however, has arranged for the maximum IAEA role in carrying out this safeguarding function. Initially, it was common practice to conclude "safeguards transfer agreements" (STA's), in which the U.S., its cooperating partner, and the IAEA agreed that the IAEA would assume responsibility for applying safeguards as called for in the agreement for

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125. Atomic Energy Act § 127(1), 42 U.S.C. § 2156(1). The law also requires IAEA safeguards to be applied to *previously* exported items as a condition of supply. *Id.* (emphasis added). This retroactive feature of the law, unlike the requirement of full-scope safeguards, as discussed *supra* note 108, has had no practical effect since all U.S. cooperating partners have continued to maintain IAEA safeguards on previous U.S. exports.

126. For example, non-U.S. origin special nuclear material fueling a U.S. reactor would be "used in" a U.S. item but not "produced through" its use. By the literal terms of U.S. law, it could be argued that such material would have to be subject to IAEA safeguards but not restricted to peaceful purposes. Such a distinction could arise, in practice, only after the reprocessing and separation of the pre-existing special nuclear material from the newly produced material. The drafting of the safeguards coverage is perhaps explicable by the IAEA practice of requiring safeguards to apply to nuclear material both "[p]roduced in or by the use of" safeguarded material in the absence of full-scope safeguards. INFCIRC/66, *supra* note 34, para. 19.

127. *E.g.*, Agreement for Cooperation With Sweden, *supra* note 117, art. 4 (peaceful use guarantee), art. 5, para. 2 (safeguards guarantee).

128. U.S. law calls for safeguards in agreements for cooperation, but does not specify what form those safeguards should take. Atomic Energy Act § 123(a)(1), 42 U.S.C. § 2153(a)(1). Since 1978, agreements with nonnuclear-weapon states have required IAEA safeguards as an export criterion. *See* Atomic Energy Act § 127(1), 42 U.S.C. § 2156(1). Some members of Congress have argued that IAEA safeguards or their equivalent are mandatory for all agreements for cooperation, even those with nuclear-weapon states such as China. *See, e.g.*, 131 CONG. REC. H35979 (1985) (remarks of Rep. Udall on the Nuclear Cooperation Agreement Between the United States and the People's Republic of China). Congress, however, approved the China agreement notwithstanding the absence of a provision for IAEA safeguards. S.J. Res. 238, 99th Cong., 1st Sess., 99 Stat. 1174 (1985).

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cooperation.[129] Bilateral U.S. safeguards rights were then held in reserve as "fall-back" safeguards in the event the IAEA for any reason was not or would not be performing its function. With the conclusion of the NPT, the United States further agreed in many cases to "suspend" the application of these STA's and to rely upon the IAEA's implementation of the cooperating partner's NPT safeguards agreement.[130] In the most recent agreements for cooperation with NPT parties, the United States has bypassed altogether the step of concluding STA's. These agreements specify that the applicable NPT safeguards agreement will apply to U.S.-transferred items, but if the IAEA is not or will not be implementing the NPT safeguards agreement then either comparable IAEA safeguards or fall-back U.S. safeguards must be applied.[131]

When the IAEA applies an NPT safeguards agreement, it treats all nuclear material within a country alike, regardless of origin.[132] Thus, one consequence of a U.S. agreement to suspend an STA or to provide for the immediate application of an NPT safeguards agreement is that the IAEA's record-keeping system no longer distinguishes U.S. origin material from any other. This makes the residual application of U.S. bilateral safeguards extremely difficult unless accurate accounting is continued bilaterally with the cooperating partner.[133]

Regardless of how the safeguards provision in a new agreement for cooperation is formulated, U.S. law now requires that it remain in effect "irrespective of the duration of other provisions in the agreement or

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129. Such trilateral agreements with the IAEA have been concluded with Argentina, Austria, Brazil, Colombia, India, Iran, Israel, Japan, Korea, the Philippines, Portugal, South Africa, Spain, Sweden, Switzerland, Turkey, Venezuela, and Taiwan. *See* TIF, *supra* note 52, at 268-69.

130. This is accomplished by means of a suspension protocol among the U.S., its cooperating partner, and the IAEA. Such protocols have been concluded with Austria, Iran, the Philippines, Portugal, Sweden, Switzerland, Turkey, and Venezuela. *Id.* at 269. The application of NPT safeguards agreements to U.S.-supplied items has not resulted in a gap in safeguards coverage by permitting military activities (allowed by the NPT but not by U.S. agreements for cooperation), because NPT safeguards agreements require an assurance to the IAEA that there are no applicable bilateral peaceful-use guarantees on safeguarded materials proposed for use in military activities. *See* INFCIRC/153, *supra* note 31, para. 14.

131. *E.g.*, Agreement for Cooperation With Sweden, *supra* note 117, art. 5, paras. 2, 4.

132. *See* INFCIRC/153, *supra* note 31, paras. 7, 31, 51 (requiring a national system of accounting and control of nuclear material, divided into "material balance areas" without regard to national origin).

133. Recent agreements for cooperation accordingly require maintenance of systems of accounting for, and control of nuclear material and reporting of inventories upon request. *E.g.*, Agreement for Cooperation with Sweden, *supra* note 117, art. 11 (consultations), Agreed Minute (inventory lists required with reporting on request).

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whether the agreement is terminated or suspended for any reason."[134] This express statement of "perpetuity" of safeguards is intended to resolve any dispute under the law of treaties as to whether the expiration of an agreement for cooperation or its suspension or termination for cause would have the effect of lifting the safeguards guarantee.[135] The Vienna Convention on the Law of Treaties codifies the general principle that performance is no longer required upon suspension or termination of a treaty except with respect to "any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."[136] The statements of some cooperating partners during the 1970s suggested they might not share the U.S. view that safeguards constitute the relevant type of "right, obligation or legal situation" for perpetuity to apply under the Vienna Convention standard.[137] Making perpetuity explicit resolves all disputes because the Convention recognizes the right of treaty partners to agree in advance on the residual legal regime that will apply following a treaty's expiration, suspension or termination.[138]

Right of Return

Closely related to peaceful use assurances and safeguard procedures, at least in theory, is the right to secure the return of transferred items if a recipient nation does not adhere to its peaceful use assurances. U.S. law requires that new agreements for cooperation contain a right to the return of transferred fuel, reactors, and special nuclear material produced through their use if a nonnuclear-weapon-state recipient terminates or abrogates *any* IAEA safeguards agreement or detonates a nuclear explosive device, even if no U.S.-supplied items are involved.[139] This is, in effect, a

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134. Atomic Energy Act § 123(a)(1), 42 U.S.C. § 2153(a)(1).

135. *See* Bettauer, *supra* note 13, at 1134. It is also congruent with IAEA practices under GOV/1621, *supra* note 63, and the requirements of The Nuclear Suppliers Guidelines, INFCIRC/254, *supra* note 66.

136. Vienna Convention on the Law of Treaties, *supra* note 44, art. 70 § 1(b).

137. The Indian Government was one partner of special concern. It had claimed that U.S. failure to supply fuel to its Tarapur power station in accordance with the applicable agreements would relieve it of its own undertakings to the U.S. regarding previously transferred items. *E.g.*, Edlow International Co., 9 N.R.C. 209, 241 (1979) (views of Chairman Ahearne).

138. Vienna Convention on the Law of Treaties, *supra* note 44, art. 70, para. 1. Under U.S. law, perpetuity is only mentioned in the case of safeguards, and not for peaceful use guarantees or other assurances and consent rights. Nonetheless, consistent with the view that non-proliferation controls by their nature have perpetual duration, recent U.S. agreements for cooperation apply the concept to all U.S. controls. *E.g.*, Agreement for Cooperation with Sweden, *supra* note 117, art. 14(2).

139. Atomic Energy Act § 123(a)(4), 42 U.S.C. § 2153(a)(4). A right of return is not a mandatory export criterion, *see* Atomic Energy Act § 127, 42 U.S.C. 2156, but pre-NNPA agreements for cooperation often contained a more limited return right as part of the U.S. fall-back safe-

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provision for "undoing" supply in the event a country's nuclear activities raise grave doubts about its intention to comply with its assurances to the United States.

Perhaps rights of return offer a marginal deterrent to misuse of nuclear material, since the actual removal of substantial nuclear material could cause severe disruptions in a nuclear energy program. But the invocation of the right of return requires a prior breach of fundamental legal undertakings or withdrawal from the NPT, actions which a state would probably take only for paramount national interests not likely affected by the threat of foreign right of return. Moreover, agreement on the technical details for carrying out the return of transferred items could pose formidable difficulties and opportunities for delay.[140] It is also uncertain whether U.S. law (or public opinion) would allow imports of spent power reactor fuel (the most likely subject of the right of return) in a timely manner.[141] No country seems ever to have exercised a right of return. It is also not an export requirement of the NPT or other international guidelines to which the United States subscribes.

Physical Protection

U.S. law requires "adequate" physical security for exported nuclear reactors and fuel and for special nuclear material used in or produced through their use.[142] "Physical security" refers to protective measures

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guard rights. *E.g.*, 1968 Agreement for Cooperation with Japan, *supra* note 111, art. IX, para. B(5), art. XII, para. c.

140. The items subject to the agreement would need to be identified (and perhaps segregated if mixed with other materials), compensation to the foreign state would have to be arranged, and the status of the material upon its return might also have to be determined. *See, e.g.*, Agreement for Cooperation with Sweden, *supra* note 117, art. 10, para. 3 (requiring reimbursement and specifying that returned items are not to be subject to the Agreement). Finally, practical arrangements for removing and transporting the items would be necessary.

141. Currently, Section 131(f) of the Atomic Energy Act 42 U.S.C. § 2160(f), requires 60 continuous session days notice to Congress prior to acceptance of foreign spent fuel unless, for "limited quantities," the President declares an emergency and notifies designated congressional committees. Recent litigation suggests the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-61), may provide a basis for private challenges to imports of foreign irradiated fuel, even when undertaken for non-proliferation purposes. *See* Northwest Inland Waters Coalition v. United States Dep't of Energy, 852 F.2d 572 (9th Cir. 1988) (opinion unreported) (formal environmental review required prior to transshipment of irradiated foreign research reactor fuel by DOE through Puget Sound).

142. Atomic Energy Act § 127(3), 42 U.S.C. § 2156(3). This is also a requirement in new agreements for cooperation. Atomic Energy Act § 123(a)(6), 42 U.S.C. § 2153(a)(6). The export criterion refers to physical security for "facilities" as well as nuclear material, while new agreements need only provide for physical security on nuclear material. This lack of parallelism is insignificant,

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designed to deter or prevent unauthorized access or misuse of nuclear materials by individuals or subnational groups.[143] It differs from safeguards in its focus upon criminal conduct rather than state diversions of nuclear material. Although there has not been a significant terrorist incident involving nuclear material, the threat of even one such incident is obviously a key motivating factor for ensuring that U.S. exports are adequately protected.[144]

The law itself does not define "adequacy."[145] In the NNPA, the Nuclear Regulatory Commission was charged with promulgating regulations "establishing the levels of physical security which in its judgment are no less strict than those established by any international guidelines to which the United States subscribes and which in its judgment will provide adequate protection . . . ."[146] Foreign physical security measures providing a level of protection equivalent to these NRC standards are, by law, deemed "adequate."[147]

Current NRC regulations require physical security measures that provide, at a minimum, protection comparable to the measures recommended by an IAEA experts panel in the publication "The Physical Protection of Nuclear Material."[148] These recommendations cover such topics as the relationship of licensing to physical security, the assignment of nuclear

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since nuclear facilities are not deemed to pose special physical security concerns in the absence of nuclear material. *Id. See also* Bettauer, *supra* note 13, at 1146-47.

143. *See* INTERNATIONAL ATOMIC ENERGY AGENCY, THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL 2, Doc. INFCIRC/225/Rev. 1 [hereinafter THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL] (describing elements of and requirements for protection of nuclear material).

144. *See* COUNCIL ON FOREIGN RELATIONS, *supra* note 22, at 9; Bettauer, *supra* note 13, at 1144-47.

145. Theoretically, adequacy could be seen as a function of the threats to be countered, the specific measures deemed effective in countering them, and an underlying judgment as to what level of risk is tolerable. This latter judgment, in turn, could require either balancing the anticipated benefits of nuclear cooperation against the threats to U.S. interests should nuclear material be misappropriated, or it might be an implicit reference to an absolute standard of security which must be met regardless of the advantages of nuclear trade. On the question of the different risks to nuclear material and countermeasures against them, *see* Willrich, *Nongovernmental Nuclear Weapon Proliferation*, in STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, NUCLEAR PROLIFERATION PROBLEMS 168 (1974).

146. Nuclear Non-Proliferation Act § 304(d), 42 U.S.C. § 2156a. The NNPA also required the Nuclear Regulatory Commission (NRC) to consult with the Secretaries of State, Energy, and Defense, and the Director of ACDA in developing its physical protection regulations.

147. Atomic Energy Act § 127(3), 42 U.S.C. § 2156(3).

148. 10 C.F.R. § 110.43 (1988); THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL, *supra* note 143. The NRC has found the physical protection requirements of the Nuclear Suppliers Guidelines, INFCIRC/254, *supra* note 66, to be comparable to the guidelines described in THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL and, therefore, has also deemed them adequate.

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activities to physical protection categories according to their sensitivity, and the specific physical protection requirements for nuclear material in these different categories (e.g., screening of employees, physical barriers, guards and prearranged forms of government response to incidents).[149]

Ordinarily, the NRC regulations permit reliance on written assurances from the recipient government and "available relevant information" in determining whether the required physical protection will be applied to U.S. exports.[150] The written assurances may take the form of ad hoc or generic assurance statements, or confirmation than an export will be received pursuant to an agreement for cooperation containing the necessary physical protection guarantees.[151] For the most sensitive materials, NRC regulations additionally require a "[r]eview of the physical security program established by the recipient country and of the implementation of the national requirements, as considered through country visits and other information exchanges," to ensure that the required physical security measures will be applied.[152] Under the most recent amendments to the Atomic Energy Act, the NRC is also specifically directed to consult with the Secretary of Defense concerning the adequacy of physical security on sensitive exports,[153] using the "regular consultation process" with the executive branch coordinated by the Department of State.[154]

There is a tension in this regulatory structure between reliance upon a foreign government's assurances, supplemented by knowledge of its laws and regulations, exchanges of technical information, and occasional reciprocal visits, and detailed oversight of the government's implementation of its physical security program, including, perhaps, as it applies to particular shipments. Because there is no supranational authority like the IAEA to "verify" the application of physical security, there may be a temptation to fill this void with bilateral inspections, as with fall-back safeguards rights. A variety of considerations counsel caution in approaching physical protection on the analogy of safeguards, however.

In physical protection, the U.S. and the recipient country share a strong common interest in deterring and preventing the misuse of nuclear materi-

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149. See THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL, *supra* note 143.

150. 10 C.F.R. § 110.43(b) (1988).

151. *See* NNPA Procedures, *supra* note 100, § 8(c). Agreements for cooperation concluded after the enactment of the NNPA generally incorporate the standards of THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL *supra* note 136, by reference. *E.g.*, Agreement for Cooperation with Sweden, *supra* note 117, Agreed Minute.

152. 10 C.F.R. § 110.43(a) (1988).

153. Atomic Energy Act § 133, 42 U.S.C. § 2160c (1982 & Supp. IV 1986).

154. Conference Report to accompany H.R. 4151, 99th Cong., 2d Sess. (1986) sec. 103. *See* NNPA Procedures, *supra* note 100, §§ 8(b), (g), (1).

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als. The recipient's interest in applying adequate measures is particularly strong because the nuclear material is located on its territory. Unlike safeguards, therefore, physical protection "verification" would do more than create disincentives and provide public reassurances about a recipient nation's intentions; it would serve essentially to second-guess the competence of the recipient.

Physical security also differs from safeguards because its purpose is fundamentally law enforcement, which most governments regard as falling exclusively within their domestic jurisdiction. For example, although the United States was recently successful in establishing a multilateral Convention on the Physical Protection of Nuclear Material,[155] the Convention deals primarily with nuclear materials in international transit, since most participants in the negotiations opposed international supervision of their domestic physical security activities.[156] Notwithstanding the Convention's useful procedures for international coordination on physical security measures,[157] its history suggests the U.S. is likely to encounter stiff resistance to proposals to conduct detailed supervision of another nation's domestic physical security system.[158] IAEA safeguards, on the other hand, have come to be accepted as a necessary confidence-building measure supporting peaceful nuclear commerce.

Finally, specific physical security needs, unlike safeguards, are difficult to generalize and can depend upon unique circumstances known only to the host government authorities, often on the basis of highly sensitive in-

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155. The Convention on the Physical Protection of Nuclear Material, *opened for signature* March 3, 1980 (entered into force Feb. 8, 1987), *reprinted in* Sen. Exec. H., 96th Cong., 2d Sess. (May 9, 1980), 18 I.L.M. 1419, 1422.

156. *See* Comments on the Draft Convention on Physical Protection of Nuclear Material, International Atomic Energy Agency Doc. CPNM/80 (1979) *reprinted in* INTERNATIONAL ATOMIC ENERGY AGENCY, LEGAL SERIES NO. 12 (1982) [HEREINAFTER COMMENTS] (Comments of Cuba, Spain, and India, *et al.*, contain expressions of opposition to international supervision of domestic physical security activities). Therefore, the Convention requires particular security levels to be maintained on domestic materials only while they are being shipped domestically through international waters or air space. *See supra* note 155, art. 4, para. 4. International shipments transiting a party's territory or being conveyed to or from its territory by a ship or aircraft under its jurisdiction need only be protected at the Convention levels "as far as practicable." *Id.*, art. 3. The Convention does, however, establish a prosecution or extradition obligation for offenses related to nuclear materials even if they are not in international transit. *Id.* arts. 7-13.

157. The Convention establishes a system in which an exporting state party, importing party, or transited state party will have responsibility for "receiving assurance" that the Convention levels of physical protection will be applied for each international shipment involving the territory of a party. *Id.* art. 4, paras. 1-3. The Convention also provides for international coordination in the event of thefts of nuclear material. *Id.* art. 5.

158. *See* Comments, *supra* note 156.

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formation. Foreign nations are thus much less likely to be tolerant of what might be regarded as an intrusion on their security than of safeguards. The same might be true of the United States if it were asked to allow foreign supervision of its physical security programs.[159]

Consent Rights

Peaceful use assurances, safeguards, and physical protection guarantees are general legal conditions for U.S. exports of nuclear reactors and fuel. The remaining U.S. legal controls are intended to provide the United States with rights of consent over specific peaceful uses made of these items. At the time of transfer the United States usually knows the immediate use intended for an export. Nuclear exports, however, may have an extended life. In the case of reactors, successive fuel bundles may be irradiated in a single facility; in the case of nuclear fuel, processing either before or after irradiation can yield isotopic compositions of special nonproliferation concern. Consent rights therefore provide the United States with the opportunity to affect a recipient's fuel cycle decisions as U.S.-supplied items are considered for additional uses.

The specific U.S. consent rights include: a right over the transfer of nuclear exports to other countries ("retransfer");[160] a right over the storage conditions for particularly sensitive materials ("storage");[161] a right over the enrichment of uranium to higher concentrations of the fissionable isotope U-235 ("enrichment");[162] and a right over the physical or chemical alteration of specified nuclear material, particularly irradiated nuclear material, which may provide readier access to sensitive materials ("altera-

159. The United States, for example, has refused to accord access to all its nuclear facilities for safeguards purposes. *See supra* note 46 and accompanying text. Some of these facilities perform both civil and military functions, such as enrichment and reprocessing plants.

160. This is both an export criteria, Atomic Energy Act § 127(4), 42 U.S.C. § 2156(4) (as amended), and a requirement for new or amended agreements for cooperation. Atomic Energy Act § 123(a)(5), 42 U.S.C. § 2153(a)(5).

161. This is not an export criterion, but is required in new or amended agreements for cooperation. Atomic Energy Act § 123(a)(8), 42 U.S.C. § 2153(a)(8).

162. This was added as an export criterion by Section 402 of the Nuclear Non-Proliferation Act, 42 U.S.C. § 2153a(a), and applies "[e]xcept as specifically provided in any agreement for cooperation . . . ." New or amended agreements must contain a U.S. right of prior approval over enrichment of designated materials, Atomic Energy Act § 123(a)(7), 42 U.S.C. § 2153(a)(7). Reading these two sections together, agreements concluded since 1978 have generally provided blanket authorization for enrichment to twenty percent U-235 and required U.S. consent for higher enrichment levels. *E.g.*, Agreement for Cooperation with Sweden, *supra* note 117, art. 8, para. 3. The Interagency Procedures adopted pursuant to the NNPA also provide advance approval to enrichment of NRC licensed exports where enrichment has been identified to the executive branch as the purpose of the export at the time of review. NNPA Procedures, *supra* note 100, § 17(b).

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tion or reprocessing").[163] Two legal issues are posed by each of these consent rights. First, to which items do the rights apply, and second, how are the rights to be exercised.

The Scope of the Consent Rights

By inadvertence or design, the text of the Atomic Energy Act applies each of the consent rights to a different category of items. For example, the retransfer right covers transferred nuclear reactors and fuel and any special nuclear material produced through their use.[164] In contrast, the storage right only requires U.S. approval of facilities before they contain separated plutonium, uranium-233, or highly enriched uranium transferred from the United States or "recovered" from either U.S.-origin nuclear material or nuclear material used in a U.S.-origin reactor.[165] The other consent rights similarly diverge in their coverage.[166]

The varying coverage of the required consent rights poses practical and theoretical difficulties. As an administrative matter, foreign countries (and the United States, if the rights are applied reciprocally) must establish extraordinarily complex systems to track the nuclear material subject to each of the rights. It is impossible simply to denominate material as "sub-

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163. Although it differs in scope for the two cases, this is both an export criterion, Atomic Energy Act § 127(5), 42 U.S.C. § 2156(5), and a requirement in new or ameneded agreements for cooperation. Atomic Energy Act § 123(a)(7), 42 U.S.C. § 2153(a)(7). U.S. agreements for cooperation have uniformly excluded simple "irradiation" from the reach of this consent right, *e.g.* Agreement for Cooperation with Sweden, *supra* note 117, art. 8, para. 2, perhaps because transfers of nuclear reactor fuel have historically been for this specific purpose.

164. This is the formulation in new or amended agreements for cooperation. The export criterion for retransfers does not apply to special nuclear material produced through the use of transferred reactors. Atomic Energy Act § 127(4), 42 U.S.C. § 2156(4).

165. Atomic Energy Act § 123(a)(8), 42 U.S.C. § 2153(a)(8). The statute refers to "recovered" nuclear material because of the ability to separate and recover specific isotopes through chemical reprocessing.

166. The enrichment prior consent rights in new or amended agreements apply to transferred nuclear material and nuclear material used in or produced through the use of any transferred material or reactors; as an export criterion it applies only to transferred nuclear material. *See supra* note 162 and accompanying text. The reprocessing consent right in new or amended agreements has the same scope as the enrichment right, while as an export criterion it does not apply to nuclear material "used in or produced through the use of" U.S. origin reactors. *See supra* note 163 and accompanying text. Despite their similar coverage in new or amended agreements, enrichment and reprocessing consent rights are actually not relevant to the same materials; as a general rule, unirradiated uranium may be enriched but not reprocessed, whereas spent fuel may be reprocessed but not enriched.

Finally, the alteration right in new or amended agreements applies only to plutonium, uranium-235, highly enriched uranium and irradiated nuclear material satisfying the coverage for enrichment and reprocessing and as an export criterion it is limited in the same manner as reprocessing. *See supra* note 163 and accompanying text.

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ject to the U.S. agreement," since different material will be subject to the agreement in different ways—some for purposes of the retransfer right, others for the enrichment right, and so on.[167] In fact, the necessity of creating and administering perhaps a dozen separate tracking systems may impose an administrative burden heavy enough to discourage nuclear cooperation with the United States.

As important, the disparate coverages pose definitional issues that determine precisely how U.S. controls will affect a cooperating partner's nuclear program. For example, the law can be read to cover nuclear material "used in" nuclear material.[168] This has no settled meaning and could be either an artifact of the statute's drafting or the creation of a new category apart from nuclear material "produced" through the use of other nuclear material. Since the law calls for new agreements to contain greater consent rights than those previously granted,[169] cooperating partners should know precisely how the new controls expand upon those in existing agreements. The uncertain scope of the coverage of these new controls makes not only for difficult negotiations, but can foster a belief that the United States is seeking to control a cooperating partner's peaceful nuclear program for reasons unrelated to nonproliferation concerns.

Administration of the Consent Rights

If U.S. motives are not trusted, or if its requirements are obscure, enhanced consent rights not only will be unachievable, but the United States may lose cooperating partners and the concomitant ability to influence their nuclear programs. The law already is inflexible concerning the basic safeguards conditions for cooperation. The United States therefore no longer exports significant nuclear items to countries refusing full-scope safeguards and plays a very limited role, if any, in the nuclear programs of most of the countries which have refused to join the nonproliferation treaties (e.g., Argentina, Brazil, India, Israel, Pakistan, and South Africa).[170] Implementation of the consent right requirements of the law has been approached with greater flexibility, in part to encourage the remain-

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167. The consent rights differ in coverage not only among themselves but also from the peaceful use, safeguards, right of return and physical protection guarantees as discussed *supra* notes 84-105 and accompanying text.

168. *E.g.*, Atomic Energy Act §§ 123(a)(6), (7), 42 U.S.C. §§ 2153(a)(6), (7) (covering nuclear material "used in" U.S.-origin nuclear material for purposes of a U.S. consent right over enrichment, reprocessing and alteration). *See also* Atomic Energy Act § 123 (a)(1), 42 U.S.C. § 2153(a)(1) (safeguards).

169. *See supra* note 92.

170. *See supra* note 103.

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ing eligible cooperating partners to accede to the full panoply of U.S. legal conditions. Three specific techniques have been employed in recent agreements for cooperation.

First, with expanding U.S. controls there is greater likelihood that U.S. consent rights will overlap those of other countries engaged in nuclear trade with the cooperating partner. For example, a recipient of a U.S. reactor might find spent fuel subject to both U.S. controls and those of the fuel supplier. This increases the administrative burden of tracking nuclear material and the possibility that permission to conduct the controlled activities will be refused or intolerably delayed. Recent agreements, as encouraged by the NNPA,[171] have therefore provided for the possiblity of arrangements with other supplier nations for the exercise of overlapping U.S. consent rights.[172] This mechanism has not been utilized yet, so it remains unclear how flexible U.S. law will be in practice.[173]

Second, and of greater immediate importance, recent agreements also have incorporated the principle of "proportionality" for calculating the U.S. share of special nuclear material produced in a non-U.S. reactor when both U.S. and third country fuels are used.[174] The proportionality formula differs from the "contamination" principle, applied in the case of peaceful use assurances, because it permits consent rights over the produced special nuclear material to be apportioned according to suppliers' relative contribution of nuclear fuel.[175] With the introduction of more complex reactor types, especially breeder reactors, applying a principle of proportionality presents technical and accounting issues.[176] But it reintroduces an element of causation into U.S. claims over derived material,

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171. Atomic Energy Act § 126(a)(1)(C), 42 U.S.C. § 2155(a)(1)(C).

172. *E.g.*, Agreement for Cooperation with Sweden, *supra* note 117, art. 9.

173. The Atomic Energy Act appears to contemplate allocation of responsibility for exercising consent rights to another supplier at the time of export. Atomic Energy Act § 126(a)(1)(C), 42 U.S.C. § 2155(a)(1)(C). If such an arrangement is concluded pursuant to the provisions of an agreement for cooperation after export, presumably it would be treated as a subsequent arrangement in accordance with Section 131 of the Atomic Energy Act, 42 U.S.C. § 2160. *See infra* note 177.

174. *E.g.*, Agreement for Cooperation with Sweden, *supra* note 117, Agreed Minute, para. 12.

175. The meaning of a rule of proportionality for U.S. consent rights was explored in detail in the hearings on the Agreement for Cooperation with Australia. *See supra* note 124.

176. A breeder reactor, so-named because it produces more plutonium than it consumes, can contain a core of plutonium oxide and/or enriched uranium fuel elements and a blanket of uranium depleted in the fissionable isotope U-235. The core fuel elements make the major contributions to fission reactions, while the non-fissionable U-238 in both core and blanket elements absorb neutrons which produces plutonium. Each isotope thus may make a different contribution to the production and burning of the plutonium in the reactor, creating significant complexities in administering a principle of proportionality for the plutonium discharged from the reactor. *See* THE NUCLEAR AGE, *supra* note 105, at 41-45.

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helping to delimit the scope of U.S. consent rights in a more easily defended manner.

Finally, the United States has sought to foster the confidence of its cooperating partners that U.S. controls will be exercised in a stable and predictable manner by providing long-term consents. Historically, such consents have been accorded on a case-by-case basis, introducing great uncertainty into programs requiring multi-billion dollar investments.[177] The Atomic Energy Act, however, provides that U.S. consent rights may be exercised in advance of proposed activities,[178] and authorizes conditions of approval to be contained in agreements for cooperation or agreements subject to comparable congressional review procedures.[179]

Several new agreements for cooperation have been concluded (including a controversial agreement with Japan), and comparable arrangements have been offered to the European Atomic Energy Community

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177. Since 1978, individual approvals must be processed as "subsequent arrangements," *see* Atomic Energy Act § 131, 42 U.S.C. § 2160, *added by* § 303 of the Nuclear Non-Proliferation Act, Pub. L. No. 95-242, § 303(a), 92 Stat. 127 (1979), in which the Secretary of Energy makes the necessary statutory determinations, with the concurrence of the Secretary of State, and in consultation with the Secretary of Defense, Director of ACDA and the Nuclear Regulatory Commission. Atomic Energy Act § 131(a)(1), 42 U.S.C. § 2160(a)(1); NNPA Procedures, *supra* note 100, § 15. In all cases, proposed subsequent arrangements must be determined "not [to] be inimical to the common defense and security," and for retransfers the recipient must agree to the application of the U.S. export criteria. Atomic Energy Act § 127(4), 42 U.S.C. § 2156(4). In the case of reprocessing, transfers for reprocessing, or transfers of greater than 500 grams of plutonium recovered through reprocessing, the Secretaries of Energy and State must make the further judgment that;

> [s]uch reprocessing or retransfer will not result in a significant increase of the risk of proliferation beyond that which exists at the time that approval is requested . . . [giving] foremost consideration . . . to whether or not the reprocessing or retransfer will take place under conditions that will ensure timely warning to the United States of any diversion well in advance of the time at which the nonnuclear-weapon state could transform the diverted material into a nuclear explosive device . . . .

Atomic Energy Act § 131(b)(2), 42 U.S.C. § 2160(b)(2); *see also* Atomic Energy Act § 133, 42 U.S.C. § 2160c (requiring Secretary of Energy to consult with Secretary of Defense and others on adequacy of physical protection against international terrorism for sensitive nuclear materials during international transport).

Notice of all proposed subsequent arrangements must be published in the Federal Register fifteen days before taking effect, Atomic Energy Act § 131(a)(1), 42 U.S.C. § 2160(a)(1), and subsequent arrangements involving reprocessing, transfers for reprocessing or transfers of more than 500 grams of recovered plutonium must be reported to Congress for 15 continuous session days, unless the President determines an "emergency exists due to unforeseen circumstances," in which case the period is 15 calendar days. Atomic Energy Act § 131(b)(1), 42 U.S.C. § 2160(b)(1).

178. *See* Atomic Energy Act § 131(a)(3), 42 U.S.C. § 2160(a)(3) (timely consideration to be given to requests for reprocessing of materials *not yet* exported or irradiated).

179. *Id.*

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(EURATOM), in which the United States has assured its cooperating partners of U.S. consent to specified activities within the partner's designated nuclear program so long as U.S. statutory requirements continue to be met.[180] The cooperating partner must provide the United States with detailed information about its activities, and the United States may revoke its consent if the activities pose a threat to U.S. national security or non-proliferation interests, the standards embodied in U.S. law for providing consent in the first instance.[181]

The faithfulness of programmatic consent to the law depends upon the continuing, conscientious scrutiny of how that consent is being used in

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180. The agreements already concluded are with Japan, Finland, Sweden, and Norway. Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy, Nov. 4, 1987, United States-Japan, H. Doc. No. 128, 100th Cong., 1st Sess. (entered into force July 17, 1988), Dep't. of State Bull. 93 (Aug. 1988) [hereinafter Agreement with Japan]; Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy, May 2, 1985, United States-Finland, H. Doc. No. 71, 99th Cong., 1st Sess. (not yet in force) [hereinafter Agreement with Finland]; Agreement for Cooperation with Sweden, *supra*, note 117; Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy, Jan. 12, 1984, United States-Norway, H. Doc. No. 164, 98th Cong., 2d Sess. The agreements with Finland and Sweden authorize source and low enriched uranium to be sent abroad for fuel cycle services. Agreement with Finland, art. 3, § 2; Agreement with Sweden, art. 3, § 2. All four agreements permit spent fuel to be sent to reprocessing facilities in the United Kingdom and France. *E.g.*, Agreement with Japan, Implementing Agreement, art. 1. The agreement with Japan proved controversial with some in Congress because it also provides for the return of plutonium to Japan after reprocessing, as well as for reprocessing in Japan and the use of plutonium in advanced reactors, some of which have not yet been built. *See e.g.*, S. Rep. No. 275, 100th Cong., 1st Sess. 8 (1987) (Senate Foreign Relations Committee Report recording 15-3 vote "to send to the President a letter indicating the committee's unhappiness with the agreement.") *But see* 134 Cong. Rec. S2669-71, 2677 (daily ed. Mar. 21, 1988) (Presidential response to letter, and Senate vote of 53 to 30 against a resolution disapproving the agreement with Japan). These programmatic consents are contained in Agreed Minutes or Implementing Agreements which are treated as an integral part of the underlying agreements for cooperation for purposes of Congressional review. The offer of programmatic consent to EURATOM parallels that already accorded Japan. *See* Factbook, *supra* note 10, at 234-54 (Administration policy statements); Report Pursuant to Section 601, *supra* note 19, at 42, 46-47.

181. *See* Atomic Energy Act §§ 131(a), (b), 42 U.S.C. §§ 2160(a), (b) (national security and non-proliferation tests for subsequent arrangements); Atomic Energy Act § 123(b), 42 U.S.C. § 2153(b) (requirement that agreements "promote" the national security). The executive branch analyses accompanying the agreements containing programmatic consents have emphasized that all the substantive and procedural requirements for *both* agreements for cooperation and subsequent arrangements had been met. *E.g.* Agreement for Cooperation with Sweden, *supra* note 117, at 83-84 (Non-Proliferation Assessment Statement for Agreement with Sweden); Agreement with Japan, *supra* note 180, at 213-14 (analysis of consents in agreement prepared by executive branch); *See* Cong. Rec. *supra* note 180 at S2669. The executive branch has not stated whether it believed this was required, however. One lawsuit challenged the practice of including programmatic consents in agreements for cooperation, but was dismissed on political question grounds. Cranston v. Reagan, 611 F. Supp. 247 (D.D.C. 1985), and an effort to block the Agreement with Japan on those grounds failed in the Senate. *See supra* note 180.

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practice. This requires a high degree of oversight, not only by the executive branch over foreign nuclear activities, but by the Congress over how the Executive is interpreting U.S. national security and nonproliferation interests.[182]

Controls on Other Exports of Possible Proliferation Significance

For nonproliferation purposes, U.S. law also regulates the export and subsequent use or transfer of commodities other than nuclear reactors and fuel having potential nuclear explosive significance. Unlike nuclear reactors and fuel, however, export of these items does not require an agreement for peaceful nuclear cooperation. These residual items fall into three categories: (1) nuclear components and moderator material; (2) nuclear technology; and (3) dual-use items with possible nuclear applications.

Components and Moderator Material

The operation of nuclear reactors involves hundreds of pieces of hardware and specialized chemicals for controlling the fission process. By regulation, four pieces of equipment have been designated as "reactors" for export purposes; pressure vessels, control rods, primary coolant pumps, and on-line charging and discharging machines.[183] Pursuant to the NNPA, the Nuclear Regulatory Commission was directed to designate and to control the export of other component parts of reactors and substances used in reactors which "are especially relevant from the standpoint of export control because of their significance for nuclear explosive pur-

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182. A vehicle for Congressional oversight exists in section 602(c) of the NNPA, 22 U.S.C. § 3282(c), which requires the executive branch to keep three designated committees of Congress "fully and currently informed . . . with respect to the current activities of foreign nations which are of significance from the proliferation standpoint." In addition, annual written reports on the implementation of U.S. nuclear cooperation policy are required to be submitted by the President to the Congress as a whole. Nuclear Non-Proliferation Act § 601(a), 22 U.S.C. § 3281(a).

The risk that Congressional oversight might be eroded as a result of advance, long-term consents was a primary focal point during Congressional review of the new U.S.-Japan Agreement. *See, e.g.*, United States-Japan Nuclear Cooperation Agreement, Hearings Before the Comm. on For. Affairs of the House of Rep., 100th Cong., 1st & 2d Sess. 429-520 (1988). Comptroller General opines that long-term consents may be contained in agreements for cooperation but that consents contained in the U.S.-Japan Agreement are unconsistent with law because, *inter alia*, Congress is deprived of its oversight function for reprocessing and plutonium use in nonnuclear-weapon states. After congressional review was completed, but before the Agreement entered into force, the executive branch gave assurances to congressional oversight committees that they would be informed of significant developments in the Agreement. *Id.* at 521-24 (letter from Acting Secretary of State to Chairman of House Foreign Affairs Committee).

183. 10 C.F.R. § 110.2. *See* Atomic Energy Act § 11(cc), 42 U.S.C. § 2014(cc) (general definition of "utilization facility").

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poses."[184] These "components" and "moderator materials" may be exported outside of an agreement for cooperation, but not without the application of IAEA safeguards, an assurance against explosive use, and prior U.S. consent over retransfers.[185] The other conditions applicable to fuel and reactor exports are not demanded: *de facto* full scope safeguards, a right of return, adequate physical protection, and consent rights over storage, enrichment, and reprocessing or alteration of associated nuclear materials. The NRC may license the export of components and moderator materials if, after consultation with the executive branch, it determines that the three required conditions are satisfied and that the export "will not be inimical to the common defense and security."[186]

There have been efforts from time to time since enactment of these controls to align the conditions for component and moderator material exports with those for nuclear reactors and fuel.[187] In support of these efforts, it has been argued that U.S. policy should be more consistent: if full-scope safeguards and rigorous nonproliferation controls under an agreement for cooperation are required for one form of nuclear cooperation, the same framework should govern all forms of nuclear cooperation. It is pointed out that the policy considerations favoring stringent controls—to assure peaceful uses and to provide an incentive for recipients of U.S. technology to accept full-scope safeguards—appear to apply with equal force to all nuclear commodities. In response, it has been stressed that components and moderator material are far less technically significant than reactors and nuclear fuel. Such items provide an opportunity for the United States to retain at least some links to the nuclear programs of countries otherwise ineligible for nuclear trade, and allow for potential U.S. influence on their

184. Nuclear Non-Proliferation Act § 309(a), 42 U.S.C. § 2139(b) (*amending* Atomic Energy Act § 109(b)).

185. *Id.* As with nuclear reactors and fuel, the President may authorize export of these items by executive order upon a national security or non-proliferation finding even if the statutory requirements are not met. Atomic Energy Act § 109(b), 42 U.S.C. § 2155(b)(2).

186. The executive branch must concur in the NRC's non-inimicality finding. Atomic Energy Act § 109(c), 42 U.S.C. § 2139(c). In practice, the NRC has established broad general licenses, with executive branch concurrence, obviating the need for individualized review of specified component and moderator material exports to designated countries. 10 C.F.R. § 110.24 (deuterium); 10 C.F.R. § 110.25 (nuclear grade graphite); 10 C.F.R. § 110.28 (embargoed destinations); 10 C.F.R. § 110.29 (restricted destinations). *See* NNPA Procedures, *supra* note 100, § 9b (exports for which executive branch review is not required). *Cf. id.* §§ 16, 18 (generic approval for certain retransfers of components).

187. One example is a Nuclear Explosives Control Act, introduced into the 97th, 98th and 99th Congresses. *See e.g.*, 131 CONG. REC. 1638 (1985) (remarks of Rep. Howard Wolpe); 129 CONG. REC. 2093 (1983) (same).

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domestic programs and export policies.[188] In practice, limited (though sometimes controversial) trade in components and moderator materials has continued with several countries which are ineligible to receive U.S. reactors or fuel.[189]

Nuclear Technology

In addition to focusing upon tangible commodities, U.S. export restrictions also apply to the transfer of information and services which might facilitate a foreign nuclear program. The Atomic Energy Act requires prior approval for United States persons "to directly or indirectly engage in the production of any special nuclear material outside of the United States."[190] This statutory mandate is broad enough to reach such traditional activities as the training of foreign reactor operators (even in the United States) and assistance in designing foreign nuclear facilities.[191] It also encompasses assistance which is considered more sensitive because of its utility in nuclear activities which result in or provide access to weapons-usable materials. This category is denominated "sensitive nuclear technology" and covers the transfer of information, whether or not in tangible form, "which is not available to the public and which is important to

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188. *See, e.g.*, HOUSE COMM. ON FOREIGN AFFAIRS, LEGISLATION TO AMEND THE NUCLEAR NON-PROLIFERATION ACT OF 1978, 97th Cong., 2d Sess. 397-98 (1982) (executive branch letter by the Assistant Secretary of State for Congressional Relations).

189. Such trade with South Africa is now barred by the Comprehensive Anti-Apartheid Act of 1986, § 307(a)(1), 22 U.S.C. § 5057(a)(1) (Supp. IV 1986). A middle option between the export criteria for components and moderator material and those for reactors and nuclear fuel are the controls required in new or amended agreements for cooperation for components and moderator material transferred under such agreements, which are stricter than for such transfers outside an agreement. *See* Atomic Energy Act § 123(a), 42 U.S.C. § 2153(a) (including full-scope safeguards). Although agreements with these requirements have been concluded, it has not been U.S. practice to require component and moderator material exports to take place under the agreements.

190. Atomic Energy Act § 57(b), 42 U.S.C. § 2077(b). The Act also controls two further categories of nuclear information. Some information is classified as "restricted data" and may not be transferred without a specific Presidential national security determination and an applicable agreement for military cooperation. Atomic Energy Act § 11(y), 42 U.S.C. § 2014(y) (definition of restricted data), Atomic Energy Act § 144, 42 U.S.C. § 2164 (requirements for transfer). This data relates primarily to atomic weapons and naval propulsion. *See id.* The second category of controls applies to "Unclassified Controlled Nuclear Information" and is administered by the Secretary of Energy. Atomic Energy Act § 148, 42 U.S.C. § 2168, 10 C.F.R. § 1017 (1988). This information is controlled because, although unclassified, it concerns U.S. atomic defense programs (for example, security measures for nuclear weapons) and its unauthorized disclosure could reasonably be expected to have a significant adverse effect on the health and safety of the public or the national security (for example, by significantly increasing the likelihood of the illegal procurement of nuclear weapons or theft, diversion, or sabotage of nuclear materials, equipment, or facilities). *See id.*

191. *See* 10 C.F.R. § 810 (1988).

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the design, construction, fabrication, operation or maintenance of a uranium enrichment or nuclear fuel reprocessing facility or a facility for the production of heavy water."[192]

The Department of Energy, with the concurrence of the Department of State, is charged with determining whether a proposed activity involving nuclear information transfers "will not be inimical to the interest of the United States."[193] To facilitate nonsensitive transactions, the Department of Energy has by regulation established broad generally authorized categories, based upon the nature of the transaction and/or the nonproliferation credentials of the recipient nation.[194] In the case of sensitive nuclear technology, the transfer may not be authorized unless additional criteria are satisfied, including full-scope safeguards, peaceful use assurances, and retransfer controls.[195]

Because technology (when viewed as information) is not exhausted by its initial use, the controls over sensitive nuclear technology also extend to any additional facilities constructed "by or through" the use of the sensitive technology and to the special nuclear material produced through their use.[196] Thus, if sensitive technology were ever to be transferred by the United States, a difficult burden of proof question could arise as to which future facilities of a similar type in the foreign jurisdiction should be

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192. Nuclear Non-Proliferation Act § 4(a)(6), 22 U.S.C. § 3203(a)(6); 10 C.F.R. § 810.3 (1988). The export of some of the key components embodying this technology is subject to additional controls. Under § 402(b) of the NNPA, 42 U.S.C. § 2153a(b), a "major critical component of any uranium enrichment, nuclear fuel reprocessing, or heavy water production facility" requires an agreement for cooperation specifically authorizing such transfers. It is reserved to the President to determine when a component is "essential to the operation" of such facilities and thus a "major critical component" for purposes of the statute. *Id.*

193. Atomic Energy Act § 57(b), 42 U.S.C. § 2077(b). If the transfer is to take place under an agreement for cooperation, it is considered a "subsequent arrangement" for which the Secretary of Energy takes the lead. *See* Atomic Energy Act § 131(a), 42 U.S.C. § 2160(a). If the transfer is to be an outside agreement, the Atomic Energy Act also designates the Secretary of Energy as the lead decision-maker. Atomic Energy Act § 57(b)(2), 42 U.S.C. § 2077(b)(2). *See* NNPA Procedures, *supra* note 100, § 12.

194. *E.g.*, 10 C.F.R. § 810.7 (1988). Categories established include furnishing public information, assisting in radiological emergencies, implementing the U.S.-IAEA safeguards agreement, participating in scientific meetings, and non-sensitive assistance to non-restricted countries (excluding assistance in the fabrication of nuclear fuel containing plutonium). *Id.*

195. Atomic Energy Act §§ 127, 128, 42 U.S.C. §§ 2156, 2157. If the transfer is to take place under an agreement for cooperation, slightly more stringent requirements are imposed. *See* Atomic Energy Act §§ 123(a)(3), (9), 42 U.S.C. §§ 2153(a)(3), (9).

196. Both the export criteria and new or amended agreements for cooperation require such facilities and their products to be treated as though transferred directly from the United States (either under or outside an agreement, as relevant). Atomic Energy Act § 127(6), 42 U.S.C. § 2156(6) (export criteria); Atomic Energy Act § 123(a)(9), 42 U.S.C. § 2153(a)(9) (agreements for cooperation).

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deemed subject to U.S. controls.[197] The sensitive nuclear technology controls also present other difficulties in application. The statutory definition emphasizes the "importance" of the information to the construction or operation of sensitive facilities.[198] It is not specified whether this is an objective standard, true for all countries, or whether its application depends upon the pre-existing abilities of the recipient to engage in the sensitive activities. The statutory definition also requires that the information not be available to the public.[199] Since information would not be commercially valuable if it were freely available to the public, its dissemination will always be limited to some extent. The statute provides no guidance as to when these commercial restrictions cease to qualify the information as sensitive technology. These issues have not had to be addressed because sensitive nuclear technology has not yet been transferred from the United States under the new controls.

Dual-Use Commodities

The remaining U.S. nuclear export controls are administered primarily by the Department of Commerce under the Export Administration Act.[200] The 1978 Nuclear Non-Proliferation Act required the establishment of procedures for the Commerce Department to control the export of items, other than those licensed by the NRC, "which could be, if used for purposes other than those for which the export is intended, of significance for nuclear explosive purposes."[201] A "nuclear referral list" was compiled by the Department of Commerce in consultation with other interested agencies to identify the items of special nuclear concern subject to the Export Administration Act.[202] These items range from metallurgical equipment

197. The Nuclear Suppliers' Guidelines, INFCIRC/254, *supra* note 66, app. § 6(b), adopt a slightly different approach, calling for IAEA safeguards on "any facilities of the same type . . . constructed during an agreed period in the recipient country."

198. Nuclear Non-Proliferation Act § 4(a)(6), 22 U.S.C. § 3203(a)(6).

199. *Id.* Department of Energy regulations provide a listing of categories of "public information," including, for example, information available in books or periodicals or presented at open meetings. 10 C.F.R. § 810.3 (1988) (defining "public information" and "open meetings").

200. 50 U.S.C. §§ 2401-20 (1982), *amended by* Pub. L. No. 99-64, § 102, 99 Stat. 120 (1985). The Department of State also regulates the export of munitions under the Arms Export Control Act, 22 U.S.C. § 2751 (1982). The applicable regulations, International Traffic in Arms Regulations, (ITAR) encompass some commodities of recognized nuclear explosives significance. *See* 22 C.F.R. Subchapter M (1988).

201. Nuclear Non-Proliferation Act § 309(c), 42 U.S.C. § 2139a (1978).

202. This is the subset of the Commodity Control List for which nuclear non-proliferation is identified as the reason for control. *See* 15 C.F.R. § 378.2 (1988). The Commerce Department also applies the procedures for nuclear non-proliferation review to commodities controlled for national security reasons which are destined for a nuclear end-user or end-use. *Id.*

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which could be used in constructing a nuclear weapon to the electronics necessary for evaluating a nuclear weapons test.[203]

The Department of Commerce also requires individual license reviews for exports of any commodity or technical data which an exporter has reason to know will be used "directly or indirectly" in designing, constructing, or testing a nuclear weapon, or in designing, constructing, or operating sensitive nuclear facilities, including facilities for the fabrication of nuclear reactor fuel containing plutonium.[204] Controls also exist for exports of technology to foreign maritime nuclear propulsion projects,[205] and for certain other technical data.[206]

When such controlled items are proposed for export, the Department of Commerce consults with the Department of Energy to determine whether, because of a proposed destination or other relevant considerations, the license should be reviewed by a special interagency "Subgroup on Nuclear Export Coordination."[207] This group is empowered to recommend action on the proposed license, including conditioning approval upon governmental or private assurances concerning the item's use and guarantees of access to verify that use. Any disagreements among the agencies may be submitted to senior level officials for resolution.[208]

The distinguishing feature of the commodities controlled under this system is their "dual-use" character; the commodities are well-suited for nonnuclear as well as nuclear applications. U.S. controls are thus potentially (and in practice) far broader than the NPT standard, which requires safeguards only on exports of equipment "especially designed or prepared for the processing, use or production of special fissionable material."[209]

There are costs to the approach adopted in U.S. law for dual-use items. The inevitable delays and uncertainties of the export process apply to a wide range of items. In cases where the United States insists upon assur-

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203. 15 C.F.R. § 399.1, Supp. 1 (1988).

204. 15 C.F.R. § 378.3 (1988).

205. 15 C.F.R. § 378.5 (1988).

206. 15 C.F.R. § 379.4(c) (1988). Recently, the United States announced conclusion of an informal arrangement among the leading potential Western suppliers of missile technology to limit the spread of nuclear weapons delivery capabilities. *See Nuclear Nonproliferation* 23 WEEKLY COMP. PRES. DOC. 395 (Apr. 20, 1987). The United States will implement this regime partly through Commerce licensing decisions, and partly through State Department decisions under the ITAR, *supra* note 193.

207. 15 C.F.R. § 378, Supp. 1 (1988). The NNPA requires the Department of Commerce "as required," to consult prior to ruling on a license request with the Departments of State, Energy, and Defense and ACDA. Nuclear Non-Proliferation Act § 309(c), 42 U.S.C. § 2139a.

208. *See* NNPA Procedures, *supra* note 100, § 20(d).

209. NPT, *supra* note 3, art. III, para.(2).

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ances, the recipient country may want to negotiate their precise terms or may even refuse to accept the U.S. controls. As a result, the United States may lose its attractiveness as a source for these commodities. The United States, however, is in a better position to screen dual-use exports for nuclear nonproliferation purposes than countries which rely upon a fixed list of nuclear-specific commodities. The United States can take into account such factors as end-user and end-use, which many countries cannot. This can be a cause for frustration for U.S. regulators, since other exporting nations may plead lack of legal authority to stop exports which the United States has worked hard to prevent on nonproliferation grounds.

SANCTIONS

The third central nonproliferation tool employed in U.S. law is the threat of sanctions. In the Atomic Energy Act,[210] the Foreign Assistance Act,[211] and the Export-Import Bank Act[212] the United States warns foreign nations that security, economic, or trade relations will be legally restricted if they engage in conduct deemed to be of nonproliferation concern. These threats are made on a unilateral basis and, in most cases, are made to all countries without distinction. To date, the United States has only halted ongoing assistance as a result of these sanctions provisions once, cutting off economic and security assistance to Pakistan for three years because of its receipt of sensitive technology from abroad without safeguards.[213]

A fundamental premise of these provisions is that the United States in fact enjoys the leverage these laws seek to codify. It is assumed that the threat of sanctions—backed up by domestic law binding upon the President—will introduce a specific cost into the calculations of foreign leaders when they consider actions of potential proliferation significance.[214] For

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210. Atomic Energy Act § 129, 42 U.S.C. § 2158.

211. Foreign Assistance Act §§ 669-70, 22 U.S.C. §§ 2429-29a, *amended by* Pub. L. No. 99-83, § 1204, 99 Stat. 277 (1985).

212. Export-Import Bank Act of 1945, § 2(b)(4), 12 U.S.C. § 635(b)(4) (as amended). *Cf.* 22 U.S.C. § 262d(b) (Secretary of Treasury to instruct Executive Directors of multilateral banks, in carrying out their duties, to "*consider* . . . whether the recipient country has detonated a nuclear device or is not a State Party to the Treaty on Nonproliferation of Nuclear Weapons or both") (emphasis added).

213. *See* Betts, *supra* note 10, at 130. When sanctions-triggering conduct may have occurred but the U.S. does not engage in the trade or provide the assistance that would be affected there is no need for a public determination of the statutes' applicability.

214. Statutory sanctions provisions can be seen as serving at least three other possible purposes: (1) in the case of a threatened cessation of nuclear cooperation, they may reflect a judgment that foreign assurances of peaceful uses may not be reliable in the wake of the sanction-triggering behavior

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the cost to seem real, the threat must be both credible and weighty. The strategy of sanctions, moreover, assumes a rational approach to decision-making by the foreign political process, and one which will not be derailed by emotional resistance to what the United States is demanding simply because of its intrusive nature. Finally, the sanctions path assumes that the United States is prepared to carry out the sanctions provided in the law in order to retain the policy's credibility, and to avoid raising doubts about the seriousness of the U.S. commitment to nonproliferation objectives.[215]

The Structure of U.S. Sanctions Legislation

The nonproliferation sanctions in U.S. law generally follow a common structure:

— They first describe the forms of assistance or trade which are at risk: under the Foreign Assistance Act, funds for particular purposes;[216] under the Atomic Energy Act, eligibility for exports of nuclear materials, components, and reactors;[217] and under the Export-Import Bank Act, eligibility for guarantees, insurance or credits.[218]

—They next describe the acts which will trigger these sanctions: transfers or receipts of sensitive technologies;[219] illegal procurement of U.S. com-

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(e.g., violation of IAEA safeguards); (2) even where confidence in the foreign nation's undertakings to the United States remains, the U.S. may regard being seen as a source of nuclear or nonnuclear assistance to a state engaged in actions of proliferation concern as detrimental to its non-proliferation interests; and (3) the statutory codification of political threats may be a symbolic expression to all countries of the non-proliferation values of the United States. This article focuses on the threat of sanctions as a manifestation of political leverage, however, because that is the role in which, as a domestic legal tool, the sanctions most directly attempt to influence foreign government behavior.

215. *See generally*, Scheinman, *Nonproliferation Regime: Safeguards, Controls, and Sanctions*, in THE NUCLEAR CONNECTION 177, 202-05 (A. Weinberg, M. Alonso & J. Barkenbus ed. 1985). One of the costs of imposing sweeping sanctions, of course, is that the U.S. may thereafter forego all influence over the target country's future actions.

216. At risk is aid authorized under the Foreign Assistance Act and the Arms Export Control Act. Foreign Assistance Act §§ 669(a), 670(a)(1), (b)(1), 22 U.S.C. §§ 2429, 2429a (a)(1), (b)(1) (1982 & Supp. IV 1986); Arms Export Control Act §§ 3, 4, 22 U.S.C. §§ 2753, 2754.

217. Atomic Energy Act § 129, 42 U.S.C. § 2158.

218. Export-Import Bank Act § 2(b)(4), 12 U.S.C. § 635(b)(4) (Supp. IV 1986).

219. The FAA sanctions apply to both enrichment transfers, § 669(a), 22 U.S.C. § 2429(a), and reprocessing transfers, § 670(a)(1), 22 U.S.C. § 2429a(a)(1). The AEA sanctions apply only to agreements for the transfer of reprocessing equipment, materials or technology. Foreign Assistance Act § 129(2)(C), 42 U.S.C. § 2158(2)(C). In both cases, the recipient of the transfer must be a nonnuclear-weapon state, but both the transferor state and transferee state risk the imposition of sanctions. The applicability of these provisions to transferors underscores the intended coercive effect of the law.

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modities for a nuclear weapons program;[220] violation of IAEA safeguards[221] or the conditions attached to U.S.-supplied nuclear commodities;[222] activities—or assistance to other countries in activities—with direct nuclear weapons significance;[223] or receipt, transfer, or detonation of a nuclear explosive device.[224]

—In some cases, the provisions offer mitigating conditions under which (alone or in conjunction with other conditions) the foregoing acts will not trigger sanctions: if the transfers or activities are carried out under multilateral auspices,[225] or pursuant to international understandings to which the United States subscribes,[226] or under international safeguards;[227] if the state subsequently has made "sufficient progress" toward terminating its

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220. Foreign Assistance Act § 670(a)(1)(B), 22 U.S.C. § 2429a(a)(1)(B). This provision applies to nonnuclear-weapon states that export illegally or attempt to export illegally from the United States items "which would contribute significantly" to their ability to manufacture a nuclear explosive device, and which the President determines were to be used for that purpose. *Id.*

221. Atomic Energy Act §§ 129(1)(B), (C), 42 U.S.C. §§ 2158(1)(B), (C) (nonnuclear-weapon states which are found by the President to have "terminated or abrogated IAEA safeguards," or "materially violated an IAEA safeguards agreement"); Export-Import Bank Act § 2(b)(4), 12 U.S.C. § 635(b)(4) ("materially violates, abrogates, or terminates" IAEA safeguards).

222. Atomic Energy Act § 129(2)(A), 42 U.S.C. § 2158(2)(A); Export-Import Bank Act, § 2(b)(4), 12 U.S.C § 635(b)(4).

223. Atomic Energy Act § 129(1)(D), 42 U.S.C. § 2158(1)(D) (engaged in activities with nuclear material "having direct significance for the manufacture or acquisition of nuclear explosive devices"), Atomic Energy Act § 129(2)(B), 42 U.S.C. § 2158(2)(B) ("assisted, encouraged, or induced any non-nuclear-weapon state" to engage in the activities described in Atomic Energy Act § 129(1)(D), 42 U.S.C. § 2158(1)(D)).

224. Atomic Energy Act § 129(1)(A), 42 U.S.C. § 2158(1)(A) (nonnuclear-weapon state found to have "detonated a nuclear explosive device"); Foreign Assistance Act § 670(b)(1)(A), 22 U.S.C. § 2429a (b)(1)(A) (transfer of nuclear explosive device to nonnuclear-weapon state), Foreign Assistance Act § 670(b)(1)(B), 22 U.S.C. § 2429a (b)(1)(B) (receipt or detonation by nonnuclear-weapon state of nuclear explosive device); Export-Import Bank Act § 2(b)(4), 12 U.S.C. § 635(b)(4) (detonation by nonnuclear-weapon state).

225. Atomic Energy Act § 129(2)(C), 42 U.S.C. § 2158(2)(C) (reprocessing agreement "in connection with an international fuel cycle evaluation in which the United States is a participant"); Foreign Assistance Act § 669(a)(1), 22 U.S.C. § 2429(a)(1) (enrichment transfers which are pledged to be placed "under multilateral auspices and management when available"); Foreign Assistance Act § 670(a)(1), 22 U.S.C. § 2429a (a)(1) (reprocessing transfers "associated with the investigation, under international evaluation programs in which the United States participates, of technologies which are alternatives to pure plutonium reprocessing").

226. Atomic Energy Act § 129(2)(C), 42 U.S.C. § 2158(2)(C) (reprocessing agreement "pursuant to a[n] . . . international agreement or understanding to which the United States subscribes").

227. Foreign Assistance Act § 669(a)(2), 22 U.S.C. § 2429(a)(2) (enrichment transfers under IAEA safeguards when "all nuclear fuel and facilities" in the recipient country are also under IAEA safeguards).

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proscribed activities;[228] or, if the technology involved is one promoted by the United States as an alternative to more sensitive processes.[229]

—In each case the President is afforded some authority to lift or avoid the sanctions on national interest, national security, or nonproliferation grounds.[230]

—Finally, in these statutes Congress reserves to itself the right to review the President's exercise of the statutory waiver authority, primarily through a congressional notice and waiting period before the waiver may take effect, during which expedited procedures are available for congressional action to block the waiver.[231]

As with export controls, this structure represents a balancing of domestic political interests as much as an effort to establish rules for international behavior. The laws, of necessity, govern U.S. not foreign conduct. They are an effort by the Congress to compel the Executive to administer nonproliferation policy in a designated fashion, based upon Congress' constitutional powers over appropriations and foreign commerce.[232] In the

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228. Atomic Energy Act § 129(1)(D), 42 U.S.C. § 2158(1)(D); Atomic Energy Act § 129(2)(B), 42 U.S.C. § 2158(2)(B).

229. Foreign Assistance Act § 670(a)(1), 22 U.S.C. § 2429a (a)(1) (reprocessing transfers "which are alternatives to pure plutonium processing").

230. Atomic Energy Act § 129, 42 U.S.C. § 2158 (Presidential determination that cessation of nuclear exports "would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security"); Foreign Assistance Act § 670(a)(2), 22 U.S.C. § 2429a(a)(2) (Presidential determination that cessation of nuclear exports or economic or security assistance "would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security"); Foreign Assistance Act § 669(b)(1), 22 U.S.C. § 2429(b)(1) (Presidential determination that termination of economic and security assistance "would have a serious adverse effect on vital United States interest[s]" and receipt of "reliable assurances that the country in question will not acquire or develop nuclear weapons or assist other nations in doing so"); Foreign Assistance Act § 670(b)(2Op)(A), 22 U.S.C. § 2429a (b)(2)(A) (1982 & Supp. IV 1986) (limited 30-day waiver if President determines "that an immediate termination of assistance to that country would be detrimental to the national security of the United States"); Export-Import Bank Act § 2(b)(4), 12 U.S.C. § 635(b)(4) (Supp. IV 1986) ("President determines that it is in the national interest for the Bank to guarantee, insure, or extend credit, or participate in the extension of credit in support of United States exports to such country").

231. Atomic Energy Act § 129, 42 U.S.C. § 2158; Foreign Assistance Act §§ 669(b)(2), 670(a)(3), 670(b)(2), 22 U.S.C. §§ 2429(b)(2), 2429a(a)(3), 2429a(b)(2). It should be noted that the provisions cited above include authorization for a legislative veto. The legislative veto, a mechanism by which one or both houses of Congress would, by resolution, overrule or "veto" a Presidential decision authorized by statute, was held unconstitutional in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). In the sanctions context, it remains to be seen how the President would respond to such Congressional action.

232. U.S. CONST. art. I, §§ 8, 9 (foreign commerce, appropriations). Aside from the constitu-

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tug and pull between the branches, the Congress has conceded that rigid, general legislation may not provide suitable rules for every situation the President might face. Therefore, the applicability of the legal sanctions depends in most cases upon difficult judgments entrusted to the President—judgments which, either because of the vagueness of the statutory standard, or the relative inaccessibility of the information upon which the judgments are to be based, or the lack of congressional expertise, are very difficult for Congress to review. Moreover, in nearly all cases the Congress has recognized the necessity of affording the President authority to waive the law where important national interests demand. Finally, although the President is required by law to keep the Congress informed of how these provisions are being administered,[233] with the invalidation of the legislative veto Congress now lacks an effective tool for overturning the President's action short of enactment of new law.[234]

A Brief Case Study

When viewed from abroad, it is uncertain whether the threat contained in such a convoluted and uncertain web of sanctions conveys the kind of clear statement of U.S. nonproliferation policy necessary to achieve the desired effect. A short review of how the statutory sanctions provisions have been applied in one sensitive region—South Asia—illustrates the

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tional question of whether the President's own foreign affairs powers could ever override these Congressional directives, there is the further question of what precisely these statutes purport to mandate the President to do. The statutes are drafted to require imposition of sanctions either if certain events occur or if the President makes specified findings. They seem to assume an Executive branch duty to determine the existence of the events or for the President to make the specified findings in appropriate circumstances but do not address operational issues such as burden of proof, reliability of intelligence versus public information, or the timing for reaching a conclusion. In at least one case, *see* Foreign Assistance Act § 670(a)(1)(B), 22 U.S.C. 2429a(a)(1)(B), the legislative history suggests the President has considerable flexibility in deciding how to implement the sanctions provisions. *See* H.R. REP. No. 99-39, 99th Cong. 1st Sess. 99 (in determining whether illegal export occurred, President may rely on a conviction—and thus presumably await the outcome of trial—or make a determination based on "all available evidence").

233. The waiver authorities by their terms require notification to Congress. In the case of waivers under the FAA, moreover, a separate statute requires annual reports to Congress on the activities of any country benefiting from a waiver. International Security and Development Cooperation Act of 1981, § 735, *codified at* 22 U.S.C. § 2429a-1. *See also* Nuclear Non-Proliferation Act, 602(c), 22 U.S.C. § 3282(c).

234. The AEA and FAA still contain concurrent resolution veto provisions; the Export-Import Act does not specify a means for the Congress to reverse the President's decision. The lack of a Congressional veto in the case of a Presidential decision to continue or renew financial assistance may not be highly significant in practice, since funds must be authorized and appropriated through affirmative Congressional action for the President's decision to continue to be effective.

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difficulty.

The dynamics of nuclear proliferation among the three key South Asian actors—Pakistan, India, and China—are complex. In 1964, based upon substantial assistance from the Soviet Union, China detonated its first nuclear device.[235] Ten years later, India detonated its "peaceful" explosive device.[236] Many observers attribute the Indian decision in large measure to its fears of a nuclear-armed China, with which it had had (and continues to have) serious border disputes.[237] The Prime Minister of Pakistan, in turn, stated that "[i]f India builds the bomb, we will eat leaves or grass, even go hungry but we will have to get one of our own."[238] While never admitting it, Pakistan is widely reported to have devoted substantial resources to arriving at a capability, if not an immediate intention, to produce nuclear weapons.[239] Albeit oversimplified, this portrayal suggests the highly interdependent nature of regional decisions to acquire nuclear explosive capabilities.[240]

U.S. sanctions legislation has applied inconsistently to each of these regional actors and has changed over time. The nuclear explosions of China and India predated the effective date of the statutory provisions.[241] Nevertheless, because the provisions incorporate the NPT's distinction between nuclear and nonnuclear-weapon states (whether a state's first test occurred before January 1, 1967), China is considered a nuclear-weapon state and India a nonnuclear-weapon state for purposes of U.S. statutory sanctions, which apply more strictly to nonnuclear-weapon states.[242] Also, the safeguards and guarantees that would be required as a condition of nuclear cooperation with India as a nonnuclear-weapon state are more

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235. STANFORD ARMS CONTROL GROUP, *supra* note 2, at 145-46. Ironically, China's weapons program seems to have been rapidly directed to counter a Soviet threat, although prompted originally by fears of the United States. *Id.*; Mohan, *Why Nations Go Nuclear*, in NUCLEAR PROLIFERATION IN THE 1980's 35-36 (W. Kincade and C. Bertram eds. 1982).

236. *See supra* note 10.

237. *See, e.g.*, STANFORD ARMS CONTROL GROUP, *supra* note 2, at 304; Strong, *The Nuclear Weapons States: Why They Went Nuclear*, in NUCLEAR PROLIFERATION IN THE 1980's, *supra* note 235, at 12; Betts, *supra* note 10, at 119-23.

238. Betts, *supra* note 10, at 113.

239. *Id* at 114; FACTBOOK, *supra* note 10, at 4.

240. *But see* Mohan, *supra* note 235, at 38 (criticizing "chain theory" or proliferation as applied to third world countries).

241. The AEA provisions are prospective from March 10, 1978; the FAA provisions are prospective from 1977, except for section 670(a)(1)(b) which is prospective from 1985. The Export-Import Act is prospective from October 26, 1977.

242. *See, e.g.*, Atomic Energy Act § 129(1), 42 U.S.C. § 2158(1); Foreign Assistance Act §§ 670(a)(1)(B), 670(b)(1)(B), 22 U.S.C. § 2429a(a)(1)(B), 2429a(b)(1)(B); Export-Import Act § 2(b)(4), 12 U.S.C. § 635(b)(4).

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stringent than for China and, in fact, required a cut-off of cooperation in 1980. Nuclear cooperation with China, in contrast, may be about to begin.[243] For all these reasons, India might see itself treated less favorably than China by U.S.

Pakistan, in turn, might make the same claim about its treatment under U.S. law vis-a-vis that of India. Because India's nuclear test predated U.S. legal provisions, it has been "grandfathered" (though later tests would not be). Pakistan, on the other hand, faces a cut-off under U.S. law should it test a first device. Further, India's use and development of sensitive nuclear technologies has relied upon indigenous resources since the enactment of U.S. sanctions legislation. Pakistan, in contrast, has acquired its enrichment and reprocessing capabilities more recently from abroad. Since U.S. law applies only to "transfers" or "agreements for the transfer" of enrichment and reprocessing technology, Pakistan has encountered continuing obstacles in its relations with the United States over the nuclear issue.

In 1979, faced with mounting evidence of transfers to Pakistan of sensitive technology and an inability to satisfy the applicable waiver standard, President Carter halted economic and security assistance to Pakistan (nuclear trade had previously been suspended).[244] The same year, the Soviet Union invaded neighboring Afghanistan, driving millions of refugees into Pakistan and placing it squarely on the front lines in the resistance to Soviet occupation. Persuaded that U.S. national interests favored a renewal of the assistance relationship with Pakistan (though not nuclear cooperation), Congress in 1981 authorized the President to waive the legal prohibitions on aid until 1987.[245] The President exercised that authority in 1982.[246]

Public reports of a Pakistani nuclear weapons program continued, how-

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243. Agreements with nuclear-weapon states need not provide for IAEA safeguards, full-scope safeguards, or a right of return. Atomic Energy Act §§ 123(a)(1), (2), (4), 42 U.S.C. §§ 2153(a)(1), (2), (4) (Supp. IV 1986). All that remains for cooperation to begin with China is compliance with the Joint Resolution approving the Agreement. *See supra* note 128.

244. *See* note 213, *supra* and accompanying text.

245. Section 736 of the International Security and Development Cooperation Act of 1981, Pub. L. 97-113, 95 Stat. 1561, added a new section, 620E, to the Foreign Assistance Act of 1961, 22 U.S.C. § 2375. Subsection d provided the President with the authority to waive the provisions of section 669 of the Foreign Assistance Act for Pakistan (receipt of enrichment technology) until September 30, 1987 "if he determines to do so is in the national interest of the United States." This responded to the President's apparent inability to certify under section 669(b)(1) that Pakistan had provided reliable assurances it would not acquire or develop nuclear weapons.

246. Presidential Determination No. 82-7, 3 C.F.R. § 241, 47 Fed. Reg. 9805 (Feb. 10, 1982), waived the provisions of section 669 for the full time period allotted, and also waived the provisions of section 670(a)(1) relating to receipt of reprocessing technology without reference to any time period.

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ever. Without revoking the President's waiver authority, Congress in 1985 attached two new conditions to the assistance program. First, the President was required to certify annually that "Pakistan does not possess a nuclear explosive device and that the proposed United States assistance program will reduce significantly the risk that Pakistan will possess a nuclear explosive device."[247] Second, in response to the conviction of an alleged Pakistani procurement agent for the illegal export of nuclear triggering devices from the United States, Congress added a new cut-off provision to the Foreign Assistance Act. It applies to any nonnuclear-weapon state which illegally exports significant commodities from the United States for a nuclear explosives program, after the amendment's effective date.[248]

In September of 1987 the special waiver authority for Pakistan expired.[249] After a variety of proposals were considered in the Congress, a simple thirty month extension based upon a Presidential national interest finding was enacted.[250] Before the President used this new authority, however, a Canadian citizen with ties to Pakistan was convicted by a U.S. court of attempting to smuggle enrichment equipment to Pakistan. On January 15, 1988, the President determined that the equipment was to be used by Pakistan in the manufacture of a nuclear explosive device.[251] This would have triggered new sanctions against Pakistan for engaging in illegal nuclear-weapons related procurement in the United States. However, the President waived these new sanctions.[252] At the same time, he renewed his waiver of the sanctions imposed on Pakistan for its earlier receipt of unsafeguarded enrichment technology.[253] In exercising these waiver authorities, the President cited the importance of continuing U.S.

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247. Section 902 of the International Security and Development Cooperation Act of 1985, Pub. L. 99-83, 99 Stat. 268, 22 U.S.C. § 2375(e). The President has made the required certification three times. *See* Presidential Determination No. 86-03, 3 C.F.R. § 427, 50 Fed. Reg. 50,237 (Dec. 10, 1985); Presidential Determination No. 87-3, 3 C.F.R. 275, 51 Fed. Reg. 40,301 (Oct. 27, 1986); Presidential Determination No. 88-4, 53 Fed. Reg. 773 (Dec. 17, 1987).

248. Foreign Assistance Act of 1961, § 670(a)(1)(B), 22 U.S.C. § 2429a(a)(1)(B). *See* H. Rep. 99-39, 99th Cong. 1st Sess. 99 (1985) (provision prompted by "1984 conviction of a Pakistani national for attempting illegally to export to Pakistan equipment of potential application to nuclear explosives").

249. *See* notes 245-246, *supra* and accompanying text. Technically, this meant the sanctions originally instituted in 1979 once again came into effect. However, because no budget had been approved by Congress, Pakistan was not actually deprived of any appropriated funds.

250. H.R.J. Res. 395, 100th Cong., 1st Sess. 100 (1988), Pub. L. No. 100-102, § 557, 101 Stat. 1329-170, *reprinted in* 12 U.S. CODE, CONG. & ADMIN. NEWS (Feb. 1988).

251. Presidential Determination No. 88-5, 53 Fed. Reg. 3325 (Jan. 15, 1988) (paragraph 1).

252. *Id.*, para. 2.

253. *Id.*, para. 3.

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aid to securing the withdrawal of Soviet troops from Afghanistan and in restraining the Pakistani nuclear program, as well as Pakistani assurances and administrative steps to prevent future illegal procurement in the United States.[254]

In sum, then, aid has continued to Pakistan notwithstanding its importation of unsafeguarded sensitive nuclear technology, its suspected nuclear explosives program, and its alleged illegal procurement activities in the United States. This has only been possible through a combination of Presidential waivers and special statutory authorities. In the future, continuation of aid is contingent upon congressional renewal of the special statutory authorities and annual presidential certifications designed to assure that Pakistan is exercising restraint in its nuclear program.

Meanwhile, India, which has tested a device and also engages in unsafeguarded uses of sensitive nuclear technology, is eligible for assistance without special executive or congressional action. China, as a nuclear-weapon state, is even less at risk of triggering sanctions as a result of its domestic nuclear program, and alone among the three regional states could be eligible for nuclear cooperation with the United States.

Since both China and India had a demonstrated nuclear weapons capability by the time U.S. sanctions legislation entered into effect, the benchmark for evaluating the legislation's role as a nonproliferation tool must focus upon Pakistan. According to presidential certifications in 1985, 1986, and 1987, Pakistan has stopped short of "possession" of a nuclear weapon. As part of his certification, the President has attributed this restraint to the continuation of U.S. economic and security assistance.[255] Whether or not this is the case, it would certainly appear that Congress has succeeded in forcing the executive branch to expend considerable diplomatic capital in an effort to keep Pakistan from taking steps that would trigger U.S. legal restrictions. To that extent Congress may feel that by its sanctions legislation it has not only brought the issue of nonproliferation into broader public view but has also helped mold U.S. foreign policy priorities.

The codification of U.S. nonproliferation policy through legislative sanctions, however, has had two unsettling effects in the South Asia context. First, the continuation of major assistance programs to Pakistan—despite the sanctions provisions and despite the widespread belief that Pakistan is engaging in nuclear weapons-related activities—may give the appearance that the United States is not committed to carrying out its

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254. *Id.*, paras. 2 & 3 and accompanying *Justification for Presidential Determination to Authorize Security Assistance for Pakistan.*

255. *See supra* note 247 and accompanying text.

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nonproliferation policies when other national security interests compete. This could diminish any influence the United States enjoys on the nuclear issue, both with Pakistan and the other regional states. Second, an ironic consequence of the increasingly refined statutory provisions is that the United States may now contribute to nuclear proliferation in the region if the President determines that Pakistan has become ineligible for aid. A failure by the President to certify that Pakistan "does not possess a nuclear device,"[256] for example, likely would be understood by India as confirmation that Pakistan has crossed the nuclear threshold. Even if the Indian government already makes its plans on the basis of this assumption, the U.S. action could set off public pressures in India for an overt weapons program, precisely the outcome both the President and the Congress are seeking to prevent.

CONCLUSION

The use of law by the United States as a tool for slowing the spread of nuclear weapons has elevated one among many possibly competing interests to a central role in the Executive's conduct of foreign policy. Because of its relative permanence and explicit character, legal codification of nonproliferation policy has symbolized the U.S. resolve to give primacy to nonproliferation values. The need to accommodate other interests and account for differences among nations at the same time has necessitated exceptions, either on the face of the law, in its application, or through its *ad hoc* revision. Domestically, this at times has translated into tension between the Executive and Congress over whether the law has been properly administered. Internationally, it may have given rise to skepticism over the U.S. commitment to nonproliferation.

To enhance the effectiveness of U.S. legal controls and overcome some of these difficulties, efforts at multilateralization continue—through promotion of universal adherence to the NPT,[257] harmonization of supplier policies,[258] and creation of an agreed program of international sanctions against states that engage in actions of serious proliferation concern.[259]

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256. *Id.*

257. *See* Nuclear Nonproliferation Act § 2(c), 22 U.S.C. § 3201 (Congressional declaration of policy to "strongly encourage" NPT adherence); REPORT PURSUANT TO SECTION 601, *supra* note 19, at 23-25 (executive branch actions to promote NPT adherence).

258. *See* Nuclear Nonproliferation Act § 403, 22 U.S.C. § 2153b (directive to President to seek international agreement on export policies); REPORT PURSUANT TO SECTION 601, *supra* note 19, at 13-15 (executive branch actions to develop common export policies, including upgrading of international trigger lists for safeguards, promotion of comprehensive safeguards as a condition of supply, and enlisting cooperation from newly emerging suppliers).

259. *See* Nuclear Nonproliferation Act § 203, 22 U.S.C. § 3243 (mandate to seek to negotiate

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Coordinating U.S. legal policy with that of other nations also carries costs, however: the NPT contains political compromises, permitting unsafeguarded military uses of nuclear energy and withdrawal from the treaty on only three months notice;[260] the international norm underlying a supplier consensus will almost certainly fall short of U.S. controls;[261] and a meaningful multilateral approach to sanctions, if it ever were achievable, would entail the loss of flexibility which U.S. statutes have thus far sought to preserve.

Some form of multilateralism will nevertheless be necessary to address the most significant defect in the current nonproliferation regime—the failure of key arms control treaties such as the NPT to attract the adherence of states with growing unsafeguarded nuclear programs. The United States cannot solve this problem alone through domestic legislation: U.S. exports have not proved a sufficiently attractive inducement for these countries to shape their policies to satisfy U.S. legal requirements for supply; cutting off any residual links to their programs, including minor components and dual-use items, also appears to have little prospect for changing their attitudes; and, U.S. sanctions legislation has not provided the leverage to shape their nuclear policies.

The United States will have to work with other states to exercise influence—through trade arrangements, financial assistance, or security assurances, for example—if it hopes to obtain nonproliferation commitments from the threshold states that have preserved a weapons option. Otherwise, the world risks a further widening of the "desperate armament race" President Truman foretold at the dawn of the nuclear age.

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common international sanctions for violations of material obligations regarding nuclear materials).

260. *See supra* notes 57-58 and accompanying text.

261. *See* Fischer, *National Policy Issues*, in THE NUCLEAR CONNECTION, *supra* note 215, at 133, 146-47.

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UNITED STATES COMMERCIAL TREATIES and INTERNATIONAL LAW

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The treaty with Israel contains a rather broadly phrased provision, in a national-treatment context, on engagement in business activities and on participation in domestic corporations. While each party reserves the right to limit the extent to which aliens may carry on or have interests in "the exploitation of land or other natural resources," and either party may require that rights to engage in mining on the public domain shall be dependent upon reciprocity, a most-favored-nation clause applies "in any event" to these activities.[99] The Japanese treaty has comparable provisions, but with reference to the reserved right of imposing "new limitations" upon the extent to which aliens are accorded national treatment as to specified activities (including exploitation of land or other natural resources), there is a rule against the application of these limitations to enterprises owned or controlled by treaty aliens at the time the new limitations are adopted. Each party may require that rights to engage in mining shall be dependent upon reciprocity. Furthermore, as to mentioned types of activities (including exploitation of natural resources) Japan is not obligated by the general most-favored-nation clause to accord to Americans treatment more favorable than that accorded to Japanese by the American States or Territories in which these Americans, respectively, are domiciled.[100]

It is now standard practice for the United States to include in its treaties of friendship, commerce and navigation (usually in accompanying protocols) a reciprocity clause with respect to mining on the public domain and, as has been indicated above, this would seem to bring the treaties into harmony with United States federal law. Treaties signed with Uruguay, Denmark and Colombia each specify most-favored-nation treatment, and the same standard for the organization of companies of the other party state. The Uruguayan treaty (Art. V, par. 2) specifies this standard (with respect, *inter alia*, to mining) "in cases in which national treatment can not be granted."

The rule of treaty interpretation which emphasizes the unity of the various parts would seem to apply particularly to a

[98] Continued
acquiring interests in, enterprises for engaging in commercial activities ..." and a most-favored-nation clause as to "industrial and other business activities...."

[99] Art. VII; Protocol, par. 4.

[100] Art. VII; Protocol, par. 4.

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commercial treaty. It is obvious that, besides provisions which refer directly to real property and to mining activity, many other provisions might need, in a complete analysis, to be taken into account. This would apply not only to what is in the general exceptions article in each of the recently concluded treaties (such as the exception relating to fissionable materials), but also to such provisions as those concerning taxation, compensation for expropriated property, the permissive rule in regard to corporations owned or controlled by third-state nationals or companies, and the provision, illustrated in the treaty with Israel, concerning "equitable treatment." [101]

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The traditional sensitiveness of peoples in regard to alien participation in the exploitation of their natural resources has naturally affected treaty policy. Discrimination on the basis of nationality has frequently applied to such natural resources as real property and minerals.

Bilateral treaties, which from a very early date have provided for disposal of real property inherited by an alien who by reason of his alienage was disqualified to continue in possession, have in some instances contained some type of provisions on the acquisition, ownership and use of real property. Aside from a few exceptional cases of extraterritoriality, there have not been serious departures, in the history of United States treaty-making, from the principle of mutuality with respect to the acquisition of real property and the activity of mining.

Limitations upon the rights and privileges given aliens have been the rule rather than the exception. From the side of the United States, these limitations have been commonly associated with the Constitutional division of power between the nation and the States, and with a policy of leaving to the States the regulation of land acquisition and use outside of federal territory and the public domain. Rights of aliens to *lease* have been specified in treaties more commonly than have rights to own.

Since the mid-nineteenth century there have at times been indications of the willingness of certain foreign states to accord national treatment in matters of real property as well as per-

[101] Art. I.

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GENERAL AGREEMENT ON TARIFFS AND TRADE

ACCORD GENERAL SUR LES TARIFS DOUANIERS ET LE COMMERCE

RESTRICTED

LIMITED C
GATT/CP.3/38

2 June 1949
ORIGINAL: ENGLISH

Contracting Parties
Third Session

Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 on the Agenda

Mr. Chairman:

I am extremely sorry that the Contracting Parties are going to have to listen to a continuation of a debate that has exhausted both the subject and the delegates in other international organizations of which most of the Contracting Parties are members. The charges that have been made by the Czechoslovak Delegate in the paper that he read on Monday of this week are essentially those that were made by his delegation and that of the Soviet Union in the General Assembly of the United Nations in November 1948 and in four separate meetings of the Economic Commission for Europe, the most recent being the meeting that was concluded last week in Geneva.

On each of these occasions proposals by Czechoslovakia or other countries of Eastern Europe have been rejected by the organization concerned. It is a temptation, therefore, to dismiss the latest repetition of these charges as merely another move in a long political debate and to spare the delegates the necessity of listening once again to the answer that has satisfied their representatives in the past. My delegation is not yielding to that temptation because the Delegate of Czechoslovakia has, this time, framed his charges in terms of the provisions of the General Agreement on Tariffs and Trade, and we believe that the Contracting Parties are entitled to hear the answer, also cast within the framework of those provisions.

The United States is charged with violating the letter of the General Agreement in the administration of its export controls and, I take it, we are also charged with violating its spirit by attempting to stifle the peaceful economic life of Czechoslovakia. I am going to prove the falseness of both those charges with many more facts than may actually be required, for I am anxious to remove any doubt that may have been created by their endless repetition. But before I do so I must ask your patience while I clear away a great deal of extraneous material in the Czechoslovak paper - a mass of underbrush that has no bearing on the real charge but that may obstruct our clear view of the issue if not removed, and, at the same time, I will correct some substantial errors of fact in the Czechoslovak speech - errors of far greater substance than the error the French Delegate referred to in his remarks at last Monday's session.

The Czechoslovak Delegate has quoted the United States Second Decontrol Act. The sin he finds in that Act is that one of its purposes is "to aid in carrying out the foreign policy of the United States," and he concludes from this that the United States has placed "political reasons" before the obligations of Article 92 of the Havana Charter. Does the Czechoslovak Delegate believe that a country's foreign policy is necessarily inconsistent with the provisions of the Charter? If he does, we are tempted to ask whether, in such a dilemna, the Government of Czechoslovakia follows the dictates of the Charter or of its own foreign policy. Actually, delegates will recognize that the reference to foreign policy in the Second Decontrol Act means nothing whatever in terms of the present debate.

The Czechoslovak Delegate's quotations from the General Agreement on Tariffs and Trade are substantially accurate and hardly require comment except to point out that he has omitted to quote two exceptions provided in the Agreement that may very well be pertinent

to the present discussion: the exception in Article XXI (b)(i) relating to fissionable materials or the materials from which they are derived, and the exception in Article XXI (a) which exempts a Contracting Party from any requirement to furnish information the disclosure of which it considers contrary to its essential security interests.

The Czechoslovak paper then devotes a good deal of space to a quotation of a speech made by the Honourable Willard Thorp in one of the earlier international debates on this subject before the Economic Committee of the United Nations Assembly. The feature of Mr. Thorp's speech that the Czechoslovak Delegate considers damaging is the use of the words "war potential". It would be interesting to know whether the Czechoslovak Government ignores the war potential of commodities exported from that country. Certainly no Contracting Party could control the export of materials destined directly or indirectly for a military establishment, or of fissionable materials, without having regard to their war potential. I am sure that no delegate believes that the use of these words by an American statesman has the slightest bearing upon an accusation that the United States has in practice gone further in limiting its exports than is clearly permitted by the provisions of Article XXI. However, the Czechoslovak Delegation has, with the aid of a quotation from de Madariaga envisioned a frightening extension of the meaning of "war potential" and, without presenting any supporting evidence, has assumed that this is the interpretation of the words intended by Mr. Thorp. I believe that we may dismiss that quotation as having no bearing on the charges presented.

Before we can get down to actual facts it is apparently necessary to dispose of another quotation. Assistant Secretary of Commerce Blaisdell recently made a statement in support of the extension of the United States export control legislation. The Czechoslovak

Delegate has quoted one phrase of that statement. "Except for commodities in short supply, shipments to Western Europe are being licensed fairly freely but shipments to Eastern Europe have been carefully restricted." It is not difficult to guess what the Czechoslovak Delegate has evidently read into this quotation, but all it says is that we are carefully restricting exports to Eastern Europe. Certainly that is entirely within our rights, if that restriction is based on the exceptions in the General Agreement on Tariffs and Trade. And I believe that most of the delegates present will feel greater security for their own future because the United States is, in fact, making use of these exceptions.

Then comes an indirect quotation that must be disposed of, the Czechoslovak paraphrase of certain of the language in the Foreign Assistance Act of 1948, Section 112g. That Act provides authority for the Foreign Economic Administrator to determine that the needs of the devastated countries of Europe, participating in the European recovery programme, should be given precedence over exports to other European countries. And here I come to the first of a series of substantial errors in the Czechoslovak paper. For this paraphrase of the American legislation fails to include the following proviso, in the very section cited in the Czechoslovak paper:

"Provided, however, That such export may be authorized if such department, agency, or officer determines that such export is otherwise in the national interest of the United States." In the light of this provision it would seem to be necessary for the Czechoslovak Delegation to show that the Act had actually resulted in discrimination that would be contrary to the General Agreement on Tariffs and Trade, but he has not done so. So I submit, Mr. Chairman, that this is one more quotation in the Czechoslovak paper that may be dismissed as not bearing upon the charges being debated here.

Beginning on page 3 of the Czechoslovak paper you will find a summary of the filing requirements in our export control regulations, contained in the Comprehensive Export Schedule of the United States Department of Commerce. The Czechoslovak Delegate has derived from the distinction that is made between various categories of countries the conclusion that the administration of export controls involves a discrimination contrary to the provisions of the General Agreement. But such a conclusion ignores the clear right that any Contracting Party has - and a right which I am sure the Czechoslovak Government itself exercises - to make a distinction between different destinations in controlling the exportation of commodities covered by the exceptions provided in that Agreement.

And, here, Mr. Chairman, I come to the most substantial misstatement in the Czechoslovak paper. That paper says that "all commodities, whether included in the so-called positive list or not, require a licence for export to Group R destinations, except shipments within the dollar value limits of a general licence". This statement is simply not true. On the same page of the Comprehensive Schedule as other provisions summarized in the Czechoslovak paper appears a description of general licence "GRO", and the explanation that for all commodities on the so-called GRO list, no licence is required to any destination whatever. This omission in the Czechoslovak paper touches on a point of real substance. I will refer to this GRO list later. For the moment I want simply to point out that the failure to mention it in what purports to be a factual description of the United States export controls has hardly resulted in a fair presentation of the case.

Now, let me refer to one other major error in the Czechoslovak paper. In the final paragraph of that paper - and apparently so placed because it was expected to carry considerable weight with the

Contracting Parties - is the statement that the United States Department of State has failed to reply to a verbal note on this subject delivered to it by the Czechoslovak Ambassador in Washington.

Perhaps this statement was merely unintentionally misleading. For the Czechoslovak Delegate may have been using the word "reply" in a special sense of his own. But I am sure it has left many delegates with the impression that the United States has ignored the Czechoslovak representations. In any event I believe the Contracting Parties will be interested in the actual history of those representations. On December 3, 1948 the Czechoslovak Ambassador in Washington presented a note to the Acting Secretary of State, including a list of rejected licence applications.

A study of the list was then undertaken, but it presented unexpected difficulties. Out of the 100 applications on the list the Department of Commerce was unable to find any corresponding application for twenty-four. Twenty-one cases were definitely identified as having been already approved. In 33 cases there were differences, in amounts or other details, between the item on the list and the nearest identifiable application. Thus a great deal of time was consumed in attempting to reconcile the Czechoslovak note with the records of the Department of Commerce. The difficulty of this task was, of course, increased by the tremendous number of licence applications received, seldom running less than 20,000 a week. So far as I have been able to learn, a large part of the list still remains unidentified. While this work was going on, however, many rejected applications for Czechoslovakia were re-submitted under our established appeals procedure, which I will describe later, and are being actively considered by the Appeals Board.

On March 4, 1949 the Secretary of State presented a note to the Czechoslovak Ambassador in which he further outlined the export control

policy of the United States, as had been requested, and stated that the re-examination of the cases listed by the Czechoslovak Ambassador was proceeding. On March 12, 1949, the Czechoslovak Ambassador acknowledged the receipt of this note and concluded his note with the following paragraph:

> "The Czechoslovak Embassy wishes to express its appreciation for the State Department's advice that in accordance with our request the list of export licence applications in the attachment to our note is being re-examined and that pending applications will be given careful consideration and licensing action will be undertaken even if only on a case-by-case basis. The Czechoslovak Embassy expresses the hope that the re-examination will result in early licensing actions in those numerous cases in which there is no question of short supply nor security involved."

Now, I submit that this exchange presents a quite different impression than delegates have probably obtained from the concluding paragraph of the Czechoslovak Delegate's speech. And I can tell you, from my personal experience that the case presented by Czechoslovakia has, subject to the consideration of national security, received more than usual attention. One of the fixed features of any system of export controls is that no one is ever satisfied with what he has received. We have a backlog of thousands of complaints from exporters who believe they were not fairly treated. And many of the governments represented around this table - governments which have co-operated with efforts of the United States to help rebuild the war damaged world - have made representations to us asking for more favourable treatment. None of these appeals has received more serious attention than the cases submitted by Czechoslovakia.

And now, Mr. Chairman, I believe I have cleared away enough of the extraneous material in the Czechoslovak paper to enable me to come to

the heart of the matter. If delegates have followed me by striking out those portions of that paper that contain no actual substance they will find that two points remain to be dealt with. One is the general accusation that we are favouring Western Europe over Czechoslovakia in the administration of controls on short supply items, and by implication, that we are doing so in an arbitrary manner that is in conflict with the opening paragraph of Article XX. The second is that in the operation of our security controls we are exceeding the scope of the security exceptions in Article XXI. I propose to deal with these two substantive charges in that order.

The first, of course, has not been supported by any facts as to the actual volume of applications validated but simply by statements of policy made by United States spokesmen. It is true, of course, that the United States has adopted the policy of using its export controls to promote the success of the European Recovery Programme and has co-operated closely with the Organization for European Economic Co-operation. This is clearly in harmony with the letter and the spirit of the General Agreement. In fact, Article XX requires that any controls exercised to promote the distribution of commodities in short supply shall be consistent with any multilateral arrangements directed to an equitable international distribution of such products. I am sure that the Czechoslovak Delegate would not contend that the OEEC lost its right to conduct such an international arrangement because Czechoslovakia, at the last minute, refused to participate in its formation.

But, in actual practice, it has hardly proved necessary to promote European recovery by withholding goods from Czechoslovakia. For that country has not come to the United States for those goods that have been in the shortest supply. Those goods in general are the goods that have been placed on our so-called "positive list". At no time have we denied a licence to Czechoslovakia on a positive list commodity. Furthermore, the denials of non-positive list commodities have been of a kind that clearly come within the security exceptions of the General Agreement.

That brings me to the second of the two basic charges, that concerning the operation of our security controls. I shall be glad to comply with a substantial part of the request made by the Czechoslovak Delegate that we provide Czechoslovakia with all relevant information concerning the administration of these restrictions and the distribution of licenses "in accordance with Article XIII, paragraph 3". I must point out, however, that Article XXI, as I have mentioned earlier, provides that a Contracting Party shall not be required to give information which it considers contrary to its security interests. The United States does consider it contrary to its security interest - and to the security interest of other friendly countries - to reveal the names of the commodities that it considers to be most strategic.

First, let me make clear that the designation at any particular time of such a group of commodities is a matter of administrative convenience and that, in practice, each application for an export licence is considered separately by an interagency committee, in which the type of product, the stated end use and the named consignee are all taken into consideration. Thus, while all commodities of potential use by a military establishment are subjected to particularly careful scrutiny, not by any means all licences for such commodities are denied.

For the most part, such commodities are confined to highly specialised sub-divisions of broader statistical classifications. The size, type, horse-power, or other factors which give them military significance are considered. But even with these qualifications, the commodities we have considered to be in this category fall within about two hundred of the approximately three thousand statistical classifications in the United States export schedule. And even then, action is based, as I have said, on examination of each case.

The only evidence in the Czechoslovak paper that purports to show that actual denials of licences to Czechoslovakia have covered commodities of no military significance is the list of examples beginning on the bottom of page 8 of that statement. Unfortunately, the description of these commodities is highly misleading, and in a number of cases we have been entirely unable to identify the applications to which the example refers. However, I think the following facts will be of interest.

The Czechoslovak statement refers to the denials of licences for electrodes, x-ray tubes, and tungsten wire, (referred to as "electric bulbs wire"). While it is correct that some licences for these commodities have been denied, we have approved licences to Czechoslovakia since March 1, 1948 for $436,000 worth of electrical equipment.

The Czechoslovak statement refers to the rejection of applications for mining machinery. It happens that mining machinery can be of widely different types and of different end uses. We received from Czechoslovakia an application for a substantial quantity of mining drills which were stated to be for coal mining. However, manufacturers and mining engineers who were consulted agreed that the type specified was never employed in mining coal but was designed for the deep exploration of mineral deposits. It happens that, while this application

was being considered, the American press published an announcement of the discovery of an important uranium deposit in Czechoslovakia. I am sure it is not necessary for me to refer again to the exception in the General Agreement with respect to commodities relating to fissionable materials. But in case the Czechoslovak statement has left the Contracting Parties with the impression that the United States has attempted to deprive Czechoslovakia of machinery for its normal, peaceful activities, I am sure they will be glad to learn that since March 1, 1948 we have approved licence applications for machinery to Czechoslovakia amounting to $6,033,000.

My point in presenting these facts is to show that our controls for security reasons have been highly selective. We have had no desire to deny licence applications where the product was for a peaceful use. But we have, admittedly, been handicapped by the difficulty of obtaining accurate information. I have already referred to the case of the mining drills, where the technicians were convinced that the end use could not be as stated in the application. There have been many similar cases. One of the most interesting had to do with a number of applications for ball bearings, which were stated to be for use in the manufacture of agricultural machinery. Experts who examined the specifications, however, were convinced that the size, type and degree of precision specified showed them to be destined for use in aircraft, or other military applications.

The Czechoslovak statement, while appealing to the provisions of the GATT, also appeals to our sense of sportsmanship by referring to the fact that some of the licence applications denied covered products that had already been ordered from United States factories and on which advance payments had been made. This is another way of saying that Czechoslovak importers - and for that matter American manufacturers and exporters - have suffered hardship because the United States found it

necessary to intensify its security export controls on March 1, 1948. I am sure that delegates will know where to place the responsibility for the deterioration in international relations that made that intensification necessary. But this does not alter the fact that there have been hardships and that undoubtedly some of the sufferers were innocent bystanders. In the administration of its export controls, therefore, the United States has recognized that, with respect to both short supply controls and security controls, hardships will occur. And in order to reduce these hardships to a minimum we have established an elaborate and expensive procedure under which any applicant may bring a rejected application before a board, which considers all aspects of the case and which may reverse the earlier decision unless the essential interests of the country are such as to outweigh the hardship involved.

This appeals procedure has been invoked on behalf of 38 licence applications for Czechoslovakia. As of March 25 of this year, the Board had found it necessary to deny 7 of these appeals. It had approved one, and the remainder were still pending. Once again, I submit that if it were the intent of the United States arbitrarily to deny licence applications to Czechoslovakia, without careful consideration, this procedure would hardly have been made available.

Now I should like to turn for a moment to a more general accusation, expressed or implicit, in the Czechoslovak paper; that is, that the United States has tried to stifle the general flow of goods to that country and thereby prevent the conduct of its peaceful economic objectives. Apparently in support of that accusation, the Czechoslovak paper presents in an appendix figures to show that the percentage of total Czechoslovak imports coming from the United States has dropped substantially since 1947 and 1948. At least, I assume that this was the purpose, rather than to show that Czechoslovakia is discriminating against United States exporters. There is no evidence given to show

that this relative drop of imports from the United States was also an absolute decline. Nor does the Czechoslovak Delegation indicate what portion of such a decline might be attributable to the actions of Czechoslovakia and her Eastern neighbours in attempting to maximize their own trade with each other. The implication, however, is left that an absolute decline in United States exports to Czechoslovakia resulted from our export controls. The Contracting Parties will probably be interested, therefore, in the facts.

Annual exports from the United States to Czechoslovakia in the 2 years 1937 and 1938 averaged something less than 19 million dollars. In the 6 months from August 1948 through January 1949 (the latest period for which figures are available) the United States validated export licences to Czechoslovakia amounting to $12,838,274 - or at an annual rate of over 25 million dollars. Most of the export licence denials that have been appealed or protested by Czechoslovakia are in the field of machinery. The average annual export of machinery to Czechoslovakia in 1937-1938 was $2,909,000. In the same 6 months' period referred to above export licence validations of machinery for Czechoslovakia amounted to $3,943,043 or at an annual rate of over $7,600,000.

If any further evidence is needed that the United States is not interested in stifling trade with Czechoslovakia, consider the significance of the GRO list. This is a list of nearly 1000 commodities on which no licence is required for shipment to any destination. It includes those commodities, not in short supply, the military use of which is so unlikely that we do not consider it necessary even to look at the end use or the consignee. Commodities are being added to this list as rapidly as it can be determined that they are entitled to this treatment. Since the beginning of this conference more than 500 items have been added to the list, a fact

which received considerable comment in the press but which, apparently, did not reach the attention of the Delegation of Czechoslovakia.

I believe, Mr. Chairman, that we have fully answered the Czechoslovak charges. I believe that, particularly in view of the absence of any documentation of those charges, we have gone a good deal further than was required. We have shown that our export controls in general have not reduced Czechoslovakia's normal imports from the United States. We have shown that our security controls are selective and are within the specific exceptions provided by the GATT. I hope we have also shown that those controls are as essential to the security of other nations as to that of the United States.

We have also refrained from making counter charges that would, we are convinced, be far more justified than the charges made by the Czechoslovak Delegate - charges that might be difficult to prove but that could certainly be supported by more facts than have been presented by him.

We believe we have played fairly with the Contracting Parties and hope that they will now dismiss the accusation of Czechoslovakia on the grounds that it is unsupported by the facts.

CONTRACTING PARTIES
Third Session

SUMMARY RECORD OF THE TWENTY-SECOND MEETING
CP.3/SR22 - II/28

Held at Hotel Verdun, Annecy

on Wednesday, 8 June 1949, at 3.15 p.m.

CHAIRMAN: Hon. L.D. WILGRESS (Canada)

Subjects discussed:

1. Report on the negotiations affecting Schedule III between Brazil and United Kingdom and United States of America. [NOT REPRODUCED BELOW]

2. Report of Working Party 2 on date of decision on proposal of the Government of Ceylon. [NOT REPRODUCED BELOW]

3. Request of the Government of Czechoslovakia for a decision under Article XXIII.

Request of the Government of Czechoslovakia for a decision under Article XXIII as to whether or not the Government of the United States of America has failed to carry out its obligations under the Agreement through its administration of the issue of export licences. (cf. GATT/CP.3/23 and GATT/CP.3/38 and GATT/CP.3/39)

Mr. AUGENTHALER (Czechoslovakia) read a reply (GATT/CP.3/39) to the speech by the representative of the United States (GATT/CP.3/38), and in addition called attention to the possible effects on international trade if an unfavourable decision were given to the Czechoslovakian application. He said it was not only exports that might be unduly controlled on the pretext of national security; on the ground that security could be undermined by dependence on foreign supplies, a country might similarly restrict its imports, either discriminatorily or otherwise, by invoking the security clause of the Agreement. This would encourage the tendency towards autarky which the Agreement professed to eliminate.

Mr. EVANS (United States of America), referring to the last section of the 4th paragraph of Mr. Augenthaler's reply, said that if at any time it were thought that a decision had been based on false premises, the interested party could have recourse to the appeal board which was instituted for that purpose. In reply to the question asked by Mr. Augenthaler as to whether the regulations requiring export licences for the export of goods to certain countries but not to others, did not contravene the provisions of Article I, Mr. Evans remarked that the provisions of Article I would not require uniformity of formalities, as applied to different countries, in respect of restrictions imposed for security reasons. In conclusion he said that since no new facts had been presented by the Czechoslovakian representative beyond what had already been given in the original statement, he would repeat his proposal that the CONTRACTING PARTIES dismiss the request on the ground that the charge was not supported by facts.

Mr. HERRERA-ARANGO (Cuba) supported the United States proposal. He said that his personal experience in dealing with the United States Government had convinced him that the difficulties referred to by the Czechoslovakian representative were due to the rigour of the officials and their stringent way of administrating the issue of licences. The officials might be tenacious in their quests for information and were often hard to convince, but this provided no ground for the accusation put forward by the Czechoslovakian representative. On the basis of his experience, it seemed that the appeal board would be an effective means of redressing any erroneous decisions. The question asked by the Czechoslovakian representative in relation to the provisions of Article I did not require an answer since the United States representative had justified his case under Article XXI whose provisions overrode those of Article I. His delegation therefore thought that the question should be decided at the present meeting and the request by the Czechoslovakian delegation should be dismissed because of the lack of factual basis for the charge.

Mr. AUGENTHALER (Czechoslovakia) replied that the appeal procedure referred to by the United States representative was available only to exporters of the United States, and it was often inoperative because in the event of a refusal of an export licence, an exporter, in order to avoid displeasure was likely to choose not to resort to that procedure. Article I stated clearly that the provisions of non-discrimination were to be observed with respect to all rules and formalities in connection with importation and exportation. If exports were to be controlled, the same formalities must be applied to all countries wishing to purchase from the country concerned. Article XXI referred to the traffic in arms, ammunition and implements of war and other goods and materials for the purpose of supplying a military establishment, but the United States Government had used and interpreted the expression "war material" so extensively that no one knew what it really covered. The filing of an application for an export licence was therefore no mere formality. As regards the Cuban proposal, Mr. Augenthaler maintained that abundant facts had been supplied to the CONTRACTING PARTIES in the successive documents submitted by the Czechoslovakian delegation and the request could not be refused on the ground of insufficient information.

Mr. HASNIE (Pakistan) said he was glad that the question had been narrowed down to the provisions of two Articles. As regards Article I, it was the opinion of his delegation that the United States Government, as a pioneer of the General Agreement, would not have seen fit to violate the provisions of such a fundamental Article and thus deliberately destroy the structure of the Agreement. Article XXI, embodying exceptions to all other provisions of the Agreement, should stand by itself notwithstanding the provisions of other Articles including Article I, and therefore the case called for examination only under the provisions of that Article. While admitting that the Czechoslovakian case deserved careful and sympathetic consideration, Mr. Hasnie was convinced that the action taken by the United States Government was in the interest of security and peace. He thought the matter should not be delegated to a Working Party because he did not believe that tangible results could be produced by deliberations in a sub-group and that no economy of time would be justified in dealing with a matter of such great importance. He suggested that the information supplied was contradictory and too scanty to justify a sweeping decision by the CONTRACTING PARTIES. Since the United States had affirmed that its intention was merely to prevent the disruption of peace and order and had assured that it had no desire to interfere with ordinary trade, and since the Czechoslovakian Government had complained about restrictions being placed on goods which were not imported for war purposes, it appeared that the dispute had arisen from a misunderstanding of facts by one party or the other and should be resolved by detailed consultation between them. In his opinion, the CONTRACTING PARTIES should suggest that the two governments approach each other through diplomatic channels and seek a solution. Commenting on the complaint that the United States appeal procedure was only available to its exporters, he thought this was in accord with the general practice in jurisprudence and there would seem to be no way of providing complaint facilities for people other than residents of the country. If an exporter refused an order by an importer, it would seem to be the end of the matter except for negotiations to be carried out by the governments. In view of the importance of the question, the CONTRACTING

PARTIES should not decide upon the request, but should try to bring about an understanding between the two parties which was not an objective achievable by deliberations in sub-committees.

Mr. SHACKLE (United Kingdom) thought that since the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security. On the other hand, the CONTRACTING PARTIES should be cautious not to take any step which might have the effect of undermining the General Agreement. The nature of the question seemed to suggest that it should be examined in detail by the two governments concerned, and that no purpose would be served by a general decision given by the CONTRACTING PARTIES. Therefore, so far as the CONTRACTING PARTIES were concerned, the request by the Czechoslovakian delegation for a decision should be dismissed.

Mr. HERRERA-ARANGO (Cuba) agreed with the representative of Pakistan that the importance of the case called for a full investigation, but he would not think that practical results could be produced.

Mr. AUGENTHALER (Czechoslovakia) reaffirmed that the provisions of Article XXI were misapplied because the narrow reference in the text to war materials had been construed by the United States Government to cover a wide range of goods which could never be so regarded.

Mr. EVANS (United States of America) replied that this was a distortion of facts; the United States Government had never denied export licences to Czechoslovakia on any item on the positive list. Out of 3,000 group items under the export classification, only 200 were affected by export control. Therefore there were no grounds for the accusation that the provisions of Article XXI were extended to cover everything; for the commodities thus controlled constituted an extremely small proportion of the exports of the country.

The CHAIRMAN, in summing up, concluded that if a decision must be made under paragraph 2 of Article XXIII, it should be understood that the consultation referred to in paragraph 1 of the Article had already taken place. Under paragraph 2, the CONTRACTING PARTIES should promptly investigate, and should either make an appropriate recommendation to the contracting parties concerned or give a ruling on the matter as appropriate. The complaint made by Czechoslovakia was based on Articles I and XXI and the United States justified any discrimination which might have occurred on the basis of Articles XX and XXI and particularly on the ground of security covered by the latter. The proposal for a Working Party to be set up to examine the issue had not found support during the discussions, and the representatives of Cuba and Pakistan had spoken against this suggestion. The CONTRACTING PARTIES, therefore, should give a decision in accordance with paragraph 2 of Article XXIII at the present meeting. The Czechoslovakian representative had posed the question of whether or not such regulations conform to the provisions of Article I. The Chairman, however, was of the opinion that the question was not appropriately put because the United States Government had defended its actions under Articles XX and XXI which embodied exceptions to the general rule contained in Article I. The question should be put as expressed in the Agenda item, i.e. <u>whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences</u>.

A vote was put by roll-call, as requested by the representative of Czechoslovakia, with the following results:

1 affirmative:	17 Negatives:	3 Abstentions:	2 Absent:
Czechoslovakia	Australia	India	Burma
	Belgium	Lebanon	Luxembourg
	Brazil	Syria	
	Canada		
	Ceylon		
	Chile		
	China.		
	Cuba		
	France		
	Netherlands		
	New Zealand		
	Norway		
	Pakistan		
	S. Rhodesia		
	South Africa		
	United Kingdom		
	United States		

Mr. HASNIE (Pakistan) explained his vote by saving that it was necessary for him to vote against the charge because this was not proved by factual evidence, and according to the principles of common law innocence would have to be presumed unless it was proved otherwise.

Mr. AUGENTHALER (Czechoslovakia) stated on behalf of his Government that it could not consider that the CONTRACTING PARTIES had made a legally valid decision or correct interpretation of the General Agreement. In consequence, his Government would regard itself free to take any steps necessary to protect its national interests. He enquired whether the decision could not be communicated to all members of the Interim Commission for the International Trade Organization, so that they would be informed of the interpretation given by the CONTRACTING PARTIES of the provisions of the Havana Charter.

Mr. EVANS (United States of America) thanked the majority of the representatives on behalf of his delegation and expressed his understanding of the position of those representatives who abstained. He requested that the proceedings of this meeting be released to the press.

The CHAIRMAN said, in reply to the Czechoslovakian representative, that the summary record of this meeting would be sent, according to the usual practice, to all signatories of the Havana Final Act and to other members of the United Nations. The meeting agreed that a press release should be issued at the authorization of the Chairman.

The meeting rose at 6 p.m.

ARTICLE XXI

UNITED STATES EXPORT RESTRICTIONS[1]
II/28

Decision of 8 June 1949

The CONTRACTING PARTIES decided to reject the contention of the Czechoslovak delegation that the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences.

[1]A complaint was brought by the Czechoslovak Government under Articles I and XXI that export restrictions imposed by the United States did not conform to the provisions of Article I.



Vienna, 14 July 2015
150714_01

JOINT STATEMENT

by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif

Today is an historic day.

It is a great honour for us to announce that we have reached an agreement on the Iranian nuclear issue.

With courage, political will, mutual respect and leadership, we delivered on what the world was hoping for: a shared commitment to peace and to join hands in order to make our world safer. This is an historic day also because we are creating the conditions for building trust and opening a new chapter in our relationship.

This achievement is the result of a collective effort.

No one ever thought it would be easy. Historic decisions never are. But despite all twists and turns of the talks, and the number of extensions, hope and determination enabled us to overcome all the difficult moments. We have always been aware we had a responsibility to our generation and the future ones.

Thanks to the constructive engagement of all parties, and the dedication and ability of our teams, we have successfully concluded negotiations and resolved a dispute that lasted more than 10 years.

Many people brought these difficult negotiations forward during the last decade and we would like to thank all of them - as we would like to thank the International Atomic Energy Agency for its critical contribution and close cooperation as well as the Austrian government for the support and hospitality.

EN

We, the EU High Representative for Foreign and Security policy and the Foreign Minister of the Islamic Republic of Iran, together with the Foreign Ministers of the People´s Republic of China, France, Germany, the Russian Federation, the United Kingdom and the United States of America met here in Vienna, following several months of intensive work, at various levels and in different formats, to negotiate the text of the Joint Comprehensive Plan of Action (JCPOA), based on the key parameters agreed in Lausanne on 2 April.

We have today agreed on the final text of this Joint Comprehensive Plan of Action

The E3/EU+3 and the Islamic Republic of Iran welcome this historic Joint Comprehensive Plan of Action (JCPOA), which will ensure that Iran's nuclear programme will be exclusively peaceful, and mark a fundamental shift in their approach to this issue. They anticipate that full implementation of this Joint Comprehensive Plan of Action will positively contribute to regional and international peace and security. Iran reaffirms that under no circumstances will Iran ever seek, develop or acquire any nuclear weapons.

The Joint Comprehensive Plan of Action includes Iran's own long-term plan with agreed limitations on Iran's nuclear program, and will produce the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme, including steps on access in areas of trade, technology, finance, and energy.

The Joint Comprehensive Plan of Action comprises of a main text, and five technical annexes - on nuclear, sanctions, civil nuclear energy cooperation, a joint commission, and implementation. These documents are detailed and specific: that is important because all sides wanted clarity so as to ensure the full and effective implementation of the agreement.

The Joint Comprehensive Plan of Action is a balanced deal that respects the interests of all sides. It is also complex, detailed and technical: we cannot fully summarise the agreement now. But the full main text and all its annexes will be made public still today and will be presented within the next few days by the E3+3 to the Security Council for endorsement.

We know that this agreement will be subject to intense scrutiny. But what we are announcing today is not only a deal but a good deal. And a good deal for all sides – and the wider international community.

This agreement opens new possibilities and a way forward to end a crisis that has lasted for more than 10 years. We are committed to make sure this Joint Comprehensive Plan of Action is fully implemented, counting also on the contribution of the International Atomic Energy Agency.

We call on the world community to support the implementation of this historic effort.

This is the conclusion of our negotiations, but this is not the end of our common work. We will keep doing this important task together.

Vox

Full transcript: the international statement on the Iranian nuclear deal

By Katy Lee | katy.lee@vox.com | Apr 2, 2015, 3:21pm EDT



The EU's foreign policy chief Federica Mogherini, center, and Iranian Foreign Minister Javad Zarif, right. | FABRICE COFFRINI/AFP/Getty Images

International negotiators have finally reached an outline agreement for a deal that will see Iran limit its nuclear program in exchange for sanctions relief, after eight days of hugely complicated talks in Switzerland. Negotiators have set themselves a June 30 deadline to work out the full details of the deal.

Here's the full text of the statement on the deal, read by the EU's foreign policy chief, Federica Mogherini, at a press conference in Lausanne on Thursday afternoon alongside Iranian Foreign Minister Javad Zarif.

I'm going now to read a joint statement that we have agreed on with Foreign Minister Zarif and all the others that have been negotiating so hard in these days.

We, the European Union High Representative and the Foreign Minister of the Islamic Republic of Iran, together with the Foreign Ministers of the E3 + 3, China, France, Germany,

the Russian Federation, the United Kingdom and the United States, met from 26 March to 2 April 2015 in Switzerland, as agreed in November 2013, to gather here to find solutions towards reaching a comprehensive solution that will ensure the exclusively peaceful nature of the Iranian nuclear program and the comprehensive lifting of all sanctions.

Today we have taken a decisive step. We have reached solutions on key parameters of a joint comprehensive plan of action. The political determination, the goodwill and the hard work of all parties made it possible and let us thank all delegations for their tireless dedication.

This is a crucial declaration laying the agreed basis for the final text of the joint comprehensive plan of action. We can now restart drafting the text and annexes of the joint comprehensive plan of action, guided by the solutions developed in these days.

As Iran pursues a peaceful nuclear program, Iran's enrichment capacity, enrichment level and stockpile will be limited for specific durations and there will be no other enrichment facility than Natanz.

Iran's research and development on centrifuges will be carried out on a scope and schedule that has been mutually agreed. Fordow will be converted from an enrichment site into a nuclear physics and technology center. International collaboration will be encouraged in agreed areas of research. There will not be any fissile material at Fordow.

An international joint venture will assist Iran in redesigning and rebuilding a modernized heavy water research reactor in Arak that will not produce weapons-grade plutonium. There will be no reprocessing, and spent fuel will be exported. A set of measures have been agreed to monitor the provisions of the JCPOA including implementation of the modified code 3.1 and provision of the additional protocol.

The International Atomic Energy Agency will be permitted the use of modern technologies and will have announced access through agreed procedures including to clarify past and present issues. Iran will take part in international cooperation in the field of civilian nuclear energy which can include supply of power and research reactors. Another important area of cooperation will be in the field of nuclear safety and security.

The European Union will terminate the implementation of all nuclear-related economic and financial sanctions and the United States will cease the application of all nuclear-related

secondary economic and financial sanctions simultaneously with the IAEA-verified implementation by Iran of its key nuclear commitments.

A new UN Security Council resolution will endorse the JCPOA, terminate all previous nuclear-related resolutions, and incorporate certain restrictive measures for a mutually agreed period of time. We will now work to write the text of a joint comprehensive plan of action including its technical details in the coming weeks and months at the political and experts level. We are committed to complete our efforts by June 30.

We would like to thank the Swiss government for its generous support in hosting these negotiations, and let me personally and on behalf of everybody also thank you all, journalists and media from around the world, for having followed our work and somehow also worked with us over this difficult but intense and positive week.

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U.S. Department of State
Diplomacy in Action

Press Availability on Nuclear Deal With Iran

Press Availability
John Kerry
Secretary of State
Austria Center
Vienna, Austria
July 14, 2015

SECRETARY KERRY: Well, good afternoon everybody. I want to begin by thanking you, as others have, for your extraordinary patience. I know this has been a long couple of weeks for everybody, including, above all, the press, who have waited long hours during the day for very little news, and we're very grateful for your patience. This is an historic day, but for me, it's an historic day because it represents the first time in six weeks that I've worn a pair of shoes. (Laughter.)

Today, in announcing a Joint Comprehensive Plan of Action, the United States, our P5+1 and EU partners, and Iran have taken a measureable step away from the prospect of nuclear proliferation, towards transparency and cooperation. It is a step away from the specter of conflict and towards the possibility of peace.

This moment has been a long time coming, and we have worked very hard to get here. A resolution to this type of challenge never comes easily – not when the stakes are so high, not when the issues are so technical, and not when each decision affects global and regional security so directly. The fact is that the agreement we've reached, fully implemented, will bring insight and accountability to Iran's nuclear program – not for a small number of years but for the lifetime of that program. This is the good deal that we have sought.

Believe me, had we been willing to settle for a lesser deal, we would have finished this negotiation a long time ago. But we were not. All of us – not just the United States, but France, the United Kingdom, Germany, Russia, China, and the EU – were determined to get this right. And so we have been patient, and I believe our persistence has paid off.

A few months ago in Lausanne, we and our international partners joined Iran in announcing a series of parameters to serve as the contours of a potential deal. Experts and commentators were, in fact, surprised by all that we had achieved at that point. After three more months of long days and late nights, I'm pleased to tell you that we have stayed true to those contours and we have now finally carved in the details.

Now I want to be very clear: The parameters that we announced in Lausanne not only remain intact and form the backbone of the agreement that we reached today, but through the detail, they have been amplified in ways that make this agreement even stronger.

That includes the sizable reduction of Iran's stockpile of enriched uranium and the number of centrifuges that it operates.

It also guarantees that Iran's breakout time – the time it would take for Iran to speed up its enrichment and produce enough fissile material for just one nuclear weapon – that time will increase to at least one year for a period of at least 10 years.

And contrary to the assertions of some, this agreement has no sunset. It doesn't terminate. It will be implemented in phases – beginning within 90 days of the UN Security Council endorsing the deal, and some of the provisions are in place for 10 years, others for 15 year, others for 25 years. And certain provisions – including many of the transparency measures and prohibitions on nuclear work – will stay in place permanently.

But most importantly, this agreement addresses Iran's potential pathways to fissile material for a bomb exactly as we said it would – with appropriate limitations and transparency in order to assure the world of the peaceful nature of Iran's nuclear program.

Now, let me explain exactly how it will accomplish that goal.

To start, the participants have agreed Iran will not produce or acquire either highly enriched uranium or weapons-grade plutonium for at least the next 15 years, and Iran declares a longer period of intent.

Iran's total stockpile of enriched uranium – which today is equivalent to almost 12,000 kilograms of UF6 – will be capped at just 300 kilograms for the next 15 years – an essential component of expanding our breakout time. Two-thirds of Iran's centrifuges will be removed from nuclear facilities along with the infrastructure that supports them. And once they're removed, the centrifuges will be – and the infrastructure, by the way – will be locked away and under around-the-clock monitoring by the International Atomic Energy Agency.

Uranium enrichment at Natanz will be scaled down significantly. For the next 15 years, no uranium will be enriched beyond 3.67 percent. To put that in context, this is a level that is appropriate for civilian nuclear power and research, but well below anything that could be used possibly for a weapon.

For the next 10 years, Iran has agreed to only use its first-generation centrifuges in order to enrich uranium. Iran has further agreed to disconnect nearly all of its advanced centrifuges, and those that remain installed will be part of a constrained and closely monitored R&D program – and none will be used to produce enriched uranium.

Iran has also agreed to stop enriching uranium at its Fordow facility for the next 15 years. It will not even use or store fissile material on the site during that time. Instead, Fordow will be transformed into a nuclear, physics, and technology research center – it will be used, for example, to produce isotopes for cancer treatment, and it will be subject to daily inspection and it will have other nations working in unison with the Iranians within that technology center.

So when this deal is implemented, the two uranium paths Iran has towards fissile material for a weapon will be closed off.

The same is true for the plutonium path. We have agreed Iran's heavy-water reactor at Arak will be rebuilt – based on a final design that the United States and international partners will approve – so that it will only be used for peaceful purposes. And Iran will not build a new heavy-water reactor or reprocess fuel from its existing reactors for at least 15 years.

But this agreement is not only about what happens to Iran's declared facilities. The deal we have reached also gives us the greatest assurance that we have had that Iran will not pursue a weapon covertly.

Not only will inspectors be able to access Iran's declared facilities daily, but they will also have access to the entire supply chain that supports Iran's nuclear program, from start to finish – from uranium mines to centrifuge manufacturing and operation. So what this means is, in fact, that to be able to have a covert path, Iran would actually need far more than one covert facility – it would need an entire covert supply chain in order to feed into that site. And to ensure that that does not happen without our knowledge, under this deal, inspectors will be able to gain access to any location the IAEA and a majority of the P5+1 nations deem suspicious.

It is no secret that the IAEA also has had longstanding questions about the possible military dimensions of Iran's nuclear program. That is one of the primary reasons that we are even here today, and we and our partners have made clear throughout the negotiations that Iran would need to satisfy the IAEA on this as part of the final deal. With that in mind, Iran and the IAEA have already entered into an agreement on the process to address all of the IAEA's outstanding questions within three months – and doing so is a fundamental requirement for sanctions relief that Iran seeks. And Director Amano announced earlier this morning that that agreement has been signed.

Now, our quarrel has never been with the Iranian people, and we realize how deeply the nuclear-related sanctions have affected the lives of Iranians. Thanks to the agreement reached today, that will begin to change. In return for the dramatic changes that Iran has accepted for its nuclear program, the international community will be lifting the nuclear-related sanctions on Iran's economy.

And the relief from sanctions will only start when Tehran has met its key initial nuclear commitments – for example, when it has removed the core from the Arak reactor; when it has dismantled the centrifuges that it has agreed to dismantle; when it has shipped out the enriched uranium that it has agreed to ship out. When these and other commitments are met, the sanctions relief will then begin to be implemented in phases.

The reason for that is very simple: Confidence is never built overnight. It has to be developed over time. And this morning, Foreign Minister Javad Zarif expressed his hope that this agreement can be a beginning of a change of the interactions between Iran and the international community.

That is why none of the sanctions that we currently have in place will, in fact, be lifted until Iran implements the commitments that it has made. And some restrictions, including those related to arms and proliferation, will remain in place for some years to come. And I want to underscore: If Iran fails in a material way to live up to these commitments, then the United States, the EU, and even the UN sanctions that initially brought Iran to the table can and will snap right back into place. We have a specific provision in this agreement called snapback for the return of those sanctions in the event of noncompliance.

Now, there will be some who will assert that we could have done more – or that if we had just continued to ratchet up the pressure, Iran would have eventually raised a white flag and abandoned its nuclear program altogether. But the fact is the international community tried that approach. That was the policy of the United States and others during the years 2000 and before. And in the meantime, guess what happened? The Iranian program went from 164 centrifuges to thousands. The Iranian program grew despite the fact that the international community said, "No enrichment at all, none." The program grew to the point where Iran accumulated enough fissile material for about 12 – 10 to 12 nuclear bombs.

I will tell you, sanctioning Iran until it capitulates makes for a powerful talking point and a pretty good political speech, but it's not achievable outside a world of fantasy.

The true measure of this agreement is not whether it meets all of the desires of one side at the expense of the other; the test is whether or not it will leave the world safer and more secure than it would be without it. So let's review the facts.

Without this agreement or the Joint Plan of Action on which it builds, Iran's breakout time to get enough material – nuclear material for a weapon was already two to three months. That's where we started. We started with Iran two months away with enough fissile material for 10 bombs. With this agreement, that breakout time goes to a year or more, and that will be the case for at least a

decade.

Without this agreement, Iran could just double its enrichment capacity tomorrow – literally – and within a few years it could expand it to as many as 100,000 centrifuges. With this agreement, Iran will be operating about 5,000 centrifuges for a fixed period of time.

Without this agreement, Iran would be able to add rapidly and without any constraint to its stockpile of enriched uranium, which already at 20 percent was dangerous and higher than any of us were satisfied was acceptable. With this agreement, the stockpile will be kept at no more than 300 kilograms for 15 years.

Without this agreement, Iran's Arak reactor could produce enough weapons-grade plutonium each year to fuel two nuclear weapons. With this agreement, the core of the Arak reactor will be removed and filled with concrete, and Iran will not produce any weapons-grade plutonium.

Without this agreement, the IAEA would not have definitive access to locations suspected of conducting undeclared nuclear activities. With this agreement, the IAEA will be able to access any location, declared or undeclared, to follow up on legitimate concerns about nuclear activities.

There can be no question that this agreement will provide a stronger, more comprehensive, and more lasting means of limiting Iran's nuclear program than any realistic – realistic alternative. And those who criticize and those who spend a lot of time suggesting that something could be better have an obligation to provide an alternative that, in fact, works. And let me add this: While the nations that comprise the P5+1 obviously don't always see eye-to-eye on global issues, we are in full agreement on the quality and importance of this deal. From the very beginning of this process, we have considered not only our own security concerns, but also the serious and legitimate anxieties of our friends and our allies in the region – especially Israel and the Gulf States. And that has certainly been the case in recent days, as we worked to hammer out the final details.

So let me make a couple of points crystal-clear: First, what we are announcing today is an agreement addressing the threat posed by Iran's nuclear program – period – just the nuclear program. And anybody who knows the conduct of international affairs knows that it is better to deal with a country if you have problems with it if they don't have a nuclear weapon. As such, a number of U.S. sanctions will remain in place, including those related to terrorism, human rights, and ballistic missiles. In addition, the United States will continue our efforts to address concerns about Iran's actions in the region, including by our providing key support to our partners and our allies and by making sure we are vigilant in pushing back against destabilizing activities.

And certainly, we continue to call on Iran to immediately release the detained U.S. citizens. These Americans have remained in our thoughts throughout this negotiation, and we will continue to work for their safe and their swift return. And we urge Iran to bring our missing Americans home as well.

And we also know there is not a challenge in the entire region that would not become worse if Iran had a nuclear weapon. That's why this deal is so important. It's also why we met at Camp David with the Gulf States and why we will make clear to them in the days ahead the ways in which we will work together in order to guarantee the security of the region. The provisions of this agreement help guarantee that the international community can and will address regional challenges without the threat of a nuclear-armed Iran.

Second, no part of this agreement relies on trust. It is all based on thorough and extensive transparency and verification measures that are included in very specific terms in the annexes of this agreement. If Iran fails to comply, we will know it, because we're going to be there – the international community, through the IAEA and otherwise – and we will know it quickly, and we will be able to respond accordingly.

And before closing, I would like to make – I would like to say thank you to some folks who really made a difference in the course of all of this. And I want to begin by thanking my president, President Obama, who had the courage to launch this process, believe in it, support it, encourage it, when many thought that the objective was impossible, and who led the way from the start to the finish. The President has been resolute in insisting from the day he came to office that Iran will never have a nuclear weapon, and he has been equally – equally strong in asserting that diplomacy should be given a fair chance to achieve that goal.

I want to thank my Cabinet colleagues – excuse me – for the many, many contributions that they have made – Treasury Secretary Jack Lew, Defense Secretary Ash Carter, the entire DOD – the department, but I especially want to thank my partner in this effort who came late to the process but has made an essential contribution to our achievement of this agreement, and that is Energy Secretary Ernie Moniz, who has put many long days here in Switzerland – here and in Switzerland – during these negotiations and, frankly, whose background as a nuclear scientist just proved to be essential in helping us, together with former foreign minister and Vice President Salehi, to be able to really work through very difficult issues, some of the toughest and technical issues.

I want to thank the members of Congress – my former colleagues – for their role in this achievement, particularly in designing and passing sanctions legislation that did exactly what the UN resolution set out to do, and that is bring Iran to the table in order to negotiate. It helped us achieve the goal of these negotiations, and I appreciate their counsel and I look forward to the next chapter in our conversations. Whatever disagreements might sometimes exist, we all agree on a goal of a Middle East where our interests are protected and our allies and our friends are safe and secure.

And I want to especially thank my friend and my exceptional colleague, the Under Secretary of State Wendy Sherman, who has piloted – (applause) – she has led our team, which you can tell is still pretty enthusiastic, notwithstanding the long stay – and she has really done so with just an amazingly strong will, with a clear sense of direction, very steady nerves, hardly any sleep – and she's been doing that for several years, folks, with amazing periods of time away from home and away from family. She and our absolutely brilliant, tireless team of experts and diplomats have done an absolutely incredible job, and frankly, they deserve the gratitude of our nation. (Applause.) I also want to thank those who've served on the U.S. negotiating team in the past who were not here for the close but who were indispensable in helping to shape this negotiation – particularly former Deputy Secretary of State Bill Burns, Jake Sullivan, who were absolutely essential in the earliest days.

I also want to thank my counterparts from every other delegation. All of the political directors were absolutely stunning in this. It's been a privilege of my public service to be able to work with the teams that I have worked with here and in the other cities we've been. Our counterparts have made absolutely critical contributions to this. This was a team effort. French Foreign Minister Laurent Fabius; British Foreign Secretary Philip Hammond; Russian Foreign Minister Sergei Lavrov; German Foreign Minister Frank-Walter Steinmeier; and Chinese Foreign Minister Wang Yi.

I also want to thank the high representatives of the EU, there's several – Javier Solana, Dame Cathy Ashton, and her successor, Federica Mogherini, who helped shepherd these past weeks in such an effective way. I also want to thank her deputy to the high representative, Helga Schmid, who, together with Wendy, they just formed an incredible unity, and they facilitated and guided our talks with enormous dedication and skill.

All of these leaders and the legion of aids who contributed countless hours to assisting us really set a new standard for international cooperation and hard work. And the fact that we have stood together and maintained our unity throughout these 18 months lends enormous weight and credibility to the agreement we have forged, but it also offers everybody a sign of possibilities, a sign of encouragement for those who believe in the power of diplomacy and of negotiation.

Thank you also to the Government of Austria, which has very generously hosted this last round of talks – perhaps for a bit longer than it may have expected – (laughter) – and it has also hosted countless rounds before this one, so they've made a very special contribution to this. And I'll tell you, all the police and the folks in the hotels and everybody in Austria, *Vielen dank*. We thank you for a really remarkable welcome. (Applause.)

I want to thank the other nations that have hosted these talks – this has been sort of a traveling circus – in particular Switzerland, Oman, Turkey, Russia, Kazakhstan, Iraq, and my home country, the United States.

And I am particularly grateful – we are particularly grateful, all of us, to the sultan of Oman, for his very personal engagement and support for the possibility of an agreement. He and his government were there to help every step of the way.

And I finally want to express my deep respect for the serious and constructive approach that Iran's representatives brought to our deliberations. The president of Iran, President Rouhani, had to make a difficult decision. We all know the tensions that exist. Foreign Minister Javad Zarif, a tough, capable negotiator, and patriot, a man who fought every inch of the way for the things he believed, and sometimes these were heated and passionate exchanges. But he and his team, while tough, always professional, always dedicated to finding solutions to difficult problems. And we were, both of us, able to approach these negotiations with mutual respect, even when there were times of a heated discussion, I think he would agree with me at the end of every meeting we left with a smile and with a conviction that we were going to come back and continue the process. We never lost sight of the goal that an agreement could bring and the best long-term interests of all concerned.

Now, we are under no illusions that the hard work is over. No one is standing here today to say that the path ahead is easy or automatic. We move now to a new phase – a phase that is equally critical and may prove to be just as difficult – and that is implementation. The 109 pages that we have agreed upon outline commitments made on both sides. In the end, however, this agreement will live or die by whether the leaders who have to implement it on both sides honor and implement the commitments that have been made.

There is reason to be optimistic. In January of last year, we took the first step by adopting the Joint Plan of Action. Man, were we told by skeptics that we were making a mistake of a lifetime – that Iran would never comply, that this was a terrible agreement. But you know what? They were dead wrong. All sides met their obligations. The diplomatic process went forward. And we are already nearing almost two years of Iran's compliance, full compliance, with the agreement.

The entire world has a stake in ensuring that the same thing happens now. Not only will this deal, fully implemented, make the world safer than it is today, but it may also eventually unlock opportunities to begin addressing regional challenges that cannot be resolved without this kind of an agreement being in place in the first place. The past 18 months have been yet another example of diplomacy's consummate power to forge a peaceful way forward, no matter how impossible it may seem.

Obviously, every country that has been at the table over the past 18 months has had its own domestic perspective to consider. The United States is no exception. Back home, the future of Iran's nuclear program has long been the focus of a lot of debate, and I have absolutely no doubt that debate is going to become even more intense in the coming days. I'll tell you what, we welcome the opportunity to engage. These are vitally important issues, and they deserve rigorous but fact-based discussion. I've heard more talk in the last days about concessions being made and people racing. We have not made concessions. Lausanne is more than intact. And the facts are what should define this agreement.

From the start, President Obama and I have pledged that we would not settle for anything less than a good deal – good for Americans and good for our partners, our friends, our allies, good for the future of the Middle East, and good for the peace of mind of the world. That is what we pursued and that is what we insisted on through long months of hard negotiations, and that is precisely what we believe we have achieved today.

I will just share with you very personally, years ago when I left college, I went to war. And I learned in war the price that is paid when diplomacy fails. And I made a decision that if I ever was lucky enough to be in a position to make a difference, I would try to do so. I believe this agreement actually represents an effort by the United States of America and all of its member – its colleagues in the P5+1 to come together with Iran to avert an inevitability of conflict that would come were we not able to reach agreement. I think that's what diplomacy was put in place to achieve, and I know that war is the failure of diplomacy and the failure of leaders to make alternative decisions.

So we have a chance here and I hope that in the days ahead that people will look at this agreement hard for the facts that define it and that we will be able to fully implement it and move forward.

I'd be happy to take a few questions.

MS HARF: The first question, it's from Indira Lakshmanan of Bloomberg News. Go ahead.

QUESTION: Thank you, Mr. Secretary. Mr. Secretary, what do you say to critics who say that lifting the UN arms embargo will fuel an arms race that endangers U.S. allies in the Middle East?

SECRETARY KERRY: Can you put it a little closer? I can't hear you very well.

QUESTION: Sorry. What do you say to critics who say that lifting the UN arms embargo will fuel an arms race that endangers U.S. allies in the Middle East, making it unlikely that Congress will endorse the deal? And what's the Administration's plan if Congress rejects the agreement with a veto-proof majority? And last, what do you say to U.S. energy companies and other businesses who will remain under U.S. primary sanctions, putting them at a disadvantage against nations who now will be allowed to return to investment and trade in Iran? Thank you.

SECRETARY KERRY: Well, let me answer the second one first. With respect to companies that want to rush to do business in Iran, it is absolutely true that because of the embargo by the United States, American companies will not be part of that rush – unless specifically exempted, and very few are. So the reality is that, indeed, other countries will make a different choice. This is something Congress is going to have to consider, whether or not over the course of time, Iran, if they fully comply, whether they think it makes sense to continue.

But let me underscore, because this goes into your first question, and that is about the arms embargo. First of all, there were seven participants in this negotiation. Three of them believe there should be no embargo whatsoever, and four of them believe there should be a continuation. The result of the negotiation is that it not only continues for five full years, which is a pretty lengthy period of time during which a lot of other things can begin to happen, but it also continues under Chapter VII, Article 41, so that it is fully enforceable and has the force of the United Nations Security Council. Now, to have achieved that when three of the nations could have said no deal and walked away or you could have had a different outcome I think is significant, number one.

Number two, and this is very important, the United Nations Resolution 1929, which is the resolution that basically brings us here and set in motion the sanctions, says specifically that if Iran comes to negotiate – not even get a deal, but comes to negotiate – sanctions would be lifted. We're not doing that with respect to the arms embargo, even though not only have they come to the negotiation, they have in fact negotiated a deal.

So we have plenty of time over the next few years to address whatever the next steps will be in that issue, but I think that we did very well to hold on to that particular restraint, and we'll see where we go in the future.

QUESTION: Congressional – the congressional override and the veto? On the – what will the Administration do if Congress has a veto-proof majority rejecting the deal?

SECRETARY KERRY: If Congress were to veto the deal, Congress – the United States of America would be in noncompliance with this agreement and contrary to all of the other countries in the world. I don't think that's going to happen. I really don't believe that people would turn their backs on an agreement which has such extraordinary steps in it with respect to Iran's program as well as access and verification.

This agreement will withstand the test of scrutiny in the next days, and I look forward to being part of that debate, obviously. We will brief Congress immediately. We will be deeply engaged in it. But I am confident that people will not choose to turn their back on the rest of the international community, on this opportunity to change a relationship, and this opportunity which is the only viable alternative to be able to guarantee there is a peaceful nuclear program and that they will not succeed or choose to get a weapon.

MS HARF: The second question is from Arash Azizi of Manoto.

QUESTION: Secretary Kerry, it wouldn't be a surprise to you that the sanctions – both the nuclear sanctions and others – have deeply hurt the Iranian people, from the airplanes that are falling, to the children who have needed medicine. When the Iranian people watch this presser tonight, mostly are thinking when and how quickly will the sanctions lifted, and how quickly can they see the result?

And they'll also be wondering that in a political atmosphere, when every single Republican contender has promised to scuttle the deal, aren't you worried that the hard efforts that you've made during this last little while will be undone by the next Administration? And what guarantees can this Administration make to prevent that?

SECRETARY KERRY: Well, as I said, there are a series of steps that are spelled out very, very clearly in this agreement that Iran has agreed to take, that are necessary to expand the breakout time and to begin to build confidence. Those steps will begin the moment after Congress has had its review time of this agreement. At that point Iran, when it sees the results, will begin to reduce its enrichment, begin to dismantle its centrifuges and take the steps necessary to expand the breakout time and provide confidence. So that is about 60 days away. And then a few months after that the IAEA will conclude and the other things will happen. So somewhere in the vicinity of four to six months or so, depending on how rapidly Iran is able to perform its initial functions. It's really dependent on Iran how fast that will happen, but I expect it to be somewhere in a matter of months – maybe six or so; hard to say exactly – and that will begin to make a difference.

With respect to this agreement, look, surviving the future, I really believe deeply that if Iran fully implements with two years already under Iran's belt, during which time Iran's program has effectively been frozen, and they have begun to show people that they're not able or ready to make a bomb, I am convinced that no one will see the common sense of turning away from that so that all of a sudden the next day Iran can go out and enrich more and do everything that you've just tried to prevent. I am convinced that whoever is our next president will see the wisdom of this agreement and they will leave it in place.

MS HARF: Our final question is from Jay Solomon of *The Wall Street Journal*.

QUESTION: Thank you. Secretary Kerry, Iran's most powerful political figure, Supreme Leader Ayatollah Khamenei, was not here in Vienna, and has repeatedly voiced skepticism or suspicion about agreements with the United States. He's also said in recent days that his country will continue its opposition to U.S. foreign policy. What assurances did you get from Minister Zarif and other Iranian officials that the supreme leader does, in fact, back this agreement? And why are you confident Tehran won't back out of the deal like they did in 2009 on the nuclear fuel swap? Thank you.

SECRETARY KERRY: Well, first of all, I never said I was confident that – I am like everybody else here, and I said this very clearly in my comments a few minutes ago. I said the fact of the signing of this agreement does not eliminate all of the challenges. It's the implementation that will matter. And I'm not going to stand here and tell you that everything's going to work without a bump, without a hitch in the road, without some misunderstanding or some effort that needs clarification.

What I do know is that the negotiators absolutely affirmed to us on several occasions, and most importantly in the last 24 hours, that they are operating with a full mandate from the president, Rouhani, and from the supreme leader.

And in a negotiation, you lay down the procedures that are expected to be taken and you lay down the consequences for not doing that. Both of those are absolutely evident and clear in this agreement, and so we obviously look forward to the implementation, but I'm not the person to vouch for the fact – which I can't – as to exactly every step or moment in time that's going to be taken in the next days in terms of compliance. But we have put in place ample mechanisms with respect to compliance and with respect to accountability. So I feel very confident about our ability to protect our interests, to protect the security interests that are stake, and I full, frankly, expect over the next days to see this process at least begin to be followed up on.

MS HARF: Thank you all very much.

QUESTION: For the Iranian (inaudible) --

MS HARF: Thank you. Thank you very much.

QUESTION: -- not saying anything.

SECRETARY KERRY: Well, I answered some, but you got to bear with me because this is the longest I've stood up for quite a while, guys. So I'm going to move out. (Applause.)

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Your 1716 Article II-2 Proposed addition repetitive. Right to enforce internal safety regulations amply covered by II-3. Security interests also provided for in IX-1-D. Additional phrase adds nothing and would create misunderstanding as to intent in II-2 and II-3. You may give written statement for negotiation records, if necessary, that enforcement internal security regulations connection travel and residence covered II-3. Treaty fully recognizes paramount right state take measures to protect itself and public safety.

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DEPARTMENT OF STATE L/T FEB 16 1955 TREATY SEARCH OFFICE OF THE LEGAL ADVISER

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Annex 121

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Article XIX (Navigation)

It was agreed that there would be added to Protocol Paragraph 4-ter (relating to definition of cargoes) the following words "as well as goods" in order to complete the balance of the provision. It was agreed that the national fisheries reservation in paragraph 3 would be consolidated with that in Article XIV (6) and be incorporated in Article XXI. It would be drafted in such a manner so as to provide no more and no less than previously.

The Dutch reverted to their earlier-expressed wish to include some provision or declaration of principle regarding air transport or civil aviation. The U.S. side repeated the views previously set forth in informal discussions to the effect that this subject was inappropriate to a Treaty of this kind, and that the door was presumably always open for discussion of civil air transport between the United States and the Netherlands within the framework of normal air agreements. The Dutch said that they would conceed that air transport could not be dealt with in specific terms in the FCN Treaty, but that they felt that there would be something lacking if this very important means of communication, which plays a key role in the Netherlands in the international sphere, were not mentioned in any way at all, especially in view of the otherwise general comprehensive scope of the Treaty. They said what they now had in mind was some kind of simple, general language of principle, and suggested that Article I, paragraph 2 afforded an appropriate precedent (interchange and use of scientific and technical knowledge). The U.S. side remarked that in its opinion, the justification for including Article I, paragraph 2 was entirely different from putting in material about the very specialized and complex subject of air transport, with respect to which there exists an appropriate and entirely adequate bilateral vehicle (such as Bilateral Air Transport Agreements). The Dutch said they nevertheless would offer some specific language to indicate what they would propose on the subject of aviation in the Treaty, and added that they hoped the U.S. side would transmit it to the Department for consideration. The U.S. side responded by saying that they would of course do so, and that the Department undoubtedly would give the matter very careful consideration. They added that it would be very unlikely, however, that anything could be worked out on the subject in the FCN (see Embassy despatch 107 of August 3, 1954).

Article XXI (General Exceptions)

Security Reservation, paragraph 1 (d). The Dutch said that they were going to propose an expanded wording of the security reservation, modelled upon language found in the Statute of Barcelona

which would emphasize that security measures were to be taken only in exceptional circumstances for reasons of genuinely vital concern, and were not to be prolonged any longer than the circumstances calling for them existed. They said that they wanted to emphasize that the security reservation ought to be strictly construed so as not to open it to abuses.

The U.S. side indicated that they concurred in the thought that this reservation was to be used for serious reasons, and was not intended to be a loophole through which arbitrary actions would or could be taken so as to defeat the purposes of the Treaty. The U.S. side emphasized that the presence in the Treaty of an ample security reservation is, however, deemed essential by the United States. They added that they could see no advantage whatsoever in trying to elaborate on the present wording, and that any attempt to elaborate on it would give rise to misapprehensions lest its scope was being narrowed to the detriment of the United States to take the measures it might consider essential or vital to national security. It was stressed that there must not be the slightest implication that the United States is committing itself to abandon any of its present security controls, even though it is unlikely that these controls are actually inconsistent with any of the provisions of the Treaty as regards U.S.-Netherlands relations. They emphasized that each Party would have to determine, according to its own discretion, what was essential from the viewpoint of its security interests. The Dutch said that they did not question the proposition that each Party would have to make its own determinations, but that they wanted to lay down some "guide posts." (The Dutch subsequently offered revised wording of the type which they had mentioned. The U.S. side stated that the revision was unacceptable. After discussion, it was very tentatively agreed that an appropriately-worded Minute provision might be possible to indicate that the security reservation was not intended to be abused and that each Party would make its own determinations as to what measures were essential for its security interests. The U.S. side drafted some wording which was reviewed in a discussion at which the Dutch attempted to give primary emphasis to the first element. An agreed ad referendum redraft is contained in the text of the consolidated Minutes reported in Embassy despatches 107 of August 3 and 147 of August 17, 1954.)

Paragraph 1(e). The Dutch said that they would like to elaborate on this provision by providing that it could be invoked in the case of any given company only so long as the third-party control existed, and that disabilities would be lifted as soon as treaty-party control had been established. The U.S. side said that no words were necessary to carry out that thought because it was axiomatic throughout the Treaty that no temporal references were necessary since the intent was that

Mr KNOWLAND. That is my purpose, in the hope of being able to expedite the transaction of the business of the Senate, and at the same time to maintain the sound public policy, which I believe is important, to have both a quorum call and a yea-and-nay vote in the case of the treaties.

Mr. President, let me inquire if there is further routine morning business.

The PRESIDING OFFICER. If there is no further routine morning business, morning business is concluded.

EXECUTIVE SESSION

Mr. KNOWLAND. Mr. President, I now move that the Senate proceed to consider executive business.

The motion was agreed to; and the Senate proceeded to the consideration of executive business.

TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION

The Senate, as in Committee of the Whole, proceeded to consider the treaty, Executive R (82d Cong., 1st sess.), a treaty of friendship, commerce, and navigation between the United States of America and Israel, together with a protocol and an exchange of notes relating thereto, signed at Washington on August 23, 1951 (with a reservation).

Mr. HICKENLOOPER. Mr. President, let me ask the acting majority leader whether he has requested that the treaties be considered en bloc; or does he believe it will be proper to make that request at a later time.

Mr. KNOWLAND. While the Senator from Iowa was out of the Chamber, that question was raised. The suggestion was made that the distinguished Senator from Iowa, who is handling the treaties for the Foreign Relations Committee, might explain each one. At that time I assume that the reservations regarding the various treaties will be discussed. It has been proposed that after the explanations have been made, a request be made to have the treaties acted upon in two groups, one to be composed of the treaties with reservations, and the other to be composed of the treaties without reservations.

Mr. HICKENLOOPER. Very well.

Mr. JOHNSON of Colorado rose.

Mr. HICKENLOOPER. I yield to the Senator from Colorado.

Mr. JOHNSON of Colorado. I should like to ask the acting majority leader whether he believes it would be practicable and possible to have a time set for voting on the treaties.

Mr. KNOWLAND. I may say to the distinguished Senator from Colorado that, before the debate has even started on the treaties, I would not like to suggest a time at which a vote be taken. I do not know how much time the Senator from Iowa will require for the explanation. I do not know how much additional debate Senators may desire to have. I therefore would not want in any degree, by setting a definite time for the vote, to foreclose debate at this time, before the Senate has even had a chance to hear an explanation of the treaties.

Mr. JOHNSON of Colorado. I may say it would greatly convenience all Senators if that could be done. The acting majority leader knows that many Senators are engaged in the discharge of other important duties, and that they are interested in being present to vote on the treaties.

Mr. KNOWLAND. I would say to the Senator from Colorado that I have already given assurance to the Senate that at the conclusion of the explanation and the debate, I shall ask for a quorum call, following which, I shall ask for the yeas and nays on the respective treaties, so that Senators will be on notice prior to the votes.

Mr. HICKENLOOPER. I may say to the Senator from Colorado in reference to his inquiry addressed to the acting majority leader, that so far as I know, every substantial objection to the treaties has been resolved. There may be objections of which I do not know; though it has occurred to me that there probably will not be prolonged debate on the treaties.

Mr. President, in discussing the treaty, Executive R, 82d Congress, 1st session, which is a treaty of friendship, commerce, and navigation between the United States of America and Israel, together with a protocol and an exchange of notes relating thereto, signed at Washington on August 23, 1951, and which was reported with a reservation, the statement I propose to make will apply generally to all the treaties to which reservations are recommended.

Mr. President, the eight treaties now before the Senate are part of a comprehensive series of modern commercial treaties being negotiated between the United States and other nations with which we carry on trade. More than 130 treaties of this type have been concluded since 1778. Congress has asked that treaties of this kind be negotiated in order to promote private investment.

The Mutual Security Act of 1952 contained an amendment which read, in part, as follows:

> The Department of State * * * shall accelerate a program of negotiating treaties of commerce and trade * * * which shall include provisions to encourage and facilitate the flow of private investment to countries participating in programs under this act.

The treaties now before the Senate, as well as several double tax conventions approved a week ago, are part and parcel of efforts being made to help American business develop markets abroad, service those markets, and arrange for the investment of American funds abroad. The Secretary of Commerce has pointed up the need for conventions of this type. He wrote to the committee on July 13, in part as follows:

> American businessmen who have investment or trade relations with these countries, or who are contemplating such relationships, have a genuine stake in numerous provisions in these treaties * * *
>
> The President has made the encouragement of American private foreign investment abroad one of the keystones of his foreign economic policy. Success in this phase of our policy will largely be dependent upon the degree to which other countries can be prevailed upon to take actions designed to improve the climate for investment.

I ask unanimous consent that the letter of July 13, written by the Secretary of Commerce, be inserted in my remarks at this point.

The PRESIDING OFFICER. Is there objection?

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

THE SECRETARY OF COMMERCE,
Washington, July 13, 1953.

The Honorable ALEXANDER WILEY,
Chairman, Committee on Foreign Relations, United States Senate, Washington, D. C.

DEAR MR. CHAIRMAN: I appreciate this opportunity to join in recommending to your committee that it report favorably on the several commercial treaties now under consideration.

For a number of years the business community has urged this Government to proceed as rapidly as possible with the program for modernizing our treaty arrangements with the countries with which we enjoy friendly and mutually profitable trade relationships. More recently, the Congress in section 516 of the Mutual Security Act of 1951, as amended, has directed the executive branch to expedite this program.

American businessmen who have investment or trade relations with these countries, or who are contemplating such relationships, have a genuine stake in numerous provisions of these treaties. These provisions include the ones which concern the protection of their persons and property in the other countries involved, the permitted range of trade and business activities in those areas, the conditions of investment and remittance of investment proceeds, and the treatment of imports and exports.

The President has made the encouragement of American private foreign investment abroad one of the keystones of his foreign economic policy. Success in this phase of our policy will largely be dependent upon the degree to which other countries can be prevailed upon to take actions designed to improve the climate for investment. The treaties before your committee take a necessary first step in the direction of establishing agreed standards for the treatment of those American businessmen who are willing to venture their capital and technology abroad.

These commercial treaties can do no more, of course, than establish the standards to be applied reciprocally by the contracting governments in these matters. Various other favorable conditions must be present before individual firms will launch ventures where these assurances can come into play. However, our discussions with American businessmen have revealed their belief that the conclusion of commercial treaties of the type now before your committee is one of the most useful steps the Government can take to aid private United States foreign investors.

Particular mention should be made of the proposals before your committee to advise and consent to the ratification of a treaty with Japan and to the revival of the 1923 treaty with Germany. Now that we have reestablished friendly political relationships with these important bulwarks of the free world, it is both appropriate and timely to reestablish a framework for our commercial and other business relationships with these countries.

It is my hope that your committee will see fit to report favorably on the several treaties now under consideration.

Sincerely yours,

SINCLAIR WEEKS,
Secretary of Commerce.

GENERAL NATURE OF THE CONVENTIONS

Mr. HICKENLOOPER. In considering these treaties, Mr. President, it must

be borne in mind that they are based upon the principal of mutuality. When the United States gives a right or a privilege to an alien to carry on activities in this country, the United States in turn obtains similar rights for American citizens abroad. I emphasize this point because it is essential that we not view the conventions simply as documents which give aliens limited rights in this country. In fact, since there are many more Americans doing business abroad than there are aliens doing business in this country, Americans as measured in either numbers or in volume of business get more advantages abroad than we accord advantages here to aliens.

THE PROVISIONS OF THE CONVENTIONS

The conventions are similar to each other and to recent conventions approved by the Senate with Italy, 1948; Uruguay, 1949; and with Ireland, 1950. The provisions are commented upon briefly in the committee report at page 3. They are described in more detail in the message of the President transmitting the conventions. For those who wish to compare the conventions, I call attention to the printed hearings on pages 7 through 17 where there is a tabular analysis.

In order to be sure that there are no new or unusual provisions in the pending conventions, with an exception I shall note later, I addressed a query to the Assistant Secretary of State for Economic Affairs, as appears in the hearings at page 4, as follows:

Senator HICKENLOOPER. Mr. Waugh, are there any provisions not already in existing treaties which in any way either curtail or diminish the constitutional provisions or authority of the States or the power of their local legislatures, or which enlarge the authority and power of the Federal Government into legislative fields which have heretofore under the Constitution been reserved to the States, with the exception of the provision on practice of professions which were referred to here?

In other words, are we enlarging the Federal power into the field of intrastate or of State legislation?

* * * * *

Mr. SETSER (answering for the Department). The question as I understand it is, are there any of these treaty provisions not already in existing treaties which encroach upon the constitutional legislative authority of the States, or enlarge the authority of the Federal Government?

To my knowledge, there are none.

Senator HICKENLOOPER. Is it the intent of the Department or the administration, in negotiating these treaties, either to enlarge the authority of the Federal Government for legislation within the States, or to curtail or restrict the authority of the States themselves in any matter where they have formerly had authority?

Mr. SETSER. No, sir.

Senator HICKENLOOPER. I am excluding, you understand, the matter of the professions, which are definitely dealt with.

Mr. SETSER. No, sir.

Mr. WAUGH (Assistant Secretary of State). I would like to confirm that also and say, "No, sir."

PRACTICE OF THE PROFESSIONS

Mr. President, I do not wish to burden the Senate unduly in discussing these treaties, but I should point out that the Committee on Foreign Relations recommends that a reservation be attached to the treaties with Israel, Denmark, Greece, Germany, and Japan. The need for this reservation arose from language which appeared originally in the treaties with Israel, and later in the treaty with Japan, and by similar language in certain of the other treaties.

The treaty with Israel, article VIII, reads:

Nationals of either party shall not be barred from practicing the professions within the territories of the other party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence, and competence that are applicable to nationals of such other party.

The committee felt that this language would have the effect of abrogating State laws or provisions of State constitutions which might make citizenship a prerequisite to the practice of certain professions. It was the sense of the committee that if a State law or constitution requires that an individual seeking to practice a profession involving functions in a public capacity or in the interest of public health and safety must be a citizen, the pending treaties should not have the effect of overturning those State laws. In order to prevent that possibility, the committee recommends that the following reservation in the resolution of ratification be attached to the treaties with Israel, Denmark, Greece, Germany, and Japan:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive —, ——— Congress, ——— session, a treaty of freindship, commerce, and navigation between the United States and ———, signed at ——— on ———, subject to the following reservation, which shall be agreed to by the other high contracting party before ratifications are exchanged:

"Article —, paragraph — (referring to the specific provision on citizenship requirements), shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are State-licensed and reserved by statute or constitution exclusively to the citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions."

The Committee on Foreign Relations examined carefully article VII of the proposed supplementary agreement with Italy. That article states a policy of seeking to avoid gaps in social-security protection as applied to nationals who might move from one country to another and sets forth certain general principles to help the parties in making "the necessary arrangements to carry out this policy."

It seemed clear to the committee that any plan of this type would involve highly technical negotiations and amendments of existing domestic legislation. Under those circumstances, the committee approved the Italian treaty, subject to the understanding that the social-security arrangements referred to "shall be made by the United States only in conformity with provisions of statute." This means that if at some future time an acceptable arrangement is worked out to give effect to the general statement of policy in the treaty, it can have no force or effect in the United States until such time as domestic legislation is adopted to give the arrangements legal effect.

I might say on that point, Mr. President, that this is a most technical problem involving social-security activities which may build up in this country or in Italy, as the case may be, for the nationals of the respective countries. It is an agreement which commits us to attempt to find an equitable and fair method of giving reasonable credit, not necessarily in dollars or in lira, but perhaps a combination between the two countries, which will afford a workman reasonable credit for the years he has build up in a social-security system.

It is certainly beyond my competence to write such an arrangement or negotiation. It is a highly technical, actuarial, and financial operation, and it will require experts of the highest order to work out a satisfactory arrangement. The treaty is not self-executing on that score, but will have to be implemented by this technical arrangement which will be approved by statute.

Mr. President, in conclusion, I remind Members of the Senate that these treaties were the subject of hearings held last year by a subcommittee under the chairmanship of the Senator from Alabama [Mr. SPARKMAN]. They were also considered this year by a subcommittee of the Foreign Relations Committee. While there were several individuals who testified on specialized subjects, such as marine insurance, investment clauses, and, in particular, the treaty with Ethiopia, no one opposed the conclusion of treaties of this type. In fact, the principal of concluding modern-type commercial treaties was endorsed time after time.

I believe we have taken care of the principal objections to these treaties either in the form or the proposed reservations or by the committee's comments in the committee report. I believe it will be advisable for the Senate to give its advice and consent to their ratification.

Mr. President, I should like to amplify a little and explain in somewhat greater detail the particular reason for the reservations which go to the question of citizenship in connection with the practice of certain professions.

Our Government has numerous treaties of friendship, navigation, and commerce with other countries. In a great many of them there is what is called a most-favored-nations clause which provides, in effect, that if we have a treaty with relation to trade with a certain nation, it will automatically be extended to all other nations with which that country has a treaty, as an automatic extension of the new or enlarged privilege.

In the treaties with Israel, Denmark, Greece, Japan, and in the agreement with the Federal Republic of Germany, there appear provisions along this line, that the nationals of either country shall not be prohibited from practicing various professions within the other countries merely by reason af alienage alone. On that point, the objections which arose were that under the most-favored-nations clause those provisions would be

automatically extended to all other nations which enjoyed the most-favored-nations treatment, without a renegotiation of the treaty.

There are a number of States of the American Union which have constitutional provisions with regard to certain professions, such as law, medicine, dentistry, and perhaps some others, which provide that one of the prerequisites for practicing those professions in those States is citizenship in the United States. A certain number of other States have by legislation provided, with reference to the practice of law or the practice of medicine, that before one can be admitted to the practice of those professions he must be a citizen of the United States. In probably half of the States of the Union there is neither a constitutional limitation nor a statutory limitation, so that in those States an alien may practice the professions, providing he meets the other qualifications of competence, study, and so forth.

But the principle of these treaties destroying the constitutional limitations of State constitutions is, of course, a question which is very, very controversial. I shall accept my full share of responsibility in this matter, because I am very much opposed to using the device of treaties—I do not mean to say they were being used in this case—to destroy the constitutional prerogatives of individual States or invading to any great degree the rights of the States to legislate within their own boundaries in matters affecting themselves and their own local administration and local affairs.

Great objection was raised by many persons to these provisions. The objection did not go to the extent that an alien should not be permitted to practice professions in this country. That was no part of the objection, because there has been no objection raised, so far as I know, to an alien practicing professions in any State in the United States where there is no prohibition. So the question of alienage in and of itself was not an issue in these treaties. There was a question of the destruction of the constitutional power of certain States or the destruction of their right to legislate in matters of public health and public interest within their States.

The reservation which is recommended provides that the provisions of the article in the treaty—and the article is a little different in the various treaties—shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are State licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clauses in the said treaty shall apply to such professions.

In a nutshell, it means that existing laws or constitutional provisions in any of the States are not changed or altered in any way. It means that we preserve the right of a State, by its constitution, to require citizenship as a prerequisite to the practice of the professions, or the right of a State, in its sovereign judgment, to legislate such a requirement as a prerequisite for the practicing of the professions.

There is a complicated list outlining the requirements in many States, in case any Senator desires to see it, but I believe about half the States do not have such requirements, and the right of aliens to practice their professions in those States which deem such practice wise and proper, and wish to allow it, is not in any way limited by the treaties.

That is the gist of the major points which gave rise to the reservations. Incidentally, the reservations will be submitted to the countries involved for their acceptance before the treaties will become effective.

The treaties have been given careful attention. We are certain that no interference with substantive basic rights of States is involved. The treaties are in the same pattern as the regular treaties of commerce, friendship, navigation, and trade which have been negotiated with other nations during the last 100 years or so. I am satisfied that our subcommittee was eventually unanimous in recommending that the treaties be adopted with the proposed reservations. The Committee on Foreign Relations was unanimous. Perhaps there might have been one or two absentees, but all Senators present at the meeting were unanimous in voting approval of the treaties, including the reservations and understandings accompanying certain of the treaties, and in recommending that the Senate advise and consent to them.

Mr. President, I ask unanimous consent to have printed at this point in the RECORD an article entitled "Senate and U. N. Aid Investors Abroad," written by Brendan M. Jones, and published on the financial page of the New York Times of Sunday, July 19, 1953. The article points up the vital importance of trade arrangements in order to facilitate international trade, and is illustrative of many other expressions of opinion in the press of the United States.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

SENATE AND U. N. AID INVESTORS ABROAD—TWO TAX TREATIES RATIFIED AND EIGHT PACTS WEIGHED—WORLD BODY ASKS LEVIES BE CUT—BUSINESS JOINS IN DEBATE—CHAMBER AID AT GENEVA SAYS COUNTRIES WANTING FOREIGN CAPITAL MUST BE REALISTIC

(By Brendan M. Jones)

New progress in the slow and difficult task of improving conditions for American private investment and business abroad has just been achieved in Washington and Geneva.

These two locations indicate the nature of the new accomplishments. In the first, the Senate and its Foreign Relations Committee took up tax and commercial treaties with 10 countries. In the second, a resolution advocating more equitable tax treatment for foreign private investment was adopted by the United Nations Economic and Social Council.

In the case of the treaties, negotiations have extended over several years, largely because of the extreme technical problems related to various countries' taxing and legal systems. However, steady efforts by the United States since World War II generally have brought about better business treaties. In many instances, they also have served to educate foreign governments on the essential requirements for encouraging private enterprise.

BUSINESS GROUPS

Major business groups have been able to contribute to these efforts and to give private business a voice in developments. Treaties by this country to avoid double taxation on foreign investment as well as pacts on friendship, commerce and navigation have been reviewed by such groups at the National Foreign Trade Council and the United States Chamber of Commerce.

In the wider field of United Nations activities, the International Chamber of Commerce has been serving as a major non-governmental advisory body. Recent preliminary debate on the resolution adopted in Geneva gave one of its representatives the opportunity in the "educational" effort. This dealt mainly with elementary, but surprisingly necessary, principles.

Their exponent was Ellsworth C. Alvord of Alvord & Alvord, legal and accounting firm, who served as an observer for the chamber at recent United Nations sessions in New York. He told a group of foreign delegates that countries actually wanting foreign capital must take realistic action to meet the numerous considerations of sound investment. Otherwise, he said there would be no such investment.

Senate action on business pacts took two forms. On June 10, the Senate ratified treaties with Belgium and Australia for the avoidance of double taxation on income.

Last Monday, the Senate Foreign Relations Committee heard recommendations of State Department officials for the ratification of treaties of friendship, commerce and navigation with Japan, West Germany, Italy, Finland, Denmark, Israel, Greece and Ethiopia.

ADD TO INCENTIVES

These treaties, especially where combined with taxation conventions, serve to increase incentives for investment and business in the countries concerned. They set the "ground rules" for mutual protection and safeguarding of legal rights and interests of capital and business classed as "foreign" by the signatory nations.

In testimony before the Senate committee, U. Alexis Johnson, Assistant Secretary of State for Far Eastern Affairs, observed that the treaty with Japan was especially important because of increased United States investments in that country.

He estimated that of the total private foreign invesments in Japan amounting to $350,000,000 at the end of 1952, 70 percent represented United States business concerns or individuals.

The implications of this estimate were that a treaty would serve to encourage such investments on an even larger scale. Also, it has been noted that private capital interest in Japan has grown more cautious with the return of sovereign power to that nation. Therefore, it is said, a treaty will serve to reduce apprehension over possible discriminatory treatment of United States investors in the interest of domestic enterprises.

As far as the United Nations action is concerned, there is always the question of how effective are the resolutions passed by various bodies of the world organization. For example, the resolution on private investment taxation practices simply makes its contents a United Nations policy, which member nations are expected to follow on a voluntary basis. They also are required to make periodic reports to the Secretary General on progress toward its objectives.

Specifically, the resolution just adopted in Geneva provides that more developed countries, when acting unilaterally or concluding tax agreements, give sympathetic consideration to the feasibility of taxing such income only, or primarily, in the country in which the income was produced.

This principle, that income earned abroad should be taxed solely in the country where earned, and not be subject to further taxes when remitted to the investors' country of residence, has been advocated

chiefly in the interests of encouraging more investment in the less-developed countries.

However, it involves the important issue of taxation prerogatives, the question of whether one country is to forego what it considers its legitimate revenue rights in the interest of other countries. Treaties for the avoidance of double taxation do not, as a general rule, provide that one country relinquish taxing rights, but they set standards determining how much of a taxable income will be taxed by either of two countries.

SINGLE TAXATION STRESSED

In explaining the requirements for inducing foreign private investment, Mr. Alvord, the chamber's representative, told United Nations delegates that investors essentially were not too concerned about taxes, so long as income was taxed only once.

In addition, he emphasized, taxation, while important, was not the only consideration in attracting foreign capital. Even double taxation treaties, while an essential instrument for clearing up taxation uncertainties, were not in themselves designed to attract foreign investment, he noted.

More fundamental than any other consideration, the American asserted, was the need for foreign Governments to provide, in effect, the same freedom of action, treatment, and fair return on investment as is enjoyed by capital in this country. While the policy of taxation only in one country—the income-producing country—was one that this country should endorse, he said, it was doubtful that Congress would ever approve such a complete relinquishment of taxing rights.

However, he advised, primary reliance on private investment as the means of raising the economic standards of less-developed countries, offers the surest road to accomplishments.

Mr. HICKENLOOPER. Mr. President, I do not know what the pleasure of the majority leader may be now. As I understood the statement made earlier, it might be acceptable to vote on the treaties in two classes; first, those without reservations might be considered and voted on en bloc; then those with reservations might be considered and voted on en bloc.

The PRESIDING OFFICER. That is the understanding of the Chair.

Mr. HICKENLOOPER. I shall be happy to attempt to answer any questions which might be of interest to any Senator.

If there are no questions, I shall yield the floor, with the understanding that the acting majority leader will settle the matter of whether the treaties will be voted upon en bloc.

Mr. WILEY. Mr. President, since 1778, when the United States concluded its first commercial treaty with France, more than 130 treaties of commerce and navigation have been concluded by this Government. Many of the treaties have been terminated for one reason or another, and others, though still in effect, have provisions which are obsolete today.

The Department of State in recent years, and at the suggestion of the Congress, has been modernizing these commercial conventions. In this process it has been possible to include new provisions which assist Americans in their activities in foreign countries.

I might say parenthetically that our great country is indeed fortunate that its foreign commerce amounts to between 3 percent and 5 percent of its overall commerce, whereas the foreign commerce of such countries as Great Britain, and some others, is as high as 40 percent of their total commerce. So the United States is certainly blessed, in that our great economic life and strength are within our own borders.

The eight treaties which the Foreign Relations Committee reported without objection to the Senate on July 17 are similar to three conventions which were approved in 1949 and 1950. They have been considered by two subcommittees of the Committee on Foreign Relations, one under the chairmanship of Senator SPARKMAN who held hearings on certain of the conventions last year, and the second subcommittee under the chairmanship of Senator HICKENLOOPER who held hearings in early July this year. It is remarkable that in these hearings no one objected in principle to the conclusion of this type of agreement. There were, however, a few suggestions made relative to specific provisions and these suggestions have been taken into consideration and are discussed in the report of the committee.

I wish to invite the attention of my colleagues, Mr. President, to the treaties with Japan and Germany, since those treaties were concluded with countries with which we were recently at war.

The treaty with Germany is simple. It merely reactivates a commercial treaty which was signed at Washington in 1923. That 1923 agreement served as a model for many of the commercial treaties concluded in the 1920's and the 1930's. It has stood the test of time and no particular questions are raised now in reactivating that convention. I should call to your attention the fact, however, that the 1923 convention is out of date in some respects, and it is the intention of the United States and the Federal Republic of Germany to negotiate a new convention in the near future.

The treaty with Japan is similar in most respects to recent modern commercial conventions which we have concluded. It will have the effect, in the words of Deputy Assistant Secretary of State for Far Eastern Affairs, Mr. Johnson, of helping to develop "a close and friendly relationship between the United States and Japan." It replaces a commercial convention between the United States and Japan which was concluded in 1911. The treaty is of special significance because of the size of potential United States investment in and trade with Japan.

This simply shows how vital our Constitution is. By means of reservations, we have met the question of whether there was any interference with the rights of the States. We did not have to rely upon an amendment to the Constitution. The power is there, and we utilized it. The committee approved the reservations, as has been fully discussed by the distinguished Senator from Iowa [Mr. HICKENLOOPER].

In concluding my remarks in support of Senate approval of these conventions, I want to commend my colleague, Senator HICKENLOOPER, who has been assiduous in his work on these treaties. As the report of the committee notes, certain reservations have been proposed with respect to provisions which might have had the effect of impairing State laws with respect to requiring citizenship on the part of aliens practicing certain professions in the United States. I think the interests of the United States will be served by the reservations proposed by the Committee on Foreign Relations and I urge Members of the Senate to support these agreements.

Mr. President, we have had a hard year in foreign relations. At this time I wish not only to compliment the Senator from Iowa, but to compliment both Democratic and Republican members of the committee for being very assiduous in taking care of the work with which the Committee on Foreign Relations has been confronted. We have practically cleared our calendar. Today we held a meeting and ordered a number of other matters to be reported. I think that is an evidence of what cooperation and collaboration can do when we are faced with tough problems.

Mr. President, I ask that these treaties be ratified.

Mr. HICKENLOOPER. Mr. President, I thank the Senator from Wisconsin for this kind words. I should like to make a brief statement for the legislative RECORD, because I think it is important in connection with the security of the United States.

These treaties have been formulated in such manner as to avoid any interference with or qualifications of the right of the United States to apply such security measures as it may find necessary. In developing the standard provisions of these treaties, the State Department consulted with the Defense establishments, the Atomic Energy Commission, the Commerce Department and other interested agencies to assure that this result was adequately achieved.

Each of the treaties, as below indicated, contains a general reservation making it clear that nothing in the treaty shall be deemed to affect the right of either party to apply measures "necessary to protect its essential security interests." This clause is contained in the several treaties as follows: Israel, article XXI, paragraph 1 (d); Japan, article XXI, paragraph 1 (d); Denmark, article XXI, paragraph 1 (d); Greece, article XXIII, paragraph 1 (d); Ethiopia, article XVI, paragraph 1 (d); Germany, article III (1).

In the German case, this reservation is made applicable to the 1923 treaty. In the case of Italy, the treaty of 1948, which the present agreement merely supplements as an integral part thereof, already contains a suitable reservation ("necessary for the protection of the essential interests of such High Contracting Party in time of national emergency," article XXIV, paragraph 1 (e)).

These treaties, moreover, do not create rights with respect to such sensitive matters as entry of persons in conflict with our laws respecting immigration, aviation, telecommunications, the arms traffic, atomic energy, or political activities. Using Israel treaty as example, see article II, paragraphs 1 (b) and 3; article VII, paragraph 2; article XXI, paragraphs 1 (b), 1 (c) 4, and 5.

I make that clear because we were especially zealous to see that these treaties in no way offended or destroyed our inherent right to make such regulations or to continue such regulations for our

own internal security as we felt were justified. By the same token, the other countries have the same right.

I thank the acting majority leader.

Mr. PURTELL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

Aiken	Gore	McClellan
Anderson	Green	Millikin
Barrett	Hayden	Monroney
Beall	Hendrickson	Morse
Bennett	Hennings	Mundt
Bricker	Hickenlooper	Murray
Bush	Hill	Neely
Butler, Md.	Hoey	Pastore
Butler, Nebr.	Holland	Payne
Byrd	Humphrey	Potter
Capehart	Hunt	Purtell
Carlson	Ives	Robertson
Case	Jackson	Russell
Chavez	Jenner	Saltonstall
Clements	Johnson, Colo.	Schoeppel
Cooper	Johnson, Tex.	Smathers
Cordon	Johnson, S. C.	Smith, Maine
Daniel	Kefauver	Smith, N. J.
Dirksen	Knowland	Sparkman
Douglas	Langer	Stennis
Duff	Lehman	Symington
Dworshak	Lennon	Thye
Eastland	Long	Tobey
Ellender	Magnuson	Watkins
Flanders	Malone	Welker
Frear	Mansfield	Wiley
Fulbright	Martin	Williams
George	Maybank	Young
Gillette	McCarran	
Goldwater	McCarthy	

Mr. SALTONSTALL. I announce that the Senator from Michigan [Mr. FERGUSON], the Senator from Nebraska [Mr. GRISWOLD], and the Senator from California [Mr. KUCHEL] are absent on official business.

The Senator from New Hampshire [Mr. BRIDGES] is absent because of illness.

The Senator from Ohio [Mr. TAFT] is necessarily absent.

Mr. CLEMENTS. I announce that the Senator from Massachusetts [Mr. KENNEDY] and the Senator from Oklahoma [Mr. KERR] are absent on official business.

The Senator from West Virginia [Mr. KILGORE] is absent by leave of the Senate.

The PRESIDING OFFICER. A quorum is present.

Mr. KNOWLAND. Mr. President, I should like to call the attention of the Senator from New York [Mr. LEHMAN] to the procedure. I understand he requests a yea-and-nay vote on the treaties. The Senate has two groups of treaties before it, one group to which reservations have been attached, and another group to which no reservations have been attached. I was wondering whether the distinguished Senator from New York would have any objection to voting en bloc on the two different groups of treaties.

Mr. LEHMAN. I may say to the distinguished acting majority leader that I have no objection whatever to such procedure. In raising the question my interest was exclusively in establishing the principle that in the future treaties and constitutional amendments shall be acted on by the Senate by a yea-and-nay vote following the establishment of the presence of a quorum. I am very grateful to the leaders of the two parties for their acquiescence in that principle. Certainly I have no objection to having all the treaties passed on en bloc. I am very happy that we have established the principle I have been urging.

The PRESIDING OFFICER. If there is no objection, the treaties will be considered as having passed through their various parliamentary stages up to and including the presentation of the respective resolutions of ratification with the accompanying reservations of the committee.

Without objection, the reservations will be printed in the RECORD at a later point without being read. The question is on agreeing to the respective reservations.

Mr. HICKENLOOPER. Mr. President, I understood the Senate would vote on the treaties en bloc. When the time comes to vote, all the treaties with reservations will be voted on by a yea-and-nay vote, en bloc.

Mr. LEHMAN. Mr. President, all that the Senate would be voting on by voice vote would be the reservations. The treaties themselves will be voted on by yea-and-nay vote, as I understand.

Mr. KNOWLAND. The Senator is correct.

Mr. HICKENLOOPER. The Senator is correct.

The PRESIDING OFFICER. The question is on agreeing to the respective reservations. [Putting the question.]

The reservations were agreed to en bloc.

The resolutions of ratification, with the reservations and understanding, appear in the RECORD following the announcement of the vote.

The PRESIDING OFFICER. The question now is on the respective resolutions of ratification, as amended, on the six treaties to which reservations are attached.

Mr. HICKENLOOPER. I thought we were voting on all of them at one time. Is there objection to voting on them all at once?

Mr. KNOWLAND. The plan was to vote on all the treaties with reservations in one group.

Mr. HICKENLOOPER. The adoption of the reservations to the treaties, to which reservations attach, can be had by voice vote prior to the submission of the question of agreeing to the resolutions of ratification of the treaties with the reservations or understandings attached.

The PRESIDING OFFICER. The question is, as the Chair has just stated, on the six treaties to which reservations have been attached.

Mr. KNOWLAND. Mr. President, on this question I ask for the yeas and nays.

Mr. HICKENLOOPER. On the eight treaties?

The PRESIDING OFFICER. That cannot be done. We must vote first on the six treaties which have reservations, and then vote on the other two.

Mr. KNOWLAND. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. JACKSON. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Washington will state it.

Mr. JACKSON. If the reservations have already been agreed to, is not it possible to vote on all the treaties en bloc, including the treaties without reservations?

The PRESIDING OFFICER. The Chair is advised that that is not possible.

Mr. JACKSON. Can it not be done by unanimous consent?

The PRESIDING OFFICER. Yes; it can be done by unanimous consent.

Mr. KNOWLAND. Now that the reservations have been adopted, in the case of the treaties to which reservations apply, I ask unanimous consent that all eight of the treaties be voted on en bloc, by yea-and-nay vote.

The PRESIDING OFFICER. Is there objection to the request of the Senator from California? The Chair hears none, and it is so ordered.

The question now is on agreeing to the respective resolutions of ratification, as amended, in the case of 6 of the treaties, and to the respective resolutions of ratification without amendment or reservation in the case of the other 2 treaties. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The Chief Clerk called the roll.

Mr. SALTONSTALL. I announce that the Senator from Michigan [Mr. FERGUSON], the Senator from Nebraska [Mr. GRISWOLD], and the Senator from California [Mr. KUCHEL] are absent on official business.

If present and voting, the Senator from Michigan [Mr. FERGUSON] and the Senator from California [Mr. KUCHEL] would each vote "yea."

I also announce that the Senator from New Hampshire [Mr. BRIDGES] is absent because of illness and the Senator from Ohio [Mr. TAFT] is necessarily absent. If present and voting the Senator from New Hampshire [Mr. BRIDGES] would vote "yea."

Mr. CLEMENTS. I announce that the Senator from Massachusetts [Mr. KENNDY], the Senator from Oklahoma [Mr. KERR], and the Senator from Montana [Mr. MANSFIELD] are absent on official business.

The Senator from West Virginia [Mr. KILGORE] is absent by leave of the Senate.

I announce further that if present and voting, the Senator from Massachusetts [Mr. KENNEDY], the Senator from Oklahoma [Mr. KERR], the Senator from West Virginia [Mr. KILGORE], and the Senator from Montana [Mr. MANSFIELD] would each vote "yea."

The yeas and nays resulted—yeas 86, nays 1, as follows:

YEAS—86

Aiken	Dworshak	Jackson
Anderson	Eastland	Jenner
Barrett	Ellender	Johnson, Colo.
Beall	Flanders	Johnson, Tex.
Bennett	Frear	Johnston, S. C.
Bricker	Fulbright	Kefauver
Bush	George	Knowland
Butler, Md.	Gillette	Langer
Butler, Nebr.	Goldwater	Lehman
Byrd	Gore	Lennon
Capehart	Green	Long
Carlson	Hayden	Magnuson
Case	Hendrickson	Malone
Chavez	Hennings	Martin
Clements	Hickenlooper	Maybank
Cooper	Hill	McCarthy
Cordon	Hoey	McClellan
Daniel	Holland	Millikin
Dirksen	Humphrey	Monroney
Douglas	Hunt	Morse
Duff	Ives	Mundt

Murray	Saltonstall	Thye
Neely	Schoeppel	Tobey
Pastore	Smathers	Watkins
Payne	Smith, Maine	Welker
Potter	Smith, N. J.	Wiley
Purtell	Sparkman	Williams
Robertson	Stennis	Young
Russell	Symington	

NAYS—1

McCarran

NOT VOTING—9

Bridges	Kennedy	Kuchel
Ferguson	Kerr	Mansfield
Griswold	Kilgore	Taft

The PRESIDING OFFICER. On this question the yeas are 86, the nays are 1.

Two-thirds of the Senators present having voted in the affirmative, the resolutions of ratification are agreed to.

The treaties and protocol to which the consent of the Senate was given, with the resolutions of ratification and reservations, are as follows:

(Ex. R (82d Cong., 1st sess.))

TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND ISRAEL

The United States of America and Israel, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural 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 and cultural intercourse and otherwise establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded, and for that purpose have appointed as their Plenipotentiaries,

The President of the United States of America:

Dean Acheson, Secretary of State of the United States of America, and

The President of the State of Israel:

Abba Eban, Ambassador Extraordinary and Plenipotentiary of Israel to the United States of America,

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

ARTICLE I

Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party.

ARTICLE II

1. Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and for the purpose of engaging in related commercial activities; and (b) for other purposes subject to the laws relating to the entry and sojourn of aliens.

2. Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to bury their dead according to their religious customs in suitable and convenient places; (e) to gather and to transmit material for dissemination to the public abroad; and (f) to communicate with other persons inside and outside such territories by mail, telegraph and other means open to general public use.

3. The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and necessary to protect the public health, morals and safety.

ARTICLE III

1. Nationals of either Party within the territories of the other Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security, in no case less than that required by international law.

2. If, within the territories of either Party, a national of the other Party is accused of crime and taken into custody, the nearest diplomatic or consular representative of his country shall on the demand of such national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel.

ARTICLE IV

1. Nationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation, or other benefit or service, on account of disease, injury, or death arising out of and in the course of employment or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals of either Party shall, within the territories of the other Party, be accorded national treatment in the application of laws and regulations establishing systems of compulsory insurance, under which benefits are paid without an individual test of financial need: (a) against loss of wages or earnings due to old age, unemployment, sickness or disability, or (b) against loss of financial support due to the death of father, husband or other persons on whom such support had depended.

ARTICLE V

1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

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, shall not be deemed unenforceable within the territories of such other Party merely 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, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party.

ARTICLE VI

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. The dwellings, 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 unlawful entry or molestation. Official searches and examinations of such premises and their contents, when necessary, shall be made with careful regard for the convenience of the occupants and the conduct of business.

3. Property of nationals and companies of either Party shall not be taken except for public purposes, nor shall it be taken without the payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and prompt payment thereof.

4. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied; nor shall either Party unreasonably impede nationals and companies of the other Party from obtaining on equitable terms the capital, skills, arts and technology it needs for its economic development.

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 3 of the present Article. Moreover, enterprises in which nationals and companies of either Party have a controlling interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

ARTICLE VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for profit (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

2. Each Party reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in communications, air or water transport, banking, or the exploitation of land or other natural resources. However, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage.

3. The provisions of paragraph 1 shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.

4. Nationals and companies of either Party, as well as enterprises controlled by such

folder 4

AIR POUCH

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FOREIGN SERVICE DESPATCH

FROM : HICOG BONN

2252
DESP. NO.

TO : THE DEPARTMENT OF STATE, WASHINGTON

February 17, 1954
DATE

REF : CURDES 2233, February 12, 1954, and previous

RETURN TO L/T

For Dept. Use Only	ACTION	DEPT.
	E-4	REP-2, DC/R-2, GER-4, OLI-6, L-2
	RECD 2/26	OTHER CIA-5, COM-8, TR-3

SUBJECT: New Treaty of Friendship, Commerce and Navigation: Report on February 15, 1954 Meeting with German Negotiators

The 24th meeting for the negotiation of the subject treaty was held at the Foreign Office on February 15, 1954. Dr. RECKER, absent from the past several meetings because of illness, again served as chairman of the German team. The United States side was the same as that reported in the reference despatch.

The February 15 meeting was devoted to a detailed discussion of United States Article XXI on general exceptions.

Discussion of Paragraph 1, United States Article XXI

Regarding clause (a), the Germans asked whether this reservation could not be expanded to include platinum as well as gold and silver on the ground that, for them, the generic term for precious metals normally included platinum. In reply to a United States question, they stated that at present platinum was not being used in Germany in connection with coinage or backing for the currency. The United States side reserved its position on the German suggestion, pending receipt of instructions from the Department. The Germans accepted this position, adding that any modification of clause (a) would also necessitate a similar change in the exchange of letters proposed by them in connection with United States Article XIV (see despatch 2089, January 29, 1954).

With respect to clause (b), (c) and (d), the Germans noted that these provisions resembled similar provisions in GATT Article XXI, and that only clause (d) needed clarification. Specifically, they inquired whether that clause contained in fact two exceptions. This question was answered in the affirmative by the United States side, which explained that the first reservation was designed notably to cover United Nations' requirements, such as action taken by the United States in response to a UNO resolution, e.g., the Korean action, whereas the second reservation was a national exception. In response to another German question whether a clear meaning or definition was available for the words "to protect its essential security interests", the United States side commented that no precise delineation or interpretation existed for this expression and that the language had been drafted in such a manner as to leave a wide area of discretion to both parties in order to allow for necessary action over an indefinite future. They added that no serious consequences

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DEPARTMENT OF STATE
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MAR 3 1954
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were expected from this reservation so long as the relations between both countries remained friendly, and stressed the word "necessary" and "essential" had been added to emphasize that the reservation was not to be invoked in a frivolous manner.

The Germans stated that they were glad to hear the last point, as they did not believe a security reservation ought to be made the excuse for economic measures not genuinely based on real security considerations.

They then asked whether the clause was justiciable. The United States side replied that offhand it knew of no international court precedents, but believed national as well as international courts would probably give very heavy weight to arguments presented by the government invoking the reservation and would have difficulty in finding a justiciable issue. Reference was made to the Senate debate of July 21, 1953, in which the importance of the reservation and the latitude it allowed each Party had been emphasized. Both sides then noted that they knew of no precedents on this point in the national courts of their countries, and concurred in the thought that the question would tend to be regarded as "political" rather than "legal" by the courts.

The Germans requested clarification whether the clause could be applied to justify a United States export embargo of certain machinery to Germany, for instance, on the assumption that it might be reexported by Germany to a third country. The United States team explained that insofar as any United States embargo was equally applied to all nations, the most-favored-nation principle would pertain without need of resort to the security reservation. In this connection they noted that the FCN treaty under discussion was not so ambitious as the GATT which aimed to eliminate embargoes. Insofar as import and export regulations on strategic materials might differ between countries, however, the security reservation contained in clause (d) would be applicable; and they added that current United States import-export regulations were deemed to be justified by the security reservation. The Germans thereupon accepted clauses (b), (c), and (d).

Regarding clause (e), the Germans agreed in principle with its content but asked for a definition of "controlling interest". The United States side e nted that these words most appropriately reflected United States nomenclature, and were designed to describe the group or interest to which the majority of the board of directors were beholden. Ordinarily, this would be the group owning 51 percent of the common stock. However, the possibility exists (at least in the United States) where stockholders owning less than 51 percent of the stock might actually exercise domination. This might be the case for large companies with very widespread and scattered stock ownership. Hence, "controlling had been used rather than "majority" in the treaty. They added, however, that in international business practices the typical, usual and practical case was that of the majority ownership situation. The Germans thereupon accepted clause (e).

German Suggestion to Transfer Fisheries Exception to Paragraph 1

The Germans suggested that paragraph 6 (a) of U.S. Article XIV should, in

FRIENDSHIP, COMMERCE, AND NAVIGATION WITH CHINA

HEARING

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

EIGHTIETH CONGRESS

SECOND SESSION

ON

A TREATY OF FRIENDSHIP, COMMERCE, AND NAVIG.. ..ON BETWEEN THE UNITED STATES OF AME.. ..AND THE REPUBLIC OF CHINA, TOGETHER WITH A PROTOCOL THERETO, SIGNED AT NANKING ON NOVEMBER 4, 1946

APRIL 26, 1948

Printed for the use of the Committee on Foreign Relations

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GOVERNMENT PRINTING OFFICE
WASHINGTON • 1948

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Mr. BOHLEN. We do not consider that the areas at present under Chinese Communist control are in any way separated from the sovereignty of the present Chinese National Government.

Senator SMITH. Where do you classify Manchuria?

Mr. BOHLEN. It is in our view a part of the territory of the Republic of China under the National Government.

Senator SMITH. How about Korea?

Mr. BOHLEN. Korea is under a different status. Under the wartime agreements—in the Cairo Conference, I believe—it was stated that Korea would achieve her independence in due course. I think these were the words. It is not regarded as under the authority of the Chinese Government, so therefore this treaty would not apply in any case to Korea.

Senator SMITH. I think it would be a different status there.

REFERENCE OF DISPUTES TO INTERNATIONAL COURT OF JUSTICE

In article XXVIII here, you provide for reference of disputes to the International Court of Justice. Is there any conflict with our resolution which I recall having had the privilege of voting for, of August 2, 1946, which excludes matters essentially within the domestic jurisdiction of the United States as determined by the United States?

In other words, certain domestic questions that we exclude from our acceptance of the voluntary jurisdiction of the Court?

Mr. BOHLEN. No, sir; we do not see any conflict in that. The fact that it is the International Court of Justice really means that is the body that is selected in many treaties of this kind. Provision is also made for arbitration of disputes arising under the treaty. I should like to submit a statement for the record on this matter:

(The matter referred to is as follows:)

RELATIONSHIP OF ARTICLE XXVIII OF THE TREATY BETWEEN THE UNITED STATES AND CHINA, SIGNED NOVEMBER 4, 1946, TO SENATE RESOLUTION 196 OF AUGUST 2, 1946

Article XXVIII of the treaty provides that any dispute between the governments of the two high contracting parties as to the interpretation or the application of this treaty, which the high contracting parties cannot satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice unless the high contracting parties shall agree to settlement by some other pacific means.

Senate Resolution 196 of August 2, 1946, is the resolution by which the Senate gave its advice and consent to the deposit with the Secretary General of the United Nations of a declaration under paragraph 2 of article 36 of the statute of the International Court of Justice recognizing as compulsory the jurisdiction of the International Court of Justice in all legal disputes arising concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation.

In giving its advice and consent to the deposit of the declaration, the Senate qualified the agreement to accept compulsory jurisdiction of the Court by adding a proviso that the declaration should not apply to (a) disputes which the parties might, pursuant to existing or future agreements entrust to other tribunals; (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States; or (c) disputes arising under a multilateral treaty except under certain specified conditions. It was further provided in the resolution that the declaration should

remain in force for a period of 5 years and thereafter until the expiration of 6 months after notice of termination.

The negotiations which resulted in the signing of the present treaty began in February 1946. In May the present text of article XXVIII was discussed informally by officers of the Department of State with the then chairman and other members of the Foreign Relations Committee. This fact is referred to not for the purpose of suggesting that there is any permanent commitment by those Senators in favor of the language of this article but as indicating that the Department was then seeking to develop a sound and generally acceptable compromissory clause for treaties of this type. The text of the article was submitted to the Chinese negotiators on June 6, and no question of its acceptance by China was raised in the negotiations. Senate Resolution 196 was adopted August 2, and the treaty was signed November 4, 1946.

It would appear that the only part of the resolution which is significant insofar as article XXVIII of this treaty is concerned is item (b) of the first proviso, which states that the declaration accepting compulsory jurisdiction of the Court shall not apply to disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States. There is, of course, no provision similar to this in the treaty. The Department of State feels that questions arising under this treaty are matters which the United States would wish to see submitted to the International Court of Justice, and that it would be in the public interest for the United States to be able to bring, without restriction, before that Court any disputes arising because of the interpretation or application by China of the provisions of this treaty in such a way as to be detrimental to the interests of the United States.

It is thought that article XXVIII of the treaty is not in conflict with the intent and purpose of Senate Resolution 196. It is to be noted that the exception in item (b) applies with respect to the acceptance of compulsory jurisdiction as to four extensive categories of questions of which the interpretation of a treaty is only one. In this broad context, the exception stands as a possible protection against this country's being cited before the Court by any one of a large number of states, some of which might conceivably try to bring before the Court, as related to a question of international law, questions such as our policy as to immigration, the Continental Shelf, or some other domestic matter.

The compromissary clause (article XXVIII) of the treaty with China, however, is limited to questions of the interpretation or application of this treaty; i. e., it is a special not a general compromissary clause. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations. Much of the general subject matter—and in some cases almost identical language—has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are, therefore, to a considerable extent established and well known. Furthermore, certain important subjects, notably immigration, traffic in military supplies, and the "essential interests of the country in time of national emergency," are specifically excepted from the purview of the treaty. In view of the above, it is difficult to conceive how article XXVIII could result in this Government's being impleaded in a matter in which it might be embarrassed.

It may be added, in conclusion, that there is at least one precedent for this type of compromissary provision. It is contained in articles 84 and 86 of the International Civil Aviation Convention (Treaties and Other International Acts, Series 1591), which was ratified by the President August 6, 1946. It would also appear that the jurisdiction of the Court in questions arising under the constitution of the International Labor Organization (Treaty Series, No. 874) is not limited by any conditions such as are established in Senate Resolution 196.

Senator SMITH. Any issue that arises under this treaty or its interpretation, we would look to the International Court to interpret for us, if it did not involve a domestic question?

Mr. BOHLEN. Yes, sir.

Senator THOMAS. May I add a sentence there?

Senator SMITH. Yes, indeed.

Senator THOMAS. Under our Federal system, the conflicts in jurisdiction between State and Nation, even in international affairs, there

will always be a question of domestic concern legally in various cases. The Federal Government is powerless to step into States even though the Federal Government has a treaty granting such rights and privileges.

If we should always keep in mind the fact of our Federal system in our own interpretation of what is a domestic question we would have a law without amendment to the Court protocol, in the practice of our own country, and all that we would generally need in every case, and every governor of every State would stand on his complete rights, and no one knows it better than the Federal Government itself.

So that a problem, like so many of the problems we fear, are problems which have not bothered us in the past because of our government system.

Mr. BROWN. I think we could add, Senator, that this, of course, is limited to the disputes arising under this treaty, and the treaty deals with familiar subject matter and it is a thoroughly documented treaty, and a great deal of the language in it has already been subject to international interpretation, and such matters as immigration and military security and mineral rights, et cetera, are withheld from it. So that we do not anticipate that there is likely to be any possible difficulty in the question of getting something into the Court that would be——

Senator THOMAS. I hope that will be the case. But so long as you are dealing with China the simple facts of allowing people to travel through our country are enough to open up any one of these subjects, the fact of trade, the fact of building, the fact of staying. It is right for us to remember those things in dealing with the treaty and to be honest with everybody about it.

Senator SMITH. I think that is a very valuable contribution.

Mr. BROWN. Senator Smith, could I add a word on that?

Senator SMITH. Yes.

Mr. BROWN. There is a precedent for this type of clause in articles LXXXIV and LXXXVI of the International Civil Aviation Convention of which the Senate advised ratification on July 25, 1946.

COMMERCIAL ARBITRATION

Senator SMITH. Article VI, section 4 provides apparently for commercial arbitration. Is this provision a new one and is it satisfactory to the interested parties?

Mr. BROWN. It is a new one and it was discussed at considerable length with the American Arbitration Association. We have had some friendly words about it from them. So I think as far as they are concerned it is satisfactory.

We have also discussed it with other business groups and received the general impression it is favorably regarded.

Senator SMITH. Is this a new approach, to go in other treaties?

Mr. BROWN. Yes, sir.

Senator SMITH. It is something we are adding to our general commercial treaties.

Mr. BROWN. Yes, sir. We think it is very important and hope to get it in future treaties of this kind.

Senator THOMAS. Is it novel or is it an extension of the old Bryan arbitration treaties? We must not lose sight of our history here.

has to deal with the relation between the nationals of the two countries.

Mr. BOHLEN. Yes, sir. It would not deal with the rights and privileges of American nationals and reciprocal rights on the territory of the two countries.

Senator SMITH. Then in the negotiation of treaties of this type with all the countries of the world, you do not feel that that group of treaties will in any way interfere with the Economic Cooperation Act of 1948?

Mr. BOHLEN. No, sir.

Senator SMITH. I think you are right, but I want to get it in the record to show that clear distinction—that in promoting these two treaties you had in mind the other act, so that there can be no conflict in other areas—for instance, in the area of currency stabilization.

Mr. BOHLEN. No, sir. We see no ground for any conflict.

Mr. BROWN. In fact, I think you could say, Senator, that it was an additional factor in helping out the purposes of the European Cooperation Act to have the ground work laid for future stability in the relations between the two countries.

Senator SMITH. I think that is very fine to have it come in in the spirit of the ECA.

I think that is all I have at this stage, Mr. Chairman.

Senator THOMAS. Mr. Bohlen, may I make two requests of you?

Mr. BOHLEN. Yes, sir.

Senator THOMAS. First, that we have throughout the hearing some Chinese expert here with us.

Mr. BOHLEN. Yes, sir.

COMPARISON WITH PREVIOUS TREATIES

Senator THOMAS. We made a statement at the opening of the hearing that this is the first commercial treaty since 1938 that we have negotiated.

Mr. BOHLEN. Yes, sir.

Senator THOMAS. We made the point that this treaty was somewhat different from the old treaties and that we were plotting a new course, as it were.

Will you formally work out for me a statement which will show the different steps that have been taken in the negotiation in the preparation of this treaty which we can contrast with what you ordinarily have done in treaties of commerce and friendship in the past?

Mr. BOHLEN. Yes, sir.

Senator THOMAS. Maybe the statement I made was too strong; I do not know. But I got it from the statement you sent up.

Mr. BOHLEN. I would like to make one very general comment, sir. They are basically a continuance of the main type of treaty that has been made before in an attempt to broaden them and expand them to take in new commerce, economic, and financial developments which have occurred in the last decade or so in connection with international trade. They are really an expansion to meet modern conditions, with the same principles which underlie the treaties of friendship, commerce, and navigation which we have traditionally made.

Senator THOMAS. May I go so far as to say that the treaty supplements those things which we have found good in the past treaties?

Mr. BOHLEN. I think that is correct, sir.

Senator THOMAS. It does not abrogate?

Mr. BOHLEN. There is one place which is a new field, and that is the question of the status and rights of corporation, which is the development of a corporate form of business enterprise, which has been very greatly extended during the past few years, or longer than that, which were not present when the original eighteenth-century treaties of commerce and navigation were made. There it was much more of individuals than of corporations.

There is also the problem of the question of nationalization and greater safeguards in the field of compensation in the event of governmental action, such as nationalization of certain industries.

But I will see that there is a more detailed statement prepared, sir.

(The matter referred to is as follows:)

COMPARISON OF THE TREATY WITH CHINA, SIGNED NOVEMBER 4, 1946, WITH PREVIOUS TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION CONCLUDED BY THE UNITED STATES

In the period from 1928 to 1938, during which the Department of State was engaged in an extensive program directed to the conclusion of treaties of friendship, commerce, and navigation, about a dozen treaties of this general type were concluded, including treaties with Germany (1923), Austria (1928), El Salvador (1926), Finland (1934), Honduras (1927), Hungary (1925), Norway (1928), Latvia (1928), Poland (1931), Siam (1937), and Liberia (1938). These treaties differ among themselves as to detail, but are generally similar. The last two in the group, the treaties with Siam and Liberia, have more points in common with the treaty with China now under consideration than do the earlier ones in the group.

For the purpose of more detailed comparison with the treaty with China, the treaty with Norway, signed at Washington June 5, 1928, may be taken as representative of the group enumerated in the preceding paragraph. There are a few quite obvious differences between the two treaties. The Norway treaty deals extensively with consular rights. This is true of most, but not all, of the treaties in the 1923-38 group. It is now the practice of the Department of State to deal with these matters in separate consular conventions.

Much subject matter is common to the two treaties and the standards of treatment established is the same in a large number of the provisions. In the treaty with China, however, most of the *provisions* have been restated with the object of making them more specific, more explicit, of adapting them more fully to the coverage of situations which experience has indicated are likely to arise, and of bringing them wherever practicable into more complete accord with United States law and judicial decisions thereunder.

The following specific differences in content between the two treaties may be noted. With respect to the rights of corporations, the treaty with Norway merely provides for the recognition of the juridical status of foreign corporations and their access to courts. The performance of their corporate functions is made wholly subject to the local law. The right of foreigners and foreign corporations to participate in domestic corporations is placed upon a most-favored-nation basis, but the right of corporations participated in by foreigners to carry on activities is made wholly subject to the local law. The treaty with China, on the other hand accords rights to foreign corporations and domestic corporations participated in by foreigners to carry on activities, and the rights specified in many articles throughout the treaty are to be enjoyed by corporations as well as natural persons.

The treaty with Norway contains no provision respecting the acquisition and holding of real property other than a provision that an alien shall have at least 3 years in which to dispose of real property which may come to him by descent, testamentary succession, or donation, and which he is disqualified by law from holding because of his alienage. The treaty with China accords limited most-favored-nation treatment to United States nationals and corporations with respect to the acquisition and holding of land in China.

The treaty with Norway does not contain any provision relating to the protection of industrial, literary, or artistic property. These subjects are dealt with in article IX of the treaty with China.

Annex 125

In the treaty with Norway, each party agrees to accord unconditional most-favored-nation treatment generally with regard to the treatment of products of the other in commerce, but the treaty contains no provisions dealing specifically with quantitative restrictions, exchange controls, and trading by public agencies and monopolies, as does the treaty with China.

There are a number of minor differences as to substance between the treaty with Norway and the treaty with China.

Senator THOMAS. We will stand in recess until 2 o'clock this afternoon.

(Thereupon, at 11:55 a. m., the committee adjourned, to reconvene at 2 p. m.)

AFTER RECESS

The committee reconvened at 2 o'clock p. m., upon the expiration of the recess.

Senator THOMAS. Mr. Blaisdell, please.

For the record, Mr. Blaisdell, will you state who and what you are?

STATEMENTS OF THOMAS C. BLAISDELL, DIRECTOR, OFFICE OF INTERNATIONAL TRADE, UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL LEE, CHIEF, FAR EASTERN BRANCH; AND MILTON A. BERGER, ACTING CHIEF, CHINA LEGAL SECTION, FAR EASTERN BRANCH, OFFICE OF INTERNATIONAL TRADE, UNITED STATES DEPARTMENT OF COMMERCE

Mr. BLAISDELL. Mr. Chairman, I am Thomas C. Blaisdell, Jr. I am Assistant to the Secretary of Commerce for International Trade. I am also Director of the Office of International Trade in the Department of Commerce.

Senator THOMAS. You are speaking today for the Department of Commerce?

Mr. BLAISDELL. I am speaking today for the Department of Commerce in support of the proposed treaty of friendship, commerce, and navigation with China.

Senator THOMAS. Did the Department have a representative in the negotiation of the treaty?

Mr. BLAISDELL. Yes, sir. The staff of the Department worked with the State Department all during the negotiations. Mr. Lee and Mr. Berger, who are here with me, participated actively in that work.

Mr. Lee would like to elaborate as to his participation and that of the departmental representatives in the work on the treaty.

Senator THOMAS. Mr. Lee?

Mr. LEE. We did not participate directly in China, but we were consulted and worked in close cooperation with the State Department in Washington.

Senator THOMAS. You are a Department of Commerce employee?

Mr. LEE. That is right.

Senator THOMAS. You worked here in Washington but you did not go to China?

Mr. LEE. That is right, sir.

Senator THOMAS. Did anyone go to China? Part of the negotiations were carried on in China, were they not?

Mr. LEE. Yes, sir.

Bahrain Bilateral Investment Treaty

Signed September 29, 1999; Entered into Force May 31, 2001

106th Congress *2d Session*	SENATE	Treaty Doc. 106-25

INVESTMENT TREATY WITH BAHRAIN

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE STATE OF BAHRAIN CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT WITH ANNEX AND PROTOCOL, SIGNED, AT WASHINGTON ON SEPTEMBER 29, 1999

MAY 23, 2000.-Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE

79-118 WASHINGTON : 2000

LETTER OF TRANSMITTAL

The White House, *May 23, 2000*.

To the Senate of the United States:
With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on September 29, 1999. I transmit also, for the information of the Senate, the report of the Department of State with respect to this Treaty. The bilateral investment treaty (BIT) with Bahrain is the third such treaty between the United States and a Middle Eastern country. The Treaty will protect U.S. investment and assist Bahrain in its efforts to develop its economy by creating conditions more favorable for U.S. private investment and thus strengthen the development of its private sector.

The Treaty is fully consistent with U.S. policy toward international and domestic investment. A specific tenet of U.S. policy, reflected in this Treaty, is that U.S. investment abroad and foreign investment in the United States should receive national treatment. Under this Treaty, the Parties also agree to customary international law standards for expropriation. The Treaty includes detailed provisions regarding the computation and payment of prompt, adequate, and effective compensation for expropriation; free transfer of funds related to investments; freedom of investments from specified performance requirements; fair, equitable, and most- favored-nation treatment; and the investor's freedom to choose to resolve disputes with the host government through international arbitration.

I recommend that the Senate consider this Treaty as soon as possible, and give its advice and consent to ratification of the Treaty at an early date.

WILLIAM J. CLINTON

LETTER OF SUBMITTAL

Department of State,
Washington, April 24, 2000.

The President,
The White House.
The President: I have the honor to submit to you the Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed at Washington on September 29, 1999. I recommend that this Treaty with Annex, be transmitted to the Senate for its advice and consent to ratification.

The bilateral investment treaty (BIT) with Bahrain is the first such treaty signed between the United States and a member of the Cooperation Council for the Arab States of the Gulf. The Treaty is based on the view that an open investment policy contributes to economic growth. This Treaty will assist Bahrain in its efforts to develop its economy by creating conditions more favorable for U.S. private investment and thereby strengthening the development of its private sector. It is U.S. policy, however, to advise potential treaty partners during BIT negotiations that conclusion of such a treaty does not necessarily result in increases in private U.S. investment flows.

To date, 31 BITs are in force for the United States--with Albania, Argentina, Armenia, Bangladesh, Bulgaria, Cameroon, the Republic of the Congo, the Democratic Republic of the Congo (formerly Zaire), the Czech Republic, Ecuador, Egypt, Estonia, Georgia, Grenada, Jamaica, Kazakhstan, Kyrgyzstan, Latvia, Moldova, Mongolia, Morocco, Panama, Poland, Romania, Senegal, Slovakia, Sri Lanka, Trinidad & Tobago, Tunisia, Turkey, and Ukraine. In addition to the Treaty with Bahrain, the United States has signed, but not yet brought into force, BITS with Azerbaijan, Belarus, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Nicaragua, Russia, and Uzbekistan.

The Office of the United States Trade Representative and the Department of State jointly led this BIT negotiation, with assistance from the Departments of Commerce, Treasury, and Energy.

The U.S.-Bahrain Treaty

The Treaty with Bahrain is based on the 1994 U.S. prototype BIT and satisfies the U.S. principal objectives in bilateral investment treaty negotiations:
--All forms of U.S. investment in the territory of Bahrain are covered.
--Covered investments receive the better of national treatment or most-favored-nation (MFN) treatment both while they are being established and thereafter, subject to certain specified exceptions.
--Specified performance requirements may not be imposed upon or enforced against covered investments.
--Expropriation is permitted only in accordance with customary international law standards.
--Parties are obligated to permit the transfer, in a freely usable currency, of all funds related to a covered investment, subject to exceptions for specified purposes.
--Investment disputes with the host government may be brought by investors, or by their covered investments, to binding international arbitration as an alternative to domestic courts.
These elements are further described in the following article- by-article analysis of the provisions of the Treaty:

Title and Preamble

The Title and Preamble state the goals of the Treaty. Foremost is the encouragement and protection of investment. Other goals include economic cooperation on investment issues; the stimulation of economic development; higher living standards; promotion of respect for internationally-recognized worker rights; and maintenance of health, safety, and environmental

measures. While the Preamble does not impose binding obligations, its statement of goals may assist in interpreting the Treaty and in defining the scope of Party-to- Party consultations pursuant to Article 8.

Article 1 (Definitions)

Article 1 defines terms used throughout the Treaty.

Company, Company of a Party

The definition of "company" is broad, covering all types of legal entities constituted or organized under applicable law, and includes corporations, trusts, partnerships, sole proprietorships, branches, joint ventures, and associations. The definition explicitly covers not-for-profit entities, as well as entities that are owned or controlled by the state. "Company of a Party" is defined as a company constituted or organized under the laws of that Party.

National

The Treaty defines "national" as a natural person who is a national of a Party under its own laws. Under U.S. law, the term "national" is broader than the term "citizen." For example, a native of American Samoa is a national of the United States, but not a citizen.

Investment, Covered Investment

The Treaty's definition of investment is broad, recognizing that investment can take a wide variety of forms. Every kind of investment is specifically incorporated in the definition; moreover, it is explicitly noted that investment may consist or take the form of any of a number of interests, claims, and rights.

The Treaty provides an illustrative list of the forms an investment may take. Establishing a subsidiary is a common way of making an investment. Other forms that an investment might take include equity and debt interests in a company; contractual rights; movable, immovable, intangible, and intellectual property; and rights conferred pursuant to law, such as licenses and permits. Investment as defined by the Treaty generally excludes claims arising solely from trade transactions, such as a sale of goods across a border that does not otherwise involve an investment.

The Treaty defines "covered investment" as an investment of a national or company of a Party in the territory of the other Party. An investment of a national or company is one that the national or company owns or controls, either directly or indirectly. Indirect ownership or control could be through other, intermediate companies or persons, including those of third countries. Control is not specifically defined in the Treaty; ownership of over 50 percent of the voting stock of a company would normally convey control, but in many cases the requirement could be satisfied by less than that proportion, or by other arrangements.

The broad nature of the definitions of "investment," "company," and "company of a Party" means that investments can be covered by the Treaty even if ultimate control lies with non-Party nationals. A Party may, however, deny the benefits of the Treaty in the limited circumstances described in Article 12.

State Enterprise, Investment Authorization, Investment Agreement

The Treaty defines "state enterprise" as a company owned, or controlled through ownership interests, by a Party. Purely regulatory control over a company does not qualify it as a state enterprise.

The Treaty defines an "investment authorization" as an authorization granted by the foreign investment authority of a Party to a covered investment or a national or company of the other Party.

The Treaty defines an "investment agreement" as a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (1) grants rights with respect to natural resources or other assets controlled by the national authorities and (2) the investment, national, or company relies upon in establishing or acquiring a covered investment. this definition thus excludes agreements with subnational authorities (including U.S. States) as well as agreements arising from various types of regulatory activities of the national government, including, in the tax area, rulings, closing agreements, and advance pricing agreements.

ICSID Convention, Centre, UNCITRAL Arbitration Rules

The "ICSID Convention," "Centre," and `"UNCITRAL Arbitration Rules" are explicitly defined to make the text brief and clear.

Article 2 (Treatment of Investment)

Article 2 contains the Treaty's major obligations with respect to the treatment of covered investments.

Paragraph 1 generally ensures the better of national or MFN treatment in both the entry and post-entry phases of investment. It thus prohibits, outside of exceptions listed in the Annex, "screening" on the basis of nationality during the investment process, as well as nationality-based post- establishment measures. For purposes of the Treaty, "national treatment" means treatment no less favorable than that which a Party accords, in like situations, to investments in its territory of its own nationals or companies. For purposes of the Treaty, "MFN treatment" means treatment no less favorable than that which a Party accords, in like situations, to investments in its territory of nationals or companies of a third country. The Treaty obliges each Party to provide whichever of national treatment or MFN treatment is the most favorable. This is defined by the Treaty as "national and MFN treatment." Paragraph 1 explicitly states that the national and MFN treatment obligation will extend to state enterprises in their provision of goods and services to covered investments.

Paragraph 2 states that each Party may adopt or maintain exceptions to the national and MFN treatment standard with respect to the sectors or matters specified in the Annex. Further restrictive measures are permitted in each sector. (The specific exceptions are discussed in the section entitled "Annex" below.) In the Annex, Parties may take exceptions only to the obligation to provide national and MFN treatment; there are no sectoral exceptions to the rest of the Treaty's obligations. Finally, in adopting any exception under this provision, a Party may not require the divestment of a preexisting covered investment.

Paragraph 2 also states that a Party is not required to extend to covered investments national and MFN treatment with respect to procedures provided for in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights. This provision clarifies that certain procedural preferences granted under intellectual property conventions, such as the Patent Cooperation Treaty, fall outside the BIT. This exception parallels those in the Uruguay Round's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the North American Free Trade Agreement (NAFTA).

Paragraph 3 sets out a minimum standard of treatment based on standards found in customary

international law. The obligations to accord "fair and equitable treatment" and "full protection and security" are explicitly cited, as is each Party's obligation not to impair, through unreasonable and discriminatory means, the management, conduct, operation, and sale or other disposition of covered investments. The general reference to international law also implicitly incorporates other fundamental rules of customary international law regarding the treatment of foreign investment. However, this provision does not incorporate obligations based on other international agreements.

Paragraph 4 requires that each Party provide effective means of asserting claims and enforcing rights with respect to covered investments.

Paragraph 5 ensures that transparency of each Party's regulation of covered investments.

Article 3 (Expropriation)

Article 3 incorporates into the Treaty customary international law standards for expropriation. Article 3 also includes detailed provisions regarding the computation and payment of prompt, adequate, and effective compensation. Paragraph 1 describes the obligations of the Parties with respect to expropriation and nationalization of a covered investment. These obligations apply to both direct expropriation and indirect expropriation through measures "tantamount to expropriation or nationalization" and thus apply to "creeping expropriations"--a series of measures that effectively amounts to an expropriation of a covered investment without taking title.

Paragraph 1 further bars all expropriations or nationalizations except those that are for a public purpose; carried out in a non-discriminatory manner; in accordance with due process of law; in accordance with the general principles of treatment provided in Article 3(3); and subject to "prompt, adequate and effective compensation."
Paragraphs 2, 3, and 4 more fully describe the meaning of "prompt, adequate and effective compensation." The guiding principle is that the investor should be made whole.

Article 4 (Compensation for Damages Due to War and Similar Events)

Paragraph 1 entitles investments covered by the Treaty to national and MFN treatment with respect to any measure relating to losses suffered to a party's territory owing to war or other armed conflict, civil disturbances, or similar events. Paragraph 2, by contrast, creates an unconditional obligation to pay compensation for such losses when the losses result from requisitioning or from destruction not required by the necessity of the situation.

Article 5 (Transfers)

Article 5 protects investors from certain government exchange controls that limit current and capital account transfers, as well as limits on inward transfers made by screening authorities and, in certain circumstances, limits on returns in kind.

In paragraph 1, each Party agrees to permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory." Paragraph 1 also provides a list of transfers that must be allowed. The list is non-exclusive, and is intended to protect flows to both affiliated and non-affiliated entities.

Paragraph 2 provides that each Party must permit transfers to be made in a "freely usable currency" at the market rate of exchange prevailing on the date of transfer. "Freely usable" is a term used by the International Monetary Fund; at present there are five "freely usable" currencies: the U.S. dollar, Japanese yen, German mark, French franc, and British pound sterling.

In paragraph 3, each Party agrees to permit returns in kind to be made where such returns have

been authorized by an investment authorization or written agreement between a Party and a covered investment or a national or company of the other Party.
Paragraph 4 recognizes that, notwithstanding the obligations of paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of laws relating to bankruptcy, insolvency, or the protection of the rights of creditors; securities; criminal or penal offenses; or ensuring compliance with orders or judgments in adjudicatory proceedings.

Article 6 (Performance Requirements)

Article 6 prohibits either Party from mandating or enforcing specified performance requirements as a condition for the establishment, acquisition, expansion, management, conduct, or operation of a covered investment. This prohibition includes, but is not limited to, imposition of any of the specified performance requirements by means of a commitment or undertaking in connection with the receipt of a governmental permission or authorization. The list of prohibited requirements is exhaustive and covers domestic content requirements and domestic purchase preferences, the "balancing" of imports or sales in relation to exports or foreign exchange earnings, requirements to export products or services, technology transfer requirements, and requirements relating to the conduct of research and development in the host country. Such requirements are major burdens on investors and impair their competitiveness.

The last sentence of Article 6 makes clear that a Party may, however, impose conditions for the receipt or continued receipt of benefits and incentives.

Article 7 (Entry, Sojourn, and Employment of Aliens)

Paragraph 1 requires each Party to allow, subject to its laws relating to the entry and sojourn of aliens, the entry into its territory of the other Party's nationals for certain purposes related to a covered investment and involving the commitment of a "substantial amount of capital." This paragraph serves to render nationals of Bahrain eligible for treaty-investor visas under U.S. immigration law. It also affords similar treatment for U.S. nationals entering Bahrain. The requirement to commit a "substantial amount of capital" is intended to prevent abuse of treaty-investor status; it parallels the requirements of U.S. immigration law.

In addition, paragraph 1(b) prohibits labor certification requirements and numerical restrictions on the entry of treaty- investors.

Paragraph 2 requires that each Party allow covered investments to engage top managerial personnel of their choice, regardless of nationality. This provision does not require that such personnel be granted entry into a Party's territory. Such persons must independently qualify for an appropriate visa for entry into the territory of the other party. Nor does this provision create an exception to U.S. equal employment opportunity laws.

Article 8 (State-State Consultations)

Article 8 provides for prompt consultation between the Parties, at either Party's request, on any matter relating to the interpretation or application of the Treaty or to the realization of the Treaty's objectives. A Party may thus request consultations for any matter reasonably related to the encouragement or protection of covered investment, whether or not a Party is alleging a violation of the Treaty.

Article 9 (Settlement of Disputes Between One Party and a National or Company of the Other Party)

Article 9 sets forth several means by which disputes brought against a Party by an investor

(specifically, a national or company of the other Party) may be resolved.
Article 9 procedures apply to an "investment dispute," which is any dispute arising out of or relating to an investment authorization, an investment agreement, or an alleged breach of rights conferred, created, or recognized by the Treaty with respect to a covered investment.

In the event that an investment dispute cannot be settled amicably, paragraph 2 gives an investor an exclusive (with the exception in paragraph 3(b) concerning injunctive relief, explained below) choice among three options to settle the dispute. These three options are: (1) submitting the dispute or the courts or administrative tribunals of the Party that is a party to the dispute; (2) invoking dispute--resolution procedures previously agreed upon by the national or company and the host country government; or (3) invoking the dispute- resolution mechanisms identified in paragraph 3 of Article 9.

Under paragraph 3(a), the investor can submit an investment dispute to binding arbitration 90 days after the dispute arises, provided that the investor has not submitted the claim to a court or administrative tribunal of the Party or invoked a dispute resolution procedure previously agreed upon. The investor may choose among the International Centre for Settlement of Investment Disputes (ICSID) (Convention Arbitration), the Additional Facility of ICSID (if Convention Arbitration is not available), ad hoc arbitration using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or any other arbitral institution or rules agreed upon by both parties to the dispute.

Before or during such arbitral proceedings, however, paragraph 3(b) provides that an investor may seek, without affecting its right to pursue arbitration under this Treaty, interim injunctive relief not involving the payment of damages from local courts or administrative tribunals of the Party that is a party to the dispute for the preservation of its rights and interests. This paragraph does not alter the power of the arbitral tribunals to recommend or order interim measures they may deem appropriate.

Paragraph 4 constitutes each Party's consent to the submission of investment disputes to binding arbitration in accordance with the choice of the investor.

Paragraph 5 provides that any non-ICSID Convention arbitration shall take place in a country that is a party to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards. This provision facilitates enforcement of arbitral awards. In addition, in paragraph 6, each Party commits to enforcing arbitral awards rendered pursuant to this Article.

The Federal Arbitration Act (9 U.S.C. 1 et seq.) satisfies the requirement for the enforcement of non-ICSID Convention awards in the United States. The Convention on the Settlement of Investment Disputes Act of 1966 (22 U.S.C. 1650-1650a) provides for the enforcement of ICSID awards.

Paragraph 7 ensures that a Party may not assert as a defense, or for any other reason, that the investor involved in the investment dispute has received or will receive reimbursement for the same damages under an insurance or guarantee contract.

Paragraph 8 provides that, for the purposes of this article, the nationality of a company in the host country will be determined by ownership or control, rather than by place of incorporation. This provision allows a company that is a covered investment to bring a claim in its own name.

Article 10 (Settlement of Disputes Between the Parties)

Article 10 provides for binding arbitration of Disputes between the United States and Bahrain concerning the interpretation or application of the Treaty that are not resolved through consultations or other diplomatic channels. The article specifies various procedural aspects of

such arbitration proceedings, including time periods, selection of arbitrators, and distribution of arbitration costs between the Parties. The article constitutes each Party's prior consent to such arbitration.

Article 11 (Preservation of Rights)

Article 11 clarifies that the Treaty does not derogate from any obligation a Party might have to provide better treatment to the covered investment than is specified in the Treaty. Thus, the Treaty establishes a floor for the treatment of covered investments. A covered investment may be entitled to more favorable treatment through domestic legislation, other international legal obligations, or a specific obligation (e.g., to provide a tax holiday) assumed by a Party with respect to that covered investment.

Article 12 (Denial of Benefits)

Article 12(a) preserves the right of each Party to deny the benefits of the Treaty to a company owned or controlled by nationals of a non-Party country with which the denying Party does not have normal economic relations, e.g., a country to which it is applying economic sanctions. For example, at this time the United States does not maintain normal economic relations with, among other countries, Cuba and Libya.

Article 12(b) permits each Party to deny the benefits of the Treaty to a company of the other Party if the company is owned or controlled by non-Party nationals and if the company has no substantial business activities in the Party where it is established. Thus, the United States could deny benefits to a company that is a subsidiary of a shell company organized under the laws of Bahrain if controlled by nationals of a third country. However, this provision would not generally permit the United States to deny benefits to a company of Bahrain that maintains its central administration or principal place of business in the territory of, or has a real and continuous link with, Bahrain.

Article 13 (Taxation)

Article 13 excludes tax matters generally from the coverage of the BIT, on the basis that tax matters should be dealt with in bilateral tax treaties. However, Article 13 does not preclude a national or company from bringing claims under Article 9 that taxation provisions in an investment agreement or authorization have been violated. In addition, the dispute settlement provisions of Articles 9 and 10 apply to tax matters in relation to alleged violations of the BIT's expropriation article.

Under paragraph 2, a national or company that asserts in a dispute that a tax matter involves expropriation may submit that dispute to arbitration pursuant to Article 9(3) only if (1) the investor has first referred to the competent tax authorities of both Parties the issue of whether the tax matter involves an expropriation, and (2) the tax authorities have not both determined, within 9 months from the time of referral, that the matter does not involve an expropriation. The "competent tax authority" of the United States is the Assistant Secretary of the Treasury for Tax Policy, who will make such a determination only after consultation with the Inter-Agency Staff Coordinating Group on Expropriations.

Article 14 (Measures Not Precluded)

The first paragraph of Article 14 reserves the right of a Party to take measures that it considers necessary for the fulfillment of its international obligations with respect to maintenance or restoration of international peace or security, as well as those measures it regards as necessary for the protection of its own essential security interests.

International obligations with respect to maintenance or restoration of peace or security would include, for example, obligations arising out of Chapter VII of the United Nations Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interests of the Party involved. This Treaty makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.

The second paragraph permits a Party to prescribe special formalities in connection with covered investments, provided that these formalities do not impair the substance of any Treaty rights. Such formalities could include reporting requirements for covered investments or for transfers of funds, or incorporation requirements.

Article 15 (Application to Political Subdivisions and State Enterprises of the Parties)

Paragraph 1(a) makes clear that the obligations of the Treaty are applicable to all political subdivisions of the Parties, such as provincial, State, and local governments.

Paragraph 1(b) recognizes that under the U.S. federal system, States of the United States may, in some instances, treat out-of-State residents and corporations in a different manner than they treat in-State residents and corporations. The Treaty provides that the national treatment commitment, with respect to the States, means treatment no less favorable than that provided by a State to U.S. out-of-State residents and corporations.

Paragraph 2 extends a Party's obligations under the Treaty to its state enterprises in the exercise of any delegated governmental authority. This paragraph is designed to clarify that the exercise of governmental authority by a state enterprise must be consistent with a Party's obligations under the Treaty.

Article 16 (Entry Into Force, Duration, and Termination)

Paragraph 1 stipulates that the Treaty enters into force 30 days after exchange of instruments of ratification. The Treaty remains in force for a period of 10 years and continues in force thereafter unless terminated by either Party as provided in paragraph 2. Paragraph 2 permits a Party to terminate the Treaty at the end of the initial 10 year period, or at any later time, by giving 1 year's written notice to the other Party. Paragraph 1 also provides that the Treaty applies to covered investments existing at the time of entry into force as well as to those established or acquired thereafter. The Treaty does not state an intention by the Parties to apply the Treaty's provisions retroactively. Thus, under customary international law, the Treaty does not apply to disputes with respect to acts or facts which took place before the Treaty came into force or to any situation which ceased to exist before the date of entry into force of the Treaty.

Paragraph 3 provides that, if the Treaty is terminated, all investments that qualified as covered investments on the date of termination (i.e., 1 year after the date of written notice of termination) continue to be protected under the Treaty for 10 years from that date as long as these investments qualify as covered investments. A Party's obligations with respect to the establishment and acquisition of investments would lapse immediately upon the date of termination of the Treaty.

Paragraph 4 stipulates that the Annex shall form an integral part of the Treaty.
Paragraph 5 states that all dates and periods mentioned in the Treaty are reckoned according to the Gregorian calendar. The final clause of the Treaty provides that the English and Arabic language texts are each authentic; however, in the event of divergence, the English text will

prevail. Bahrain requested that the English text prevail in the event of divergence, in recognition of the widespread use of the English language in international commercial transactions in Bahrain.

Annex

U.S. bilateral investment treaties allow for exceptions to national and MFN treatment, where the Parties' domestic regimes do not afford national and MFN treatment, or where treatment in certain sectors or matters is negotiated in and governed by other agreements. Future derogations from the national treatment obligations of the Treaty are generally permitted only in the sectors or matters listed in the Annex, pursuant to Article 2(2), and must be made on an MFN basis unless otherwise specified therein.

Under a number of statutes, many of which have a long historical background, the U.S. federal government or States may not necessarily treat investments of nationals or companies of Bahrain as they do U.S. investments or investments from a third country. Paragraphs 1 and 2 of the Annex list the sectors or matters subject to U.S. exceptions.

The U.S. exceptions from its national treatment obligation are: atomic energy; customhouse brokers; licenses for broadcast, common carrier, or aeronautical radio stations; COMSAT; subsidies or grants, including but not limited to, government-supported loans, guarantees, and insurance; State and local measures exempt from Article 1102 of the North American Free Trade Agreement pursuant to Article 1108 thereof; and landing of submarine cables.

The U.S. exceptions from its national and MFN treatment obligations are: fisheries; air and maritime transport, and related activities; banking, insurance, securities, and other financial services; and one-way satellite transmissions of Direct-to-Home (DTH) and Direct Broadcasting Satellite (DBS) television services and of digital audio services.

Paragraph 3 of the Annex lists Bahrain's exceptions from its national treatment obligation, which are: ownership or control of television and radio broadcasting and other forms of mass media; fisheries; and initial privatization of exploration or drilling for crude oil.

Paragraph 4 of the Annex lists Bahrain's exceptions from its national and MFN treatment obligation, which are: air transportation; purchase or ownership of land; and until January 1, 2005, purchase or ownership of shares quoted on the Bahrain Stock Exchange.

Paragraph 5 of the Annex ensures that national treatment is granted by each Party in all leasing of minerals or pipeline rights-of-way on government lands. In so doing, this provision affects the implementation of the Minerals Lands Leasing Act (MLLA) (30 U.S.C. 181 et seq.) and 10 U.S.C. 7435, regarding Naval Petroleum Reserves, with respect to nationals and companies of Bahrain. The Treaty provides for resort to binding international arbitration to resolve disputes, rather than denial of mineral rights or rights to naval petroleum shares to investors of the other Party, as is the current process under the statute. U.S. domestic remedies, would, however, remain available for use in conjunction with the Treaty's provisions.

The MLLA and 10 U.S.C. 7435 direct that a foreign investor be denied access to leases for minerals on on-shore federal lands, leases of land within the Naval Petroleum and Oil Shale Reserves, and rights-of-way for oil or gas pipelines across on- shore federal lands, if U.S. investors are denied access to similar or like privileges in the foreign country.

Bahrain's extension of national treatment in these sectors will fully meet the objectives of the MLLA and 10 U.S.C. 7435. Bahrain was informed during negotiations that, were it to include this sector in its list of treatment exemptions, the United States would (consistent with the MLLA and 10 U.S.C. 7435) exclude the leasing of minerals or pipeline rights-of-way on Government lands

from the national and MFN treatment obligations of this Treaty.

The listing of a sector or matter in the Annex does not necessarily signify that domestic laws have entirely reserved it for nationals. And, pursuant to Article 2(2), any additional restrictions or limitations that a Party may adopt with respect to listed sectors or matters may not compel the divestiture of existing covered investments.

Finally, listing a sector or matter in the Annex exempts a Party only from the obligation to accord national or MFN treatment. Both parties are obligated to accord to covered investments in all sectors--even those listed in the Annex--all other rights conferred by the Treaty.

The other U.S. Government agencies that participated in negotiating the Treaty join me in recommending that it be transmitted to the Senate at an early date.
Respectfully submitted,

MADELINE ALBRIGHT.

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE STATE OF BAHRAIN CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of the State of Bahrain (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

Recognizing that the development of economic and business ties can promote respect for internationally recognized worker rights;

Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application; and

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

ARTICLE I

For the purposes of this Treaty,

(a) "company" means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, and includes, but is not limited to, a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other organization;

(b) "company of a Party" means a company constituted or organized under the laws of that Party;

(c) "national" of a Party means a natural person who is a national of that Party under its applicable law;

(d) "investment" of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes, but is not limited to, investment consisting or taking the form of:

(1) a company;

(2) shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests, in a company;

(3) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;

(4) moveable and immovable property; and intangible property, including, but not limited to, rights, such as leases, mortgages, liens and pledges;

(5) intellectual property, including, but not limited to:

copyrights and related rights,

patents,

rights in plant varieties,

industrial designs,

rights in semiconductor layout designs,

trade secrets, including, but not limited to, know-how and confidential business information,

trade and service marks, and

trade names; and

(6) rights conferred pursuant to law, such as licenses and permits;

(e) "covered investment" means an investment of a national or company of a Party in the territory of the other Party;

(f) "state enterprise" means a company owned, or controlled through ownership interests, by a Party;

(g) "investment authorization" means an authorization granted by the foreign investment authority of a Party to a covered investment or a national or company of the other Party;

(h) "investment agreement" means a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (1) grants rights with respect to natural resources or other assets controlled by the national authorities and (2) the investment, national or company relies upon in establishing or acquiring a covered investment;

(i) "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965;

(j) "Centre" means the International Centre for Settlement of Investment Disputes Established by the ICSID Convention; and

(k) "UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law.

ARTICLE 2

1. With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in
its territory of its own nationals or companies (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country

(hereinafter "most favored nation treatment"), whichever is most favorable (hereinafter "national and most favored nation treatment"). Each Party shall ensure that its state enterprises, in the provision of their goods or services, accord national and most favored nation treatment to covered investments.

2. (a) A Party may adopt or maintain exceptions to the obligations of paragraph 1 in the sectors or with respect to the matters specified in the Annex to this Treaty. In adopting such an exception, a Party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective.

(b) The obligations of paragraph 1 do not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.

3. (a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law.

(b) Neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments.

4. Each Party shall provide effective means of asserting claims and enforcing rights with respect to covered investments.

5. Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain to or affect covered investments are promptly published or otherwise made publicly available.

ARTICLE 3

1. Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article 2, paragraph 3.

2. Compensation shall be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of expropriation"); and be fully realizable and freely transferable. The fair market value shall not reflect any change in value occurring because the expropriatory action had become known before the date of

expropriation.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of
expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid--converted into the currency of payment at the market rate of exchange prevailing on the date of payment--shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

ARTICLE 4

1. Each Party shall accord national and most favored nation treatment to covered investments as regards any measure relating to losses that investments suffer in its territory owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events.

2. Each Party shall accord restitution, or pay compensation in accordance with paragraphs 2 through 4 of Article 3, in the event that covered investments suffer losses in its territory, owing to war or other armed conflict, revolution, state of national
emergency, insurrection, civil disturbance, or similar events, that result from:

(a) requisitioning of all or part of such investments by the Party's forces or authorities, or

(b) destruction of all or part of such investments by the Party's forces or authorities that was not required by the necessity of the situation.

ARTICLE 5

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include, but are not limited to:

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments made under a contract, including, but not limited to, a loan agreement; and

(e) compensation pursuant to Articles 3 and 4, and payments arising out of an investment dispute.

2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer.

3. Each Party shall permit returns in kind to be made as authorized or specified in an investment authorization, investment agreement, or other written agreement between the Party and a covered investment or a national or company of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities;

(c) criminal or penal offenses; or

(d) ensuring compliance with orders or judgments in adjudicatory proceedings.

ARTICLE 6

Neither Party shall mandate or enforce, as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment, any requirement (including, but not limited to, any commitment or undertaking in connection with the receipt of a governmental permission or authorization):

(a) to achieve a particular level or percentage of local content, or to purchase, use or otherwise give a preference to products or services of domestic origin or

from any domestic source;

(b) to limit imports by the investment of products or services in relation to a particular volume or value of production, exports or foreign exchange earnings;

(c) to export a particular type, level or percentage of products or services, either generally or to a specific market region;

(d) to limit sales by the investment of products or services in the Party's territory in relation to a particular volume or value of production, exports or foreign exchange earnings;

(e) to transfer technology, a production process or other proprietary knowledge to a national or company in the Party's territory, except pursuant to an order, commitment or undertaking that is enforced by a court, administrative tribunal or competition authority to remedy an alleged or adjudicated violation of competition laws; or

(f) to carry out a particular type, level or percentage of research and development in the Party's territory.

Such requirements do not include conditions for the receipt or continued receipt of an advantage.

ARTICLE 7

1. (a) Subject to its laws relating to the entry and sojourn of aliens, each Party shall permit to enter and to remain in its territory nationals of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the other Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

(b) Neither Party shall, in granting entry under paragraph 1 (a), require a labor certification test or other procedures of similar effect, or apply any numerical restriction.

2. Each Party shall permit covered investments to engage top managerial personnel of their choice, regardless of nationality.

ARTICLE 8

The Parties agree to consult promptly, on the request of either, to resolve any

disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty or to the realization of the objectives of the Treaty.

ARTICLE 9

1. For purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment.

2. A national or company that is a party to an investment dispute may submit the dispute for resolution under one of the following alternatives:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b), and that ninety days have elapsed from the date on which the dispute arose, the national or company concerned may submit the
dispute for settlement by binding arbitration:

(1) to the Centre, if the Centre is available; or

(2) to the Additional Facility of the Centre, if the Centre is not available; or

(3) in accordance with the UNCITRAL Arbitration Rules; or

(4) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.

(b) A national or company, notwithstanding that it may have submitted a dispute to binding arbitration under paragraph 3 (a), may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Party that is a party to the dispute, prior to the institution of the arbitral proceeding or during the proceeding, for the preservation of its rights and interests.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice of the national or company under paragraph 3 (a) (1), (2), and (3) or the mutual agreement of both parties to the dispute under paragraph 3 (a) (4). This consent and the submission of the dispute by a national or company under paragraph 3 (a) shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties to the dispute; and

(b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, for an "agreement in writing."

5. Any arbitration under paragraph 3 (a) (2), (3) or (4) shall be held in a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.

8. For purposes of Article 25 (2) (b) of the ICSID Convention and this Article, a company of a Party that, immediately before the occurrence of the event or events giving rise to an investment dispute, was a covered investment, shall be treated as a company of the other Party.

ARTICLE 10

1. Any dispute between the Parties concerning the interpretation or application of the Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted upon the request of either Party to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except to the extent these rules are (a) modified by the Parties or (b) modified by the arbitrators unless either Party objects to the proposed modification.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as chairman, who shall be a national of a third state. The UNCITRAL Arbitration Rules applicable to appointing members of three-member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Centre.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the arbitral panel shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses incurred by the Chairman and other arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the arbitral panel may, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

ARTICLE 11

This Treaty shall not derogate from any of the following that entitle covered investments to treatment more favorable than that accorded by this Treaty:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;

(b) international legal obligations; or

(c) obligations assumed by a Party, including, but not limited to, those contained in an investment authorization or an investment agreement.

ARTICLE 12

Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and

(a) the denying Party does not maintain normal economic relations with the third country; or

(b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.

ARTICLE 13

1. No provision of this Treaty shall impose obligations with respect to tax matters, except that:

(a) Articles 3, 9 and 10 will apply with respect to expropriation; and

(b) Article 9 will apply with respect to an investment agreement or an investment authorization.

2. With respect to the application of Article 3, an investor that asserts that a tax measure involves an expropriation may submit that dispute to arbitration pursuant to Article 9, paragraph 3, provided that the investor concerned has first referred to the competent tax authorities of both Parties the issue of whether that tax measure involves an expropriation.

3. However, the investor cannot submit the dispute to arbitration if, within nine months after the date of referral, the competent tax authorities of both Parties determine that the tax measure does not involve an expropriation.

ARTICLE 14

1. This Treaty shall not preclude a Party from applying measures which it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude a Party from prescribing special formalities in connection with covered investments, such as a requirement that such investments be legally constituted under the laws and regulations of that Party, or a requirement that transfers of currency or other monetary instruments be reported, provided that such formalities shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE 15

1. (a) The obligations of this Treaty shall apply to the political subdivisions of the Parties.

(b) With respect to the treatment accorded by a State, Territory or possession of

the United States of America, national treatment means treatment no less favorable than the treatment accorded thereby, in like situations, to investments of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of, other States, Territories or possessions of the United States of America.

2. A Party's obligations under this Treaty shall apply to a state enterprise in the exercise of any regulatory, administrative or other governmental authority delegated to it by that Party.

ARTICLE 16

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2. It shall apply to covered investments existing at the time of entry into force as well as to those established or acquired thereafter.

2. A Party may terminate this Treaty at the end of the initial ten year period or at any time thereafter by giving one year's written notice to the other Party.

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered
investments.

4. The Annex shall form an integral part of the Treaty.

5. All dates and periods mentioned in this Treaty shall be reckoned according to the Gregorian calendar.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE at Washington, this twenty-ninth day of September, 1999, in duplicate in the English and Arabic languages, each text being authentic; however, in the case of divergence, the English text shall prevail.

FOR THE GOVERNMENT OF THE UNITED STATES
OF AMERICA:

[signature]

FOR THE
GOVERNMENT OF
THE STATE OF
BAHRAIN:

[signature]

APPENDICES:

ANNEX

1. The Government of the United States of America may adopt or maintain exceptions to the obligation to accord national treatment to covered investments in the sectors or with respect to the matters specified below:

atomic energy; customhouse brokers; licenses for broadcast, common carrier, or aeronautical radio stations; COMSAT; subsidies or grants, including, but not limited to, government-supported loans, guarantees and insurance; state and local measures exempt from Article 1102 of the North American Free Trade Agreement pursuant to
Article 1108 thereof; and landing of submarine cables.

Most favored nation treatment shall be accorded in the sectors and matters indicated above.

2. The Government of the United States of America may adopt or maintain exceptions to the obligation to accord national and most favored nation treatment to covered investments in the sectors or with respect to the matters specified below:

fisheries; air and maritime transport, and related activities; banking, insurance, securities, and other financial services; and one-way satellite transmissions of direct-to-home (DTH) and direct broadcast satellite (DBS) television services and of digital audio services.

3. The Government of the State of Bahrain may adopt or maintain exceptions to the obligation to accord national treatment to covered investments in the sectors or with respect to the matters specified below:

ownership or control of television and radio broadcasting and other forms of mass media; fisheries; initial privatization of exploration or drilling for crude oil.

Most favored nation treatment shall be accorded in the sectors and matters indicated above.

4. The Government of the State of Bahrain may adopt or maintain exceptions to the obligation to accord national and most favored nation treatment to covered investments in the sectors or with respect to the matters specified below:

air transportation; purchase or ownership of land; and until 1 January 2005, purchase or ownership of shares quoted on the Bahrain Stock Exchange.

5. Each Party agrees to accord national treatment to covered investments in the following sectors:

leasing of minerals and pipeline rights-of-way on government lands.

UNITED STATES COMMERCIAL TREATIES and INTERNATIONAL LAW

ROBERT RENBERT WILSON



THE HAUSER PRESS
GALLEON BOOKS
New Orleans, La.

enterprises (as in connection with waivers of jurisdictional immunity). Some of the more recent treaties go so far as to try to place privately owned enterprises of one party operating in the territory of the other on a plane of equality with public enterprises in such territory with which they compete. For example, the treaty of 1951 with Israel contains the following:

> Rights and privileges with respect to commercial, manufacturing and processing activities accorded, by the provisions of the present Treaty, to privately owned and controlled enterprises of either Party within the territories of the other Party shall extend to rights and privileges of an economic nature granted to publicly owned or controlled enterprises of such other Party, in situations in which such publicly owned or controlled enterprises operate in fact in competition with privately owned and controlled enterprises. The preceding sentence shall not, however, apply to subsidies granted to publicly owned or controlled enterprises in connection with: (a) manufacturing or processing 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. (Article XVIII, par. 2.)

The integration of commercial treaties with policy looking to a more peaceful, law-ordered world is suggested by provisions on collective security and by the special compromissory clauses. The first of these would touch obligations not only under the United Nations Charter, but also those accepted in regional organizations. In the past the question has sometimes arisen of whether action in the form of sanctions, such as those against Italy in 1935-'36, would be violative of commercial treaty commitments which the sanctionist states might have with the state against which they directed sanctions. Post-World-War-II commercial treaties of the United States make clear that they are not to preclude the application of measures by either party necessary to fulfill its obligations for the maintenance or restoration of international peace and security. Accompanying

this is a clause to permit a party's applying measures "necessary to protect its essential security interests." [37]

For advocates of a widened competence for new international judicial organs, the compromissory clauses in sixteen out of seventeen of the commercial treaties signed by the United States since the Second World War and up to the middle of 1959 will undoubtedly be the most striking feature of these undertakings. Prior to World War II, there had been suggestion of inserting in a commercial treaty a clause binding the parties to adjudicate disputes concerning interpretation or application, but the United States did not agree with the suggestion.[38] After the Second World War, for the first time in its bilateral treaty history the United States in a series of agreements accepted unqualifiedly the rule of obligatory jurisdiction. The essence of that rule is that parties agree, *in advance of the occurrence of a dispute,* to the adjudication of a dispute in case one arises.[39] The time relationship between the making of the agreement and the occurrence of the dispute distinguishes this from optional adjudication, which the United States has long approved.

As an alternative to general obligatory jurisdiction of the International Court of Justice, the United States delegation to the San Francisco Conference in 1945 supported the idea of an Optional Clause.[40] Approving the country's acceptance of the Optional Clause, the United States Senate made a reservation for questions which the United States might find to be within its domestic jurisdiction.[41] While it has evoked criticism from some international lawyers because of its possible inconsis-

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[37] See, for example, Art. XXI (1) (d) of the 1951 treaty with Israel.

[38] The suggestion was made by Liberia in the negotiations which led to the treaty of 1938 with that country. By the proposal, reference was to be, at the request of either party, to a court of arbitration. A separate paragraph of the proposal related to a plan for formation of the tribunal. The United States position was that the arbitration convention of 1926 between the two parties would seem to be adequate to govern the situation. Department of State file (National Archives) 711.822/8.

[39] The problem of reservations and that of provisions on the actual reference of disputes are considered in Robert R. Wilson, "Reservation Clauses in International Agreements for Obligatory Arbitration," AJIL, XXXIII (1929), 68-93, and "Clauses Relating to Reference of Disputes in Obligatory Arbitration Treaties," *ibid.*, XXV (1931), 469-489.

[40] See *United Nations, Conference on International Organization, Documents,* Vol. XIV, for the alternatives proposed at the San Francisco Conference.

[41] Sen. Res. 196, Aug. 2, 1946.

Annex 127

Federal Register
Vol. 60, No. 52
Friday, March 17, 1995

Presidential Documents

Title 3—

The President

Executive Order 12957 of March 15, 1995

Prohibiting Certain Transactions With Respect to the Development of Iranian Petroleum Resources

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, WILLIAM J. CLINTON, President of the United States of America, find that the actions and policies of the Government of Iran constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. The following are prohibited, except to the extent provided in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order: (a) the entry into or performance by a United States person, or the approval by a United States person of the entry into or performance by an entity owned or controlled by a United States person, of (i) a contract that includes overall supervision and management responsibility for the development of petroleum resources located in Iran, or (ii) a guaranty of another person's performance under such a contract;

(b) the entry into or performance by a United States person, or the approval by a United States person of the entry into or performance by an entity owned or controlled by a United States person, of (i) a contract for the financing of the development of petroleum resources located in Iran, or (ii) a guaranty of another person's performance under such a contract; and

(c) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order.

Sec. 2. 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, 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 (including foreign branches), or any person in the United States; and

(d) The term "Iran" means the land territory claimed by Iran and any other area over which Iran claims sovereignty, sovereign rights or jurisdiction, including the territorial sea, exclusive economic zone, and continental shelf claimed by Iran.

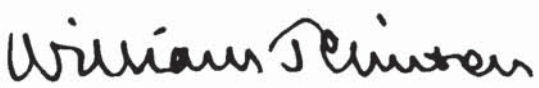
Sec. 3. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to me by the International Emergency Economic Powers Act as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States

Government. 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. 4. Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 5. (a) This order is effective at 12:01 a.m., eastern standard time, on March 16, 1995.

(b) This order shall be transmitted to the Congress and published in the **Federal Register**.



THE WHITE HOUSE,
March 15, 1995.

[FR Doc. 95–6849
Filed 3-15-95; 4:50 pm]
Billing code 3195–01–P

United Nations S/PV.7488

Security Council

Seventieth year

Provisional

7488th meeting
Monday, 20 July 2015, 9 a.m.
New York

President:	Mr. McCully	(New Zealand)
Members:	Angola	Mr. Lucas
	Chad	Mr. Cherif
	Chile	Mr. Barros Melet
	China	Mr. Liu Jieyi
	France	Mr. Delattre
	Jordan	Mrs. Kawar
	Lithuania	Mrs. Jakubonė
	Malaysia	Mr. Ibrahim
	Nigeria	Mr. Laro
	Russian Federation	Mr. Churkin
	Spain	Mr. Oyarzun Marchesi
	United Kingdom of Great Britain and Northern Ireland	Mr. Rycroft
	United States of America	Ms. Power
	Venezuela (Bolivarian Republic of)	Mr. Ramírez Carreño

Agenda

Non-proliferation

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The meeting was called to order at 9.05 a.m.

Adoption of the agenda

The agenda was adopted.

Non-proliferation

The President: In accordance with rule 37 of the Council's provisional rules of procedure, I invite the representatives of Germany and the Islamic Republic of Iran to participate in this meeting.

In accordance with rule 39 of the Council's provisional rules of procedure, I invite His Excellency Mr. Thomas Mayr-Harting, Head of the Delegation of the European Union to the United Nations, to participate in this meeting.

The Security Council will now begin its consideration of the item on its agenda. Members of the Council have before them document S/2015/547, which contains the text of a draft resolution prepared in the course of the Council's prior consultations.

The Council is ready to proceed to the vote on the draft resolution before it. I would like to thank all Council members for their sponsorship of the draft resolution, which is now a presidential text. I shall put the draft resolution to the vote now.

A vote was taken by show of hands.

In favour:

Angola, Chad, Chile, China, France, Jordan, Lithuania, Malaysia, New Zealand, Nigeria, Russian Federation, Spain, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of)

The President: The draft resolution received 15 votes in favour. The draft resolution has been adopted unanimously as resolution 2231 (2015).

I now give the floor to those members of the Council who wish to make statements after the vote.

Ms. Power (United States of America): Today we have adopted resolution 2231 (2015), enshrining the Joint Comprehensive Plan of Action agreed to six days ago in Vienna.

By now, many are familiar with the basic tenets of the deal, which, if implemented, would cut off all pathways to fissile material for a nuclear weapon for the Islamic Republic of Iran, while putting in place a rigorous inspection and transparency regime for verifying Iran's compliance. The Plan of Action will cut the number of Iran's centrifuges by two thirds and prevent Iran from producing weapons-grade plutonium. Iran will also get rid of 98 per cent of its stockpile of enriched uranium, going from a quantity that could produce approximately 10 nuclear weapons to a fraction of what is needed for a single nuclear weapon. The deal will quadruple Iran's break-out time — the time needed to produce enough weapons-grade uranium for one nuclear weapon — from the current estimate of two to three months to one year. It will also require Iran and all States to comply with legally binding restrictions on nuclear and conventional arms-related and ballistic missile-related activities.

Ninety days from today, when our respective capitals and legislatures have had a chance to carefully review the deal's provisions, the commitments in the Joint Comprehensive Plan of Action should take effect. Sanctions relief will begin only when Iran verifiably completes the initial steps necessary to bring its nuclear programme in line with the deal. It is important today to step back from the Plan of Action to its larger lessons — lessons about enforcing global norms, the essential role of diplomacy, the need for ongoing vigilance and the absolute necessity of the unity of the Security Council; lessons that have implications both for ensuring implementation of the deal and for tackling other crises that confront us today.

This year we mark 70 years since the founding of the United Nations, which its second Secretary-General, Dag Hammarskjöld, famously said "was not created to bring us to heaven, but to save us from hell". In the wake of the devastating loss of life in the Second World War and the immeasurable suffering it caused, representatives of nations around the world came together with an aim — to save succeeding generations from the scourge of war.

The first lesson we can learn from how this deal was secured is that it is not enough to agree to global norms, such as that against the proliferation of nuclear weapons. The Council and all the countries of the United Nations must actually take steps to enforce global norms. In 2006, in response to Iran's efforts to develop a nuclear-weapons programme, the Security Council put in place on the of toughest sanctions regimes in its history, which was complemented by robust sanctions imposed by the United States, several other countries and the European Union (EU). Faced

with Iran's ongoing non-compliance, the United Nations tightened its sanctions in 2007, 2008 and 2010. The sanctions regime played a critical role in helping to lay the groundwork for the talks that would give rise to the Joint Comprehensive Plan of Action.

The second lesson is one that was most eloquently articulated more than 50 years ago by President John F. Kennedy and echoed last week by President Obama: "Let us never negotiate out of fear, but let us never fear to negotiate". Given the devastating human toll of war, we have a responsibility to test diplomacy. In 2010, when then-United States Ambassador to the United Nations Susan Rice spoke in the Chamber after the Council strengthened sanctions on Iran, she cited the ways in which Iran had violated its commitments to the International Atomic Energy Agency (IAEA) and its obligations under prior Security Council resolutions. Yet she also said:

> "The United States reaffirms our commitment to engage in robust, principled and creative diplomacy. We will remain ready to continue diplomacy with Iran and its leaders" (*S/PV.6335, p.5*).

And when a credible opening emerged for negotiations, that is exactly what the United States and the other members of the P-5+1 — the United Kingdom, France, Germany, Russia and China — and the EU did.

There were many occasions over these past two years of grueling negotiations when any party could have walked away. The distances just seemed too great, the history between us searing and the resulting mistrust defining. But the United States and our partners knew that we had a responsibility to try to overcome these obstacles and resolve the crisis peacefully. One only has to spend a week in the Security Council — any week — and hear accounts of the bloodshed and heartbreak in Yemen, Syria, South Sudan, Darfur, Mali, Libya or any other conflict-ridden part of the world to be reminded of the consequences of war. Sometimes, as bother the Charter of the United Nations and history make clear, the use of force is required, but we all have a responsibility to work aggressively in diplomatic channels to try to secure our objectives peacefully.

This nuclear deal does not change our profound concern about human rights violations committed by the Iranian Government or about the instability Iran fuels beyond its nuclear programmes — from its support for terrorist proxies to its repeated threats against Israel to its other destabilizing activities in the region. That is why the United States will continue to invest in the security of our allies in the region and why we will maintain our own sanctions related to Iran's support for terrorism, its ballistic-missiles programme and its human rights violations.

And this deal will in no way diminish the United States outrage over the unjust detention of United States citizens by the Government of Iran. Let me use this occasion to call once again on Iran to immediately release all unjustly detained Americans: Saeed Abedini, imprisoned for his religious beliefs; Amir Hekmati, falsely accused of espionage; and Jason Rezaian, a *Washington Post* correspondent who just a year ago was covering the nuclear negotiations. I also call on Iran to help locate Robert Levinson, who has been missing from Iran since 2007. No family should be forced to endure the anguish that the Abedini, Hekmati, Rezaian and Levinson families feel, and we will not rest until they are home where they belong.

But denying Iran a nuclear weapon is important not in spite of these other destabilizing actions, but rather because of them. As President Obama has pointed out,

> "that is precisely why we are taking this step — because an Iran armed with a nuclear weapon would be far more destabilizing and far more dangerous to our friends and to the world".

So while this deal does not address many of our profound concerns, if implemented it would make the world safer and more secure.

Yet while reaching this deal matters, our work is far from finished. In the months and even years ahead, the international community must apply the same rigour to ensuring compliance with the Joint Comprehensive Plan of Action as we did to drafting and negotiating it. This is my third point — implementation is everything. And that is precisely why so many verification measures have been built into this deal. The Joint Comprehensive Plan of Action will grant the IAEA access when it needs it and where it needs it, including 24/7 containment and surveillance of Iran's declared nuclear facilities. Inspectors will have access to the entire supply chain that supports Iran's peaceful nuclear programme, from mining and milling to conversion, enrichment, fuel manufacturing, nuclear reactors and spent fuel. If the terms of the deal are not followed, all sanctions that have been suspended can be snapped back into place, and if the United States or any other participant in the Plan of

Action believes that Iran is violating its commitments, we can trigger a process in the Security Council that will reinstate the United Nations sanctions.

The fourth and final lesson we can learn from the process that led us here today is that when our nations truly unite to confront global crises, our impact grows exponentially. The founders of the United Nations understood that concept intrinsically and enshrined it in the Charter, which calls on each of us "to unite our strength to maintain international peace and security". In the twenty-first century, it is now an axiom that our nations can do more to advance peace, justice and human dignity by working together than any single country can achieve on its own, and that, indeed, only when we act as united nations can we address the world's most intractable problems.

Although we do not see that unity enough here at the United Nations, the countries of the United Nations did largely unite behind the cause of preventing nuclear proliferation in Iran, and it was the persistent multilateral pressure that came out of this unity, combined with a critical openness to seeking a diplomatic solution that gave the P-5+1 and EU negotiators the leverage they needed to get the deal that would advance our collective security.

In conclusion, the only proper measure of this deal and all of the tireless efforts that went into it will be its implementation. This deal gives Iran an opportunity to prove to the world that it intends to pursue a nuclear programme solely for peaceful purposes. If Iran seizes that opportunity; if it abides by the commitments that it agreed to in this deal, as it did throughout the period of the Joint Comprehensive Plan of Action negotiations; if it builds upon the mutual respect and diligence that its negotiators demonstrated in Lausanne and Vienna; and if it demonstrates a willingness to respect the international standards upon which our collective security rests, then it will find the international community and the United States willing to provide a path out of isolation and towards greater engagement.

We hope that Iran's Government will choose that path, not only because it would make the United States, its allies and the world more secure — which it will — but also because it will more fully empower the Iranian people, whose potential all of us should wish to see unlocked. But let us just think for one moment how much more effective the Council would be if we were to bring the same approach to tackling other threats to international peace and security today: rigourous enforcement; a willingness to be relentless in our pursuit of tough, principled diplomacy, even when the odds seem stacked against us; a commitment not just to resolutions but to their full implementation; and a willingness to overcome divisions to strengthen our collective security.

If we did all that, we can only imagine what we might be able to achieve to mitigate the horrific suffering in Syria today, and what progress the United Nations could make were we to bring the same political will to advancing the human rights of the world's most vulnerable people as we have to cutting off Iran's pathways to a nuclear weapon. How many more girls worldwide would be in classrooms? How many more warlords and dictators worldwide would be behind bars? It is humbling to imagine how much more we could achieve. It should motivate us to do far more.

Mr. Liu Jieyi (China) (*spoke in Chinese*): A few minutes ago, the Security Council unanimously adopted resolution 2231 (2015), on the Iranian nuclear issue, endorsing the Joint Comprehensive Plan of Action reached on that matter by the P-5+1 — China, France, the Russian Federation, Germany, the United Kingdom and the United States of America — in Vienna on on 14 July.

In spite of ups and downs, the efforts made with regard to the Iran nuclear issue over more than the past 10 years have finally resulted in a political solution. With the conclusion of the Joint Comprehensive Plan of Action, the international nuclear non-proliferation regime has been safeguarded. Iran has made a political commitment not to develop nuclear weapons, while at the same time it has been given the legitimate right to the peaceful uses of nuclear energy. A new chapter has also begun on Iran's relationship with all sides.

The conclusion of the Joint Comprehensive Plan of Action brings far-reaching inspiration to contemporary international relations. First, the setting up of a new type of international relationship centred on mutual benefit and win-win outcomes has a strong vitality. The Iranian nuclear issueconcerns the immediate — and even core — interests of all sides. Without a multi-win and all-win spirit, the Joint Comprehensive Plan of Action would not have been achieved. Even if it had been, it would not have lasted for long.

Secondly, it is essential to stay the course in seeking political solutions to major issues. However the difficult the process may be, a political solution

is always the only practical and viable path. The Joint Comprehensive Plan of Action also serves as a successful example of how to address other regional and international hot-spot issues through political and diplomatic means.

Thirdly, it is possible to achieve success so long as confidence is maintained, political will is demonstrated and tireless efforts are made in the course of seeking political solutions. The Council's adoption of resolution 2231 (2015), which endorses the Joint Comprehensive Plan of Action, is an important step in the process of implementing the agreement. This is a good beginning. Implementing the agreement over the next 10 years will be even more important, during which it will be essential to adhere to the following principles.

First, the Council's resolution and the Joint Comprehensive Plan of Action must be implemented in a balanced, precise and comprehensive manner. All sides should effectively fulfil the commitments they have made and seriously and effectively implement all the provisions of the agreement. Secondly, in accordance with the principles of mutual respect, equality and mutual benefit, it is essential to appropriately resolve the differences that may arise during the implementation process, demonstrate goodwill and stay the course for the implementation of the Joint Comprehensive Plan of Action. Thirdly, it is necessary to constantly take stock of experiences and good practices during the implementation process, maintain the effectiveness of the relevant mechanism and make positive efforts to maintain world peace, promote regional stability and improve relations among all sides.

China has all along worked constructively for fruitful negotiations on the Iranian nuclear issue. We will continue to make new contributions to implement the Joint Comprehensive Plan of Action in a responsible manner.

Mr. Delattre (France) (*spoke in French*): France welcomes the adoption of resolution 2231 (2015), which marks a historic moment both for international peace and security and for the Security Council. Following 12 years of a nuclear crisis, after many months of intensive months of negotiation, an agreement with Iran was finally reached in Vienna on 14 July. First, the agreement charts a demanding path towards establishing trust in the exclusively peaceful nature of Iran's nuclear programme. It also serves to confirm the relevance and robustness of the non-proliferation regime. The agreement will also make a contribution to regional and international stability, as an Iran with nuclear weapons would further destabilize a region already experiencing many crises. Conversely, with this agreement we will together be able to write a new chapter in the history of the region. Above all, the authority of the Council and of our collective security system has been strengthened thanks to this agreement. If the commitments are upheld, one of the most serious crises of the past 20 years will have been settled peaceably through dialogue and negotiation.

This agreement is first and foremost a triumph of method. As the Council is aware, from the outset of the crisis, in 2003, along with Germany and the United Kingdom, France gave priority to dialogue through what came to be known as a dual approach, namely, negotiations and sanctions. We believed that, without firmness and pressure from the international community, calls for dialogue would have been in vain. Our American, Russian and Chinese partners, and eventually the rest of the Security Council, rallied around that approach. In that way, we were able to establish the framework for dialogue that, 12 years later, made it possible to arrive at an outcome.

This agreement is also the result of firmness. Throughout the negotiations, France did not waver from its position of being in favour of civilian nuclear programme for Iran but against a nuclear weapon. Against that backdrop, France resolutely joined in the search for a negotiated solution. That course of constructive resolve made it possible to arrive at a robust and binding agreement that is also precise, complete and credible and whose full implementation will serve to address the expectations of the international community and the concerns of Iran's neighbours.

It is now up to the Security Council to endorse the Vienna agreement and act as guarantor of its implementation. Although the time for negotiations has come to an end, now is the time for action and vigilance. The process that has been put in place includes clear and exact limits on Iran's nuclear programme, a robust oversight and verification system and the possibility for automatically reinstating sanctions in the event of Iran's violation of its commitments. It is Iran's responsibility, in line with the timetable that has been established, to implement the entirety of the measures agreed. The International Atomic Energy Agency will play a key role with regard to oversight and verification, as well as in informing the Council as to Iran's adherence to its commitments. Along with its partners, France will

rigorously and in good faith monitor compliance with this agreement. We will judge Iran's by its actions in making this agreement a success. The role and unity of the Council will also be a determining factor. The lifting of Security Council sanctions is preconditioned on Iran's respect for its commitments. The Council must continue to exercise vigilance throughout the period covered by the agreement. Over the next 15 years, it must be prepared to reinstate sanctions in the event of shortcomings on the part of Iran.

Together, with eyes wide open, we are embarking today upon a new chapter. But the most important part is yet to be written, and the coming weeks will be decisive.

Mr. Churkin (Russian Federation) (*spoke in Russian*): Today's resolution 2231 (2015), adopted unanimously in support of the Joint Comprehensive Plan of Action, marks a fundamental shift in the Security Council's consideration of the situation regarding the Iranian nuclear programme, with a view towards resolving the matter once and for all. By creating a new reality, we are not just turning a page but beginning a new chapter in the work of the Council. We expect that all countries will quickly adapt to the new conditions and contribute to the successful implementation of the agreement.

The Security Council, and the international community it represents, has supported a clear choice to resolve the situation regarding the Iranian nuclear programme through political and diplomatic means based on international law — first and foremost the Treaty on the Non-Proliferation of Nuclear Weapons. A choice has been made in favour of mutual respect, stability and cooperation. We are pleased that that decision has been based on a gradual and reciprocal approach, which our country consistently supported throughout all stages of the negotiations.

The Council has today confirmed the inalienable right of Iran to develop a peaceful nuclear programme, including to enrich uranium, while also ensuring comprehensive oversight by the International Atomic Energy Agency (IAEA). This resolution also guarantees lifting the burden of sanctions on Iran in the framework of the implementation of the Joint Comprehensive Plan of Action though a clear and transparent mechanism that will be made operational through concrete steps based on confidence in Iran's nuclear programme, including IAEA verification.

A reliable filter has been created in the framework of the Joint Comprehensive Plan of Action and resolution 2231 (2015) that will guarantee that all disputes and disagreements that could arise in the implementation of the Joint Comprehensive Plan of Action will be subject to collective consideration in the framework of the joint commission, with the participation of the P-5+1, Iran and the European Union. Moreover, the Security Council maintains a leading role on issues regarding the implementation of the Plan of Action. During negotiations we knew that the Plan of Action would be subject to Security Council approval, and we therefore gave special attention to ensuring the prerogatives of this organ and respect for the role of all its members, including non-permanent members, in taking decisions that are essential to implementing the agreement. We are grateful to the IAEA for its readiness to assume responsibility for monitoring and verification of Iran's obligations.

We hope that the agreement with Iran will help other countries of the Middle East and the Persian Gulf to refrain from destabilizing moves, including in the nuclear sphere, and to ensure that the region does not enter a new arms race. We are creating conditions conducive to the establishment in the Middle East of a zone free of weapons of mass destruction and to the search for common approaches among countries of the Middle East to addressing regional security issues and uniting their collective efforts in the fight against the terrorist threat. In a statement following the conclusion of the negotiations, the President of the Russian Federation, Vladimir Putin, underscored that Russia will do all it can to ensure that the Vienna agreements become fully operational in order to promote the strengthening of international and regional security, the global regime of nuclear non-proliferation, and the mobilization of a broad regional coalition to counteract the terrorist threat.

We underscore that the work of all the negotiating teams deserve the highest praise. We commend in particular the Governments of Austria and Switzerland, which ensured optimal conditions for guaranteeing the success of the negotiations. We would also like to praise the consideration of our friends from Kazakhstan, who organized several rounds of negotiations.

Reaching an agreement to resolve the issues surrounding the Iranian nuclear programme demonstrates that where there exists a political will based on realism and respect for legitimate mutual

interests, the international community can resolve the most complex tasks. All participants in the negotiations demonstrated their readiness to engage in collective efforts. A reserve of trust has been built up that will be very useful in the course of implementing the agreement. We hope that this invaluable experience of collective efforts, unburdened by ideological geopolitical calculations, will also be used to resolve other crisis situations where, perhaps, success will be secured exclusively through joint work. Russia is ready for this.

Mr. Rycroft (United Kingdom): The United Kingdom welcomes the adoption of resolution 2231 (2015). The resolution endorses the Joint Comprehensive Plan of Action agreed in Vienna last week. It creates the baseline from which to recalibrate our broader relationship with Iran, and it is an opportunity for us all to re-engage economically and culturally with an important regional Power as it takes on its proper responsibility for improving regional stability. Today's adoption is an important milestone in the history of the Council, the culmination of negotiations that have taken place over more than a decade. The Joint Comprehensive Plan of Action is a landmark achievement, and I join my colleagues in expressing my congratulations and gratitude to everyone involved in that process.

In the Council, we often call for the peaceful resolution of disputes. In some cases, progress is slow and situations remain unresolved, but while in the past we have met to call on Iran to respond to our concerns, today we can be proud that Iran has committed to taking actions to address those concerns. I am delighted that the Council has endorsed the deal unanimously. It is a good deal — good for the United Kingdom and the international community, good for the region, and good for Iran. If implemented fully, the resolution will address our proliferation concerns through comprehensive commitments on the part of Iran to limit its nuclear programme — commitments that will be verified through extensive monitoring and transparency. As soon as Iran takes steps on its nuclear programme, it will receive comprehensive economic and financial sanctions relief, enabling it to trade more freely again with the rest of the world. Under full implementation of the deal, Iran will be treated just like any other non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons.

We now need to look ahead and make sure that we all deliver on our commitments as we implement the agreement. That will not be easy. There will inevitably be difficulties and unforeseen obstacles, but we must live up to our commitments, act in good faith and try wherever possible to resolve together any problems in implementing the deal. The role of the Security Council will be important. We will maintain oversight in the implementation of the agreement. We also need to take significant steps to support its implementation. In some areas, that will involve novel working methods for the Council. We will have to be flexible and imaginative, and get this right.

The deal gives us the chance to change the relationship between Iran and the Security Council, and change for the better the dynamics in the region and beyond. We can now start the work of rebuilding a deficit of trust that has arisen over decades; we can start to normalize our relationships, which hold great promise for the future. We will also encourage Iran to play a transparent and constructive role in regional affairs, including in the current crises in Yemen and Syria. Iran has an opportunity to make a positive decision about its responsibilities in the region.

The world is now a safer place in the knowledge that Iran cannot build a nuclear bomb. I encourage all of us in the Council to show the same determination, courage and vision in supporting this project and pursuing our other top priorities, as the negotiators on all sides have demonstrated in getting us the agreement we have endorsed here today.

Mr. Oyarzun Marchesi (Spain) (*spoke in Spanish*): Today we celebrate the triumph of diplomacy following an arduous and complex negotiating process between the E-3+3 and Iran. I join in congratulating all participants on their efforts and commitments. I congratulate Iran, the United States, Russia, China and our partners in the European Union, and of course the United Kingdom, France and Germany. They have demonstrated us that nothing is impossible where there is political will. They have also given us new impetus in addressing new challenges to international peace and security, as we do daily here in the Council. Such challenges can sometimes seem insurmountable in the absence of inspiration such as that provided in this case today.

Plutarch, writing in *Parallel Lives* in the late first century A.D., ascribes to Alexander the Great a statement that we here today could also endorse, to the effect that dealing with the Persians on the basis of dialogue rather than confrontation serves our

interests and benefits us and them. The benefits will be undeniable — Iran can return to normality and the world will be a safer place.

We are also seeing a demonstration of the Security Council's effectiveness. In adopting resolution 1737 (2006), on 23 December 2006, the Council showed its determination to place limits on Iran's development of sensitive nuclear technologies that could serve to support its nuclear and missile programmes. Today, the Council followed through on that determination. The Council's approach to the Iranian issue has undoubtedly been decisive in reaching the agreement and shows how, when we act united and with determination, we can make the Council the most valuable guardian of international peace and security. Moreover, in a symbiotic process, the more effective this body is, the stronger it is and the more capable it is to address future challenges.

Before us now are opportunities and challenges. The opportunities we now have stem from a balanced agreement that strengthens the non-proliferation system and offers an outstanding opportunity that should not be missed. We also have the responsibility to take advantage of the synergies the agreement offers. To that end, we must ensure that the process is brought to an optimal conclusion. Among the opportunities presented, we must highlight the beneficial effect that the process could have on the region because it will bring about an element of stability, as the representative of the United Kingdom just said. We must take advantage of this as as a valuable basis to work towards combating the threat of terrorism and bringing about the end of the conflict in the Middle East.

But there are also challenges, which is why we must implement what has been agreed to in a timely and effective manner. Today, the Foreign Affairs Council of the European Union will meet to take a decision about the Union's role under the terms of the agreement. Now that the hardest part has been achieved, we here in the Council must continue to show unity and determination in duly implementing the agreement and establish follow-up and monitoring mechanisms that will replace current ones. We must find the most effective way of monitoring the restrictions that will remain in place for a certain amount of time.

Accordingly, as Chair of the Security Council Committee established pursuant to resolution 1737 (2006), I feel deeply involved in this process and I can guarantee that I will make every effort to uphold my role throughout the transition phase, being as pragmatic as possible and assisting Member States in the full implementation of the agreement in their respective relationships with the current regime. As I said on the day that the United States submitted the draft resolution, the greatest source of happiness for me would be to see the 1737 Committee simply disappear, as that would mean we are fulfilling the message the tapestry that floats above this Chamber delivers on a daily basis: the 1737 Committee, like the phoenix, will die only to light up a future of peace and security. As we forge that future the Council can count on the full support and commitment of Spain.

Mrs. Kawar (Jordan) (*spoke in Arabic*): Jordan welcomes the agreement reached on the Iranian nuclear issue, as well as the political and diplomatic efforts made by China, France, Germany, the Russian Federation, the United Kingdom, the United States and the European Union to achieve it.

Jordan has always called for a peaceful diplomatic solution to the Iranian nuclear issue. Therefore, Jordan supports any steps taken to entrench regional and international peace and security and stability, particularly in the current conditions prevailing in the Middle East. We hope that the agreement signed between the P5+1 and Iran will promote further confidence among the States of the region. We also hope that it will have positive repercussions on all States of the region and on the security and stability of their peoples. And we hope that it will serve as a constructive step towards preventing a new arms race in the Middle East region and that it will rid the region of all weapons of mass destruction, including nuclear weapons.

In conclusion, we stress the importance of the role of the International Atomic Energy Agency in following up and implementing the agreement and providing the Security Council with regular reports on Iran's implementation in accordance with the Joint Comprehensive Plan of Action.

Mr. Barros Melet (Chile) (*spoke in Spanish*): We express our satisfaction at the adoption of resolution 2231 (2015), by which the Security Council endorses the agreement reached between Iran and the E3/EU+3 on the Iranian nuclear programme. We voted in favour of the resolution because we value the agreement, as it contributes to resolving differences on the programme's scope and prospects and reaffirms the right of all States

party to the Treaty on the Non-Proliferation of Nuclear Weapons to benefit from the peaceful uses of nuclear energy.

We hope that the significant verification elements in the agreement will make it possible to build confidence among the parties, preserve the integrity of the multilateral non-proliferation regime and strengthen the role of the International Atomic Energy Agency (IAEA), thereby promoting greater cooperation to safeguard peace and stability in the Middle East.

The agreement has served to reaffirm the irreplaceable value of negotiation and diplomacy in conducting international relations. The responsibility, flexibility and creativity that all the parties demonstrated show the will and commitment to peace and cooperation, which are the guiding principles of our Organization.

At this historic juncture, from our seat in the Council and on the Board of Governors of the IAEA, we will provide our full support to the effective and smooth implementation of this agreement. We therefore hope to contribute to building confidence and creating better conditions for the maintenance of regional and global security.

Mr. Ramírez Carreño (Bolivarian Republic of Venezuela) (*spoke in Spanish*): The Bolivarian Republic of Venezuela co-sponsored and voted in favour of resolution 2231 (2015), which ratifies the agreements reached between the P5+1, the European Union and the Islamic Republic of Iran. We are convinced that through this resolution the Security Council is giving its firm backing to an important agreement that ushers in a new era in relations among the various States.

Venezuela welcomes this important agreement and congratulates all the delegations that participated in the negotiations process that led to the signing of this important document — on the courage, persistence, political will and commitment they showed throughout the 18 months of intense negotiations. The results achieved reveal the importance of political and diplomatic efforts to find a peaceful solution to the impasse, in accordance with Article 2 of the Charter of the United Nations. It also shows once again that, where there is political commitment among the parties, peace and dialogue impose themselves in the face of warmongering speeches that fuel distrust and confrontation.

This agreement is the triumph of diplomacy over war. The full implementation of the Joint Comprehensive Plan of Action will guarantee the Islamic Republic of Iran the right to exercise its sovereign right to the use of nuclear energy for peaceful purposes with a view to promoting its technological and energy independence. We are also convinced that this instrument will contribute positively to the birth of a new phase of diplomatic relations between Iran and the States party to the agreement, based on mutual trust and respect and a collective commitment with a view to strengthening international peace and security.

We are pleased that the agreements reached will in the end allow for the final lifting of the Security Council sanctions regime as well as other unilateral coercive measures unlawfully applied in other areas related to Iran's nuclear programme, which include measures restricting access to economic, commercial, financial, technological, energy goods and services, inter alia, which has had a negative impact on the Iranian people and other States in their cooperative relations with Iran. We reaffirm our full support and implementation of this historic effort with a view to achieving the welfare and progress of the Iranian people. We hope that the agreement reached will mark the beginning of a far-reaching political process that paves the way to progress towards a peaceful solution to the other conflicts taking place in the Middle East — including regarding the Palestinian issue, Syria, Iraq, Yemen and extremist terrorism — that are threatening peace and stability in the region.

In conclusion, we believe that the international community must now support and demonstrate the same political will with a view to achieving a nuclear-weapon-free zone in the Middle East in conformity with the package of measures agreed at the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, which is necessary and of major importance in achieving peace and stability in that troubled region.

Mr. Ibrahim (Malaysia): I thank you, Mr. President, for giving me the floor to explain Malaysia's vote on resolution 2231 (2015), which the Council just adopted and which we co-sponsored and voted in favour of. At the outset, Malaysia wishes to congratulate the delegations responsible for reaching this historic agreement, namely, China, France, Germany, the Russian Federation, the United Kingdom, the United

States, the European Union and, of course, the Islamic Republic of Iran.

We place on record our appreciation to those delegations for their commitment and for remaining steadfast in upholding key principles of constructive engagement, dialogue and diplomacy in good faith throughout the difficult negotiations. The Joint Comprehensive Plan of Action, endorsed by the Council via resolution 2231 (2015), is a positive step that augurs well for international efforts aimed at enhancing nuclear security. We look forward to the immediate and constructive implementation of the Plan of Action by all the parties concerned.

The agreement reached on 14 July is a landmark understanding that, in our view, reaffirms the principle of the peaceful use of nuclear technology and, at the same time, appears to strike a balance in terms of concerns about proliferation as provided for under the regime established under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Malaysia remains convinced that the NPT regime continues to occupy a role of central importance in the efforts to halt the proliferation of nuclear weapons, as well as forming an essential foundation for the pursuit of general and complete nuclear disarmament. Nuclear non-proliferation and nuclear disarmament are two sides of the same coin. In that connection, we reiterate the call upon all the nuclear-weapon States to reinvigorate efforts to implement their obligations under the disarmament pillar of the NPT regime, including by taking steps to reduce their nuclear weapon stockpiles and decrease the operational readiness of the nuclear weapons systems, among others.

As a member of the Council and of the Security Council Committee established pursuant to resolution 1737 (2006), Malaysia looks forward to working with other Council members in the implementation of the Joint Comprehensive Plan of Action with a view to working towards the eventual lifting of all United Nations sanctions against the Islamic Republic of Iran. Malaysia hopes that the successful implementation of the Joint Comprehensive Plan of Action will positively contribute to peace and stability in the Middle East region and beyond.

Mr. Laro (Nigeria): We would like to begin by congratulating the parties — the Islamic Republic of Iran, China, France, Germany, the Russian Federation, the United Kingdom, the United States and the European Union — on the historic agreement reached last week on the Iranian nuclear programme. The agreement is a victory for diplomacy. It proves that, no matter how difficult a subject is, with commitment and determination, negotiations can produce results.

Nigeria voted in favour of resolution 2231 (2015) because we are convinced that it will aid in the process of implementing the agreement. The Joint Comprehensive Plan of Action clearly spells out the obligations of the parties. We urge them to implement the plan transparently and in good faith.

We takes this opportunity once more to reaffirm our support for the peaceful uses of nuclear energy, in accordance with article IV of the Treaty on the Non-Proliferation of Nuclear Weapons.

Mr. Lucas (Angola): The Angolan delegation is very honoured to take part in this meeting of the Security Council and to have cast its vote on the historic resolution 2231 (2015), which represents the triumph of multilateralism, negotiation and the peaceful settlement of disputes. The agreement that the Council has just endorsed is clear evidence that, however complex or difficult it might be, negotiated solutions can be achieved for any political problem if the parties show political will and a commitment to seek peaceful solutions and to avoid recourse to military means.

The present agreement has an additional and special virtue, since, for many years, diplomacy has been defeated in all Middle East disputes. The United States, China, France, Germany, the United Kingdom, the Russian Federation, the European Union and the Islamic Republic of Iran deserve all of our praise for being able to reach such an outstanding achievement by concluding the Joint Comprehensive Plan of Action as a contribution to the building of confidence in the exclusively peaceful nature of Iran's nuclear programme. We hope that implementation of the Plan of Action will produce the best possible results, that the national Parliaments of the signatory States will give their endorsement to the agreement, that the International Atomic Energy Agency will assume its essential and independent role in verifying compliance with the Safeguards Agreement and that the sanctions imposed on Iran will be lifted in accordance with the provisions of the Joint Comprehensive Plan of Action.

It was our expectation — or, if preferred, our wishful thinking — that the very difficult and thoughtful negotiating process would allow for the highest possible degree of understanding of each

other's views and expectations, thus making possible the building of mutual confidence and triggering a game change, namely, an innovative factor that might create a new dynamic for the whole region. However, in the current environment in the Middle East, the closing — or the opening — of the distracting Iranian nuclear programme, after such a long and complex negotiating process between the main world Powers, the permanent members of the Security Council and an influential regional Power, is a limited outcome. Now we want more. The people of the region deserve more. And the agreements so far reached should be followed by other outstanding initiatives that address very serious regional issues.

It is our view that the permanent members of the Council should deploy further efforts by taking advantage of the negotiating dynamics opened up by the Iranian nuclear programme, so as to reach out to regional Powers and countries of the region to address and resolve proxy wars and serious crisis situations affecting the region, namely, the fight against the Islamic State in Iraq and the Levant, the Syrian war, the conflict in Yemen, the Palestinian issue and the establishment of a political framework to repair the rift between Sunni and Shiite majority countries in the Middle East.

In our view, beyond the non-proliferation and arms control issues, the establishment of new dynamics in the entire Middle East region would be the greatest accomplishment and most valuable legacy of the process to which we are giving a boost today by adopting this landmark resolution.

Mrs. Jakubonė (Lithuania): Lithuania welcomes the unanimous adoption of resolution 2231 (2015), on the Joint Comprehensive Plan of Action agreed by the European Union (EU), the E3/EU+3 and the Islamic Republic of Iran on 14 July. We strongly believe that this deal, based on Iran's implementation of essential changes to its nuclear programme in return for a phased lifting of sanctions, offers a real, durable and verifiable path to resolve a dispute spanning over a decade. It also marks a victory for multilateralism and international diplomacy, as it proves that sustained pressure by the international community, including through United Nations sanctions and their full implementation by Member States, can create conditions that bring parties to the negotiating table and keep them engaged in good faith and in the spirit of compromise.

Lithuania applauds the perseverance and determination of all those involved in that extraordinary diplomatic endeavour. In particular, we acknowledge the instrumental coordinating role played by both former and current European Union High Representatives for Foreign Affairs and Security Policy. Since the core objective of the deal is to ensure the international community's trust in a peaceful measure of Iran's nuclear programme, the full implementation of comprehensive transparency and verification measures will be indispensable in ensuring its success. Iran's agreement to implement the Additional Protocol to its Comprehensive Safeguards Agreement as well as further transparency measures foreseen in the Plan of Action will provide the International Atomic Energy Agency (IAEA) with powerful tools to implement continuous monitoring and will grant the Agency extensive access to Iran's nuclear sites. We also welcome the road map agreed on by the IAEA and Iran on 14 July that provides a specific time frame to clarify past and present outstanding issues by the end of this year.

In addition to the rigorous verification measures, Iran will remain under the legally binding Charter-based obligations to comply with the arms embargo and refrain from ballistic missile-related activities. The travel ban and assets freeze will also remain in place, while the Council will continue to be actively engaged in monitoring the implementation of the Plan of Action. Finally, all current sanctions will be reinstated in the event of significant non-performance by Iran with regard to its commitments under the Joint Comprehensive Plan of Action.

In conclusion, Lithuania is convinced that, if implemented fully and in good faith, the Joint Comprehensive Plan of Action will become a crucial element in building trust between Iran and the international community, open the door to a steady improvement of relations with Iran and positively contribute to regional and international peace and stability.

Mr. Cherif (Chad) (*spoke in French*): Chad would like to join previous speakers in welcoming the signing in Vienna on 14 July by the Islamic Republic of Iran, the P5+1 countries and the European Union of the Joint Comprehensive Plan of Action on the Iranian nuclear programme. Chad takes note of the parties' joint statement aimed at promoting transparency and creating an atmosphere conducive to the implementation of the

Plan of Action. Chad encourages them to implement their commitments fully and in good faith.

It is important to recall that the Plan of Action, which the Security Council has just endorsed in resolution 2231 (2015), is the outcome of a long process. The text of the agreement is voluminous, with more than 100 pages and five annexes. The complexity and length of the negotiations clearly demonstrate that the parties were open-minded and persevered to overcome doubts and difficulties throughout the process. Chad would like to congratulate all the leaders, politicians, diplomats and experts from all parties for the courage, determination, tact and wisdom that they demonstrated in reaching a negotiated solution to the Iranian nuclear programme. We share their satisfaction in having managed to reach an agreement that had not, in past negotiations, been reached for more than 12 years. We support future efforts to implement the agreement reached on 14 July. Chad is convinced of the virtues of dialogue and peace, which is why we voted in favour of the resolution just adopted. Its unanimous adoption clearly symbolizes the triumph of diplomacy and the noble principles enshrined in the Charter of the United Nations that call for the peaceful resolution of differences without the use of threats or force.

Within the framework of that approach, we pay tribute to the leadership of the United States and its leaders' fresh approach that focuses on dialogue, peace and stability around the world. In that regard, we completely agree with what President Obama said when receiving the Nobel Peace Prize, on 10 December 2009 in Oslo:

> "sanctions without outreach — condemnation without discussion — can carry forward only a crippling status quo.

Chad expects that the International Atomic Energy Agency (IAEA) will monitor respect for the agreements on guarantees and the implementation of the cooperation framework agreed with Iran on 11 November 2013, as well as the road map for clarification of the past and current outstanding issues. With that in mind, Chad encourages the IAEA and Iran to cooperate fully to ensure the comprehensive, successful implementation of the Joint Comprehensive Plan of Action. We also hope that the sanctions and measures implemented pursuant to the relevant provisions of the various Council resolutions adopted between 2006 and 2015 pertaining to Iran will be completely lifted after the Security Council receives an IAEA report that confirms the adoption by that country of the implementation of all measures outlined in the Plan of Action.

We would like to reiterate that, like all the other States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Iran is entitled to develop, conduct research and produce nuclear energy for civilian purposes. We hope that the agreement signed on 14 July will make it possible for Iran to join the community of nations and ensure its contribution to the promotion and strengthening of international cooperation. In a world threatened by conflict, every contribution should be welcomed in maintaining international peace and security.

In conclusion, we should like to reiterate our encouragement and support to all parties of the 14 July Vienna agreement. We call on them to respect the commitments undertaken and to continue to engage in dialogue until the end of the implementation of the Plan of Action. Chad, which signed and ratified the Treaty of Pelindaba, which makes Africa a nuclear-weapon-free zone, dreams of a world rid of these weapons of mass destruction, wherein the use of nuclear science and technological research are done solely for peaceful purposes. Therefore, we would like to note the very pertinent and, unfortunately, very imperialist slogan "Nuclear energy for all, nuclear weapons for no one".

The President: I shall now make a statement in my capacity as the Minister for Foreign Affairs of New Zealand.

Today, the permanent members of the Security Council, the European Union, Germany and Iran have presented us with an agreement that, if fully implemented, will provide a comprehensive and long-term solution to the Iran nuclear issue. The truly historic agreement reached in Vienna represents a triumph of diplomacy and cooperation over confrontation and mistrust. New Zealand commends all parties for staying the course throughout what were complex and challenging negotiations.

It is now crucial to ensure that the agreement is fully and swiftly implemented and that small missteps and misunderstandings not be allowed to derail the process. We urge all parties to approach that task with the same constructive intent that has led to this agreement, and we encourage Iran to act swiftly to implement all transparency measures and allow the International Atomic Energy Agency access to the relevant sites.

Through the adoption today of resolution 2231 (2015), we give international legal force to the agreement reached in Vienna and extend the obligations it contains across the broader United Nations membership. New Zealand endorses the comments of High Representative Mogherini, who has said that this is a good deal for everyone — for the parties who signed up to it and for the rest of the international community. Sadly, there are too few days when we can say that constructive and patient diplomacy has succeeded in bridging the differences and overcoming the mistrust that contain the seeds of conflict. Today we mark an opportunity to change the nature of the relationship between Iran and the international community, and we remind ourselves that with the right approach and with the commitment of key stakeholders, even seemingly intractable issues can be resolved through diplomacy and dialogue. As the Council confronts the extraordinarily difficult challenges related to the Middle East peace process, Syria, Iraq, Yemen and Libya, that is a message we should reflect on today.

I now resume my functions as President of the Security Council.

I now give the floor to the representative of the Islamic Republic of Iran.

Mr. Khoshroo (Islamic Republic of Iran): Today's adoption by the Council of resolution 2231 (2015) marks a significant development and a fundamental shift in the Council's consideration of Iran's peaceful nuclear programme over the past 10 years. The Joint Comprehensive Plan of Action is the result of an extensive series of collective efforts that for close to two years have sought to give diplomacy a chance and end resorts to pressure, coercion and threats. That fundamentally different approach, a departure from the path travelled in previous years, has helped all of us to opt for the best possible way out, put an end to an unnecessary crisis and accomplish a major achievement for all the parties involved and the international community as a whole.

Today's resolution and the Plan of Action that it endorses also provide for terminating the Security Council resolutions that placed unjustifiable sanctions on Iran for its efforts to exercise its rights. The sanctions were grounded on nothing but baseless and pure speculation and hearsay. Nobody has ever presented any proof that Iran's programme has been anything but peaceful. The International Atomic Energy Agency, which has put Iran's facilities through a record number of inspections, has consistently reported that Iran has duly stood by every single one of its commitments. For example, in terms of inspection frequency, only Japan has been subject to greater scrutiny than Iran, while Japan has far more extensive nuclear facilities. Last year, Iran even surpassed Japan in the number of inspections it was subjected to.

The Security Council's involvement was thus not based on a suspicious nuclear weapon programme; it was driven by the objective stated in resolution 1696 (2006), of compelling Iran to suspend its lawful enrichment programme. That demand was not only unnecessary and uncalled for, but also ran counter to the unanimous conclusions of the 2000 and 2010 Review Conferences of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, which stipulated that Member States' choices with regard to their fuel-cycle activities must be respected. It also ignored the repeated demands of the majority of the international community represented in the Non-Aligned Movement.

The sanctions imposed on Iran by resolution 1737 (2006) through resolution 1929 (2010) were all punishments for the Iranian people's refusal to accept that demand. In engaging with the E3+3, the Iranian people have had the foresight to move forward without losing sight of the past. While we therefore hope that the Security Council will open a new chapter in its relations with us, we cannot accept or forget its previous treatment of Iran, starting with its inaction in the face of Saddam's aggression and use of chemical weapons and continuing through its more recent approach to Iran's peaceful nuclear programme.

The solution we have arrived at is undoubtedly in the interests of strengthening the nuclear non-proliferation regime in its entirety, since it includes and recognizes Iran's right to develop nuclear energy for peaceful purposes, including conducting uranium enrichment activities and research and development on its territory. The rights and obligations of States parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), as under any other international regime, must go hand in hand. Obligations can be honoured and such regimes, including that of the NPT, can be sustained only if those rights are also achievable. No threats of sanctions or war can sustain the NPT in the long run if the great Powers fail to honour all three of its pillars, including total nuclear disarmament and the right of all to use nuclear energy, and if non-parties are rewarded for their intransigence.

Looking to the future, my Government hopes that the Joint Comprehensive Plan of Action and resolution 2231 (2015) herald a new chapter in the relationship between Iran, the Council and the Plan of Action's participants. Iran is both able and willing to comply fully with its commitments under the Plan of Action, because it is already committed to the fatwa of its Supreme Leader, who has declared all weapons of mass destruction, particularly nuclear weapons, to be haram, or forbidden, which is also a principle of Iran's defence doctrine. We hope that our partners and the Council will do the same with regard to their commitments under the same documents.

The desire that the Council has expressed for building a new relationship with Iran, its encouragement of all Member States to cooperate with Iran within the framework of the Plan of Action in the area of the peaceful uses of nuclear energy and related projects, and its emphasis on the fact that the Plan of Action can help to promote and facilitate the development of normal economic and trade contacts and cooperation with Iran are all positive and encouraging signs.

While this deal focuses on the nuclear issue, Iran expects it to have broader positive implications for our region and the entire international community that include the following. First, the deal, sealed on the basis of mutual respect and understanding, is an important victory for diplomacy over the pressure and coercion exerted on Iran, which have produced no results over the past 37 years. It reinforces our faith in diplomacy as the most rational way to resolve differences in our interconnected world, and it shows that diplomacy can work and prevail over war and tension. It therefore sends a clear message to those who still believe they can achieve anything through force and coercion.

Secondly, the Joint Comprehensive Plan of Action has the potential to help trigger major developments in the region aimed at achieving greater cooperation and coordination in addressing the real issues at hand. We therefore earnestly hope that it helps turn a page in our region that can enable countries to close ranks, fight resolutely against violent extremism and move towards greater cooperation in addressing the grave threats facing the region and the world. While every country in the region has a very high stake in defeating terrorism, violent extremism and sectarianism, the Plan of Action's participants are facing similar challenges to their security from such phenomena. With the dust settled over the nuclear issue, we are now free to focus on real issues and to benefit from an improved environment conducive to wider cooperation among all actors.

Thirdly, in the wake of this major development in the region, we renew our confirmation to our neighbours and friends in the Persian Gulf and the wider region that Iran is ready to engage in good faith with all of them based on mutual respect, good-neighbourliness and brotherhood. We have many common challenges in our region to address and many common opportunities to benefit from. This is the time to start working together against our most common and important challenges, which include above all violent extremism.

Fourthly, the Israeli regime, following its general policy to stoke tension in the region, has done all in its power to sabotage and defeat any effort to resolve the standoff over Iran's nuclear energy programme. In so doing, it has proved once more that it does not see peace in our region to be in its interest and considers peace to be an existential threat to itself. The Iranophobia that it tries to spread in the region and beyond also serves that nefarious purpose. We therefore alert our friends and neighbours not to fall into Israel's trap.

In this context, it is also not surprising that the Israeli regime is the only obstacle in the way of establishing a nuclear-weapon-free zone in the Middle East, the concept for which my country initiated more than 40 years ago and has promoted ever since. We believe that the nuclear warheads stockpiled by the Israeli regime constitute a grave threat to peace and security in our unstable region, and that the Security Council should live up to its primary responsibility under the Charter of the United Nations and take the action necessary to neutralize this threat.

To conclude, let me recall that Iran, a nation with a rich culture and civilization, has withstood enormous millennial storms while being steadfast in preserving its independence and identity. These have not been acquired by oppressing others or reneging on commitments. The steadfastness that our delegation showed during the negotiations was based on the fact that we only accept commitments that we can abide by. As Iran is resolute in fulfilling its obligations, we expect that our counterparts shall also remain faithful to theirs. Only by honouring commitments, displaying good faith and adopting the right approach can we ensure that diplomacy will prevail over conflict and war in a world that is replete with violence, suffering and oppression. In this context, the Joint Comprehensive

Plan of Action provides a solid foundation for further and more effective diplomatic interaction.

Let me thank those Ambassadors who supported the Joint Comprehensive Plan of Action and those countries that helped this deal to happen. I also wish to briefly react to some baseless accusations leveled by some speakers in today's meeting. It is ironic that the Ambassador of the United States accused my Government of destabilizing the region and of terrorism. The country that invaded two countries of our region and created grounds favourable to the growth of terrorism and extremism is not well placed to raise such accusations against mine. The feckless and reckless actions of the United States in our region over many years are at the root of many challenges that we are now facing in our neighbourhood. Iran is a stable country in an unstable region. As we want our stability to endure, we promote stability in the region and help our neighbours to stabilize and cooperate towards that end.

In conclusion, let me also inform you, Mr. President, that my delegation, upon instruction from my Government, is forwarding the statement of the Islamic Republic of Iran following the action taken today by the Security Council, to be circulated as a document of the Security Council.

The President: I now give the floor to Mr. Mayr-Harting.

Mr. Mayr-Harting: The High Representative of the European Union (EU) for Foreign Affairs and Security Policy, Ms. Federica Mogherini, has asked me to convey the following message to the Security Council:

> "The agreement reached in Vienna on 14 July 2015 between Iran and China, France, Germany, Russia, the United Kingdom and the United States of America, with the support of the High Representative of the Union for Foreign and Security Policy, on a Joint Comprehensive Plan of Action is historic in nature.
>
> "The agreement, once implemented, marks a conclusion to the long-running diplomatic efforts to reach a comprehensive, long-lasting and peaceful solution to the Iranian nuclear issue that will provide the necessary assurances on the exclusively peaceful nature of Iran's nuclear programme, on the one hand, and the lifting of sanctions, on the other. As such, it represents a significant achievement and a tribute to the merits of patient diplomacy on all sides.
>
> "It is appropriate that the deal was struck in Vienna, where all this began 12 years ago, when the International Atomic Energy Agency started to look into possible undeclared Iranian nuclear activities. Since then, there have been many months and years of at times difficult negotiations. A key milestone in that process was the interim Geneva agreement of 2013, the smooth implementation of which provided the time and space necessary for the complex negotiation process that followed. This resulted in the Lausanne agreement in April 2015, which set the parameters for the final deal.
>
> "The E-3/EU+3 format was especially effective. We feel that the European Union, in particular through the High Representative, was able to play a crucial facilitation role. Throughout the whole process, the EU was the facilitator, moderator and, in the final stages, penholder for the Joint Comprehensive Plan of Action text and its annexes. It is hard to imagine another actor that could have done this. A key element of success was maintaining the unity of the group and focus on a shared goal. It is to the credit of all those who participated that we stayed committed to reaching a mutually beneficial deal. The fact that the self-imposed deadline was overrun several times bears witness to the shared view that a quality agreement was vastly superior to a quick one.
>
> "The agreement is good, durable and verifiable. Iran has agreed to make changes to its nuclear programme. The International Atomic Energy Agency will have the access it needs to determine when Iran has completed those actions and to detect any future violation of the agreement. Iran will receive phased sanctions-lifting in return. The Plan of Action annexes set out in detail what is required by all sides, providing clarity to facilitate the implementation of the agreement. Together with the conclusion to be made by the International Atomic Energy Agency in that regard, the full implementation by Iran of its commitments under the Plan of Action will contribute to building confidence in the exclusively peaceful nature of the Iranian nuclear programme.
>
> "It will be necessary for all sides to work now towards implementing the Joint Comprehensive Plan of Action. The resolution adopted today

by the Security Council is a key element in this process. As agreed in Vienna, the European Union will endorse the resolution in conclusions of the Foreign Affairs Council, which is in session as we speak. The European Union will also endorse the Joint Comprehensive Plan of Action and commits to abiding by its terms and to follow the agreed implementation plan."

In effect, European Union actions and commitments under the Joint Comprehensive Plan of Action related to the lifting sanctions will be carried out in accordance with the timeline and modalities specified in the Plan. As stipulated in the Plan, the termination of the implementation of economic and financial sanctions would come into effect once the International Atomic Energy Agency has verified that Iran has implemented all of its nuclear-related commitments. For the time being, the provisions of the Joint Plan of Action agreed in Geneva in 2013 have been extended for a further six months, to cover the period until the International Atomic Energy Agency has verified that Iran has carried out its commitments.

The High Representative of the Union for Foreign Affairs and Security Policy will continue her supporting and coordinating role during the entire implementation phase of the Plan of Action. The High Representative hopes and expects that this positive development will open the door to a steady improvement in relations between the European Union, its member States and Iran, as well as improved Iranian regional and international relations, and that it will constitute the basis of a more stable and secure region in the longer term. It is essential that this opportunity be seized by all.

The President: I now give the floor to the representative of Germany.

Mr. Braun (Germany): The Joint Comprehensive Plan of Action, reached in Vienna and endorsed today by the Security Council in resolution 2231 (2015), is an important, and possibly historic, step towards ending the decade-long conflict concerning Iran's nuclear programme. As such, it has the potential to ease concerns regarding peace and security in the region and beyond. Allow me briefly to address its significance from three different angles.

First, Germany firmly believes that the agreement does in fact reduce the risk of a nuclear arms race. After long and demanding negotiations, the E3+3 and the European Union has achieved a credible framework that will prevent Iran from acquiring nuclear weapons. Iran has committed itself to comprehensive technical restrictions and an unprecedented transparency regime that will allow us to rule out any covert nuclear activities.

The agreement is not merely built on trust or goodwill; we have established a unique and long-term set of confidence-building measures. Everything we agreed on will be strictly monitored. A powerful snap-back mechanism for sanctions will serve as an additional incentive for Iran to abide by its obligations. It will now be crucial to effectively implement the agreement. The International Atomic Energy Agency will have an important role in that regard. In exchange for the nuclear restrictions, Iran will profit from early and comprehensive sanctions relief. The resolution adopted today is a decisive step in the right direction.

Secondly, the agreement also offers ample political opportunities for Iran. It reflects a fundamental choice by the Iranian Government. It is an expression of intent to be a constructive part of the international community. It is up to Iran to deliver on that commitment. We express our hope that, in fulfilling the agreement, Iran will seize this potential to bring about improvements in other fields as well, from civil liberties to human rights and the accommodation of regional security concerns.

Finally, we hope that the agreement reached in Vienna will also have a positive effect on the relations between Iran, the European Union and its member States — and that it will improve Iran's regional and international relations. We also hope that it will open the door to a more constructive Iranian foreign policy and, ultimately, contribute to a more secure and stable region.

The agreement reached in Vienna on 14 July has proved that complex and long-standing conflicts can be peacefully resolved if there is enough political will and courage. It is a victory for diplomacy and for the principles of the United Nations.

The President: There are no more names inscribed on the list of speakers.

The meeting rose at 10.35 a.m.

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The White House

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Statement by the President on Iran

The Cabinet Room

10:48 A.M. EST

THE PRESIDENT: This is a good day, because, once again, we're seeing what's possible with strong American diplomacy.

As I said in my State of the Union address, ensuring the security of the United States and the safety of our people demands a smart, patient and disciplined approach to the world. That includes our diplomacy with the Islamic Republic of Iran. For decades, our differences with Iran meant that our governments almost never spoke to each other. Ultimately, that did not advance America's interests. Over the years, Iran moved closer and closer to having the ability to build a nuclear weapon. But from Presidents Franklin Roosevelt to John F. Kennedy to Ronald Reagan, the United States has never been afraid to pursue diplomacy with our adversaries. And as President, I decided that a strong, confident America could advance our national security by engaging directly with the Iranian government.

We've seen the results. Under the nuclear deal that we, our allies and partners reached with Iran last year, Iran will not get its hands on a nuclear bomb. The region, the United States, and the world will be more secure. As I've said many times, the nuclear deal was never intended to resolve all of our differences with Iran. But still, engaging directly with the Iranian government on a sustained basis, for the first time in decades, has created a unique opportunity -- a window -- to try to resolve important issues. And today, I can report progress on a number of fronts.

First, yesterday marked a milestone in preventing Iran from obtaining a nuclear weapon. Iran has now fulfilled key commitments under the nuclear deal. And I want to take a moment to explain why this is so important.

Over more than a decade, Iran had moved ahead with its nuclear program, and, before the deal, it had installed nearly 20,000 centrifuges that can enrich uranium for a nuclear bomb. Today, Iran has removed two-thirds of those machines. Before the deal, Iran was steadily increasing its stockpile of enriched uranium -- enough for up to 10 nuclear bombs. Today, more than 98 percent of that stockpile has been shipped out of Iran -- meaning Iran now doesn't have enough material for even one bomb. Before, Iran was nearing completion of a new reactor capable of producing plutonium for a bomb. Today, the core of that reactor has been pulled out and filled with concrete so it cannot be used again.

Before the deal, the world had relatively little visibility into Iran's nuclear program. Today, international inspectors are on the ground, and Iran is being subjected to the most comprehensive, intrusive inspection regime ever negotiated to monitor a nuclear program. Inspectors will monitor Iran's key nuclear facilities 24 hours a day, 365 days a year. For decades to come, inspectors will have access to Iran's entire nuclear supply chain. In other words, if Iran tries to cheat -- if they try to build a bomb covertly -- we will catch them.

So the bottom line is this. Whereas Iran was steadily expanding its nuclear program, we have now cut off every single path that Iran could have used to build a bomb. Whereas it would have taken Iran two to three months to break out with enough material to rush to a bomb, we've now extended that breakout time to a year -- and with the world's unprecedented inspections and access to Iran's program, we'll know if Iran ever tries to break out.

Now that Iran's actions have been verified, it can begin to receive relief from certain nuclear sanctions and gain access to its own money that had been frozen. And perhaps most important of all, we've achieved this historic progress through diplomacy, without resorting to another war in the Middle East.

I want to also point out that by working with Iran on this nuclear deal, we were better able to address other issues. When our sailors in the Persian Gulf accidentally strayed into Iranian waters that could have sparked a major international incident. Some folks here in Washington rushed to declare that it was the start of another hostage crisis. Instead, we worked directly with the Iranian government and secured the release of our sailors in less than 24 hours.

This brings me to a second major development -- several Americans unjustly detained by Iran are finally coming home. In some cases, these Americans faced years of continued detention. And I've met with some of their families. I've seen their anguish, how they ache for their sons and husbands. I gave these families my word -- I made a vow -- that we would do everything in our power to win the release of their loved ones. And we have been tireless. On the sidelines of the nuclear negotiations, our diplomats at the highest level, including Secretary Kerry, used every meeting to push Iran to release our Americans. I did so myself, in my conversation with President Rouhani. After the nuclear deal was completed, the discussions between our governments accelerated. Yesterday, these families finally got the news that they have been waiting for.

Jason Rezaian is coming home. A courageous journalist for The Washington Post, who wrote about the daily lives and hopes of the Iranian people, he's been held for a year and a half. He embodies the brave spirit that gives life to the freedom of the press. Jason has already been reunited with his wife and mom.

Pastor Saeed Abedini is coming home. Held for three and half years, his unyielding faith has inspired people around the world in the global fight to uphold freedom of religion. Now, Pastor Abedini will return to his church and community in Idaho.

Amir Hekmati is coming home. A former sergeant in the Marine Corps, he's been held for four and a half years. Today, his parents and sisters are giving thanks in Michigan.

Two other Americans unjustly detained by Iran have also been released -- Nosratollah Khosravi-Roodsari and Matthew Trevithick, an Iranian -- who was in Iran as a student. Their cases were largely unknown to the world. But when Americans are freed and reunited with their families, that's something that we can all celebrate.

So I want to thank my national security team -- especially Secretary Kerry; Susan Rice, my National Security Advisor; Brett McGurk; Avril Haines; Ben Rhodes -- our whole team worked tirelessly to bring our Americans home, to get this work done. And I want to thank the Swiss government, which represents our interests in Iran, for their critical assistance.

And meanwhile, Iran has agreed to deepen our coordination as we work to locate Robert Levinson -- missing from Iran for more than eight years. Even as we rejoice in the safe return of others, we will never forget about Bob. Each and every day, but especially today, our hearts are with the Levinson family, and we will not rest until their family is whole again.

In a reciprocal humanitarian gesture, six Iranian–Americans and one Iranian serving sentences or awaiting trial in the United States are being granted clemency. These individuals were not charged with terrorism or any violent offenses. They're civilians, and their release is a one-time gesture to Iran given the unique opportunity offered by this moment and the larger circumstances at play. And it reflects our willingness to engage with Iran to advance our mutual interests, even as we ensure the national security of the United States.

So, nuclear deal implemented. American families reunited. The third piece of this work that we got done this weekend involved the United States and Iran resolving a financial dispute that dated back more than three decades. Since 1981, after our nations severed diplomatic relations, we've worked through a international tribunal to resolve various claims between our countries. The United States and Iran are now settling a longstanding Iranian government claim against the United States government. Iran will be returned its own funds, including appropriate interest, but much less than the amount Iran sought.

For the United States, this settlement could save us billions of dollars that could have been pursued by Iran. So there was no benefit to the United States in dragging this out. With the nuclear deal done, prisoners released, the time was right to resolve this dispute as well.

Of course, even as we implement the nuclear deal and welcome our Americans home, we recognize that there remain profound differences between the United States and Iran. We remain steadfast in opposing Iran's destabilizing behavior elsewhere, including its threats against Israel and our Gulf partners, and its support for violent proxies in places like Syria and Yemen. We still have sanctions on Iran for its violations of human rights, for its support of terrorism, and for its ballistic missile program. And we will continue to enforce these sanctions, vigorously. Iran's recent missile test, for example, was a violation of its

international obligations. And as a result, the United States is imposing sanctions on individuals and companies working to advance Iran's ballistic missile program. And we are going to remain vigilant about it. We're not going to waver in the defense of our security or that of our allies and partners.

But I do want to once again speak directly to the Iranian people. Yours is a great civilization, with a vibrant culture that has so much to contribute to the world -- in commerce, and in science and the arts. For decades, your government's threats and actions to destabilize your region have isolated Iran from much of the world. And now our governments are talking with one another. Following the nuclear deal, you -- especially young Iranians -- have the opportunity to begin building new ties with the world. We have a rare chance to pursue a new path -- a different, better future that delivers progress for both our peoples and the wider world. That's the opportunity before the Iranian people. We need to take advantage of that.

And to my fellow Americans, today, we're united in welcoming home sons and husbands and brothers who, in lonely prison cells, have endured an absolute nightmare. But they never gave in and they never gave up. At long last, they can stand tall and breathe deep the fresh air of freedom.

As a nation, we face real challenges, around the world and here at home. Many of them will not be resolved quickly or easily. But today's progress -- Americans coming home, an Iran that has rolled back its nuclear program and accepted unprecedented monitoring of that program -- these things are a reminder of what we can achieve when we lead with strength and with wisdom; with courage and resolve and patience. America can do -- and has done -- big things when we work together. We can leave this world and make it safer and more secure for our children and our grandchildren for generations to come.

I want to thank once again Secretary Kerry; our entire national security team, led by Susan Rice. I'm grateful for all the assistance that we received from our allies and partners. And I am hopeful that this signals the opportunity at least for Iran to work more cooperatively with nations around the world to advance their interests and the interests of people who are looking for peace and security for their families.

Thank you so much. God bless you, and God bless the United States of America.

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REPORT

Iranian-Backed Militias Set Sights on U.S. Forces

Airstrikes against Syria may galvanize support against the United States.

BY BORZOU DARAGAHI | APRIL 16, 2018, 1:52 PM

With the Islamic State in retreat and anti-regime rebels losing ground, Iranian-backed armed groups in Syria are turning the focus of their militancy to U.S. troops on the ground.

Western military officials and independent analysts have long said it was only a matter of time before U.S. forces on the ground in Syria were targeted by militias. Now, this weekend's U.S.-led airstrikes on alleged chemical weapons installations could hasten such attacks.

The militias have "always had this anti-American tone, but when you have one threat after another, you see they're trying to send a specific message," says Phillip Smyth, a scholar at the Washington Institute for Near East Policy who has been tracking Iranian-backed militias in Syria.

This month, the Baqir Brigade, one of a number of Iranian-backed militias operating in Syria, announced on its Facebook page that it would begin attacks on U.S. military personnel.

"We in the Baqir Brigade leadership announce the good news of the launch of military and jihadi operations against the U.S. occupier and all those affiliated with it in Syria," the militia said in an April 6 statement that was carried by multiple media outlets the following day. (Facebook appears to have shut down the page shortly afterward.)

In a report published last week, Smyth chronicled increasing militia hostility toward U.S. forces in northern Syria that goes beyond the normal invective. He noted that the Baqir Brigade declaration went beyond a statement to a call for jihad, or religiously sanctioned holy war. "The group itself cannot declare jihad — it has to come from their Iranian higher-ups," he says.

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The Baqir Brigade declaration was a "huge thing," says Nawar Oliver, a military analyst at the Omran Center for Strategic Studies, a think tank in Istanbul. "The announcement is not a joke. Eventually we might see action."

The limited airstrikes overnight Friday damaged sites where, Western officials said, chemical weapons were allegedly produced or distributed and then used against civilians in rebel territories, including in the city of Douma on April 7. But the airstrikes also appear to have galvanized Syrian President Bashar al-Assad's supporters, who flooded streets in pro-regime demonstrations.

"What happened on Saturday morning will complicate the political solution," Lebanese Hezbollah leader Hassan Nasrallah said in a speech Sunday. "It will inflame international relations … and it will delay Geneva talks if not destroy them."

Armed groups in Syria with direct or suspected connections to Tehran have become increasingly vocal about their intention to target U.S. forces in Syria, mostly grouped in the country's north and northeast. Newly emboldened pro-Iranian militias across the region have already shifted their focus from battling the Islamic State toward Washington and its allies.

"After the fight against the Islamic State, now what they say is, 'We're No. 1 against America, and everything else is No. 2,'" says Renad Mansour, an Iraqi-based researcher for Chatham House who has spoken with leaders and members of pro-Iranian militias. "In rhetorical terms, they're making it clear Americans are their enemies. If a conflict heats up between the U.S. and Iran, these guys are the agents on the ground."

Just hours after the U.S. attack on alleged Syrian chemical sites, hundreds of Iranian-backed militia fighters reportedly surrounded a U.S. air base to the west of Baghdad, defying the orders of commanders in the city, according to the Lebanese newspaper *Ad-Diyar*. U.S. military officials declined to confirm or deny the incident but cautioned that all Iraqi forces, including militias, must obey the central government. "Coalition forces maintain the right to defend themselves and our Iraqi partners against any threat," U.S. Army Col. Ryan Dillon said in response to an emailed question about the report.

After the U.S. invasion of Iraq in 2003, Shiite-led militias organized by Iran's Islamic Revolutionary Guard Corps targeted American forces, using armor-piercing roadside bombs to attack U.S. patrols and firing mortars and missiles into bases. In Syria, U.S. forces confined to far-flung bases with threadbare desert supply lines may be in a particularly vulnerable position.

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The U.S. military presence in northern Syria numbers around 2,000 Army, Marine, and special operations forces, alongside smaller numbers of U.K. and French personnel. In addition, at least 5,500 Defense Department contractors, half of them U.S. citizens, are spread throughout Syria and Iraq, according to a report issued by U.S. Central Command this month.

An American and a British soldier were reportedly killed in Syria on March 30, when a roadside bomb struck their vehicle.

"The more the conflict winds down and the insurgency against the Assad regime fades away, the more incentivized Iran and its proxies become to provoke a military confrontation with the US," says Ranj Alaaldin, a scholar the Brookings Doha Center. "The U.S. can overwhelm them and inflict heavy damages from the air, but the 2,000 U.S. troops stationed in the east are no match for the tens of thousands of proxies Iran has at its disposal."

The most vociferously anti-American militias tend to be focused on the eastern provinces, where they have been recruiting among pro-Assad Sunni tribes, as well as from Syria's tiny Shiite minority. Syrian forces under the Assad regime's direct command appear careful to avoid conflicts with the Americans, but Iranian-backed militias have repeatedly tangled with U.S. forces in the country.

One pro-regime militia, Popular Resistance in the Eastern Region, distributed a video this month claiming to show a mortar attack on a U.S. base in the Syrian town of Ain Issa, north of Raqqa. The group has announced that it will attack both U.S. forces and allied Kurdish militias working with them.

In recent days, Iran's leadership has also signaled that it's time to hasten America's departure from Syria.

Just hours before the United States launched its airstrikes, Ali Akbar Velayati, Supreme Leader Ali Khamenei's advisor on international affairs, appeared on state television during a visit to Syria. "The Americans are too weak to remain in the east of the Euphrates," he said.

After the Syrian regime's victory over rebels in Eastern Ghouta, where the most recent alleged chemical attack took place, Velayati said the Americans will ultimately be forced to leave.

"There is no possibility for them to stay. That is why they consider air attacks," Velayati

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skies."

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VIEW COMMENTS

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Iran's Deadly Diplomats

By Matthew Levitt

With the July arrest of an Iranian diplomat in Germany for his role in an alleged plot to bomb a rally of Iranian dissidents in Paris, U.S. officials have warned allies to be vigilant of Iranian terrorist plotting elsewhere. Indeed, there is ample precedent for such concern. For decades, Tehran has been dispatching operatives to Europe to carry out assassinations and other acts of terrorism.

Though it had all the makings of an espionage thriller, the event was anything but fiction. An Iranian diplomat accredited to Tehran's embassy in Vienna, Austria, is arrested in Germany and charged with conspiracy to commit murder and activity as a foreign agent. Authorities suspect the diplomat, Assadollah Assadi, hired an Iranian couple living in Belgium to carry out a bomb plot targeting a rally of about 4,000[1] Iranian dissidents at the Villepinte Congress Center[2] near Paris and provided them with 500 grams of TATP explosives at a meeting in Luxembourg in late June 2018.[3] The target was the annual meeting of the Paris-based National Council of Resistance of Iran (NCRI), which is the umbrella political organization including the Mujahedeen-Khalq, or MEK, a group once listed as a terrorist group by the United States and European Union. Among the VIPs attending the event on June 30 were former New York City mayor and Trump lawyer Rudolph Giuliani and former House Speaker Newt Gingrich, among others.[4] When that same day the couple was stopped in a leafy suburb of Brussels, Belgium, authorities say they found powerful explosives and a detonation device in their car and they were arrested "just in time."[5] Three people were subsequently arrested in France, and the operation to arrest Assadi and three others at a highway rest stop was taken so seriously by German authorities that they shut down the highway for the period of time it took to make the arrest.[6]

According to German prosecutors, Assadi was no run-of-the-mill diplomat but rather an Iranian intelligence officer operating under diplomatic cover. In a statement, prosecutors tied Assadi to Iran's Ministry of Intelligence and Security (MOIS), whose tasks "primarily include the intensive observation and combatting of opposition groups inside and outside Iran."[7]

U.S. officials are pointing to this latest case as they seek to mobilize allies to counter Iran's support for terrorism around the world. Speaking on background with members of the press en route to Belgium from Saudi Arabia, one senior State Department official made Washington's concerns very clear:

> *"The most recent example is the plot that the Belgians foiled, and we had an Iranian diplomat out of the Austrian embassy as part of the plot to bomb a meeting of Iranian opposition leaders in Paris. And the United States is urging all nations to carefully examine diplomats in Iranian embassies to ensure their countries' own security. If Iran can plot bomb attacks in Paris, they can plot attacks anywhere in the world, and we urge all nations to be vigilant about Iran using embassies as diplomatic cover to plot terrorist attacks."*[8]

In fact, this is just the latest example of how active Iranian intelligence operatives have been in Europe as of late. In June 2018, an investigation by Dutch intelligence led to the expulsion of two Iranian diplomats based at the Iranian embassy in Amsterdam from the Netherlands.[9] This followed the assassination several months earlier of an Iranian Arab activist who was gunned down in the Dutch capital.[10] In March 2018, Albanian authorities arrested two Iranian operatives on terrorism charges after being caught allegedly surveilling a location where Iranian New Year (Nowruz) celebrations were about to begin.[11] In January 2018, after weeks of surveillance, German authorities raided several homes tied to Iranian operatives who reportedly were collecting information on possible Israeli and Jewish targets in Germany, including the Israeli embassy and a Jewish kindergarten. Arrest warrants were issued for 10 Iranian agents, but none were apprehended.[12] And just a month before that, the German government issued an official protest to the Iranian ambassador following the conviction of an Iranian agent for spying in Germany. In that case, the agent scouted targets in 2016, including the head of the German-Israeli Association.[13]

In other cases, Iranian diplomats involved in terrorism or surveillance of possible targets for attack were quietly arrested and deported. In April 2013, for example, two Iranian intelligence officers posted to Bosnia and Herzegovina as diplomats were expelled from the country after being involved in espionage and "connections to terrorism," according to information prepared by the National Counterterrorism Center. And in 2012, four IRGC-Qods Force operatives were found trying to attack Israeli targets in Turkey, and another was arrested in Sofia, Bulgaria, where he was conducting surveillance of a local synagogue.[14] According to a 1987 U.S. intelligence community assessment, several organizations within the Iranian government are involved in terrorism. That appears to remain the case today. The 1987 intelligence report offers some specific examples:

> *"Department 210 of the Foreign Ministry serves as a primary*

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Editor's note: This article includes material from Hezbollah: The Global Footprint of Lebanon's Party of God *by Matthew Levitt, published by Georgetown University Press, 2013. Reprinted with permission.*

operations center for coordination with Iranian intelligence officers abroad, and is often used to instruct intelligence officers about terrorist operations. The Revolutionary Guard, which is the principal agent of Iranian terrorism in Lebanon, uses its own resources, as well as diplomatic and intelligence organizations, to support, sponsor, and conduct terrorist actions."[15]

The Assadi arrest is, therefore, just the most recent alleged example of Iranian state-sponsored terrorism in which Tehran uses visiting government officials or accredited diplomats to plot terrorist attacks. Iranian diplomats were deeply involved in the 1992 and 1994 bombings of the Israeli embassy and AMIA Jewish community center, respectively, in Buenos Aires.[16] But they have a long track record of just this kind of activity across Europe as well.

Looking Back at Iran's Dissident Hit List

Immediately following the founding of the Islamic Republic, the Iranian leadership embarked on an assassination campaign targeting individuals deemed to be working against the regime's interests. Between 1979 and 1994, the CIA reported that Iran "murdered Iranian defectors and dissidents in West Germany, the United Kingdom, Switzerland, and Turkey."[17] Overall, more than 60 individuals were targeted in assassination attempts.[18] In many cases, Hezbollah members functioned as the logistics experts or gunmen in these plots.

The first successful assassination of an Iranian dissident in Western Europe occurred in 1984. On February 7 that year, General Gholam Ali Oveissi and his brother were fatally shot on a Paris street by what French police described as "professional assassins." Police claimed there were "two or three men involved and that one or two of them had fired a 9-millimeter pistol at the victims who were walking on Rue de Passy."[19] Oveissi, the former military governor of Tehran under the shah who was known as the Butcher of Tehran, distinguished himself by responding to protests with tanks. Just before his death, Oveissi claimed that he had assembled a small counterrevolutionary army to retake Iran. Hezbollah's IJO and another group, the Revolutionary Organization for Liberation and Reform, claimed responsibility for the killings. The day after the attack, the Iranian government described the event as a "revolutionary execution."[20]

Oveissi's assassination ushered in a period of great danger for Iranian dissidents in Europe. On July 19, 1987, for example, Amir Parvis, a former Iranian cabinet member and the British chairman of the National Movement of the Iranian Resistance, suffered a broken leg, cuts, and burns when a car bomb exploded as he drove past the Royal Kensington Hotel in London. Several months later, on October 3, 1987, Ali Tavakoli and his son Nader, both Iranian monarchist exiles, were found shot in the head in their London apartment.[21] Both attacks were claimed by a previously unknown group, the Guardians of the Islamic Revolution, which according to a March 3, 1989, report by the *Times* of London, "is believe[d] to be closely linked to the Hezbollah extremists in south Beirut, but all its London-based members are Iranian."[22]

On July 13, 1989, Dr. Abdolrahman Ghassemlou, secretary-general of the Kurdish Democratic Party of Iranian Kurdistan (PDKI); Abdollah Ghaeri-Azar, the PDKI's European representative; and Fazil Rassoul, an Iraqi Kurd serving as a mediator, were assassinated in a Vienna apartment while meeting with a delegation from the Iranian government. Although forced underground after the



Former Mayor of New York City Rudy Giuliani attends the annual gathering of Free Iran-Alternative 100 ASHRAF at the Villepinte exhibition North of Paris, France, June 30, 2018. (Siavosh Hosseini/NurPhoto via Getty Images)

1979 revolution, Ghassemlou and the PDKI were informed after the Iran-Iraq War that the Iranian government was open to conducting talks. On December 30 and 31, 1988, Ghassemlou had met with an Iranian delegation headed by Mohammad Jafari Sahraroudi, the head of the Kurdish Affairs Section of the Iranian Ministry of Intelligence. The two met regularly until July 13 the following year, when a meeting was held that included Sahraroudi; governor of the Iranian province of Kurdistan Mostafa Ajoudi; an undercover Iranian agent, Amir Mansour Bozorgian; and the victims. At one point during the meeting, Rassoul and Ghassemlou proposed a break and suggested that the negotiations resume the next day. Soon after, gunshots were heard. In the shooting, the three Kurds were killed and Sahraroudi was injured. Investigators found a blue baseball cap in Ghassemlou's lap, the same call sign that was left at the scene of the murder of an Iranian pilot, Ahmad Moradi Talebi, in 1987 and the 1990 murder of resistance leader Kazem Radjavi.[23] Bozorgian was taken into custody; however, he was later released and fled the country, along with several other suspects.[24]

Just one month after the Vienna assassination, on August 3, 1989, a Hezbollah operative by the name of Mustafa Mahmoud Mazeh died when an explosive device he was preparing detonated prematurely inside the Paddington Hotel in London. His target was Salman Rushdie, whose 1988 publication of *The Satanic Verses* prompted Ayatollah Khomeini to issue a *fatwa* condemning the writer, his editors, and his publishers to death, and to place a $2.5 million bounty on his head. Mazeh, a Lebanese citizen born in the Guinean capital of Conakry, had joined a local Hezbollah cell in his teens. Though he was being watched by security agencies, he succeeded in obtaining a French passport in Abidjan, Ivory Coast, from an official later arrested by the French authorities in Toulouse. Mazeh apparently went to Lebanon and stayed in his parents' village before traveling to London through the Netherlands.[25]

Later, speaking about Khomeini's *fatwa* against Rushdie, a Hezbollah commander would tell an interviewer that "one member of the Islamic Resistance, Mustafa Mazeh, had been martyred in Lon-

don."[26] According to the CIA, attacks on the book's Italian, Norwegian, and Japanese translators in July 1991 suggested "that Iran has shifted from attacking organizations affiliated with the novel—publishing houses and bookstores—to individuals involved in its publication, as called for in the original *fatwa*."[27] Today, a shrine dedicated to Mazeh still stands in Tehran's Behesht Zahra cemetery with an inscription reading, "The first martyr to die on a mission to kill Salman Rushdie."[28]

Less than a year after the Vienna assassinations and the abortive attempt on Rushdie's life in London, Kazem Radjavi, former Iranian ambassador to the United Nations and brother of the leader of the Iranian opposition group MEK, was assassinated. On April 24, 1990, his car was forced off the road in Coppet, Switzerland, by two vehicles, after which two armed men exited one of the vehicles and opened fire. Again, a blue baseball cap was left at the scene, marking the third use of this call sign at the site of a suspected Iranian assassination.[29]

According to the report of the Swiss investigating judge, evidence pointed to the direct involvement of one or more official Iranian services in the murder. All in all, there were 13 suspects—all of whom had traveled to Switzerland on official Iranian passports.[30] One report indicated that "all 13 came to Switzerland on brand-new government-service passports, many issued in Tehran on the same date. Most listed the same personal address, Karim-Khan 40, which turns out to be an intelligence ministry building. All 13 arrived on Iran Air flights, using tickets issued on the same date and numbered sequentially." International warrants for the 13 suspects' arrests were issued on June 15, 1990.[31]

No death, however, shook the Iranian expatriate community more than the assassination of Chapour Bakhtiar, former Iranian prime minister and secretary-general of the Iranian National Resistance Movement. On August 6, 1991, Bakhtiar and an aide were stabbed to death by Iranian operatives in Bakhtiar's Paris apartment.[32] Previously, in July 1980, Bakhtiar had been targeted in another assassination attempt led by Anis Naccache, which killed a policeman and a female neighbor. One reason Hezbollah abducted French citizens in Lebanon was to secure the release of Naccache, who was imprisoned in France for the attempted killing.[33]

In a 1991 interview, Naccache recalled, "I had no personal feelings against Bakhtiar … It was purely political. He had been sentenced to death by the Iranian Revolutionary Tribunal. They sent five of us to execute him."[34] Hezbollah, for its part, pushed hard for Naccache's release and on July 28, 1990, finally got its wish. Naccache was released and deported to Tehran in a bid to improve relations with Tehran that would lead to the release of French hostages held in Lebanon.[35]

Death at the Mykonos Restaurant

The most daring and public assassinations Hezbollah carried out at the behest of its Iranian masters occurred on September 17, 1992, when operatives gunned down Dr. Sadegh Sharafkandi, secretary-general of the PDKI—the biggest movement of Iranian Kurdish opposition to Tehran—and three of his colleagues at the Mykonos restaurant in Berlin.[36] This operation also involved Iranian diplomats.

In its findings, a Berlin court ruled that the attack was carried out by a Hezbollah cell by order of the Iranian government. In delivering the opinion, presiding judge Frithjof Kubsch said the judges were particularly struck by Iranian leaders' assertions that they could "silence an uncomfortable voice" any way they pleased. To strengthen his point, he cited a television interview given by Iran's intelligence minister, Ali Fallahiyan, one month before the Mykonos attack, in which Fallahiyan bragged that Iran could launch "decisive strikes" against its opponents abroad.[37] Furthermore, on August 30, 1992, Fallahiyan admitted in an interview with an Iranian television reporter that Iran monitored Iranian dissidents both at home and abroad: "We track them outside the country, too," he said. "We have them under surveillance … Last year, we succeeded in striking fundamental blows to their top members."[38]

Much of the information surrounding the Mykonos plot was relayed by an Iranian defector named Abolghasem Mesbahi, who claimed to be a founding member of the Iranian Security Service. According to him, the decision to carry out the attack was made by the Committee for Special Operations, which included President Rafsanjani, Minister of Intelligence Fallahiyan, Foreign Minister Ali Akbar Velayati, representatives of the Security Apparatus, and, most significantly, Supreme Leader Ali Khamenei.[39]

The "attack group," organized by Fallahiyan, arrived in Berlin from Iran on September 7, 1992. It was headed by Abdolraham Banihashemi (also known as Abu Sharif, an operative for the Ministry of Intelligence and Security who trained in Lebanon), who also served as one of the attack's two gunmen and who has been implicated in the August 1987 assassination of a former Iranian F-14 pilot in Geneva.[40] The operation's logistics chief, Kazem Darabi, was a former Revolutionary Guard and Hezbollah member who had been living in Germany since 1980 and belonged to an association of Iranian students in Europe. According to Argentine prosecutors, "UISA [Association of Islamic Students in Europe] and the associations that belonged to it worked closely with extremist Islamic groups, particularly Hezbollah and Iranian government bodies such as the embassy and consulate. UISA was the main organization from which Iran's intelligence service recruited collaborators for propaganda and intelligence activities in Iran."[41]

In a statement to German prosecutors, Ataollah Ayad, one of Darabi's recruits, made clear that Darabi was "the boss of Hezbollah in Berlin."[42] Moreover, Darabi would also be linked to an attack at the 1991 Iran Cultural Festival in Dusseldorf. Before the festival, German intelligence reportedly intercepted a telephone call in which Darabi was instructed by someone at the Iranian cultural center in Cologne with ties to Iran's Ministry of Intelligence to enlist some "Arab friends" from Berlin and head to Dusseldorf. Armed with pistols, gas, guns, and mace, Darabi and his accomplices assaulted members of the Iranian opposition group MEK, who were exhibiting books and pictures at the festival. Several MEK members were seriously injured. Eyewitnesses later testified that Darabi appeared to be the leader of the assault.[43]

Already concerned about Darabi's activities in their country, German officials attempted to deport Darabi in June 1992. However, the Iranian government intervened and asked Germany to allow Darabi to remain in the country.[44] The second gunman, Abbas Rhayel, and one of the co-conspirators, Youssef Amin, "were members of Hezbollah," according to Argentine prosecutors, adding they received training at an IRGC center near Rasht in Iran.[45] According to German prosecutors, when the "Hit Team" arrived in Berlin and command was transferred from Darabi to Banihashemi, two of the co-conspirators who were not members of Hezbollah "were shut out of the immediate involvement in the act."[46]

The operational stage of the Mykonos attack began on the morn-

ing of September 16, 1992, when Rhayel and Farajollah Haider, another Hezbollah member of Lebanese origin, received an Uzi machine gun, a pistol, and two silencers. The source of these arms was never identified but was suspected to be linked to Iranian intelligence. German investigators later traced both the pistol and silencer to Iran. On the next morning, September 17, Rhayel and Haider purchased the bags they would use to conceal the weapons as they entered the Mykonos restaurant.[47]

On the night of September 17, 1992, Banihashemi and Rhayel entered the restaurant at 10:50 PM, while Amin waited outside to block the door. Haider and an Iranian known only as Mohammad, who had previously been tasked with keeping the targets under surveillance, waited several blocks away with the getaway car. The car had been purchased several days earlier by Ali Dakhil Sabra, who had served with Amin and Rhayel in Lebanon and then come with them to Germany. When the targets emerged into view, Banihashemi shouted, "You sons of whores" in Persian and opened fire. Rhayel followed Banihashemi inside and shot both Sharfkandi and Homayoun Ardalan, the PDKI's representative in Germany. Between the two assassins, 30 shots were fired. The assailants then fled on foot to the getaway vehicle.[48]

The police investigation quickly revealed Iranian involvement in the attack. On September 22, 1992, the bag containing the weapons and silencers was discovered, and tests revealed significant similarities between these weapons and those used in the assassination of Iranian dissidents Akbar Mohammadi in Hamburg in 1987 and Bahman Javadi in Cyprus in 1989. The police also matched the serial number on the pistol used by Rhayel to a shipment delivered by a Spanish dealer to the Iranian military in 1972. Rhayel's palm print was discovered on one of the pistol magazines, the blood of one of the victims was identified on the pistol itself, and Amin's fingerprints were found on a plastic shopping bag inside the getaway vehicle.[49]

According to German prosecutors, Abdolraham Banihashemi "left the city by airplane after the crime and went via Turkey to Iran. There, he was rewarded for his role in the attack with a Mercedes 230 and participation in profitable business transactions."[50] The others were not so fortunate. Darabi and Rhayel were sentenced to life in prison in Germany in April 1997, while Amin and Mohammad Atris, a document forger who assisted the attackers, were given terms of 11 years and about five years, respectively.[51] While Amin and Atris served out their shorter terms, in December 2007 Darabi and Rhayel were released from prison and returned to Iran. Germany's *Der Spiegel* news magazine suggested they were released in exchange for a German tourist arrested in Iran in November 2005. Germany, it appears, was not the only country seeking collateral for Darabi and Rhayel's release; Israel had hoped to bargain for an early release in return for information about Ron Arad, an Israeli aviator shot down over Lebanon in 1986.[52]

The brazen assassination in public of four Iranian dissidents at Mykonos, in the opinion of Germany's highest criminal court, signaled culpability for terrorism at the highest levels of the Islamic Republic. The court judgment rejected the premise that the attack was executed by "mavericks," concluding that "the assassination [was] put into action much more through the powers in Iran." By identifying President Rafsanjani and the Supreme Leader himself as the orchestrators of the assassination, the judgment found that "Iranian powers not only allow terrorist attacks abroad … but that they themselves set in action such attacks." When the Tehran regime encountered political opposition, the court determined, its solution was simply to have the opponents "liquidated."[53]

Contending with Iranian Terrorism

And yet, the German court ruling in the Mykonos case did not translate into durable and tangible action against Iran or Hezbollah. Iran responded to the placement of a plaque memorializing the victims of the Mykonos attack by displaying one of its own near the German embassy in Tehran denouncing Germany for arming Saddam Hussein with chemical weapons during the Iran-Iraq War. Apparently concerned over the diplomatic ramifications, the German ambassador to Iran distanced his government from the original plaque's assertion of Iranian responsibility for the Mykonos attack.[54] While many European nations withdrew their ambassadors from Iran following the ruling, this diplomatic freeze lasted only months. And along with the release of perpetrators Darabi and Rhayel, none of the Iranian leaders identified in the court judgment—Rafsanjani, Fallahian, Velayati, or Khamenei—were ever held to account for their roles in the attack.

Indeed, several of these officials—in particular, Velayati—were involved in a number of international terrorist plots. Argentinean officials have requested Velayati's arrest and extradition multiple times as he has traveled the world as a senior Iranian official. The most recent request was made to Russia, where Putin hosted Velayati on July 12, 2018, just a day after Assadi, the arrested Iranian diplomat was formally charged in Germany. Similar requests for his arrest made to the governments of Singapore and Malaysia were also ignored.[55]As U.S. authorities have long assessed, without coordinated international action, Iran is unlikely to be deterred from carrying out such operations again in the future. In the wake of Iranian terrorist plots abroad in the late 1980s, the U.S. intelligence community concluded that "over the long term, Iran is likely to be deterred from terrorism only if evidence of its culpability results in strong, unified action by the international community, including a willingness to impose sanctions. This could include the breaking of relations, or the recall of ambassadors." But to date, that has not been the case.[56]

Today, law enforcement agencies around the world—and especially in Europe—are cooperating much more closely to deal with Iran and Hezbollah's global terrorist and criminal activities. For example, the U.S.-led Law Enforcement Coordination Group (LECG) has met six times in various locations around the world to address Hezbollah's terrorist and criminal activities worldwide. The latest meeting, held in Quito, Ecuador, was convened by the United States and Europol and held under the auspices of Ameripol.[57] The LECG will next meet in Europe in late 2018, where more than 30 governments—along with officials from Europol and Interpol—will convene to compare notes on Hezbollah activities in their far-flung jurisdictions and strategize on how to best cooperate to counter Hezbollah terrorist and criminal operations.

As a result of Iran's direct involvement in this latest plot—and with the benefit of hindsight into Iran's long history of such active operations in Europe—LECT officials are likely going to consider expanding their focus to include the full range of Iranian agents and proxies deployed by Tehran to carry out attacks abroad, including Iran's diplomats and diplomatic facilities. There would be utility in that, not only because of Iran's own attack plans but because of the support Iranian agents provide time and again to Hezbollah plots. Consider, for example, the series of 1985 Paris bombings or the hi-

jacking of TWA flight 847, both carried out by Hezbollah but with the logistical support of Iranian agents, according to the National Counterterrorism Center.[58]

The international response to Iran's international terrorist activity should not be limited to law enforcement action alone. Regulatory action would also be helpful, and it is worth noting there have been calls for the European Union to designate not just Hezbollah's military wing as a terrorist group but to include the organization in its entirety, as well as expanded financial and diplomatic sanctions. European states should consider designating more Iranian institutions and personnel involved in Tehran's illicit conduct, but they should also consider working to isolate Iran diplomatically so long as Tehran continues to abuse diplomatic privilege and use its representatives abroad to murder people on foreign soil.

To that end, in the wake of the Assadi affair, the State Department released timelines and maps depicting select incidents of Iranian-sponsored operational activities in Europe from 1979 to 2018, including both incidents involving Iran's proxy, Hezbollah, as well as those carried out by Iranian agents themselves.[59] Developing an appreciation for the extent of Iranian operations in Europe over the years is important, and not just as some kind of academic exercise. As authorities in Austria, Belgium, France, and Germany dig deeper into the Assadi affair, they are likely to determine fairly quickly, as investigators invariably did in previous Iranian plots, that these are not rogue actions, but the actions of a rogue regime. CTC

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