

CONSIDERATION OF PENDING TREATIES

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CONSIDERATION OF PENDING TREATIES

TUESDAY, SEPTEMBER 12, 2000

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Rod Grams presiding.

Present: Senators Grams and Sarbanes.

Senator GRAMS. Good morning. I would like to bring this hearing to order.

I would like to welcome our witnesses this morning, Mr. Swartz from the Justice Department, and also Mr. Witten from the State Department, to this hearing on law enforcement and other treaties, and I look forward to your answers to our questions and also to your statements this morning.

I think we have a vote coming up at about 10, so we will try to get as much done as we can before then. If we cannot finish, we will take a brief recess and then come back to finish.

But this morning, we are going to consider four extradition treaties, ten mutual legal assistance treaties, five treaties for the return of stolen vehicles, one prisoner transfer treaty, and a treaty with Ireland on taxation of diplomatic and consular personnel.

All of these treaties are designed to further the United States' interest and to help our citizens. In general, I understand that all of the treaties enjoy bipartisan support.

Now the United States is party to more than 100 bilateral extradition treaties. And of the four extradition treaties before us today, we note that the treaties with Belize and Sri Lanka replace U.S./U.K. treaties which have been honored by the two states since their independence from Britain. On the other hand, the treaties from Paraguay and South Africa modernize existing treaties there.

Now, the committee notes with pleasure that in all four of the extradition treaties before us today, the nationality of the fugitive has been eliminated as a basis to deny U.S. extradition requests. In other words, if these treaties are approved, citizens of these countries who commit criminal offenses in the U.S. will not be able to flee to their homelands with the expectation of escaping American justice by virtue of their nationality.

We recognize and fully support the principle that justice is far better served by trial of a fugitive in the jurisdiction where the extradition offense was committed rather than in the homeland where they may have traveled to escape justice. We encourage the

executive branch to make extradition of nationals a bedrock principal of all future extradition treaties.

Now our last major round of work on extradition treaties was in September 1998. Since then, many fugitives have been returned to the United States for prosecution, and the United States has extradited many fugitives to other countries for prosecution. The committee expects the important avenue of international extradition to remain open and accessible in the coming years as well.

Today, the committee also plans to review ten mutual legal assistance treaties, the MLATs, with countries in Europe, Africa, the Middle East, and with the Organization of American States. In each of these regions, organized crime, drug trafficking, and money laundering pose high priority challenges for the United States.

MLATs help us meet those challenges. And in the end, they help ordinary Americans by enabling us to obtain from abroad information and evidence related to criminal investigations and prosecutions. More and more the cooperation of foreign authorities can make or break a Federal or state prosecution in the United States.

So MLATs help our Federal and state prosecutors obtain material and statements from the jurisdiction of foreign treaty partners in a form that helps ensure its admissibility into evidence into our Federal and state courtrooms.

The committee understands the importance of MLATs to Federal and state prosecutors and their superiority to letters rogatory and other judicial assistance measures which are unsuited to the challenges of sophisticated modern criminality.

Today we also have before us five important treaties which are intended to ease the return of recovered stolen vehicles to and from U.S. owners. We have only one such treaty in force at present. That is with Mexico.

The experience with the serious and apparently growing problem of international auto and aircraft theft over the years has underlined the need for new agreements in this field. So today, the committee will also examine a Multilateral Prisoner Transfer Convention produced by the Organization of American States.

The convention is the first multilateral treaty of its kind, signed by the United States since the Reagan administration signed the Council of Europe Prisoner Transfer Convention back in 1983. Upon entry into force for the United States, the convention is expected to open new opportunities for cooperation with Latin American countries. And I was pleased to hear that the convention follows the format of bilateral United States Prisoner Transfer Agreements with Mexico, Canada, and also the Council of Europe.

And finally, the committee will review and hear testimony on a recently concluded protocol to our 1950 Consular Convention with Ireland. Now the protocol deals with taxation of diplomatic and consular property and personnel in each country.

These are all important treaties. It appears that none of them would require implementing legislation. In particular, the extradition treaties and MLATs do provide a framework to allow the United States to share information and transfer criminals worldwide.

Precisely because of the broad international scope of these treaties, it is essential to clarify the relationships between U.S. bilat-

eral relations under MLATs, and extradition treaties, and an eventual international criminal court which may come into being if the July 1998 Rome Treaty enters into force.

As you know, I authored a provision which is now law requiring that before we extradite a U.S. citizen to a foreign nation, we have an agreement with that nation that it will not extradite U.S. citizens to the International Criminal Court. To that end, Senate approval of these MLATs and extradition treaties must be contingent on an understanding that in the context of our treaty relationship, no fugitive who has been returned to a treaty partner by the United States may be re-extradited to the International Criminal Court, and no legal assistance provided by the United States to a treaty party pursuant to an MLAT request may be shared in any way with that court.

Today the committee will hear from Deputy Assistant Attorney General Bruce Swartz of the Department of Justice, and then from Samuel Witten, Assistant Legal Adviser for Law Enforcement and Intelligence at the Department of State.

So I want to welcome you both this morning.

And Mr. Swartz, we will begin with your testimony first. Thank you very much.

STATEMENT OF BRUCE C. SWARTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. SWARTZ. Thank you, Mr. Chairman. I am pleased to appear before you today to present the views of the Department of Justice on these law enforcement treaties. As was suggested, Mr. Chairman, these treaties will advance the law enforcement interests of the United States. They will also help protect our citizens.

With the chairman's permission, I would like to submit my full statement for the record and just briefly summarize it.

Senator GRAMS. It will be so submitted. Thank you.

Mr. SWARTZ. Thank you. In my testimony today I will concentrate on why these extradition and mutual legal assistance treaties are important instruments for United States law enforcement agencies engaged in investigating and prosecuting serious offenses. I will also briefly describe the advantages of the OAS prisoner transfer treaty and the benefits of the stolen vehicle treaties.

Extradition treaties remain the most effective means of obtaining the return of international fugitives. Modernizing our extradition treaties is one of the primary goals of the Department of Justice in the international area. The four extradition treaties being considered by the committee today all update existing treaties.

Each of the new treaties contains the core elements we seek in a modern, effective extradition instrument, including provisions regarding dual criminality, provisional arrests, and temporary surrender. In addition, each treaty explicitly provides that extradition may not be denied, as the chair has pointed out, on the basis of the fugitive's nationality.

Extradition treaties are important, but also of course, the mutual legal assistance treaties before the committee today provide an invaluable aid to our prosecution of cases in this country and an aid to prosecution of serious offenses in other countries as well.

The 9 bilateral MLATs before the committee will join 36 other MLATs signed and brought into force by the United States since 1977. These new MLATs, when ratified, will strengthen our ability to obtain evidence and assistance in criminal cases. More than 20 years of experience has proven the importance of these tools, particularly as we face the globalization of serious crime.

Mutual legal assistance treaties provide, as the chair has suggested, a formal framework in the context of obligations under international law, for cooperation between states in investigating and prosecuting crime. On a practical level, they are much more useful and efficient than letters rogatory.

The more streamlined handling of requests, however, is just one of several reasons why the MLATs are so important to our multinational and international law enforcement efforts.

First, the MLAT makes assistance obligatory as a matter of law.

Second, each of the MLATs before the committee today will allow us to penetrate bank secrecy and business confidentiality laws of foreign countries.

Third, the MLAT provides an opportunity to devise procedures to obtain foreign evidence in a manner that is admissible in our court proceedings. In our bilateral MLATs, we are able to establish procedures that will meet the special requirements of our statutes, our constitutional protections, such as the right to confrontation, and our evidentiary rules, such as hearsay.

Fourth, each of the MLATs provides a framework for cooperation in the tracing, seizure, and forfeiture of criminal assets.

While these MLATs are useful tools, the Department of Justice recognizes they are not panaceas, that will, without more, resolve the problem of international crime. We are well aware that an MLAT's effectiveness depends as much on the commitment and competence of the parties as on the specific language of the instrument.

However, our experience shows us that MLATs themselves provide a useful framework for us to establish and maintain frank and productive working relationships with our treaty partners. Indeed, we have found the process of consultation to be so important to the effectiveness of the treaties that specific consultation provisions have been included in each of the MLATs before the committee today.

In addition to the bilateral MLATs I have discussed, the committee also has before it an OAS multilateral convention on mutual legal assistance, and its related optional protocol. The United States took an active role in the negotiation of this convention. Indeed, it was largely modeled on U.S. bilateral MLATs and contains the key benefits of an MLAT that I have already described.

Joining the OAS MLAT will provide a means for the United States to extend its mutual assistance treaty relationships in the hemisphere to countries as to which there might not be a sufficient basis to justify the resources needed to conclude separate bilateral treaties. The convention, in addition, is supplemented by a related optional protocol requiring mutual legal assistance in investigations and prosecutions involving tax offenses. This protocol was initiated at the behest of the United States.

Turning to the Inter-American Convention on Serving Criminal Sentences Abroad, better known as the OAS Prisoner Transfer Treaty: This treaty offers an opportunity for the United States to establish, via a single instrument, a treaty relationship with several countries in the hemisphere for the transfer of sentenced persons.

As in the case of the OAS MLAT, the United States was an important participant in the negotiation of this treaty and helped shape the text based on our experience with the prisoner transfer treaty of the Council of Europe.

Finally, let me turn to the stolen vehicle treaties. According to insurance industry estimates, approximately 200,000 motor vehicles stolen in the United States are illegally exported. Frequently, organized criminal groups are involved in these thefts. The vehicle treaties before the committee are useful tools for addressing international trafficking in stolen vehicles, and are part of an overall program being pursued by law enforcement to combat domestic and international vehicle theft.

In conclusion, Mr. Chairman, we appreciate the committee's support for our efforts to strengthen and enlarge the framework of treaties that assist us in combating international crime.

For the Department of Justice, modern extradition and mutual assistance treaties are particularly critical law enforcement tools. The prisoner transfer treaty and stolen vehicle treaties will also serve extremely important interests of the United States.

Accordingly, we join the State Department in urging the prompt and favorable consideration of these law enforcement treaties.

I would be pleased to respond to any questions the committee may have. Thank you.

Senator GRAMS. Thank you very much, Mr. Swartz.

[The prepared statement of Mr. Swartz follows:]

PREPARED STATEMENT OF BRUCE C. SWARTZ

Mr. Chairman and members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice on twenty-one law enforcement treaties that have been referred to the Committee. Each of these treaties will directly advance the law enforcement interests of the United States.

Four of these treaties—with Belize, Paraguay, South Africa, and Sri Lanka—replace, and thereby update, old extradition treaties. Another nine treaties are bilateral mutual legal assistance treaties (or "MLATs")—with Cyprus, Egypt, France, Greece, Nigeria, Romania, the Russian Federation, South Africa, and Ukraine. There are three treaties negotiated under the auspices of the Organization of American States: an MLAT, its related optional protocol, and a prisoner transfer treaty. Finally, there are five treaties addressing the problem of stolen vehicles, with Belize, the Dominican Republic, Guatemala, Costa Rica and Panama.

The decision to proceed with the negotiation of law enforcement treaties such as these is made jointly by the Departments of State and Justice, and reflects our international law enforcement priorities. The Department of Justice participated in the negotiation of the extradition and mutual legal assistance treaties, and consulted closely regarding the prisoner transfer and stolen vehicle treaties. We join the Department of State today in urging the Committee to report favorably to the Senate and recommend its advice and consent to the ratification.

The Departments of Justice and State have prepared and submitted to the Committee detailed technical analyses of the mutual legal assistance and extradition treaties. In my testimony today, I will concentrate on why these extradition and mutual legal assistance treaties are important instruments for United States law enforcement agencies engaged in investigating and prosecuting serious offenses. I also will describe briefly the advantages of the OAS prisoner transfer treaty and the benefits of the stolen vehicle treaties.

THE EXTRADITION TREATIES

Extradition treaties remain the most effective means of obtaining the return of international fugitives. Modernizing our extradition treaties—and where appropriate establishing new extradition relationships—is one of the most important of the Justice Department's international efforts.

The four extradition treaties being considered by the Committee all update existing treaties: the 1972 treaty that currently governs our extradition relations with Belize, the 1973 treaty with Paraguay, the 1947 treaty with South Africa and the 1931 U.S.-U.K. treaty that currently governs our extradition relations with Sri Lanka. Each of the new treaties contains the core elements we seek in a modern, effective extradition instrument.

First, each is a "dual criminality" treaty. This means that the obligation to extradite applies to *all* offenses that are punishable in both countries by imprisonment for a specified minimum period, generally more than one year. This is a significant improvement over the outmoded "list" approach of our older treaties, including our current treaties with Paraguay, South Africa and Sri Lanka. Under a "list treaty" extradition is limited only to those crimes enumerated in the treaty itself.

There are strong advantages to "dual criminality" treaties. First they reach the broadest possible range of offenses, with the sole limitations being those of a felony threshold and the dual criminality requirement itself. Second, they obviate the need to repeatedly update treaties as new forms of criminality are recognized. This second benefit is particularly important because of the United States' strong interest in investigating and prosecuting newly emerging criminal activities, such as money laundering, computer crime and environmental offenses.

The four extradition treaties also incorporate a variety of procedural improvements. For example, all clarify the procedures for "provisional arrest," the process by which a fugitive can be immediately detained while the documents in support of extradition are prepared, translated and submitted through the diplomatic channel.

All four treaties contain "temporary surrender" provisions, which allow a person found extraditable but already in custody abroad on another charge, to be temporarily surrendered for purposes of trial. Absent temporary surrender provisions, we face the problem that extradition of a fugitive may be delayed for years while he serves out a sentence in another country, during which time the case against him becomes stale, and his victims await vindication for the crimes against them.

All four treaties also allow the fugitive to waive extradition or otherwise agree to immediate surrender, thereby substantially speeding up the extradition process in uncontested cases. In addition, the treaties all contemplate extradition for extraterritorial offenses, with the Sri Lankan and Paraguayan provisions being particularly broad. For the U.S., extraterritorial jurisdiction is important in two areas of particular concern: drug trafficking and terrorism. Finally, all four treaties are explicitly retroactive, so that their terms will apply also to crimes committed before the treaty entered into force. These procedural improvements allow the legal framework for extradition to operate more efficiently and with respect to the broadest possible range of offenses.

For the Department of Justice, it is particularly important that all four treaties explicitly provide that extradition may not be denied on the basis of the fugitive's nationality. In our experience, non-extradition of nationals is one of the most serious obstacles to bringing fugitives to justice. Thus, we seek, whenever possible, to include explicit obligations regarding extradition of nationals in our treaties.

While nations generally agree on the importance of extradition, there have been striking differences on the question of extraditing citizens. Most countries with a common law tradition, like the United States, do extradite their citizens, provided there is a treaty in force and evidence to support the charges. Many countries with a civil law tradition, however, have historically refused to extradite their nationals.

We see this pattern changing for the better, however, particularly in Latin America. For example, our new treaties with Argentina and Bolivia (both civil law countries) expressly provide that nationality shall not be a bar to extradition, and the Dominican Republic, Colombia and El Salvador have recently changed their internal law to permit extradition of nationals. Thus, the extradition treaty with Paraguay is especially important in that it will reinforce the trend in Latin America of abandoning the bar on extradition of nationals and embracing a modern commitment to deny fugitives safe haven.

THE MUTUAL LEGAL ASSISTANCE TREATIES

The nine bilateral MLATs before this Committee will join 36 other MLATs signed and brought into force by the United States since 1977. These new MLATs, when

ratified, will strengthen our ability to obtain evidence and other assistance in criminal cases. More than twenty years of experience has proven the importance of these law enforcement tools, particularly as we face increasing globalization of serious crime.

The benefits of MLATs

Mutual legal assistance treaties provide a formal framework, in the context of obligations under international law, for cooperation between states in investigating and prosecuting crime. On a practical level, they are a much more efficient way of seeking and providing assistance on an international scale than the traditional system of letters rogatory.

One reason for this enhanced efficiency of MLATs is their system of direct communications between Central Authorities. The Attorney General is the Central Authority for the United States, and the Attorney General has delegated this authority to the Criminal Division's Office of International Affairs. In 1999, the Office of International Affairs made close to five hundred requests for international assistance on behalf of state and federal prosecutors and received over one thousand requests for assistance from abroad. These figures reflect not only the increasing problem of transnational crime, but also the greater familiarity and confidence among law enforcement officials regarding our various mechanisms to obtain foreign cooperation. Of these mechanisms, MLATs such as those before the Committee are of critical importance.

The more streamlined handling of requests is just one of several reasons why MLATs are so important to our international law enforcement efforts. First, an MLAT makes assistance obligatory as a matter of international law. (Letters rogatory are executed solely on the basis of comity.) A request for assistance cannot be refused unless specifically permitted by the terms of the treaty, and the grounds for refusal of assistance under MLATs are quite limited.

Second, an MLAT, either by itself or together with implementing legislation, provides a means to overcome foreign bank secrecy and business confidentiality laws that otherwise can frustrate our investigations. Indeed, in some instances, we may feel it is appropriate that an MLAT may contain specific provisions negating bank secrecy as a barrier to mutual assistance. Such provisions are included, for example, in the pending treaties with Romania and Russia.

Third, an MLAT provides an opportunity to devise procedures to obtain foreign evidence in a form admissible in our courts. For example, our complex and stringent evidentiary rules, including our hearsay rules, are largely unheard of in civil law countries. Similarly, our requirements regarding the right to confrontation of witnesses may not have a close analogue in countries that have an inquisitorial system, rather than an adversarial system such as ours. In our bilateral MLATs, we are able to establish procedures that will meet these special requirements of our own laws.

Fourth, each of these MLATs provides a framework for cooperation in the tracing, seizure and forfeiture of criminal assets. In our experience, use of MLATs, such as our MLAT with Switzerland, has been extremely effective in blocking and ultimately forfeiting millions of dollars of drug monies and other proceeds of crime. Similarly, our ability to use MLATs to trace crime profits through layers of bank accounts and shell corporations has proven an extremely effective tool in identifying those at the top levels of criminal organizations.

While these MLATs can be extremely useful tools, the Department of Justice recognizes that they are not panaceas, which will, without more, resolve the problem of international crime. We are well aware that an MLAT's effectiveness depends as much on the commitment and competence of the parties as on the specific language of the instrument. However, our experience shows us that MLATs themselves provide a framework for us to establish and maintain frank and productive working relationships with our treaty partners. Indeed, we have found the process of consultation to be so important to the effectiveness of the treaties that specific consultation provisions have been included in each MLAT.

In sum, bilateral MLATs can provide a predictable and effective regime for obtaining evidence in criminal cases, and the bilateral MLATs before the Committee will augment the capacity of the Department of Justice and our state and local prosecutors to pursue international cases in nine foreign countries—countries in Africa, the Middle East, Europe, and the former Soviet Union—which are significant from a law enforcement perspective.

The bilateral MLATs before the Committee

While each of the MLATs now before the Committee shares certain fundamental characteristics, the specific provisions of each treaty vary to some extent. In the

MLATs, as in the extradition treaties, some of the variances are minor or semantic; others are more substantive. The technical analyses explain these variances. The variances are the inevitable result of negotiations over a period of years with different countries, each of which has a different legal system and domestic interests, and as to each of which the United States' law enforcement relations and priorities differ.

I would like to highlight how each of the MLATs before the Committee reflects our international law enforcement priorities:

- We expect that the MLAT with Cyprus will assist in fighting organized and financial crime. Cyprus has become a major center for the laundering of criminal proceeds by drug traffickers, some terrorist organizations, violators of U.S. export control laws, and, most recently, by Russian organized crime. The MLAT would complement the new extradition treaty with Cyprus, which entered into force last year, and reflects the overall modernization of our law enforcement relations in the region.

- The MLAT with Egypt provides a means of close cooperation with Egyptian authorities in various criminal matters in a region of critical law enforcement interest to the United States. Most important, an MLAT with Egypt would enhance the ability of U.S. law enforcement to assist in investigating and prosecuting narcotics and terrorism-related offenses, particularly those targeted against American interests.

- France is, of course, a major law enforcement partner of the United States, and the new MLAT will help ensure the most efficient assistance possible. French law enforcement has provided significant cooperation in several recent major cases, and the number of legal assistance matters with France continues to grow.

- The MLAT with Greece will enhance the ability of U.S. law enforcement to assist Greece in investigating and prosecuting narcotics, money-laundering, and terrorism-related offenses. Similarly, it will provide a modern, more effective tool for U.S. law enforcement to obtain evidence and other information from Greece to support U.S. efforts to identify, apprehend and prosecute terrorists, drug traffickers and others who commit crimes within the jurisdiction of the United States.

- The MLAT with Nigeria provides a practical mechanism for cooperation with an African nation of key importance. We expect the treaty to be an effective tool in the investigation and prosecution of a wide variety of modern crimes of concern to the U.S. and Nigeria, including drug trafficking, money laundering, and fraud.

- The MLAT with Romania is a part of our overall modernization of law enforcement relations in the region, where we have recently signed or negotiated a number of other MLATs. Moreover, Romania has become an effective leader in anti-crime efforts in its region, with Bucharest serving as headquarters for the Southeast European Cooperative Initiative (SECI), a major U.S.-supported effort to coordinate regional crime prevention efforts.

- The MLAT with Russia reflects the importance to the United States of increased cooperation with Russia in combating organized crime, financial crime, and corruption. Over the last decade, Russian criminal groups have emerged as a serious threat within Russia and in other countries, including the United States. U.S. law enforcement authorities have been investigating and prosecuting increasing numbers of Russian organized criminals who have committed a variety of crimes, and there has been a significant increase in the number of requests for cooperation between Russia and the United States. As a result of these experiences, our organized crime prosecutors and the FBI have strongly supported our entering into an MLAT with Russia because of its importance to the success of our own investigations.

The MLAT with Russia will be a significant improvement over the executive agreement—the mutual legal assistance agreement (MLAA)—which now governs our cooperation with Russia in criminal law matters. For example, the MLAT requires assistance for all crimes which are punishable under both U.S. and Russian law, while the MLAA applies only to specified categories of crimes. As a result, under the MLAT, we will be able to reach offenses such as computer crime and trafficking in women—significant offenses outside the scope of the current executive agreement.

Moreover, because the MLAT will carry a greater force of law—and we understand this distinction has been of particular importance to Russian prosecutorial and police authorities—we expect that cooperation will improve under the MLAT.

It also contains safeguards of the type found in all our MLATs that enable the United States to deny a request, or to condition the providing of information in appropriate circumstances. Thus, we will be able to review incoming requests and either impose conditions to ensure that information is not used improperly, or deny a request if we believe its primary purpose is intelligence-rather than law enforce-

ment-related or would otherwise compromise our security or other essential interests.

- The MLAT with South Africa, in conjunction with the extradition treaty also before this Committee, reflects the importance we place on modernizing our law enforcement relationship with this key nation in Africa. We are already working closely with South Africa in the areas of terrorism, arms trafficking, organized crime and major frauds, and the MLAT will strengthen our ability to cooperate.

- The MLAT with Ukraine complements our efforts to enhance our network of law enforcement treaties in Eastern and Central Europe. It also reflects our particular concerns about organized crime groups working, or having their roots, in Ukraine, as well as our concerns about corruption, drug trafficking and other forms of criminality. Indeed, because of the need to seek formal cooperation from Ukraine in connection with U.S. investigations, we obtained Ukraine's agreement to provisional application of the MLAT. Under this arrangement, Ukraine provided assistance to the United States in our money-laundering case against former Ukrainian Prime Minister Pavlo Lazarenko that led to his indictment. For the Department of Justice, this case well illustrated the practical utility of the sort of formal cooperation with Ukraine which will be afforded under the MLAT.

THE INTER-AMERICAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

In addition to the bilateral MLATs I have discussed, the Committee also has before it an OAS multilateral convention on mutual legal assistance, and its related optional protocol. The United States took an active role in the negotiation of this Convention. Indeed, it was largely modeled on U.S. bilateral MLATs and contains the key benefits of an MLAT that I have already described.

Joining the OAS MLAT will provide a means for the United States to extend its mutual assistance treaty relationships in the hemisphere to countries as to which there might not be a sufficient basis to justify the resources needed to conclude separate bilateral treaties. For example, upon ratification, the OAS MLAT would create an immediate treaty relationship between the U.S. and with Peru (with which we do not have a bilateral MLAT). Similar MLAT relationships would be created as five additional signatories to the Convention complete the steps necessary for ratification, and as new countries join.

The Convention is supplemented by a related optional protocol requiring mutual legal assistance in investigations and prosecutions involving tax offenses. The Protocol was initiated at the behest of the United States because of our concern that the Convention itself allowed assistance to be denied in certain cases in which the underlying offense was considered a "fiscal" offense. For the Department of Justice, ratification of the Protocol is important to improve cooperation in a wide range of criminal tax cases.

We are aware that, to date, the OAS Convention has been ratified by only three countries. However, with U.S. ratification, we will be in a position to urge other countries in the hemisphere to join the Convention, and in that manner enhance its potential as a means of law enforcement cooperation among OAS members.

As reflected in the President's transmittal of these instruments to the Senate, we recommend that two Understandings be included in the United States instrument of ratification for the OAS Convention, and that one Understanding be included in the instrument of ratification for the related optional protocol. Mr. Witten has described these Understandings in greater detail in his testimony.

INTER-AMERICAN PRISONER TRANSFER TREATY

The Inter-American Convention on Serving Criminal Sentences Abroad, better known as the OAS Prisoner Transfer Treaty, offers an opportunity for the United States to establish, via a single instrument, a treaty relationship with several countries in the hemisphere for the transfer of sentenced persons. As in the case of the OAS MLAT, the U.S. was an important participant in the negotiation of this treaty and helped shape the text based on our extensive experience under bilateral treaties and the Council of Europe's prisoner transfer treaty. Ratification of the OAS prisoner transfer treaty will expand a successful program that the Department of Justice has administered for more than twenty years, and through which several thousand U.S. citizens incarcerated abroad—often under poor conditions—have been able to return to the U.S. to serve out the balance of their sentences.

The benefits of a multilateral treaty on prisoner transfer have been well illustrated by our experience with the Council of Europe treaty. Through the COE treaty, we have established a prisoner transfer relationship with more than 40 countries. While some OAS members also have signed the COE treaty, it is our impression that many Latin American countries will be more inclined to join the OAS trea-

ty than the COE treaty. Thus, the OAS prisoner transfer treaty may provide us with opportunities for transfer that might not otherwise exist. Upon ratification, we would immediately have a new treaty relationship with Venezuela. Once Brazil, Ecuador and Paraguay complete their ratification process, we would similarly be in a position to send or receive prisoners to and from those countries. Also, there are several other countries that have not yet signed the treaty, but might be encouraged to do so in the future.

The provisions of the OAS treaty are similar to those of existing prisoner transfer treaties to which we are a party, including the multilateral Council of Europe prisoner transfer treaty. First, transfer is consensual. Not only must the prisoner agree, but both the sentencing state and the state of nationality to which transfer is sought must agree. As a result, the U.S. has complete discretion to transfer a prisoner, or to accept a prisoner from abroad, based on any number of factors, ranging from those bearing on the prisoner's potential for rehabilitation to law enforcement concerns that may advise against transfer. Second, the treaty is in accord with important procedural aspects of our own prisoner transfer law. For example, we are able to verify that the prisoner's consent to transfer is voluntary and informed; all appeals must have been resolved; and challenges to the validity of the sentence are matters reserved to the courts of the original sentencing State.

In two key respects, the OAS treaty incorporates important provisions not always present in prior instruments. First, it explicitly acknowledges the rights of states under the U.S. federal system to decline to transfer a prisoner sentenced under state law. Second, it reserves to the sentencing State all power to pardon or grant amnesty.

As reflected in the President's transmittal of these instruments to the Senate, we recommend that one Understanding and one Reservation be included in the United States instrument of ratification of the OAS prisoner transfer treaty. Mr. Witten has described these in greater detail in his testimony.

STOLEN VEHICLE TREATIES

According to insurance industry estimates, approximately 200,000 motor vehicles stolen in the United States are illegally exported. Frequently, organized criminal groups are involved. The vehicle repatriation treaties before the Committee are useful tools for addressing international trafficking in stolen vehicles and are part of an overall program being pursued by law enforcement to combat domestic and international vehicle theft.

The five treaties establish procedural and documentary requirements for the return of stolen motor vehicles and, in the case of the treaties with Guatemala, Costa Rica and Panama, for the return of stolen aircraft. Indeed, we understand that, absent a treaty, the domestic laws and procedures of some countries do not create a sufficient formal framework to facilitate the return of these types of stolen property to their rightful owners in the United States. The treaties also provide a means by which insurers can work with law enforcement to more promptly resolve claims involving stolen vehicles and thus better serve their customers.

The treaties also facilitate international cooperation of law enforcement agencies and the sharing of information about stolen vehicles. This cooperation and exchange of information in turn allows the FBI and Customs Service, often working with local law enforcement, to identify and target the criminal enterprises engaged in international trafficking in stolen vehicles.

The treaties before this Committee are modeled on the treaty between the United States and Mexico, which entered into force in 1983. According to insurance industry data, the Mexico treaty has led to the return of approximately 2,000 stolen vehicles every year since 1994. More recently, we have begun to see a reliance on the Mexico treaty to facilitate the return of vehicles stolen in Mexico and recovered in the United States.

We know the problem of vehicles stolen from the United States extends also into Central America and the Caribbean. Therefore, entering into treaty relations with Belize, Costa Rica, the Dominican Republic, Guatemala and Panama will further assist our efforts to combat international trafficking in stolen vehicles.

CONCLUSION

In conclusion, Mr. Chairman, we appreciate the Committee's support in our efforts to strengthen and enlarge the framework of treaties that assist us in combating international crime. For the Department of Justice, modern extradition and mutual assistance treaties are particularly critical law enforcement tools. The prisoner transfer treaty and stolen vehicle treaties will also serve extremely important interests of the United States. Accordingly, we join the State Department in urging

the prompt and favorable consideration of these law enforcement treaties. I would be pleased to respond to any questions the Committee may have.

Senator GRAMS. Mr. Witten, your opening statement.

STATEMENT OF SAMUEL M. WITTEN, ASSISTANT LEGAL ADVISER FOR LAW ENFORCEMENT AND INTELLIGENCE, DEPARTMENT OF STATE, WASHINGTON, DC

Mr. WITTEN. Thank you, Mr. Chairman. With your permission I would like to submit my full statement for the record and merely summarize it at this time.

Senator GRAMS. Without objection.

Mr. WITTEN. Thank you.

I am pleased to appear before you today to testify in support of 21 treaties for international law enforcement cooperation, as well as a protocol to the 1950 U.S./Ireland Consular Convention.

The Department of State greatly appreciates the opportunity to move toward ratification of these important treaties. The law enforcement treaties before the committee will make important contributions to the U.S. Government's ability to receive and provide international cooperation in criminal investigations and prosecutions.

The four extradition treaties update older extradition treaties now in force, and are a part of the administration's ongoing program to review and revise these older relationships, many of which are extremely outdated and do not include many modern crimes or modern procedures.

The new treaties have modern features such as extradition based on dual criminality, rather than a list of offenses, retroactive application and modern provisions for the provisional arrests of fugitives.

Significantly, as you noted, Mr. Chairman, all four treaties provide for the unrestricted extradition of nationals. As a matter of longstanding policy, the U.S. Government extradites U.S. nationals and strongly encourages other countries to extradite their nationals.

The treaty with Paraguay is in this respect particularly significant because of the commitment in that treaty that "extradition shall not be refused on the ground that the person sought is a national of the Requested State."

This treaty and our treaties with Bolivia and Argentina, to which the Senate gave advice and consent in 1996 and 1998 respectively, represent an important breakthrough in our efforts to convince civil law countries in the Western Hemisphere to obligate themselves to extradite their nationals to the United States.

Turning to the MLATs: The committee has before it a mix of bilateral and multilateral instruments. The bilateral treaties are with countries that have been identified by the U.S. law enforcement community as important law enforcement partners for which this kind of formal law enforcement cooperation relationship is necessary.

The United States has 36 MLATs in force at this time, with most of them having been brought into force in the last 5 years. These nine additional relationships will facilitate cooperation and assistance in U.S. investigations and prosecutions.

Also before the committee is the Inter-American Convention on Mutual Assistance in Criminal Matters with a related optional protocol. This convention is largely similar to our bilateral MLATs, as Mr. Swartz has explained, and is shaped with the guidance of the United States in negotiations at the OAS.

The convention will enable the United States to readily establish legal assistance relations with countries in the hemisphere with which we have not yet decided to negotiate bilateral MLATs.

We also recommend Senate advice and consent to the optional protocol on tax matters related to the Inter-American Convention. As between parties to the protocol, it removes the discretion to refuse assistance on the grounds that a tax offense is involved, and clarifies that the limited dual criminality provision in article 5 of the convention should be interpreted liberally in cases involving tax offenses.

The pursuit of tax crimes is an important part of our law enforcement effort. We believe this protocol will lead to increased cooperation in this area.

The administration recommends that the United States include two Understandings in its instrument of ratification for the convention, and one Understanding in its instrument of ratification for the protocol. The proposed texts of these Understandings were included in the administration's transmittal of the convention and the protocol to the Senate, and are discussed more fully in my prepared statement.

Just briefly, Mr. Chairman, one relates to article 25 of the convention and clarifies that the disclosure and use limitations of the convention no longer apply if such information or evidence is made public consistent with the article.

And the other Understanding, which is identical for both convention and protocol, makes clear that the assistance and procedures set forth in these instruments do not prevent the contracting parties from granting assistance to another party through the provisions of other international agreements, or treaties, or national laws.

The third category of treaties before the committee are stolen vehicle treaties, with Belize, Costa Rica, the Dominican Republic, Guatemala, and Panama.

The United States currently has one such treaty in force which, according to insurance industry estimates, prompts the return to the United States of approximately 2,000 vehicles annually. The five treaties before the committee build on the Mexico precedent and will create a legal basis for the return of stolen vehicles, and in several cases, stolen aircraft, from several other nearby countries. The U.S. insurance industry strongly supports these treaties since U.S. insurers are typically subrogated to the ownership interests of Americans whose vehicles or aircraft have been stolen and taken overseas.

Next, the committee has before it the Inter-American Convention on Serving Criminal Sentences Abroad, commonly called the OAS Prisoner Transfer Treaty. This instrument will facilitate the transfer of persons sentenced in the United States and other state parties to their own nations to serve their sentences.

The convention establishes procedures that can be initiated by sentenced persons who want to serve their sentences in their own countries. Procedures employed to achieve this purpose are similar to those embodied in ten existing prisoner transfer treaties to which the United States is a party, including the Council of Europe Convention, which itself now has over 40 parties.

Immediately upon U.S. ratification, the convention will establish a new prisoner transfer relationship between the United States and Venezuela, which has already ratified the convention. And as other OAS members join the convention, the number of countries with which we have prisoner transfer relationships will further expand.

As reflected in the transmittal of the convention to the Senate, we recommend the submission of one Understanding and one Reservation with the U.S. instrument of ratification to the Prisoner of Transfer Convention. The Understanding would clarify that the consent of all the parties—the prisoner, the sentencing state, the receiving state, and, where applicable, the sub-Federal state or province—is required prior to the transfer.

Although this requirement is implied by the convention text, consent by all parties is such a fundamental feature of the U.S. Government's prisoner of transfer regime that we believe it appropriate to clarify the text in this manner.

The proposed Reservation sets forth the requirement that before a U.S. national may be returned, the sentencing state must provide English language versions of a certified copy of the sentence and other key documents in addition to the language of the sentencing state. The United States will do an analogous translation for the benefit of requesting state in similar circumstances. This Reservation will greatly facilitate U.S. implementation of the convention.

And finally, Mr. Chairman, also before the committee is a protocol to amend the 1950 U.S./Ireland Consular Convention. The protocol will expand the scope of tax exemption under the consular convention to provide for reciprocal exemption from all taxes, including value added taxes, or VAT, on goods and services for the official use of the mission or for the personal use of mission members and families.

It will provide financial benefit to the United States both through direct savings on embassy purchases of goods and services as well as through lowering the cost of living for U.S. Government employees assigned to the U.S. Embassy in Dublin.

Thank you, Mr. Chairman. I will be happy to answer any questions the committee may have.

Senator GRAMS. Thank you very much, Mr. Witten.

[The prepared statement of Mr. Witten follows:]

PREPARED STATEMENT OF SAMUEL M. WITTEN

Mr. Chairman and members of the Committee:

I am pleased to appear before you today to testify in support of 21 treaties for international law enforcement cooperation, as well as a protocol to the 1950 Consular Convention between the United States and Ireland. The treaties, which have been transmitted to the Senate for advice and consent to ratification, fall into five categories:

- Extradition treaties with Belize, Paraguay, South Africa, and Sri Lanka.
- Bilateral mutual legal assistance treaties—or “MLATs”—with Cyprus, Egypt, France, Greece, Nigeria, Romania, the Russian Federation, South Africa,

Ukraine, and a multilateral Inter-American MLAT and related protocol negotiated under the auspices of the Organization of American States.

- Treaties for the return of stolen vehicles with Belize, Costa Rica, Dominican Republic, Guatemala and Panama. The treaties with Costa Rica, Guatemala and Panama also cover the return of stolen aircraft.
- A multilateral Inter-American prisoner transfer treaty negotiated under the auspices of the Organization of American States.
- A Protocol amending the 1950 Consular Convention Between the United States and Ireland to provide exemption from all taxes on purchases by diplomatic and consular missions, members of such missions and their families.

The Department of State greatly appreciates this opportunity to move toward ratification of these important treaties. I will address the extradition and mutual legal assistance treaties first, followed by the treaties covering stolen vehicles, the transfer of prisoners, and the consular convention.

The growth in transborder criminal activity, especially violent crime, terrorism, drug trafficking, arms trafficking, trafficking in persons, the laundering of proceeds of criminal activity, including organized crime and corruption, generally has confirmed the need for increased international law enforcement cooperation. Extradition treaties and MLATs are essential tools in that effort.

The negotiation of new extradition and mutual legal assistance treaties is an important part of the Administration's many efforts to address international crime, as reflected in the International Crime Control Strategy, which was promulgated in May of 1998. That Strategy recognizes the increasing threat of international crime to our national security. One important measure to better address this threat is to enhance the ability of U.S. law enforcement officials to cooperate effectively with their overseas counterparts in investigating and prosecuting international criminal cases. Replacing outdated extradition treaties with modern ones and negotiating extradition treaties with new treaty partners is necessary to create a seamless web of mutual obligations to facilitate the prompt location, arrest and extradition of international fugitives. Similarly, mutual legal assistance treaties are vitally needed to provide witness testimony, records and other evidence in a form admissible in criminal prosecutions. The instruments before you today will be important tools in achieving this goal.

EXTRADITION TREATIES

I will first address the extradition treaties currently before the Committee. As you know, under U.S. law, fugitives can only be extradited from the United States pursuant to authorization granted by statute or treaty. The treaties pending before the Committee will update our existing treaty relationships with four important law enforcement partners. These updated treaties are part of the Administration's ongoing program to review and revise older extradition treaty relationships, many of which are extremely outdated and do not include many modern crimes or modern procedures.

Two of these treaties, with Belize and Sri Lanka, will replace existing treaty relationships between the United States and these former British territories. The U.S. extradition relationship with Belize is currently governed by a 1972 treaty between the United States and United Kingdom and the relationship with Sri Lanka is governed by a 1931 U.S.-U.K. treaty. The other two treaties will also replace existing relationships—the South Africa treaty updates a treaty from 1947 and the Paraguay treaty modernizes a relationship from 1973. With the passage of time, these older treaties are not as effective as the modern treaties before the Committee today in ensuring that all fugitives may be brought to justice.

All four extradition treaties contain several noteworthy provisions that will substantially serve our law enforcement objectives.

First, these treaties define extraditable offenses to include conduct that is punishable by imprisonment or deprivation of liberty for a specified minimum period, typically more than one year, in both states. This is the so-called "dual criminality" approach. Our older treaties, including those in force with Paraguay, South Africa, and Sri Lanka, provide for extradition only for offenses appearing on a list contained in the instrument. As time passes, these lists have grown increasingly out of date. The dual criminality approach obviates the need to renegotiate treaties to cover new offenses in instances in which both states pass laws to address new types of criminal activity.

Second, these four treaties expressly permit extraditions whether the extraditable offense is committed before or after their entry into force. This provision is particularly useful and important, since it will ensure that persons who have already com-

mitted crimes can be extradited under the new treaties from each of the new treaty partners after the treaty enters into force.

Third, these treaties all contain a provision not contained in the current treaty relationships that permits the temporary surrender of a fugitive to the Requesting State when that person is facing prosecution for, or serving a sentence on, charges within the Requested State. This provision can be important to the Requesting State so that, for example: (1) charges pending against the person can be resolved earlier while the evidence is fresh; or (2) where the person sought is part of a criminal enterprise, he can be made available for assistance in the investigation and prosecution of other participants in the enterprise.

These treaties also address two of the most difficult issues in our extradition treaty negotiations—extradition of nationals of the Requested State and extraditions where the fugitives may be subject to the death penalty in the Requesting State.

As a matter of longstanding policy, the U.S. Government extradites United States nationals and strongly encourages other countries to extradite their nationals. All four of the treaties before the Committee contemplate the unrestricted extradition of nationals by providing that nationality is not a basis for denying extradition.

The treaty with Paraguay is in this respect particularly significant. Article III of the Paraguay extradition treaty provides that “[e]xtradition shall not be refused on the ground that the person sought is a national of the Requested State.” This provision is especially useful since it is likely that a relatively large percentage of fugitives wanted by the United States in that country would be of Paraguayan nationality. This treaty, and our treaties with Bolivia and Argentina, which also permit extradition of nationals, and to which the Senate gave advice and consent in 1996 and 1998, represent an important breakthrough in our efforts to convince civil law countries in the Western Hemisphere to oblige themselves to extradite their nationals to the United States. We are already using these treaties as precedents in our efforts with other nations in Latin America and elsewhere. In practical terms, these treaties should help the United States to bring to justice narcotics traffickers, regardless of nationality, who reside or are found in these countries.

A second issue that often arises in modern extradition treaties involves extraditions in cases in which the fugitive may be subject to the death penalty in the Requesting State; A number of countries that have prohibited capital punishment domestically, also, as a matter of law or policy, prohibit the extradition of persons to face the death penalty. To deal with this situation, or to address the possibility that in some cases the United States might want to seek such assurances, a number of recent U.S. extradition treaties have contained provisions under which a Requested State may request an assurance from the Requesting State that the fugitive will not face the death penalty. Provisions of this sort appear in the extradition treaties with Paraguay, South Africa and Sri Lanka. In our negotiations with Belize, it was agreed that the possibility of the death penalty would not serve as a basis for the denial of extradition.

MUTUAL LEGAL ASSISTANCE TREATIES

Overview

I will now comment briefly on the mutual legal assistance treaties with Cyprus, Egypt, France, Greece, Nigeria, Romania, the Russian Federation, South Africa, and Ukraine, as well as the Inter-American Convention on Mutual Assistance in Criminal Matters with Related Optional Protocol. The Department of Justice will speak on these treaties at greater length.

These mutual legal assistance treaties before the Committee are similar to thirty-six bilateral MLATs that have entered into force with countries throughout the world. The U.S. Government’s mutual legal assistance treaty program is relatively new when compared with extradition, but has fast become a central aspect of our international law enforcement cooperation program. As a general matter, MLATs obligate the Requested State to provide the Requesting State with certain kinds of evidence, such as documents, records, and testimony, provided that treaty requirements are met. Ratification of the MLATs under consideration today will enhance our ability to investigate and prosecute a variety of crimes, including violent crime, drug trafficking, terrorism, and money laundering and other financial crimes.

All of the bilateral MLATs require the Contracting Parties to assist each other in proceedings related to the forfeiture of the proceeds and instrumentalities of criminal activity, to the extent such assistance is permitted by their respective laws. Such assistance may prove invaluable insofar as it is used to deprive criminals, including international drug traffickers and members of organized crime, of the benefits of their criminal activity. The bilateral MLATs also provide that forfeited and seized assets or the proceeds of their sale may be transferred to the other Party.

As is the case with all MLATs currently in force, there are exceptions in all of these instruments to the obligation to provide assistance. Although the language varies to a certain extent among the treaties, all of the pending MLATs provide that requests for assistance may be denied if their execution would prejudice the essential interests of the Requested State. All of them also contain a useful provision that ensures that our obligations under the treaty do not interfere with our own domestic law enforcement efforts by providing that the Requested State may postpone assistance if it determines that execution of a request would interfere with an ongoing criminal investigation or proceeding. For all of the treaties, the provisions relating to procedures to be followed in making requests and the type of assistance to be provided are similar to the other MLATs currently in force.

Inter-American Convention and Related Optional Protocol

The Inter-American Convention on Mutual Assistance in Criminal Matters will serve as a legal basis for mutual assistance in criminal matters between the United States and any state that also becomes a party. This Convention was negotiated at the Organization of American States beginning in the mid-1980's, and was adopted and opened for signature by the OAS General Assembly on May 23, 1992. It was signed on behalf of the United States on January 10, 1995. The Convention was shaped largely with the assistance of the United States, and is therefore in essential ways similar to the U.S. Government's typical modern bilateral MLATs. For example, it requires each party to identify a Central Authority for issuing and receiving requests of assistance; details a broad range of assistance that may be provided between the law enforcement authorities of parties, such as taking testimony and serving legal documents; and provides a list of bases for denial of assistance, such as where the public policy or basic public interests of the requested state would be prejudiced by granting the assistance. Unlike our typical modern mutual legal assistance treaties, however, it will not serve as the legal basis for asset sharing, such as the sharing of forfeited assets, which the negotiators determined was best left for bilateral agreements.

We also recommend Senate advice and consent to the Optional Protocol related to the Inter-American Convention on Mutual Assistance in Criminal Matters. This Protocol was negotiated at the Organization of American States in the early 1990's, was adopted and opened for signature by the OAS General Assembly on June 11, 1993, and was signed by the United States on January 10, 1995. While the OAS Convention will be a valuable tool for obtaining assistance in a wide variety of criminal matters, it contains certain limitations regarding assistance in cases involving tax offenses. Most significantly, under Article 9(f) of the Convention, a party may decline assistance in investigations and proceedings involving certain tax offenses. While the United States delegation consistently opposed this provision during the negotiation of the Convention, it ultimately joined consensus on the Article as a whole, but at the same time proposed an additional protocol to enable assistance in tax matters. The United States considers criminal tax investigations to be an important aspect of a State's overall strategy for combating crime, and believes that such investigations are also an increasingly important weapon in the battle against offenses such as drug trafficking and organized crime. The first article of the Protocol removes the discretion of Protocol signatories to refuse assistance on the grounds that a tax offense is involved. The second article clarifies that the limited dual criminality provision in Article 5 of the Convention should be interpreted liberally in cases involving tax offenses.

Recommended Understandings Related to Inter-American Convention and Related Optional Protocol

The Administration recommends that the United States include two Understandings in its instrument of ratification for the Convention, and one Understanding in its instrument of ratification for the Related Optional Protocol. These Understandings, the proposed texts of which were included in the Administration's transmittal of the Convention and Related Optional Protocol to the Senate, would clarify the views of the United States about certain provisions of the Convention and Protocol.

First, regarding Article 25 of the Convention (on limitations on the use of information or evidence), we recommend an Understanding be included in the United States instrument of ratification that the disclosure and use limitations stated in Article 25 shall no longer apply if such information or evidence is made public in a manner consistent with the Article. When evidence obtained under the Convention has been revealed publicly, in court records or otherwise, that information effectively becomes part of the public domain and can be obtained by anyone. This principle is explicit in most of our bilateral MLATs, and implicit in the operation of the Convention, but

since it was not addressed in the text of the Convention we have determined it would be advisable to include an Understanding to this effect in the U.S. instrument of ratification.

Second, we recommend an Understanding be included in the United States instrument of ratification for the Convention and the Protocol, regarding Article 36 of the Convention and Article 3(5) of the Protocol. These provisions make clear that the assistance and procedures set forth in these instruments shall not prevent any of the Contracting Parties from granting assistance to another Party through the provisions of other international agreements, or bilateral treaties, or through the provisions of national laws. The Parties also may provide assistance pursuant to any bilateral arrangement, agreement, or practice that may be applicable. The Understanding that would be included in each instrument of ratification reaffirms these points.

A key provision of all MLATs is the creation of "Central Authorities" to coordinate requests for assistance. For the United States, the Attorney General or her designee is the Central Authority. Since the Department of Justice implements these treaties, I will defer to Deputy Assistant Attorney General Swartz in describing the other specific provisions of these instruments and issues related to their implementation.

STOLEN VEHICLE TREATIES

Also before the Committee are stolen vehicle treaties with Belize, Costa Rica, the Dominican Republic, Guatemala and Panama.

The U.S. stolen vehicle treaty program seeks to eliminate the difficulties faced by owners of vehicles that have been stolen and transported across international borders. Generally speaking, these treaties establish procedures for the recovery and return of vehicles that are documented in the territory of one party, stolen within its territory or from one of its nationals, and found in the territory of the other party. Many countries lack a sufficient institutional and procedural framework for the repatriation of vehicles that were stolen in other countries, and the stolen vehicle treaties remedy this deficiency.

The United States currently has one such treaty in force, the Convention between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft of 1981. That treaty entered into force between the United States and Mexico in 1983 and according to insurance industry estimates prompts the return to the United States of approximately two thousand vehicles annually. The five treaties currently before the Committee build on the precedent with Mexico, and will create a legal basis for the return of stolen vehicles from several other nearby countries. Like the 1981 treaty with Mexico, the treaties with Costa Rica, Guatemala, and Panama also provide for the return of stolen aircraft.

We relied heavily on our experience under the 1981 Mexico treaty in developing these new treaties with neighboring countries. Thus, all of the new treaties contain provisions similar to those in the Mexico treaty by providing procedures for the country that finds a vehicle covered by the treaty to notify the other country that the vehicle has been located and to provide an opportunity for the vehicle to be returned once the owner has made a request. The treaties set deadlines for action by the party receiving a request for the return of a vehicle and give owners more time to claim vehicles than is provided for under the U.S.-Mexico treaty. The treaties also provide that if the U.S. government learns that the other party may have seized or impounded a stolen vehicle but has failed to provide notification, the U.S. government may seek official confirmation of the seizure or impoundment, and request formal notification under the treaty. The other party is then required to submit such notification or explain why notification is not necessary.

The United States insurance industry strongly supports these treaties, since it is typically subrogated to the ownership interests of U.S. citizens or businesses whose vehicles have been stolen and taken overseas. In fact, insurance industry representatives have informed us that the mere negotiation and signature of several of the treaties now before the Senate has already brought discernible improvements in the cooperation of the foreign authorities abroad. Ratification and full implementation of the treaties should significantly improve the return of U.S. vehicles from the countries concerned.

INTER-AMERICAN CONVENTION ON SERVING CRIMINAL SENTENCES ABROAD

The Committee also has before it the Inter-American Convention on Serving Criminal Sentences Abroad. The purpose of this instrument is to facilitate the transfer of persons sentenced in the United States and in other states parties to their own nations to serve their sentences. The Convention achieves this purpose by es-

tablishing procedures that can be initiated by sentenced persons who prefer to serve their sentences in their own countries. The means employed to achieve this purpose are similar to those embodied in existing bilateral prisoner transfer treaties in force between the United States and eight other countries and Hong Kong, and the Council of Europe Convention, which now has over 40 parties.

The major advantages of concluding a multilateral convention with the OAS member States are the establishment of uniform procedures and the saving of resources that would be required to negotiate and bring into force bilateral treaties with a large number of countries in the hemisphere. Immediately upon U.S. ratification, this Convention would establish a prisoner transfer relationship between the United States and Venezuela, which has already ratified the Convention. Brazil, Ecuador and Paraguay have all signed the Convention but have not ratified. Once each of them completes its domestic ratification processes, and becomes a party, we would have new prisoner transfer relationships with them as well. This would further enhance our ability to seek the return of American citizen prisoners who want to serve their sentences in more familiar surroundings and to return foreign prisoners who are in the custody of U.S. prisons to other countries to serve their sentences, subject to the consent of both parties and the prisoner. As other OAS member States join the Convention, the number of countries with whom we have prisoner transfer relationships will further expand and could include countries such as Colombia, the Dominican Republic, Jamaica, Haiti, El Salvador, and Guatemala.

The United States can become a party to the Convention without any additional legislation. However, to clarify our interpretation of certain provisions of the Convention, and to ensure that documents for the United States are provided in English, we recommend that the U.S. instrument of ratification include one Understanding and one Reservation. The proposed texts of the Understanding and Reservation were included in the Administration's transmittal of the Convention to the Senate.

The proposed Understanding, which relates to Articles III, IV, V and VI, would ensure that the Convention may be implemented consistent with existing legislation pertaining to prisoner transfer, by clarifying that the consent of all parties—the prisoner, the sentencing state, the receiving state, and, where applicable, the sub-federal state or province—is required prior to the transfer. Although this requirement is implied by the Convention text, consent by all parties is such a fundamental feature of our prisoner transfer regime that we believe it is appropriate to clarify the text in this manner.

The proposed Reservation relates to Article V(7) and sets forth a requirement that before a U.S. national may be returned, the sentencing state must provide English language versions of a certified copy of the sentence, including information on the amount of time already served and the time off that could be credited, and any other information the receiving state deems necessary. These documents must also be provided in the language of the sentencing state. The Reservation further provides that the United States would do the same for the benefit of the requesting state in like circumstances. This Reservation will greatly facilitate U.S. implementation of the Convention.

PROTOCOL TO 1950 U.S.-IRELAND CONSULAR CONVENTION

Finally, also before the Committee is a Protocol to amend the 1950 Consular Convention Between the United States of America and Ireland. The Protocol will expand the scope of tax exemption under the Consular Convention to provide for reciprocal exemption from all taxes, including Value Added Taxes (VAT) on goods and services for the official use of the mission or for the personal use of mission members and families. It will provide financial benefit to the United States, both through direct savings on embassy purchases of goods and services as well as through lowering the cost of living for United States Government employees assigned to the U.S. Embassy in Dublin.

Mr. Chairman, we very much appreciate the Committee's decision to consider these important treaties.

I will be happy to answer any questions the Committee may have.

Senator GRAMS. Gentlemen, thank you for your opening statements.

I have a series of general questions dealing with all areas of the treaties that we're talking about, so I am not going to specifically direct them to either of you, but if either or both of you would like to comment, you would be welcome to do so.

First, my questions dealing with extradition: There is currently a debate as to whether the United States should waive visas or agree to debt relief for countries that never extradite their citizens to the United States to face justice for crimes committed here. What would your position be on those issues?

Mr. WITTEN, we will start with you.

Mr. WITTEN. Thank you. We have addressed the issue of tying extradition issues with other aspects of foreign affairs in a couple of contexts, including in the visa waiver context. Our position has been that extradition treaties present issues that are one part of our overall relationship with other countries.

We strive, as the committee is aware, to see that our extradition treaties are enforced to the greatest possible extent. And we are updating treaties to see that their implementation is improved even further. We are reluctant, though, to tie the performance of countries under extradition treaties to other issues that are being addressed separately.

Mr. SWARTZ. Mr. Chairman, if I may add the Department of Justice's viewpoint in that regard. We agree with the Department of State that there should be no tie between those issues. Extradition is denied by countries for a variety of reasons and in a variety of circumstances. And we do have remedies available to address those denials when we believe that they are improper.

Those include intervention at the diplomatic levels. They include working at the law enforcement levels. And from a practical law enforcement point of view, we believe that the denial of extradition in a particular case should not be seen as possibly jeopardizing our relationship with the country, particularly because it may affect other law enforcement matters in which we are working with that country.

Senator GRAMS. But this says for those that never extradite their citizens. So they are not working cooperatively with us at least in this area. So you are saying there should be no hammer or retribution in any way, especially dealing with other areas of debt relief or visas.

Mr. SWARTZ. Mr. Chairman, to the extent that a country refuses to extradite its citizens under any circumstances due to constitutional or statutory bars, as we have pointed out and the committee is aware, we have tried to work with such countries to encourage them to change their laws, to permit the extradition of their nationals.

We believe that we have had some success, particularly in Latin America in that regard, and we continue to press that as an important Department of Justice objective, but we do not believe that it would be appropriate to tie visa waiver or other conditions to the failure of a state to extradite nationals.

Senator GRAMS. All right. Has a foreign state ever declined to surrender a fugitive to the United States on the grounds that the fugitive did not receive consular warnings in the United States at the time of his/her arrest here? Is that a concern as well?

Mr. WITTEN. Mr. Chairman, I am not aware that this has ever come up.

Mr. SWARTZ. I am not aware of such an incident as well.

Senator GRAMS. OK. Has the United States ever declined to surrender a fugitive to a foreign state for reasons related to the Torture Convention? And I guess, what happens when a fugitive tries to defeat extradition and/or surrender by relying on the Torture Convention?

Mr. WITTEN. I can address that, Mr. Chairman. The Torture Convention has been in force for the United States for 6 years. And in those 6 years, from time to time, fugitives, or their families, or their attorneys, have occasionally raised the issue with us of the possibility of mistreatment, including torture.

And as of, I believe, 2 years ago, the State Department promulgated regulations that I believe are codified at 22 CFR 95, in which are set forth the procedures for notifying the State Department of allegations of torture. The way we have handled that, as noted in our procedures and in our general practice, is after we receive information, or allegations, we research them, we contact our embassies, we work with the regional bureaus and others, we consult with the Department of Justice about what information it might have, and with our counterparts overseas.

And from time to time, we have engaged in a dialog with foreign governments that are at issue where an individual, or their representatives, have made claims. Thus far, we have not needed to invoke the rights under the Torture Convention to deny extradition. However, the State Department takes the responsibilities very seriously as reflected in our promulgated regulations.

Senator GRAMS. So to date no decline has been made because of this.

Mr. WITTEN. That is correct, sir.

Senator GRAMS. OK. But it has been raised on issues or instances.

Mr. WITTEN. From time to time, and especially since the regulations were promulgated and word is out more than it was 2 years ago.

Senator GRAMS. Have there been any significant extradition developments recently in the European Union at all, any conflicts, or questions, or concerns?

Mr. WITTEN. Mr. Chairman, within the European Union our extradition relations are bilaterally with the individual states, and we are in a continuing dialog with those states to try to improve the extradition relations.

Senator GRAMS. OK. And in another area, why is Paraguay, or the Paraguay Extradition Treaty, silent on what we call the expiration of the statute of limitations? I think I would like you to explain the U.S. position that the expiration of the statute of limitations will not preclude extradition to or from Paraguay.

Mr. WITTEN. Mr. Chairman, the issue of statute of limitations I am aware was discussed in the negotiations in the Paraguay treaty. And with your permission, I would like to submit something for the record after I get enough information to give you an authoritative answer.

Senator GRAMS. All right. I will look forward to the response. Thank you.

Mr. Swartz, anything?

Mr. SWARTZ. We, too, will join with the Department of State in submitting the answer on that.

[The following response was subsequently supplied:]

RESPONSE TO SENATOR GRAMS' QUESTION

Question. Why is the Paraguay extradition treaty silent on what we call the expiration of the statute of limitations? I think I would like you to explain the U.S. position that the expiration of the statute of limitations will not preclude extradition to and from Paraguay.

Answer. Most recent U.S. extradition treaties contain a provision addressing the relevance of the statute of limitations in extradition proceedings. The preferred U.S. Government formulation, used in many recent treaties, is that the decision whether to extradite shall be made without regard to the statute of limitations of either the Requesting or Requested States.

The 1973 extradition treaty with Paraguay currently in force bars extradition if the statute of limitations of either the Requested or Requesting State has expired. In the negotiations for the new treaty, because of particular provisions in its domestic law, the Paraguay delegation indicated that it could not agree to include any provision on statute of limitations that did not prohibit extradition on the basis of the expiration of the Requested State's statute of limitations. Accordingly, the U.S. delegation determined, and the Paraguayan delegation agreed, that the best solution under those circumstances would be for the Treaty to remain silent on the issue.

By omitting any reference to lapse of time, the U.S. delegation intended that, at least in the context of extradition proceedings in the United States, the decision whether to extradite would be made without regard to the statute of limitations of either the Requesting or Requested State. While current extradition practice in Paraguay is to deny extradition in cases where Paraguay's statute of limitations would have expired if the crime had been committed there, the Paraguayan delegation confirmed that absence of language to this effect in the Treaty leaves open the possibility of greater flexibility on a case-by-case basis. In any event, the omission is an improvement over the 1973 Treaty, which, as noted, expressly provides that extradition shall be refused if the statute of limitations of either the Requesting or Requested State has expired.

Senator GRAMS. OK. And I guess I would ask: What is next on the U.S. agenda for extradition treaty negotiations? Any in the works planned, updates, modernizations, new?

Mr. WITTEN. We have—just a minute, Mr. Chairman.

[Pause.]

Mr. WITTEN. Mr. Chairman, we have several negotiations that have had rounds of discussion, none that have yet matured into a signed instrument. These include the Czech Republic, to update the existing relationship, Lithuania, and we have had discussions with Israel to update the 1962 U.S./Israel treaty.

Senator GRAMS. All right. Thank you. We will address those then maybe next Congress, hopefully.

Mr. WITTEN. Yes, sir.

Senator GRAMS. In another area, the International Criminal Court that I talked about in my opening statement: Assuming that the International Court manages to come into being, how will we be able to prevent or control the re-extradition to the International Criminal Court of fugitives who we surrender to other countries?

Mr. WITTEN. Mr. Chairman, this issue arose, as you know, in 1998, and it was discussed again at our Korea hearing in 1999. We understand that it is likely that the Senate, and your opening statement reflected, that the Senate will likely impose an understanding to be included in the instruments of ratification.

We would include that Understanding related to the operation of the rule of specialty, which is the rule that countries receiving fugi-

tives from the United States cannot re-extradite to third countries or bring additional charges without our consent. When we exchange the instruments of ratification, that in our view puts the other country on notice of our authoritative and joint interpretation of the rule of specialty. And we would anticipate that through the operation of the treaty and through individual cases, we would ensure that re-extradition would not happen under those circumstances contemplated by the committee.

Senator GRAMS. Is this a make or break in any kind of talks or negotiations with other countries? Have they raised this concern? I mean, we would want to make sure that they lived up to that portion, but has it been a problem at all?

Mr. WITTEN. The International Criminal Court is not up and running, of course, so it has not been tested. As we have had our dialogs in the wake of a 1998 treaties with a number of countries, they have asked us to explain our position, explain the Understanding because it is not a typical issue that arises in bilateral extradition negotiations.

Normally, in our talks we are talking about procedures, and what crimes are covered, and so forth. And the Understandings have led occasionally to lengthy discussions about the U.S. position. But so far, for each of the 16 complete treaties that were approved by the Senate in 1998, plus the Korea treaty, all of our partners that have completed their process have accepted the Understanding in the context of receiving and accepting our instrument of ratification.

Senator GRAMS. Assuming that the court ever does come into being, is there any possible way for the United States to prevent an MLAT treaty partner from passing onto the International Criminal Court information or material that we provide our partner under MLAT, not the extradition of a person, but this evidence or information?

Mr. Swartz.

Mr. SWARTZ. Mr. Chairman, if an understanding was to be included in the Senate's resolution, of course, that would be included in the instrument of ratification. And there would then be a question of how this would be implemented with regard to the treaties.

With regard to the OAS MLAT that is now before the committee, the evidence can only be used for the criminal investigation or prosecution for which it was provided. In the other MLATs now before the committee, the state providing the evidence must expressly invoke the use limitation. And we are considering how to best implement the Understanding once it is in an instrument of ratification.

That could include the possibility of general notice, or through a note, and it may make it appropriate in particular cases to actually make a reservation at the time that the evidence is provided. But, we believe that with those possibilities there are protections available with regard to this issue.

Senator GRAMS. Does the Department of Justice now routinely include in all MLAT transmittal letters language which forbids MLAT treaty partners from passing U.S. provided information to the International Criminal Court?

Mr. SWARTZ. No, we do not. We rely on the decisions that we have made with regard to particular cases, if we feel there is a need. Or as I have suggested before, the possibility exists, if there is a need, to send a diplomatic note on that basis.

Senator GRAMS. So you do it on a targeted basis, not on a—

Mr. SWARTZ. And since the Court is not in operation, we have never had to take those steps, but we would proceed on a targeted basis if that seemed appropriate.

Senator GRAMS. Any concern that some of these cases could linger over in case this court ever comes into being?

Mr. SWARTZ. I am not aware of any case where we have that concern.

Senator GRAMS. All right. Thank you.

The Mutual Legal Assistance Treaties, what confidence do you have that signing an MLAT with the Government of Russia would yield cooperation from Russian law enforcement agencies that will be more forthcoming, reliable, or honest?

Mr. SWARTZ. From the Department of Justice's point of view, we believe that the decision to go forward and ratify the MLAT with Russia first of all, would help make cooperation more reliable in the sense that it will increase the formal nature of the cooperation beyond that we now have under the Mutual Legal Assistance Agreement.

For a variety of reasons, we have been informed that the Russian Government looks upon the treaty obligation that would be imposed by an MLAT as being binding on more government agencies than the MLAA that is currently in place.

In a more general sense, it has been the Department of Justice's experience that the establishment of an MLAT relationship itself provides a basis for the development of ongoing trust and cooperation between law enforcement agencies. We have encountered in a number of countries where we have established MLAT relationships, initial difficulties. That is not an unusual experience for us.

But the process of working through the MLAT, of having central authorities dealing with each other itself provides the kind of framework that makes law enforcement cooperation increasingly effective, increasingly a matter of routine, and serves our interest in ensuring that our law enforcement investigations and prosecutions obtain the evidence that they need.

Senator GRAMS. So in other words, you do have more confidence.

Mr. SWARTZ. We do have more confidence. That is correct.

Senator GRAMS. Ever since Vladimir Putin became President, the Kremlin has used the state's police powers in an increasingly arbitrary and undemocratic manner. And just to note a few examples of that: The arrest and mistreatment of Edmond Pope; continuing harassment and intimidation of Russian NGO's and journalists who criticize the Kremlin including Andre Babitsky by Russian law enforcement agencies; Putin's arbitrary use of law enforcement agencies to help Russian oligarches; the Russian Government's refusal to be fully forthcoming in international corruption and investigations; and also endemic corruption in law enforcement agencies.

So does signing an MLAT with the Government of Russia in any way signify that the United States regards the Government of Rus-

sia to be a partner that uses its power in a genuinely fully legitimate way?

Mr. WITTEN. Mr. Chairman, I will address that issue. First of all, the MLAT, in our view, does not imply a blanket endorsement of all institutions in Russia. It is a reflection of a commitment that has evolved particularly since the MLAA, the Mutual Legal Assistance Agreement, entered into force in February 1996, that the two governments are willing to commit themselves to work together on law enforcement matters and that they have a common agenda to fight crime.

As Mr. Swartz has indicated, the signing and hopefully soon the ratification and entry into force of this agreement is a step. It is not a panacea, it will not address all issues, many of which are being addressed in other forums in other ways, but it is an important tool to bridge and strengthen the relationship between the two law enforcement communities. And the State Department endorses it fully.

Senator GRAMS. As you know, since April 3, 2000, U.S. citizen Edmond Pope has been imprisoned in Moscow's notorious prison on an unsubstantiated charge of espionage.

Pope has bone cancer that currently is in remission, and there is a genuine fear that his incarceration could exacerbate the condition, and is dangerously today jeopardizing his health. Pope has not received appropriate medical treatment. The Russian Government refuses U.S. Governmental request that Pope be examined by an American doctor. Another American citizen imprisoned in a Russian jail recently died from inadequate medical attention.

Can we, or how can we possibly, proceed with an MLAT with the Russian Government when it uses its police power in this arbitrary, and what we would consider cruel, manner, against an American citizen?

Mr. WITTEN. Senator, I would like to speak about the Pope case and then address your question. We have engaged in a broad diplomatic effort to bring Mr. Pope home. We have raised this case in every high level meeting with the Russians in the past weeks and months.

The President, the Secretary of State, and the National Security Advisor have all raised this issue on several occasions. It is our view that the Russian Government should release Mr. Pope and allow him to come home. We have no evidence that Mr. Pope violated any Russian laws. We are disturbed and concerned that he remains in custody.

Every indication is that Mr. Pope's work in Russia was transparent and fully known to Russian authorities. Mr. Pope, as you have indicated, Mr. Chairman, has been denied access to satisfactory medical care during his period of detention. And our Embassy's repeated request for the Embassy doctor to visit him have been denied and his medical records, and test results have not been made available to us.

This is a matter obviously, Mr. Chairman, of tremendous importance, not merely as a consular matter, but it has become a major diplomatic matter raised for example by the President, Secretary of State, and National Security Adviser. And we will continue the ef-

fort to see that Mr. Pope is released and receives satisfactory medical treatment.

That said, Mr. Chairman, the fact that we have issues like the Pope case or other cases with the Government of Russia doesn't undermine the basic message that Mr. Swartz gave, and hopefully I have been able to give, about the importance of creating bridges on issues like law enforcement cooperation.

It can only help the relationship between the U.S. and Russia to have a fabric of relations that will enable our investigators and prosecutors and others to work closely on fundamentally important issues like organized crime, corruption, and so forth. So I believe that the issues can be reconciled and should be reconciled in a way that we pursue these kinds of issues and we enter into this new stronger relationship on law enforcement matters.

Senator GRAMS. Do you see the Russians cooperating in that way? I mean, outside of the Pope case, or is the Pope case one of these kind of insurmountable road blocks in negotiations on other areas?

Mr. SWARTZ. We do see law enforcement cooperation in other contexts. Our experience under the MLAA, admittedly, has been difficult in large part because of the inability, due to the less formal structure of the MLAA, to establish a counterpart central authority in the Procuracy.

On the other hand, we do have regular ongoing and important law enforcement links in cases that we are working on involving Russia. The FBI, for instance, is engaged in a number of highly important investigations involving Russian organized crime, money laundering and corruption, all of which would be facilitated by the ratification of an MLAT. The FBI strongly supports this. Law enforcement agencies generally see this as an important next step in the relationships that have been developed under the MLAA.

Senator GRAMS. So you both feel that we should proceed or that proceeding with an MLAT with the Russian Government is beneficial and can maybe help overcome some of these other problems.

Mr. SWARTZ. We strongly believe it is in the law enforcement interests of the United States to do so.

Mr. WITTEN. Yes, we fully endorse it, Mr. Chairman.

Senator GRAMS. Moving onto the OAS Agreement: Why did the OAS member states negotiate an optional protocol governing tax assistance instead of incorporating provisions for this kind of assistance into the main agreement? Is the optional protocol basically now in force, and if not, what are its prospects?

Mr. WITTEN. Mr. Chairman, as I understand the history of the OAS MLAT, article 9, which includes all the bases for denial, was the subject of a tremendous amount of negotiation.

In our bilateral MLATs we have something of a formula of "security and other essential interests" or similar phrasings to discuss the bases for denial. In a multilateral context with so many different legal systems, article 9 on the bases of denial became much more complicated and included a wider variety of bases to deny assistance.

And from the perspective of some OAS countries during this consensus exercise, they wanted language in article 9 that would create the possibility of denial in certain kinds of tax cases. The U.S.

resisted this during negotiations, but overall joined consensus on article 9 as a whole.

But a part of the dynamic of that negotiation was that we also insisted that there be a second instrument developed so that the United States could encourage that as between parties to the second instrument, that is the tax protocol that you have mentioned, that the bases for denial in article 9 on tax matters would be greatly restricted and eliminated. And therefore there are two instruments before the committee.

Your question about whether the protocol is in force, the answer is no. The United States was a leader in the negotiation of these two instruments. Our view is that once we become a party to the two instruments, we will be in a far better position to advocate that other countries become a party.

And we hope that after we become a party, these will be an acorn out of which an oak will grow in terms of a lot of MLAT relations within the hemisphere. And we would advocate both the MLAT and the optional protocol.

Mr. SWARTZ. The Department of Justice fully agrees with that position. We would add only that Brazil, Chile, Ecuador, and Paraguay have signed the optional protocol. So if we did enter into and ratify it, we would enter into treaty relationships as soon as they ratify.

Senator GRAMS. OK. Thank you, gentlemen.

On the stolen vehicle treaties, were the views of the U.S. insurance industry taken into account during negotiations with these treaties? And if so, why or how?

Mr. WITTEN. The insurance industry advocated these treaties. As I mentioned, Mr. Chairman, in my prepared testimony, typically what happens in the stolen vehicle context is that the insurers are subrogated to the rights of U.S. citizens and businesses that have vehicles stolen or embezzled and taken overseas.

The Mexico relationship has been a tremendous benefit with 2,000 or more cars returned to the United States each year. The insurance industry brought to the Federal Government's attention that Mexico was the single biggest matter, but in other countries in the hemisphere, particularly Mexico's neighbors and some countries in the Caribbean, there were also problems of vehicles being stolen from the United States and brought to those countries. So they strongly encouraged this, and we have been in close consultation with the U.S. insurance industry throughout the process.

Senator GRAMS. Just a couple of quick followup questions and then I will recognize the Senator that just entered.

Why do only three of the five treaties explicitly cover aircraft? And if recovered vehicles must be returned to their owners quickly, how can prosecutors here go forward with them in relation to criminal proceedings?

Mr. WITTEN. I will address that, Mr. Chairman. Our focus in the negotiation was primarily on stolen vehicles, and the initial negotiations that we had were to expand the Mexico relationship so that vehicles that were taken in containers, or shipped over-land through Mexico, were returned.

During negotiations, we also discussed with these five treaty parties the possibility of including stolen aircraft. For three of them,

it was decided to be mutually advantageous to include treaty provisions on aircraft.

The fact that two of the treaties, Belize and Dominican Republic, do not have aircraft, does not mean that we could not request the return of aircraft from them, and does not imply that in the other three treaties there was a particular problem. It was the function of individual negotiations, and therefore, while all five cover vehicles, three are explicit on aircraft. But we could, of course, ask the other two outside the treaty framework.

Senator GRAMS. So there has been success with these vehicles being returned in due time so the process of any criminal investigation or proceedings would go forward. So you think this is—

Mr. WITTEN. I am sorry, Mr. Chairman. You asked also about being able to hold back vehicles that are the subject of criminal proceedings. All of these treaties provide that for example, if U.S. authorities had a vehicle that was the subject of a forfeiture action or was relevant to a criminal investigation, we would not have to disrupt our process and return it because the owner was identified in another country.

The treaties, I believe, typically in article 8 or 9, have a provision that indicates that if the vehicle is the subject of a pending law enforcement action, that action can continue and the vehicles do not have to be returned and disrupt that action.

Mr. SWARTZ. And I would add that the treaties actually facilitate law enforcement cooperation by encouraging the sharing of information, and allow our law enforcement agencies, working with foreign law enforcement agencies, to penetrate where oftentimes organized crime rings engage in car theft.

Senator GRAMS. In the Inter-American Convention on Serving the Sentences Abroad, if the Senate approves this convention, will it open the door to immediate cooperation with any countries where there are no existing treaties? And if not, then what would the point be?

Mr. WITTEN. Mr. Chairman, the day we submit our instrument of ratification, we will have for the first time prisoner transfer relations with Venezuela. Three other countries in South America—Brazil, Ecuador, and Paraguay—have signed and not yet ratified. I believe that is accurate. I will correct it for the record if need be. It is correct.

Mr. SWARTZ. That is correct.

Mr. WITTEN. And once those countries deposit their instruments, that would be four new relations in South America. And over time, we would expand the reach of the convention. We would expect to have even more relations within the hemisphere based on the OAS instrument.

Senator GRAMS. What about prisoner consent, is that part of the negotiations?

Mr. SWARTZ. Yes, that is a condition that the prisoner has to consent to the transfer. That is correct.

Senator GRAMS. What about state governments' willingness to transfer foreign-born prisoners under their penal system? Have the states agreed to this as well?

Mr. WITTEN. The treaty expressly provides, and the Understanding that the administration has proposed, echoes this, that for

the United States, when we have a sub-Federal prosecution where someone is in a state or local jail, four consents would be required instead of three: The receiving state, the sending state, the state or local jurisdiction in the United States, and the prisoner.

Senator GRAMS. And all four of those have to be met before any transfer could be made.

Mr. WITTEN. Yes.

Senator GRAMS. So anybody holds a veto on this.

Mr. WITTEN. In any non-Federal case, that is correct. The state authority that holds the prisoner would need to agree.

Senator GRAMS. All right. I only have one other question, but I would like to break here for a moment if Senator Sarbanes is prepared and would like to be recognized now or in a moment.

Senator SARBANES. Well, why not ask further questions?

Senator GRAMS. OK. I only have two quick questions on an area here dealing with the protocol to the U.S./Ireland Consular Convention.

And just wrapping this up, since both the United States and Ireland are parties to the Vienna conventions which govern diplomatic and consular relations, why do we even need this kind of protocol?

Mr. WITTEN. This protocol resulted from a diplomatic dialog that the United States and Ireland had leading up to negotiations in the spring of 1998.

There was a disagreement about whether the existing legal instruments, the Vienna Convention on Diplomatic Relations, the 1950 U.S. Irish Consular Convention, were adequate under Irish law to grant exemptions from value added taxes.

After consultations between the United States and Ireland, we decided that the best way to address this and ensure that our diplomatic missions and personnel would not be subject to value added tax in Ireland would be an amendment of the existing instrument, the consular convention, which has some language on taxation issues.

And basically, the protocol before the committee provides an authoritative interpretation and gloss on the underlying 1950 convention. The Irish Government informed us that from their perspective it needed to be a formal treaty agreement and that less formal arrangements that might have been considered were not sufficient under their domestic law.

Senator GRAMS. So this was to help put definition to taxation, and if so, who is helped by this?

Mr. WITTEN. The United States is helped by it, because Ireland has value added taxes, I understand between 18 and 21 percent is added to the cost. And under the pre-protocol interpretation, that value added tax would not be a category of tax that would be exempt from taxation under Irish domestic law. And with this instrument, the Irish Government does have the legal basis to grant us exemption from value added tax.

Senator GRAMS. All right. Thank you very much, gentlemen.

I would now like to recognize Senator Paul Sarbanes for any opening comments or questions he may have.

Senator SARBANES. Well, Mr. Chairman, I do not have any questions, and the only comment I want to make is that I hope, unless there is some good reason of which I am not aware right now, but

in fact, who knows, there may be some problem that has been identified with one or another of these treaties, I hope that we would be able to put them on a business agenda and move them through the Senate before we adjourn this year.

We are only here for 4 weeks now, and unless we do that, all of these things are simply going to hang out there. The United States makes a strong point of the need for cooperation, the effort to carry through on a whole range of international law enforcement problems. And it seems to me that an important step in laying the basis for this cooperation is to get these various treaties approved.

Where do they stand in terms of the approval of the other treaty party, do you know, just as a general proposition?

Mr. SWARTZ. We can address that, Senator.

Senator SARBANES. I do not need each one specifically, but have most of them been through the ratification process within their own country, or are they awaiting us to do it first, or where do we stand?

Mr. WITTEN. Senator, it does vary. Within the extradition treaties, our understanding is that three of the four other countries have already completed their process, Belize, Paraguay, and Sri Lanka.

The MLATs, our information—we are still checking on one, but at least two of the nine bilateral partners have already completed their process. Stolen vehicle treaties, three of the five have completed their process. So we are about halfway there, I think.

Senator GRAMS. And, Senator, just to answer your question, too, talking with staff that the intention is to make sure this is on the business calendar as early as the 27th of this month, and hopefully will be passed out then and ready for approval. And also according to staff, many countries do await our action before they finish theirs. So we do hope to get this done before the end of this Congress.

Senator SARBANES. I am, in a sense, relieved to hear that because I think as a matter of expeditiously doing our own business, and since once we adjourn we will not be back until—presumably will not be back until next January. And then there is a whole gearing up process that accompanies any new Congress. You will be talking about a number of months into the new year before we would be in a position to address these matters again.

So I am pleased to hear that it is the intention to move them forward out of the committee and hopefully through the Senate so we can get them into place.

Thank you, Mr. Chairman, that is all.

Senator GRAMS. Well, thank you very much, Mr. Swartz, Mr. Witten. I appreciate your time, your answers, your testimony this morning. I would like to leave the record of this committee open for at least three business days to allow any of the other Senators who may want to submit a question in writing to you. And then, if you would, quickly respond.

But again, thank you very much for your time this morning and your answers.

Mr. SWARTZ. Thank you, Mr. Chairman.

Mr. WITTEN. Thank you, Mr. Chairman.

[Whereupon, at 10:30 a.m., the hearing was adjourned.]

ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

RESPONSES OF BRUCE C. SWARTZ AND SAMUEL M. WITTEN TO ADDITIONAL
QUESTIONS SUBMITTED BY SENATOR JESSE HELMS

RUSSIAN MLAT

Question 1. What confidence do you have that signing an MLAT with the Government of Russia will yield cooperation from Russian law enforcement agencies that will be more forthcoming, reliable, and honest?

Answer. We believe an MLAT with Russia will increase and enhance the cooperation that has been gradually developing under the legal framework of the mutual legal assistance agreement (MLAA), which has been in force since February 1996.

We negotiated the MLAT because of U.S. law enforcement's urgent need for greater and more effective legal assistance and cooperation between our countries, particularly on matters involving organized crime, corruption, money laundering and large scale fraud. The urgency results from the increase in crime, including Russian organized crime, and the opening of borders following the breakup of the Soviet Union.

The U.S.-Russia MLAT will provide a broader legal framework for assistance than currently exists. It will facilitate assistance on a broader range of criminal issues of importance to the United States, including in the area of computer crime and trafficking in women. In the long term, it will further the rule of law in Russia and help that country regularize its law enforcement cooperation efforts overall. In this connection, we would seek under the MLAT to make the Russian Central Authority a more consistent and effective interlocutor than it has often been under the MLAA. We believe that the formality of a treaty, in addition to its broader coverage, will assist us toward that end, because it has greater force of law in Russia and would be recognized by all Russian law enforcement agencies.

Question 2. Ever since Vladimir Putin became President, the Kremlin has used the state's police powers in an increasingly arbitrary and undemocratic manner. To note but a few examples:

- the arrest and mistreatment of Edmond Pope;
- continuing harassment and intimidation of Russian NGO's and journalists who criticize the Kremlin, including Andry Babitsky, by Russian law enforcement agencies;
- Putin's arbitrary use of law enforcement agencies to help Russia's oligarchs;
- the Russian government's refusal to be fully forthcoming in international corruption investigations, and endemic corruption in Russian law enforcement agencies.

Does signing an MLAT with the Government of Russia in any way signify that the United States regards the Government of Russia to be a partner that uses its power in a genuinely fully legitimate way?

Answer. We do not believe that entering into an MLAT with Russia implies a blanket endorsement of Russia's law enforcement institutions, or diminishes the concerns or differences that the U.S. Government may have with aspects of those institutions. To the contrary, we believe that the MLAT should be entered into for pragmatic, law enforcement reasons: it will help us gain evidence that will allow us to obtain convictions in our courts. It will therefore assist our own criminal investigations and prosecutions. Moreover, the dialogue and cooperation that will result from the MLAT can only advance the regularization and improvement of law enforcement efforts in Russia, which in turn will allow Russia to confront organized crime and other criminal activity before it is exported.

Failure to enter into the MLAT does not necessarily mean that we will simply return to the status quo. Instead, that failure may undercut the progress we have made in law enforcement cooperation we have made to date.

Question 3. As you well know, since April 3, 2000, U.S. citizen Edmund Pope has been imprisoned in Moscow's notorious Lefortovo Prison on unsubstantiated charges of espionage. Pope has bone cancer that is in remission, and there is genuine fear that his incarceration could exacerbate this condition and is dangerously jeopardizing his health. Pope has not received appropriate medical attention. The Russian Government refuses U.S. government requests that Pope be examined by an American doctor. Another American citizen imprisoned in a Russian jail recently died due to inadequate medical attention. How can we possibly proceed with an MLAT with

the Russian government when it uses its police powers in this arbitrary and cruel way against American citizens?

Answer. We have engaged in a broad diplomatic effort to bring Mr. Pope home. We have raised his case in every high level meeting with the Russians in the past weeks and months. The President, the Secretary of State, and the National Security Adviser have all raised this issue on several occasions. We have repeatedly said that the Russian Government should release Mr. Pope and allow him to return home. We have no evidence that Mr. Pope violated any Russian laws. We are disturbed and concerned that he remains in custody. Every indication is that Mr. Pope's work in Russia was transparent and fully known to Russian authorities. Mr. Pope has been denied access to satisfactory medical care during his period of detention. Our Embassy's repeated requests for the Embassy doctor to see Mr. Pope have been denied and his medical records and test results have not been made available to us.

However, the fact that we have disagreements with Russia over the Pope case and some other cases involving Americans in Russia does not mean that we should not enter into a new and stronger agreement with Russia for law enforcement cooperation. Indeed, it is important in this kind of developing relationship to ensure that channels of communication between the two governments are as strong as possible, to develop increased mutual trust and create more and better opportunities to improve relevant law enforcement institutions.

EXTRADITION

Question 1. Under the U.S. Spain judicial assistance treaty, the Clinton Administration provided hundreds of declassified U.S. documents and other assistance to the Spanish judge trying to prove that President Augusto Pinochet did not enjoy head of state immunity from prosecution. In light of its efforts to help Spain extradite Pinochet, is it the President's view that President Fidel Castro enjoys head of state immunity for the murder of American citizens whose aircraft was shot down by the Cuban Air Force in 1996?

Answer. The U.S. Department of Justice has assisted Spain in connection with a pending Spanish criminal law investigation as contemplated by the U.S.-Spain Mutual Legal Assistance Treaty. The United States did not provide this cooperation to help Spain extradite Pinochet or to help decide any immunity issue, and we took no position on the merits of the Spanish case. We would expect reciprocal assistance from Spain in connection with U.S. criminal cases and proceedings.

The United States believes that the Cuban Government's shutdown of civil aircraft operated by Brothers to the Rescue in February 1996 was a flagrant violation of international law and international civil aviation standards. As a sitting head of state, however, Fidel Castro has personal inviolability and immunity from the jurisdiction of U.S. courts under the doctrine of Head of State immunity.

Question 2. Why didn't the U.S. government arrest Fidel Castro for these murders while he was in New York last week for the United Nations General Assembly? Do our obligations as host country of the United Nations really mean that foreign officials who murder or abet the murder of American citizens can enter or leave our country as they please?

Answer. Fidel Castro has not been charged in connection with the shutdown. As noted in the previous answer, as a sitting head of state, he has personal inviolability and immunity from the jurisdiction of U.S. courts both under the doctrine of Head of State immunity and, while in New York for the recent U.N. Conference, also under the General Convention on Privileges and Immunities of the United Nations.

Question 3. Mexican President-elect Vicente Fox has spoken at length recently on the probable benefits of open borders in North America. What are his views on extradition of Mexican citizens to the United States?

Answer. We look forward to working with President-elect Fox's Administration on ways to build upon the progress that has been made in the U.S.-Mexico extradition relationship during the Zedillo Administration, including that Administration's decision to break with longstanding practice and begin entering extradition orders for its citizens wanted for narcotrafficking and other serious offenses in the United States. We will continue to press for the extradition of nationals and are encouraged by press reports indicating that President-elect Vicente Fox favors the extradition of Mexican nationals accused of drug trafficking.

Question 4. One of Senator Helms' North Carolina constituents was murdered by a Mexican citizen by the name of Emigdio Garcia Ramirez, who fled to Mexico after committing this crime. The U.S. requested his extradition from Mexico last year, and gave his location information to Mexican authorities. Why haven't they sent

him back to us? What do we have to do to get him back? Is cutting off foreign aid the only approach that is going to work?

Answer. In November 1998, Mexico issued a warrant for the arrest of Garcia Ramirez in response to the request by the United States for his extradition. Although the United States provided information about what was believed to be Garcia Ramirez's location, Mexican law enforcement officials have been unable to locate him. Mexican officials have committed to work with the U.S. Government to take Garcia and other fugitives into custody, and have asked that U.S. law enforcement provide them with updated location information, if it becomes available. Toward this end, U.S. law enforcement representatives in Mexico are continuing in their efforts to locate the fugitive. If Garcia Ramirez is located in Mexico, we fully expect Mexican law enforcement will take him into custody and we will continue to seek his extradition.

EXTRADITION FROM FRANCE OF IRA EINHORN

Question. The Committee understands that France is interested in concluding an MLAT with the United States to improve law enforcement cooperation. With that in mind, please give the state of play in the extradition case of Ira Einhorn. When will the French Government surrender this alleged murderer to the United States for trial in Pennsylvania?

Answer. Ira Einhorn has been found extraditable by French courts and his extradition has been approved by French Prime Minister Jospin. We understand that Mr. Einhorn will continue to challenge his extradition under French law. Although we therefore do not know when he will be returned for trial, we will continue to work hard in conjunction with the law enforcement authorities of Pennsylvania and the Government of France to see that Mr. Einhorn is returned to Pennsylvania for trial as quickly as possible.

RESPONSES OF SAMUEL M. WITTEN AND BRUCE C. SWARTZ TO ADDITIONAL QUESTIONS SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

PROTOCOL TO U.S.-IRELAND CONSULAR CONVENTION

Question. The protocol was signed in June 1998. Given the financial benefit of this treaty both to the government and to U.S. Embassy employees in Dublin, why has there been a two-year delay in submitting this protocol to the Senate?

Answer. The protocol was signed on June 16, 1998, and was approved by the Irish Dail within several months of signature. At that time, upon formal approval by its Dail, the Irish Government began providing the U.S. Government the tax exemptions contemplated in the treaty pending approval of the protocol by the U.S. Senate. Thus, while the Administration had intended to submit the treaty more quickly to the Senate than actually occurred, the United States has not been deprived of the treaty's financial benefits in the interim. The protocol's entry into force following U.S. ratification will enable the United States to enjoy these benefits permanently.

GENERAL QUESTIONS ABOUT EXTRADITION TREATIES AND MLATS

Question 1. What are the Executive Branch's current priorities for negotiation of extradition treaties and MLATs? How are decisions made within the Executive Branch about such priorities?

Answer. The Executive Branch is continuing to negotiate new extradition treaties, and protocols to existing treaties, to update our current extradition treaty relationships and in appropriate cases to enter into new extradition relationships. Similarly, we are negotiating MLATs and protocols to existing MLATS, to create and enhance formal law enforcement cooperation relationships with countries where such relationships would benefit U.S. law enforcement interests. Current extradition treaty or extradition protocol negotiations include Canada, Israel and Lithuania, and current MLAT or MLAT protocol negotiations include Ireland, Italy and Japan.

Decisions on priorities are made jointly by the State and Justice Departments. The Justice Department periodically canvasses components of the U.S. law enforcement community to assess its needs in international law enforcement cooperation, and the results of these surveys are incorporated into the interagency dialogue on priorities. The decision-making process relies on these law enforcement community assessments, together with human rights issues and other considerations that might be relevant to particular cases. The opening of treaty negotiations are approved by

the Assistant Secretary of State for the appropriate regional bureau. The signing of treaties is approved by the Secretary of State or Acting Secretary of State.

Question 2. What assessment, if any, is undertaken of a nation's judicial system and the human rights situation before decisions are made to commence negotiations on extradition treaties?

Answer. Once a country is identified as a potential candidate for extradition treaty negotiations, the State Department assesses its judicial system and its human rights situation during the process noted above of consideration and approval of negotiations by the Assistant Secretary of State for the appropriate State Department regional bureau. The process includes coordination with the relevant State Department regional bureau and the State Department's Bureau of Democracy, Human Rights and Labor (DRL) and other relevant sources, and reflects matters such as the independence of the judiciary, due process issues and related matters that might be relevant in a particular case. Negotiations are commenced only following this review process and the policy-level approval by the relevant Assistant Secretary.

U.S.-RUSSIA MLAT

Question 1. Please provide general information on the number of requests each party has made in the last two years under the current U.S.-Russia Mutual Legal Assistance Agreement.

Answer. Over the past two years, the United States has received hundreds of requests from Russia under the MLAA. Between January 1999 and April 2000 alone, the United States received over 120 requests for assistance from Russia. These requests cover a range of criminal offenses, including very large scale money laundering, political corruption, organized criminal activity, murder, and fraud. During the same time period, we submitted 24 requests to Russia. Typically, requests from the United States to Russia have involved money laundering, organized crime, and fraud offenses.

These statistics, however, tell only part of the story, for several reasons. First, in addition to formal requests under the MLAA, assistance is being provided informally through police-to-police channels, such as the FBI-MVD channel. Second, it is not unusual for our treaty partners to make many more requests than we do under formal law enforcement agreements, particularly in the early implementation of the agreement. Foreign countries often use formal mechanisms for assistance more often than informal channels, such as cooperation between police authorities. Thus, the FBI makes many more informal requests to its Russian counterparts than it receives. The United States tends to reserve use of the treaties for when formal mechanisms are, in fact, needed. Third, a large number of requests to us, particularly when we are first implementing a formal agreement, may reflect initial lack of effective control on the part of the foreign Central Authority, an issue which generally is ironed out with increased experience and communications between the Central Authorities. Finally, the number of formal MLAA requests by the United States is on the rise.

Question 2. What types of cases are being developed or furthered by U.S. law enforcement as a result of such information?

Answer. While we cannot discuss pending matters in detail, U.S. requests to Russia have furthered a variety of criminal cases including, in particular, cases involving large scale money laundering, organized crime, and fraud. Many of these cases are still ongoing.

U.S.-FRANCE MLAT

Question. How should the Committee regard the explanatory note that was submitted along with the Treaty? Are there any other written exchanges between the negotiating delegations that, like the note, embody the parties' joint understanding about treaty terms?

Answer. The explanatory note, like a protocol, constitutes an authoritative agreement between the governments on certain aspects of the treaty that had proven complex to resolve because of differences in criminal procedure laws and governmental structures. For example, it identifies authorities that are competent to make requests under Article 3 of the treaty, thus bridging the gap between functions that are regarded as prosecutorial in the U.S. system and judicial in the French system. There are no other similar written exchanges in connection with this treaty. Given the nature of this explanatory note, although originally submitted for the information of the Senate, the Administration would concur in a decision by the Senate in this instance to give advice and consent to the explanatory note as well as the treaty itself.

U.S.-GREECE MLAT

Question. Article 8(3) provides a list of person who may be present during testimony. Subparagraph (c) provides that “attorneys for the parties” may be present. The Technical Analysis submitted to the Committee states that “[s]ince the prosecution is also a *party* under subparagraph 3(b), this provision would allow the participation of another prosecution attorney.” (emphasis added).

- Does this imply that only two government attorneys are permitted (the one provided under subparagraph 3(b) and one under subparagraph 3(c))?

If so, is there also a limit on the number of attorneys for the defendant permitted in this session? If so what it is it? If there is a limit, what is the purpose of it?

Answer. Unlike U.S. law and practice, Greek law and practice outside of the context of this treaty limits strictly the number of persons who can attend a proceeding to take testimony. General Greek procedural law limits the participants in a proceeding to take testimony to three individuals, the investigating judge, the witness and the clerk recording the testimony.

This provision was the subject of intensive negotiations, and was the last issue settled in the treaty. U.S. concerns focused on ensuring the possibility of the presence of the defendant and the prosecutor, so as to ensure the effectiveness of the proceeding to law enforcement efforts. The resulting text, which achieves both of these concerns, is inconsistent with current Greek law but will take effect because the Greek Constitution gives primacy to treaty provisions. The United States is the first mutual legal assistance treaty partner with Greece that will have the benefit of this kind of provision.

Article 8(3) reconciles the competing desires of Greece to limit strictly the number and type of participants in these proceedings, as reflected in its current law, with the U.S. need to ensure the presence of essential defense and law enforcement personnel. In a typical case we expect that under Article 8 one prosecuting attorney and one defense attorney would witness testimony in Greece. In unusual and appropriate cases where the presence of additional defense or law enforcement personnel was justified by the nature of the case and proceeding, the United States would be prepared to advocate for their presence. As reflected in the technical analysis, because of the way the Article is structured, the argument for additional members of the prosecution team is stronger than for additional defense attorneys.

U.S.-EGYPT MLAT

Question. The Technical Analysis discussion of Article 1 states, for illustrative purposes, that the MLAT might be available for “disbarment proceedings.”

- Would this include state bar disbarment proceedings? Or does this refer to disbarment proceedings for federal contracting?
- In general, how frequently are MLATs used for such civil proceedings (it is not necessary to provide precise numbers to respond to this part of the question)?

Answer. A state bar disbarment proceeding based on a lawyer’s criminal conduct would be one example of a “proceeding related to criminal matters” (see Art. 1(1) of the Egypt MLAT) and it is conceivable that MLAT assistance could be available for such a proceeding. We have no record of ever making or receiving an MLAT request in connection with such a matter.

U.S.-UKRAINE MLAT

Question. The United States and Ukraine exchanged diplomatic notes in September 1999 in which the two nations agreed to provisionally apply this MLAT.

- What was the reason or reasons for the United States proposing this provisional application?
- Did you consult with the Committee on Foreign Relations prior to doing so?
- What is the purported authority for the Executive to undertake such an agreement?

Answer. The United States exchanged notes with Ukraine on September 30, 1999 to apply the treaty provisionally, to the extent possible under the respective domestic laws of the United States and Ukraine. This was done at the request of the U.S. law enforcement community because of the urgent need to establish interim formal law enforcement relations to help with pending investigations, including investigations relating to corruption and fraud. After the notes were exchanged, the Justice Department sought and received evidence from Ukraine under this interim arrangement to advance its money laundering investigation of former Ukrainian Prime Minister Pavlo Lazarenko, leading to Lazarenko’s indictment in the U.S. District Court for the Northern District of California on May 18, 2000.

In the wake of the dissolution of the Soviet Union and related developments, the Executive Branch advised the Committee in 1994 of the need to have effective mutual assistance relations and our consequent intention to utilize executive agreements and provisional application in some cases because of urgent law enforcement needs. This decision followed a series of meetings held by FBI Director Freeh in 1994 with law enforcement officials in Eastern Europe and the former Soviet Union. The United States and Latvia brought the U.S.-Latvia MLAT into force provisionally through an exchange of notes on June 13, 1997, and the treaty was approved by the Senate on October 21, 1998.

The provisional application of the Ukraine MLAT is an interim executive agreement that will terminate by its own terms when the MLAT enters into force. As noted above, the agreement by its express terms is limited to that which can be done under existing legal authority. Often assistance can be provided through administrative cooperation, which the Department of Justice and FBI routinely undertake even in the absence of an international agreement. To the extent that measures of compulsion are required, however, the primary relevant legal authority is Title 28, United States Code, Section 1782, which authorizes U.S. authorities to obtain assistance for proceedings in foreign tribunals, including criminal investigations conducted before formal accusation. The agreement's forfeiture-related provisions could be implemented as necessary under the forfeiture provisions of Title 18, 19 and 21. To the extent that authority does not exist to implement a particular request from Ukraine, assistance would need to be denied on a case-by-case basis.

U.S.-NIGERIA MLAT

Question. What is the scope of the agreement referenced in the preamble? Is the MLAT intended to replace that agreement?

Answer. The November 2, 1987, Agreement on Procedures for Mutual Assistance in Law Enforcement Matters reflects the commitment of the U.S. Department of Justice and Nigerian Ministry of Justice to "use their best efforts to assist each other in connection with criminal proceedings," including criminal prosecutions and grand jury investigations. At the time, the parties had in mind serious narcotics cases and large-scale fraud investigations involving scams perpetrated by Nigerian citizens on Americans. The 1987 Agreement was always intended to be replaced by the MLAT. Indeed, the 1987 Agreement specifically states: "The parties view this as an interim agreement which shall terminate upon the entry into force of a treaty governing mutual assistance in criminal matters, or upon thirty days' written notice by one party to the other, whichever occurs first."

U.S.-SOUTH AFRICA MLAT AND EXTRADITION TREATY

Question. The Technical Analyses for the South Africa MLAT and Extradition Treaty indicate that under South African law, an inconsistent internal law overrides the treaty "unless the treaty is enacted into law in national legislation."

- Please provide an update on whether South Africa has begun to take such steps to enact these treaties into law, or whether the government is planning to do so.

Answer. We understand from the South African Government that it has prepared the necessary documentation for approval of these two treaties by its legislature and that South African authorities are also in the process of developing certain changes to South African domestic law on extradition to take account of several recent extradition treaties, including the treaty with the United States. We do not have information at this time on the South African Government's intentions with respect to its domestic legal assistance law.

OAS MLAT

Question 1. In the Technical Analysis regarding Article 2, in the 1st and 3d sentences, there are references to the phrase "other proceedings" as if that term were used in the treaty. But that phrase does not appear in the text of the treaty submitted to the Senate. The treaty says that the parties shall provide assistance in "investigations, prosecutions, and proceedings that pertain to crimes."

- Please submit a revised Technical Analysis that reflects the text of Article 2.

Answer. We have corrected this reference and are submitting a revised Technical analysis to the Committee.

Question 2. Please elaborate on the meaning of the last paragraph of Article 26.

Answer. Article 26 describes the information that must be submitted in support of a request for assistance under the Convention. The penultimate paragraph of Article 26 permits the requested state to ask for additional information if such is nec-

essary to execute the request. Article 26's final paragraph states: "When necessary, the requesting state shall proceed in accordance with the provisions of the last paragraph of Article 24 of this convention"; Article 24's last paragraph states: "[t]he requested state may, at its own discretion, deny in whole or in part, any request made under the provisions of this paragraph." Thus, the final paragraph of Article 26, read together with Article 24, would appear to emphasize the fact that when the requested state asks the requesting state to supply additional information, the requesting state has the discretion to decline to do so if it would require the provision of non-public government records.

U.S.-SRI LANKA EXTRADITION TREATY

Question 1. Please provide data on the number of requests and extraditions under the existing U.S.-Sri Lanka Extradition Treaty during the last five years.

Answer. In the last five years, the United States has submitted two extradition requests to Sri Lanka. Sri Lanka has not submitted any requests to the United States. Of the two requests submitted by the United States, in one case the fugitive has not been located. In the other case, the United States withdrew the extradition request when the government and the fugitive agreed to a non-criminal disposition of the case.

Question 2. Please comment on the Executive Branch's views on the independence and fairness of the judiciary in Sri Lanka.

Answer. The Sri Lankan Constitution provides for an independent judiciary and the Government respects these provisions in practice. In addition, there are no significant concerns about the fairness of the Sri Lankan judiciary.

Question 3. The State Department's human rights report for 1999 indicates that under Sri Lanka's Emergency Regulations (ER) and its Prevention of Terrorism Act (PTA), suspects may be detained for "extended periods" without court approval.

- Are there other provisions of the ER or PTA that similarly depart from due process norms?

Answer. There are fewer protections for defendants built into the PTA and the ER than are present in the regular criminal law. For example, there are no jury trials in cases brought under the PTA. In addition, confessions, which are inadmissible in regular criminal proceedings, are allowed in PTA cases and defendants bear the burden of proof to demonstrate that their confessions were obtained by coercion. While it is possible the U.S. would receive extradition requests from Sri Lanka that implicate the ER and the PTA, we understand that PTA and ER cases represent a small fraction of the total number of criminal cases in Sri Lanka. The United States would review any such cases very carefully under the standards set forth in the treaty and applicable U.S. law.

Question 4. The State Department's human rights report for 1999 says that "in criminal cases" defendants are tried in public by juries, but that there are not jury trials in cases under the Prevention of Terrorism Act.

- Are cases under the PTA considered "criminal cases?"

Answer. Under the PTA, prosecutions may be initiated against individuals suspected of terrorist activity. We understand that cases brought under the PTA are cases that generally correspond with Sri Lankan Penal Code provisions.

STOLEN VEHICLE TREATIES

Question. Article 7(3) of the Treaty with Belize and the Treaty with the Dominican Republic, and Article 8(3) of the Treaty with Panama, do not contain a provision similar to that in Article 8(3) of the Treaty with Guatemala on Stolen Vehicles, namely, that a defective request can be remedied and resubmitted.

- Is there some understanding between the parties to any of the three treaties (i.e., the treaties with Belize, Dominican Republic, or Panama) that defective requests can be resubmitted?

Answer. Although these treaties do not contain an explicit provision regarding re-submission of a request, it is our understanding that, so long as the time for filing a request has not elapsed, either party would be able to supplement a request for return or resubmit a request found defective. The provision in the Guatemala treaty providing an extension of time to revise and resubmit a request was developed in response to the particular negotiations with the Government of Guatemala, and it is for this reason that similar language does not appear in the other three treaties mentioned. In this regard, the absence of this language in the other treaties does not preclude the U.S. from asking for an extension of time in appropriate cases if initial U.S. requests are defective for some reason. It also does not preclude our

treaty partner from returning the vehicle after granting additional time under its laws for the U.S. to develop further documentation.

CONSIDERATION OF PENDING TREATIES

WEDNESDAY, SEPTEMBER 13, 2000

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 2:25 p.m. in room SD-419, Dirksen Senate Office Building, Hon. Charles Hagel presiding.
Present: Senator Hagel.

Senator HAGEL. Good afternoon. I apologize for the late start. We were voting on the Thompson amendment to the Permanent Normal Trade Relations bill, PNTR, and if there is anyone in the audience interested in that vote, it was a motion to table the Thompson amendment, and it was tabled by a vote of 65 to 32. I will take no questions.

Senator HAGEL. And I also appreciate you putting up with me as my colleagues up here were rearranging the furniture. I don't want you to think this is the Titanic and we are doing anything on the deck, but it was noted that I did not draw new furniture from the Democratic side, and I said I didn't want to do that, because the Republican Party has been doing strange things lately and if Senators Biden and Sarbanes showed up and fell, they would accuse me of sabotaging their furniture.

So, with that very poignant and serious conversation out of the way, this Committee will now consider the 10 bilateral investment treaties, the U.S.-Mexico agreement on the Western Gap, and the Madrid Protocol. We have invited two witnesses from the Department of State to help the committee understand the implications of these treaties to the United States.

Our first witness today is the Honorable Mary Beth West, Deputy Assistant Secretary of State for Oceans and Fisheries. Madam Secretary, we are pleased you are here. In October 1988 Secretary West received Senate confirmation for the rank of Ambassador in recognition of her service in treaty negotiations. Prior to her current position, Ambassador West served at the State Department as Assistant Legal Advisor for European and Canadian Affairs, Director of the Small Claims Program of the Office of International Claims and Investment Disputes, and Assistant Legal Advisor for Legislation and General Management. Welcome.

Ms. WEST. Thank you.

Senator HAGEL. Our second witness is Janice F. Bay, Deputy Assistant Secretary of State for International Finance and Development. Since Assistant Secretary Anthony Wayne is out of the country, Secretary Bay is currently serving as Acting Assistant Sec-

retary of State for Economic and Business Affairs. Welcome to you as well.

In Secretary Bay's previous positions, she has served as Economic Minister Counselor at our Embassies in France and Germany. We are pleased that you are both here.

Today we have a large number of important treaties to consider. First, we will consider Bilateral Investment Treaties with Azerbaijan, Bahrain, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, and Uzbekistan.

And I understand that we have a document that I must read to include in this, that the record should reflect, so unless there is an objection at this time, we will add treaty document 106-46 to this agenda as well. This document is a Protocol of Amendment to the existing U.S.-Panama Bilateral Investment Treaty. The protocol was concluded in Panama on June 1 but for reason unknown to the committee, it reached the Senate Executive Clerk only at 5:25 p.m. yesterday. Nonetheless, we understand that Deputy Assistant Secretary Bay wishes to refer to it in her statement. Without objection, so ordered.

Foreign direct investment offers positive benefits to both the investing and recipient countries, including an increase in competition and consumer choice, and gains in productivity and efficiency. These treaties guarantee U.S. companies will be on a level playing field when investing overseas. By increasing protection for investors, we improve the environment for investing. Increased U.S. investment to the countries under consideration today will lead to increased prosperity in those countries and expanded markets for American products abroad. That's because American subsidiaries abroad buy products and services from their parent companies and other American companies located in the United States.

American companies overseas buy about 63 percent of all goods exported by the United States, far more than they export back to the United States. Trade and overseas investment increase job opportunities in the United States rather than the reverse.

Today we will also consider the Treaty with Mexico on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, otherwise known as the Western Gap Agreement. The Western Gap is an area between the 200-mile exclusive economic zones of each country where oil reserves may exist. Mexico has been concerned in particular that the United States with its great advantage in deep water technology, will exploit transboundary petroleum reserves. This agreement, which is related to the U.S.-Mexico Maritime Boundary Agreement, which entered into force in 1997, should lay those concerns to rest.

As long as uncertainties have existed, the U.S. has been unable to sell leases for oil exploration in this region. We are more dependent on OPEC for our oil now than at any time in the history of this country. Development of this region will be one step forward in maximizing our domestic sources and decreasing our dependence on foreign source oil.

We will also consider the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, otherwise known as the Madrid Protocol. The United States has never belonged to an international trademark registration system, nota-

bly the Madrid Trademark Agreement, because U.S. trademark law differs substantially from obligations under this treaty.

The protocol under consideration today establishes a separate international trademark registration system and significantly modifies the Madrid Agreement, largely to accommodate the concerns of the United States. Trademarks are among the most valuable assets a business may own, and protection of these assets is vital. Today we will explore whether the Madrid Protocol accomplishes this.

On that note, let me now turn to our witnesses and again welcome you. It's my understanding that Ambassador West will be testifying first on the Western Gap Agreement, followed by Secretary Bay's testimony on the Bilateral Investment Treaties and the Madrid Protocol. Again, thank you for coming. Ambassador West.

STATEMENT OF HON. MARY BETH WEST, DEPUTY ASSISTANT SECRETARY OF STATE FOR OCEANS AND FISHERIES, DEPARTMENT OF STATE, WASHINGTON, DC

Ms. WEST. Mr. Chairman, thank you for the opportunity to testify today in support of the treaty between the United States and Mexico establishing a Continental Shelf boundary in the western Gulf of Mexico. This treaty was signed here in Washington on June 9, 2000.

Mr. Chairman, my brief oral remarks will address the nature of the treaty, how the boundary was drawn up, and the treaty's potential benefits for the United States. I also have a longer statement that I would like to submit for the record.

Senator HAGEL. It will be included.

Ms. WEST. Thank you.

This treaty delimits the Continental Shelf jurisdiction of the United States and Mexico in an area known as the Western Gap. This area is beyond the outer limit of the two countries' 200 mile exclusive economic zones in the western part of the Gulf of Mexico. The treaty does not affect the water column above the Continental Shelf, which will remain high seas.

Mr. Chairman, I had the privilege of testifying before you 3 years ago on the 1978 treaty establishing maritime boundaries between the U.S. and Mexico in the Pacific and the Gulf of Mexico. That treaty set the boundary in areas where the United States and Mexico's 200-mile zones overlapped. It did not, however, cover two areas of Continental Shelf in the Gulf of Mexico beyond the 200-mile zones.

In recommending Senate advice and consent to the ratification of the 1978 treaty, this committee urged the executive branch to proceed expeditiously to negotiate the boundary in one of those areas, the Western Gap. We did so and the treaty before you today is the result.

The location of the boundary in the new treaty employs the same method used to delimit the 1978 maritime boundary. United States and Mexican experts calculated an equidistant line, a line that is midway between the respective coast lines, including islands. The boundary is approximately 135 miles long. At its end points, it joins two segments of the 1978 maritime boundary.

The treaty also contains provisions that address the possibility of transboundary oil and gas reservoirs. It creates a buffer zone called "the area," which is 1.4 nautical miles wide on each side of the boundary. For the United States, this represents slightly less than 10 percent of its portion of the Western Gap.

Within the "area," the United States and Mexico agree to a 10-year moratorium on commercial oil and gas exploitation. Exploration to gather information would be permitted. The treaty creates a regime in which the parties will exchange information that will help determine the possible existence of transboundary reservoirs in the "area," as well as a commitment to address the equitable and efficient development of such reservoirs.

The treaty will allow the U.S. Government through the Department of the Interior to proceed with leasing in an area of the Continental Shelf of great interest for its oil and gas potential. In particular, it will provide the needed certainty for industry interested in proceeding to develop this oil and gas potential.

From the commencement of the negotiations in early 1998, the U.S. negotiating team consulted closely with the U.S. oil and gas industry, and we believe that the treaty has the full support of this industry.

Mr. Chairman, given the economic benefits that we believe would accrue to the United States, we strongly support favorable Senate action on the treaty. Thank you, Mr. Chairman. I would be pleased to answer questions.

Senator HAGEL. Ambassador West, thank you. It's always good to have you before this committee.

Let me begin with a question that Chairman Helms asks that I relay to you. You note in your testimony that because of concerns about the policy environment—oh, I am sorry, this is Uzbekistan, it's another treaty. Let me get back to Mexico. There is a question he did want to ask there too. We will deal with the Uzbekistan question when we deal with Uzbekistan.

What potential reserves of oil and gas are estimated to exist in the Western Gap?

Ms. WEST. Mr. Chairman, an assessment of the exact potential of hydrocarbon resources that may exist in the Western Gap has not been made yet. Recent discoveries in the U.S. exclusive economic zone right above the Western Gap suggest that hydrocarbon bearing structures extend into the U.S. portion of the Western Gap. As there has been no drilling or exploration in the gap yet, however, information regarding potential reserves would be highly speculative.

Once U.S. portions are made available for leasing, it is expected that industry will be gathering the information necessary to develop more reliable projections.

Senator HAGEL. You touched a bit on it, but maybe we could go back and you could define it a little clearer if you can. What portions lay on either side of that line, the Mexican side of the boundary versus the U.S. side?

Ms. WEST. The drawing of the equidistant line creates a situation in which the United States has about 38 percent of the gap and Mexico has about 62 percent of the gap. This of course is just an extension of a long boundary that we have drawn with Mexico

based on the principles of equidistance, which are principles that we have used in almost all of our maritime boundary treaties because of their clarity and certainty, and because overall they serve U.S. interests.

I think the important thing about the area is that the certainty created by the boundary will allow us to now go into the area and start leasing and start exploring and exploiting.

Senator HAGEL. Are you referring to potential reserve percentages?

Ms. WEST. No.

Senator HAGEL. Do you have any idea what potential reserves might be on either side of the boundary?

Ms. WEST. No, Senator, we do not, because there has not been the effort yet to explore in the area. There has been no assessment. We do, however, believe that the potential for exploration and exploitation in the U.S. portion is excellent, based on the discoveries that have been made near the gap.

Senator HAGEL. On the U.S. side?

Ms. WEST. On the U.S. side.

Senator HAGEL. What in your opinion is the general feeling of our U.S. private sector on this? You obviously talked with them and they have had input, I know, and we have dealt with that in some detail, but give me if you can your sense of the U.S. private sector's view of this.

Ms. WEST. Mr. Chairman, I think that the U.S. private sector is anxious to have the ability to lease and to begin the process of exploration and exploitation in the gap. Because these activities cost millions of dollars, they have felt they needed the certainty of the boundary and that is why we undertook expeditiously to try to achieve the boundary. I think that the industry is anxious to begin the process of exploring and exploiting the resources in the gap, and they are supportive of the treaty for that reason.

Senator HAGEL. Are you aware of any problems with fisheries as a result of the delimitation of this boundary?

Ms. WEST. Mr. Chairman, the boundary in this case is just a Continental Shelf boundary; it does not apply to the water column, so it would have no effect on fisheries.

Senator HAGEL. And no other maritime issues are involved?

Ms. WEST. No. It will have no effect on any maritime issue other than the jurisdiction over the Continental Shelf.

Senator HAGEL. Any outstanding claims, any unresolved claims, drilling rights claims, any other kind of unresolved claims?

Ms. WEST. No, Mr. Chairman, I'm not aware of anything.

Senator HAGEL. Do we take on an obligation to help Mexico develop or acquire deep-sea technology with this treaty?

Ms. WEST. No, Mr. Chairman, there is no technology transfer element to this treaty.

Senator HAGEL. OK. Since we have other treaties and issues to get to, I have a few more questions and I suspect my colleagues have some as well. So with your agreement, what I would do, and you know how it works around here, we would just submit the rest of the questions to you and you can respond in writing.

Ms. WEST. We will be pleased to do that, thank you.

Senator HAGEL. Thank you.

[Additional questions for the record follow:]

RESPONSES OF HON. MARY BETH WEST TO ADDITIONAL QUESTIONS FROM SENATOR JOSEPH R. BIDEN, JR.

TREATY WITH MEXICO ON DELIMITATION OF CONTINENTAL SHELF

Question 1. Article IV(3) permits the parties, by mutual agreement to modify the 10 year period set forth in Article IV(1) “through an exchange of diplomatic notes.” If the Senate were to provide advice and consent to ratification of this treaty, does the executive branch understand Article IV(3) to permit modification of the period of years in Article IV(1) without receiving Senate advice and consent to such ratification. If so, will the executive branch commit to consulting closely with this committee in connection with any negotiations to modify the period set forth in Article IV(1)?

Answer. Yes, the administration understands that Article IV(3) permits modification of the period of years in Article IV(1) without the need for further Senate advice and consent to such a modification. At the same time, given the novel nature of this provision, the administration would intend to consult with the committee prior to any decision to modify the period set forth in Article IV(1).

Question 2. Article IV(6) requires one party to notify the other if it “has knowledge of the existence or possible existence of a transboundary reservoir.” Do the parties understand this requirement to require notification within a certain time period once “knowledge” is obtained?

Answer. Although the treaty does not attempt to specify such a time period, normal practice would indicate that a party would be expected to provide such a notification within a reasonable amount of time after obtaining such knowledge.

Question 3. Article IV, paragraphs (5) and (6) require that the parties, in sharing information or authorizing studies, act “in accordance with its national laws and regulations.” Does this phrase have particular relevance? That is, are there U.S. or Mexican laws or regulations that prohibit the kind of studies or information sharing contemplated by these paragraphs? If so, please describe these laws or regulations.

Answer. This language was incorporated in the treaty at the request of the United States to ensure that the regimes for approving studies and sharing information would be subject to United States law. This is particularly significant with respect to U.S. laws involving the protection of confidential business information. Apart from laws that are similar to those in the United States, the administration is not aware of other Mexican laws that would prohibit or restrict the kinds of activities contemplated in those paragraphs.

Question 4. Please explain the factors that led to the decision on the size of “the Area” provided for under Article IV(1).

Answer. The idea of creating the “Area” was to identify an area closest to the boundary, in which any existing transboundary reservoirs would likely lie. Our Minerals Management Service (MMS) scientists have “mapped” more than 23,000 oil and gas reservoirs in the Gulf of Mexico. Our data show that 99.9% of these reservoirs would fit into an area that is 1.4 nautical miles wide. Discussion with Mexican technical experts confirmed that they too believed that an area of 1.4 miles on each side of the boundary would capture virtually all possible transboundary resources.

[The prepared statement of Ms. West follows:]

PREPARED STATEMENT OF HON. MARY BETH WEST

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify today in support of the treaty between the United States and Mexico establishing a continental shelf boundary in the Western Gulf of Mexico. This treaty was signed on June 9, 2000, in Washington DC.

This treaty delimits the geographical areas within which each party may exercise its sovereign rights over the seabed and subsoil of the Continental Shelf in an area known as the “Western Gap.” This area is beyond the outer limits of the two countries’ 200 mile exclusive economic zones in the western part of the Gulf of Mexico. The treaty does not affect the water column above the Continental Shelf, which will remain high seas.

Mr. Chairman, I had the privilege of testifying before this committee three years ago on the 1978 treaty establishing Maritime Boundaries between the United States and Mexico in the Pacific Ocean and the Gulf of Mexico. This treaty, which entered

into force November 13, 1997, established the boundary in areas where the U.S. and Mexico's 200-mile exclusive economic zones overlapped. It did not, however, cover two areas of Continental Shelf in the Gulf of Mexico beyond the 200-mile zones.

In recommending Senate advice and consent to the ratification of the 1978 treaty, this committee urged the executive branch to proceed expeditiously to negotiate the boundary in one of those areas, the "western gap." It also noted that, "delimitation of the western gap has become increasingly important to U.S. interests as petroleum exploration has moved into deeper waters."

Turning to the salient features of the treaty, Article I describes the location of the boundary as geodetic lines connecting the listed 16 turning and terminal points. In keeping with the methodology used in the 1978 Maritime Boundary, U.S. and Mexican technical experts calculated an equidistant line, a line that is equally distant from the respective baselines, including islands, of the United States and Mexico. The boundary is approximately 135 miles long. The western and eastern points of the boundary join two segments of the 1978 maritime boundary.

Article II sets out the technical parameters of the boundary. This article is needed to ensure that the treaty can be applied uniformly, and accurately, by the United States, Mexico, and other users. Further, the article states that, for the purpose of illustration only, a map depicting the boundary is attached to the treaty at Annex 1.

Article III states that north of the boundary, Mexico will not, and south of the boundary, the United States will not, claim or exercise for any purpose sovereign rights or jurisdiction over the seabed and subsoil. A provision of this nature is contained in all modern maritime boundary treaties to which the United States is a party.

Articles IV and V of the treaty contain provisions that address the possibility that oil and natural gas reservoirs may extend across the Continental Shelf boundary (called "transboundary reservoirs"). These provisions, among other things, create a framework by which the parties can exchange information to help determine the possible existence of transboundary reservoirs. Should the parties identify a transboundary reservoir, they agree to seek to reach agreement for the equitable and efficient exploitation of such reservoirs.

Article IV(1) creates a buffer zone, called the "Area," which is 1.4 nautical miles wide on each side of the boundary. For the United States this represents slightly less than 10 percent of its portion of the western gap. (About 5.6% of Mexico's total area in the western gap is included within its 1.4 mile buffer zone.)

Within the area, the United States and Mexico agree to a 10-year moratorium on oil and gas drilling or exploitation. Exploration to gather information on the Continental Shelf would be permitted. Each party's right to authorize petroleum drilling and exploitation outside the area within the western gap on its side of the boundary is unaffected by this moratorium.

Article IV(3) states that the parties may modify the 10-year moratorium applicable to the area by mutual agreement through an exchange of diplomatic notes. This provision will enable the parties to shorten or to extend the duration of the moratorium should they both agree.

Article IV(4) provides that each party, on its side of the boundary within the area and in accordance with its national laws and regulations, shall facilitate requests from the other party to authorize geological and geophysical studies for determining the possible presence and distribution of transboundary reservoirs.

Article IV(6) obliges each party, if it has knowledge of the existence or possible existence of any transboundary reservoir, to notify the other party.

Article V of the treaty details the mechanism for communication and cooperation between the parties with respect to the area and the possible existence and location of transboundary reservoirs.

Article VI requires the parties to consult to discuss any issue regarding the interpretation or implementation of the treaty upon the written request by a party through diplomatic channels. Finally, Article VIII states that any dispute concerning the interpretation or application of the treaty must be resolved by negotiation or other peaceful means as may be agreed by the parties.

No new legislation is needed for the United States to meet its obligations under the treaty.

The treaty will allow the United States Government, through the Department of the Interior, to proceed with leasing in an area of Continental Shelf of great interest for its oil and gas potential. In particular, it will provide the needed certainty for industry interested in proceeding to develop this oil and gas potential.

From the commencement of these negotiations, in early 1998, the U.S. negotiating team consulted closely with the U.S. oil and gas industry. We believe the treaty has the full support of this industry.

Mr. Chairman, given the economic benefits that we believe would accrue to the United States, we strongly support favorable Senate action on this treaty.

Thank you Mr. Chairman. I would be pleased to answer questions you and other members of the committee may have.

Senator HAGEL. Now the way we are going to do this, Madam Secretary, you are next, is that the way we want to do this? Thank you. Secretary Bay.

STATEMENT OF JANICE F. BAY, DEPUTY ASSISTANT SECRETARY OF STATE FOR INTERNATIONAL FINANCE AND DEVELOPMENT, DEPARTMENT OF STATE, WASHINGTON, DC

Ms. BAY. Thank you, Mr. Chairman, and thank you for the opportunity to testify before the Foreign Relations Committee as the administration seeks the advice and consent of the Senate to ratification of Bilateral Investment Treaties [BITs] with Azerbaijan, Bahrain, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Uzbekistan, a protocol to the Panama BIT, as well as the Madrid Protocol.

I will begin with my testimony on the Bilateral Investment Treaties and I will also be submitting more detailed written testimony on these treaties.

With respect to the Bilateral Investment Treaties, the administration strongly recommends that the Senate give its advice and consent to all ten treaties and the protocol. Azerbaijan, Bahrain, Bolivia, Lithuania, and Uzbekistan have already ratified the treaties. The Senate's advice and consent would permit instruments of ratification to be exchanged forthwith for the first four countries, with entry into force 30 days thereafter. However, for reasons explained below, we would not expect an early exchange of ratification instruments with Uzbekistan.

Since the inception of the Bilateral Investment Treaty program in 1982, the United States has concluded 31 BITs that have entered into force. We have active discussions underway with Colombia, Korea, Slovenia, Venezuela, and Yemen. Several other countries have expressed interest in a BIT with the United States.

Our outward investment policy supports the objectives of promoting U.S. exports and enhancing the international competitiveness of U.S. companies. Our policy has two aims. First, we seek greater access for U.S. investors in foreign investments, including non-discriminatory treatment in the establishment and operation of investment.

The BIT program, which has enjoyed bipartisan support throughout its existence, is an effective tool for gaining and maintaining market access for U.S. investors. The program has helped to standardize sound investment policy in developing countries, to remove impediments to U.S. exports, and to gain wider acceptance of important investment principles that then become a more robust part of international law.

BITs are negotiated on the basis of a prototype document and we accept only minor changes in the prototype language. As you know, the State Department and the Trade Representatives office work together in negotiation of these BITs. The model BIT we use is not a static document; the interagency BIT team has revised model BIT text on a number of occasions, most recently in 1994. However,

recent years of negotiation have revealed possible improvements in several provisions, and we plan to pursue possible changes with the next administration.

We do not, however, believe that this should hold up ratification of these signed treaties, as regular revisions of the prototype have been standard practice throughout the BIT program, and the fundamental principles have remained unchanged.

U.S. bilateral investment treaties provide American investors with six basic protections. They are as follows: National and most favored nation treatment; expropriation; right of free transfers; performance requirements; key personnel; and dispute settlement. Each one of the ten BITs and the protocol not only protect U.S. investment in the manner I have just described, but can be used to serve broader U.S. economic and foreign policy goals.

I would now like to highlight aspects of the specific BITs before you today. The administration has continued to negotiate BITs with countries in economic transition. The Senate has already given its advice and consent to BITs with 17 such countries. Today we are presenting four more with Azerbaijan, Croatia, Lithuania, and Uzbekistan.

The ratification of the BIT with Croatia comes at a propitious time following the recent election of a democratic, market-oriented government. We anticipate that the BITs with Lithuania and Uzbekistan will ultimately play a similar role with respect to U.S. investment in these economies.

Nevertheless, the BIT with Uzbekistan raises some particular concerns. It was signed in 1994 and ratified by Uzbekistan soon afterwards. The Department transmitted it to the Senate for its advice and consent in 1996.

Unfortunately, Uzbekistan's investment climate has deteriorated since that BIT was concluded. In 1996, the government issued a series of decrees restricting access to foreign currency. This was in direct violation of BIT provisions assuring free convertibility and transfer of funds related to an investment. Today, Uzbekistan's currency remains inconvertible, and foreign investors cite capital controls as the single biggest obstacle to investment in Uzbekistan.

In light of this situation, should the Senate provide its advice and consent, the administration intends to withhold the exchange of instruments of ratification as leverage to encourage policy change in Uzbekistan. The United States could bring the treaty quickly into force once Uzbekistan demonstrates that it is able and willing to comply with its terms. U.S. companies have substantial investment in the country, and we want to afford them the right of protection of a BIT as soon as conditions warrant.

The administration is pleased to highlight the BIT with Mozambique, the first BIT concluded with an African country in about 10 years. Mozambique has proven itself to be a serious reformer, despite formidable obstacles. This BIT will give a boost to the administration's drive to augment U.S. exports to Africa, and provide reassurance to a growing number of potential U.S. investors.

We anticipate similar benefits in the Middle East, as we are presenting for your consideration BITs with Jordan and Bahrain. In addition to providing reassurance to investors and promoting eco-

conomic development, we hope the BITs demonstrate for others in the region the economic benefits of peace.

Finally, in our own hemisphere, we are presenting BITs with Bolivia, El Salvador and Honduras, as well as a protocol to the Panama BIT. The protocol restores assured investor access to international arbitration.

In summary, the BIT program is a key element of U.S. outward investment policy. Its core principles underlie U.S. negotiating objectives in our bilateral, regional and multilateral investment discussions worldwide.

Would you like me to turn now to the Madrid Protocol or would you like to take questions?

Senator HAGEL. Yes, Madam Secretary, thank you.

Ms. BAY. OK. I will now turn to my testimony on the Madrid Protocol. I am delighted to present the administration's views on the accession of the United States to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, called the Madrid Protocol.

The United States has declined to participate in the international registration system of the Madrid Agreement due to several problematic provisions. However, the Madrid Protocol, which entered into force December 1, 1995, creates a new international registration system that is parallel to, but independent of, the Madrid Agreement. It addresses our problems with the Madrid Agreement.

It has been difficult and costly to obtain and maintain registrations of U.S. trademarks in each and every country. As a result, many U.S. businesses must focus only on protecting their marks in major markets abroad, and hope for the best elsewhere. This hope turns to despair when unscrupulous pirates register in their countries the marks of these U.S. businesses, and it effectively closes that country's markets to the products and services of U.S. businesses.

The Madrid Protocol provides for a trademark registration filing system that would permit a U.S. trademark owner to file for registration in any number of countries by the filing of a single standardized application in English with a single set of fees, in the U.S. Patent and Trademark Office.

Equally important, under the protocol, renewal and assignment of a trademark registration in each country could be made by the filing of a single request with a single set of fees, thus giving U.S. businesses easier and more cost-effective access to protection.

The protocol would have no effect on the integrity of the trademark registration system in the United States. While the protocol would provide an additional basis for a foreign national to register a trademark in the United States, such a request would be subject to the same substantive requirements as exist in the law today for domestic and foreign applicants. Once an international registration is extended to the United States, the foreign holder of the international registration would have the same rights, remedies and obligations as a U.S. registrant.

With regard to a problem that delayed possible U.S. accession, I would note that an interagency group worked for several years with officials from the European Commission and achieved a satis-

factory solution addressing U.S. concerns over EC voting in the protocol. We believe that in any case, those voting provisions will be used rarely if ever. Consensus decisionmaking is expected to be the norm under the Madrid Protocol, as it has long been under the original Madrid Agreement and the World Intellectual Property Organization itself. In fact, we understand that members have only needed to resort to voting twice in the more than 100-year history of the Madrid Agreement.

The Madrid Protocol comes before this committee today at a time when other factors have emerged favoring U.S. accession. In March 2000, the Government of Japan acceded to the protocol. Japan's entry in the absence of U.S. membership is an adverse development for U.S. companies and heightens the desirability of U.S. accession as soon as feasible.

Japan's pendency from application filing to the registration of a trademark is several years. However, as a party to the Madrid Protocol, it will have to process and register the protocol request for extension of protection within the strict Madrid Protocol time limits. As a result, those filers who cannot use the Madrid Protocol will be in the unfortunate position of waiting years for a registration, while Madrid Protocol applicants receive consideration and registration within an 18-month timeframe. Thus, a U.S. trademark owner seeking to protect its mark in Japan will be seriously disadvantaged unless the United States becomes a party to the Madrid Protocol.

The same situation may occur in other countries. In light of these developments, we understand that most affected U.S. companies favor the United States becoming a party.

In summary, Mr. Chairman, we believe the United States should proceed with accession. This will facilitate efficient and economic trademark registration for U.S. companies. I thank you, Mr. Chairman, for your continued interest in the BIT program and the Madrid Protocol, and will be happy to answer any questions you may have. Thank you.

[The prepared statement of Ms. Bay follows:]

PREPARED STATEMENT OF JANICE F. BAY

Mr. Chairman, thank you for the opportunity to testify before the Foreign Relations Committee as the Administration seeks the advice and consent of the Senate to ratification of Bilateral Investment Treaties (BITs) with Azerbaijan, Bahrain, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Uzbekistan, a Protocol to the Panama BIT, as well as the Madrid Protocol. I would like to begin with my testimony on the Bilateral Investment Treaties.

With respect to the bilateral investment treaties, the Administration strongly recommends that the Senate give its advice and consent to all ten treaties and the Protocol. Azerbaijan, Bahrain, Bolivia, Lithuania, and Uzbekistan have already ratified the treaties. The Senate's advice and consent would permit instruments of ratification to be exchanged forthwith for the first four countries, with entry into force 30 days thereafter. However, for reasons explained below we would not expect an early exchange of ratification instruments with Uzbekistan.

Since the inception of the Bilateral Investment Treaty (BIT) program in 1982, the United States has concluded 31 BITs that have entered into force. We have active discussions underway with Colombia, Korea, Slovenia, Venezuela, and Yemen. Several other countries have expressed interest in a BIT with the United States.

In my statement, I will cover three topics:

- First, how the Administration's overall policy on outward direct investment advances U.S. interests and how the BIT program fits into this effort;

- Second, the specific protections for U.S. investors provided by our Bilateral Investment Treaties; and
- Third, a brief analysis of how the ten treaties and one Protocol under consideration today advance U.S. interests.

THE PLACE OF BITS IN U.S. OUTWARD INVESTMENT POLICY

Our outward investment policy supports the objectives of promoting U.S. exports and enhancing the international competitiveness of U.S. companies.

Worldwide, foreign direct investment (FDI) in the international economy grew at 15.9 percent annually in nominal terms over the 1990-1995 period, and even more rapidly in the last three years. In 1998, world FDI outflows reached a \$694 billion, making it the single most important component of private capital flows to developing countries. These levels were reached against the backdrop of conditions in the world economy, particularly the 1997-98 global financial crisis, which could have slowed down FDI in 1998, but did not. As the world's leading source and recipient of international investment, the United States has a significant stake in this trend.

In today's highly competitive international business environment, successful companies increasingly rely upon global operations. American companies often find it necessary to have an on-site presence. Some manufacturers need a local presence to export, market, service and adapt their products. Others need to establish a local distribution outlet or network under their control and import U.S. products and services. In some cases, production facilities or joint ventures also may be desirable, particularly in sectors evolving into truly global industries.

American firms increasingly use their overseas affiliates' sales and distribution networks, R&D expertise and specialized production techniques to compete with Asian and Western European companies in foreign markets. In many instances the international competitiveness of U.S. companies may depend on maintaining an effective worldwide presence in each important economic region.

Foreign direct investment is increasingly understood to be a complement to trade. Investment abroad is often a crucial part of a successful export strategy. Foreign affiliates of U.S. firms abroad are some of America's best export customers; U.S. exports to foreign affiliates rose from \$56 billion in 1985 to \$185.4 billion in 1998, an increase of 230 percent. Such exports accounted for 27 percent of total U.S. merchandise exports in 1998. These exports, in turn, support jobs for Americans here at home.

For U.S. business interests abroad, it is our policy to establish a framework in which our businesses are treated at least as well as companies of other countries. To achieve this end, our outward investment policy has two aims. First, we seek greater access for U.S. investors in foreign markets. Second, we seek high levels of protection for U.S. investments, including non-discriminatory treatment in the establishment and operation of investment.

The BIT program, which has enjoyed bi-partisan support throughout its existence, is an effective tool for gaining and maintaining market access for U.S. investors. The BIT program was initiated to promote and protect U.S. investment interests in other countries and to build on the principles contained in earlier Treaties of Friendship, Commerce and Navigation (FCN), which were concluded with some of the countries included in this testimony. The program has helped to standardize sound investment policy in a variety of developing nations and in economies making the transition from central planning. Many investment-restrictions also have the effect of restricting trade flows. Thus, our BITs not only help remove restrictions on U.S. investments, but also remove impediments to U.S. exports. Furthermore, as more nations agree to conclude a BIT with the United States, the important investment principles they contain gain wider acceptance and become a more robust part of international law.

The BIT program is a relatively efficient means of affording state-of-the-art protection to U.S. investors in a wide variety of countries. BITs are negotiated on the basis of a prototype document and we accept only minor changes to the prototype language.

This is not to say that the model BIT we use is a static document. Since this program began, the inter-agency BIT team has revised the model BIT text on a number of occasions. The most recent revision of the BIT prototype was completed in April 1994, and is the model on which the treaties before you, with the exception of Lithuania, are based. (Lithuania is based on the 1992 model.) The 1994 prototype embodies the same basic principles as its predecessors. As you could expect, since the 1994 revision, recent years of negotiation have revealed possible additional improvements in several provisions. Although we plan to discuss a possible revision of the 1994 prototype with the next administration, we do not believe this should hold up

ratification of these signed treaties, as regular revisions of the prototype have been standard practice throughout the BIT program and the fundamental principles have remained unchanged.

BILATERAL INVESTMENT TREATIES PROTECT U.S. INVESTORS

U.S. Bilateral Investment Treaties provide U.S. investors with six basic protections. They also mirror basic protections offered to foreign investment under law in this country. They are as follows:

National and Most Favored Nation (MFN) Treatment

First, our BITs afford U.S. investors parity with investors from other countries by granting the United States most favored nation treatment. Many of these investors are commercial competitors of the United States and concluding a BIT prevents companies from other countries from gaining a competitive advantage. Also, U.S. BITs provide an opportunity to gain better market access for American companies, particularly where countries have heretofore imposed extensive restrictions on foreign direct investment. In addition, our treaties specify that U.S. investors will be treated as well as domestic investors, in other words, national treatment. Any exceptions to national or MFN treatment are limited and specifically described in annexes or protocols to the treaties.

U.S. BIT standards in the area of national and MFN treatment are the highest in the world. While many countries' BITs afford their investors such treatment once an investment has been established, only U.S. BITs traditionally have obligated treaty partners to give such treatment in both the pre- and post-establishment phases of investment. In practical terms, this means countries may not use nationality-based screening or approval mechanisms to block U.S. investment.

Expropriation

Second, these treaties protect U.S. investors by establishing clear limits to expropriation of investments and by requiring that U.S. investors be properly compensated if their property is expropriated. Under U.S. BITs, expropriation can only occur in accordance with customary international law standards, that is, for a public purpose, in a nondiscriminatory manner, under due process of law, and accompanied by payment of prompt, adequate and effective compensation.

Right of Free Transfers

Third, U.S. investors are afforded the right to transfer funds into and out of a country without delay using a market rate of exchange. This covers not only repatriation of profits, but transfers of all categories of funds related to an investment, including interest, proceeds from the liquidation of an investment, and the infusion of additional financial resources after the initial investment has been made.

Such a provision can help increase U.S. exports since free transfers facilitate the purchase and import of U.S.-produced goods and services. Further, because the right of free transfer also covers royalties and fees, the transfer provision facilitates increased U.S. exports of intellectual property.

Here again, U.S. BITs provide protection superior to that provided by those of other countries. For example, our BITs protect all forms of investment-related transfers. By way of contrast, the United Kingdom model BIT, perhaps the closest to ours in overall standard of protection, covers only transfers of profits and proceeds of the sale of an investment. Also, U.S. BITs cover inward as well as outward transfers. The BITs of other countries generally cover only outward transfers. In certain circumstances, our BITs also cover transfers of returns in kind, such as oil exports.

Performance Requirements

Fourth, our BITs limit the ability of host governments to impose certain performance requirements on an investor, such as local content or export performance requirements. This limitation helps U.S. investors avoid being coerced by host governments into inefficient and trade distorting practices.

This provision also entitles U.S. investors to purchase competitive U.S.-produced components without restriction as input in their production of various products. And they cannot be forced, as a condition of establishment or operation of their investment, to export back to the U.S. market or to third-country markets locally produced goods.

U.S. BIT standards are high in this area as well. To our knowledge, few if any countries have used their Model BITs to limit other parties' performance requirements on their investors.

Key Personnel

Fifth, our BITs support our firms' need for flexibility in engaging the top managerial personnel of their choice, regardless of nationality. This provision supports a company's ability to hire the best available talent to manage its investment—a key element in being competitive in a global market. It is also a protection against any arbitrary local hire quotas applied to top management that might interfere with a company's ability to manage its investment.

Dispute Settlement

Sixth, our BITs give investors the option of submitting an investment dispute with the treaty party's government to international arbitration.

This provision is one of the most important protections provided by a BIT. Most investment disputes are resolved through negotiation without resort to formal dispute settlement and investors are not required to notify the USG of a dispute. We are aware of only a handful of disputes that have gone to arbitration under U.S. BITs. Nevertheless, the availability of arbitration procedures provides the investor with important leverage to encourage a host government to act in a manner consistent with its commitments. The U.S. has never been taken to arbitration, under a BIT. To some extent, this reflects the fact that our BITs are primarily with capital-importing countries.

BITs also provide for formal state-to-state consultations and binding state-to-state arbitration. For example, if a difference should develop over interpretation or application of the treaty, we have appropriate avenues for recourse.

BITs provide U.S. investors and the U.S. government with additional means to press for favorable resolution of investment disputes. Nevertheless, BITs cannot meet all needs in all situations. They reduce the risks of investing abroad, but do not eliminate them. The BITs supplement rather than replace other, traditional means of resolving investment disputes, including: general consular assistance to U.S. business and property owners; active diplomacy; access to other investment regimes, including those of the WTO; and formal government to government understandings if investment problems are pervasive.

The BITs are an important element of our efforts to protect our investors abroad. By obligating our BIT partners to establish transparent and non-discriminatory investment laws and regulations, BITs help to prevent investment disputes between U.S. investors and host governments. By affording investors access to binding, international arbitration, BITs also add to an investor's toolkit of dispute resolution options.

THE TREATIES BEFORE THE SENATE SERVE U.S. INTERESTS

Each one of the ten BITs and the Protocol not only protect U.S. investment in the manner I have just described, but can be used to serve broader U.S. economic and foreign policy goals. Let me turn to the following specific aspects of the BITs before you for your consideration.

As the Administration indicated to you in previous testimony on the BIT program in 1993 and 1995, it has continued to negotiate BITs with those countries in economic transition. The Senate has already given its advice and consent to BITs with 17 such countries. Today we are presenting four more—with Azerbaijan, Croatia, Lithuania, and Uzbekistan.

The ratification of the BIT with Croatia comes at a propitious time following the recent election of a democratic, market-oriented government. The new administration in Croatia is actively engaged in promoting reforms to integrate itself into the global economy. The BIT will protect U.S. investors in this time of growing commercial opportunities afforded by the demise of the nationalistic Tudjman government. The BITs with Lithuania and Uzbekistan (when it ultimately enters into force) will play a similar role with respect to U.S. investment in these economies. We recognize that, as economies-in-transition develop and refine the reforms needed to become market economies, problems will arise and setbacks will occur. The BITs, however, obligate these countries to afford those protections I described earlier, which the Administration believes are essential components of a sound investment regime.

Nevertheless, the BIT with Uzbekistan raises some particular concerns. It was signed on December 16, 1994. Uzbekistan ratified the treaty soon after its signature. The Department transmitted it to the Senate for its advice and consent on February 28, 1996, after the Senate last took action on a group of BITs in 1995.

Unfortunately, Uzbekistan's investment climate has deteriorated since the BIT was concluded. In 1996, the government issued a series of decrees restricting access to foreign currency in direct violation of BIT provisions, assuring free convertibility and transfer of funds related to an investment. Today, Uzbekistan's currency re-

mains inconvertible, and foreign investors cite capital controls as the single biggest obstacle to investment in Uzbekistan.

In light of this situation, should the Senate provide its advice and consent, the Administration intends to withhold the exchange of instruments of ratification as leverage to encourage change in Uzbek policy. Senate advice and consent now would enable the U.S. to bring the treaty quickly into force once Uzbekistan demonstrates that it is able and willing to comply with the terms of the treaty. Given that U.S. companies already have substantial investment in the country, we want to be in a position to afford them the protections of the BIT as soon as conditions warrant.

The Administration is pleased to highlight the BIT with Mozambique, the first BIT concluded with an African country in about 10 years. Mozambique has proven itself to be a serious reformer, despite formidable obstacles. This BIT will give a boost to the Administration's drive to augment U.S. exports to Africa and provide reassurance to a growing number of potential U.S. investors. Growing levels of investment will in turn reinforce the benefits of peace, democracy, and economic growth in Mozambique and the rest of sub-Saharan Africa.

We anticipate similar benefits in the Middle East, as we are presenting for your consideration BITs with Jordan and Bahrain. In addition to providing reassurance to investors and promoting economic development, we hope the BITs demonstrate for others in the region the economic benefits of peace.

Finally, in our own hemisphere, we are presenting BITs with Bolivia, El Salvador, and Honduras, as well as a Protocol to the Panama BIT. The purpose of the Protocol is to correct a technical problem that has arisen in the Panama BIT with respect to investor-state dispute resolution. The Protocol takes into account the fact that, since the Panama BIT's entry into force, Panama has become a party to the International Center for Settlement of Investment Disputes (ICSID) dispute settlement convention. As amended by the Protocol, the BIT would assure U.S. investors in Panama access to an available option for investor-state arbitration. Indeed it would enable U.S. investors to utilize and select among the same arbitration options now available under the current U.S. model BIT.

The President had submitted the Nicaragua BIT for advice and consent in the belief that it serves the interest of protecting present and future U.S. investors. We understand that the Committee has continuing concerns with Sandinista-era expropriations of U.S. citizens property. However, the Administration continues to believe that ratification would serve U.S. interests and hopes that our continuing efforts to promote further progress on claims resolutions will encourage the Committee to take action in the future.

Overall, the BIT program is making substantial progress toward reaching the Administration's goal for increased investment protection in the Western Hemisphere. Approving the BITs with Bolivia, El Salvador and Honduras would go a long way to help prevent future inequitable treatment of U.S. investors in a region of the world with substantial U.S. investment.

CONCLUSION

In conclusion, the BIT program is a key element of U.S. outward investment policy, and its core principles underlie U.S. negotiating objectives in our bilateral, regional and multilateral investment discussions worldwide. U.S. BITs are high standards agreements that cover a broader range of topics than other countries have included. In areas such as freedom from discriminatory treatment in establishing an investment and freedom from performance requirements, the standards of U.S. BITs exceed those of most other industrialized nations.

MADRID PROTOCOL

Let me turn now to the Administration's views on the accession of the United States to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (the "Madrid Protocol").

The United States has declined to participate in the international registration system of the Madrid Agreement due to several problematic provisions. The Protocol, which entered into force December 1, 1995, creates a new international registration system that is parallel to, but independent of, the Madrid Agreement. To attract a broader membership, the Protocol addresses the problems that exist with the Madrid Agreement.

One major obstacle to obtaining protection internationally for U.S. trademarks has been the difficulty and cost of obtaining and maintaining a registration in each and every country. As a result, many U.S. businesses are forced to concentrate their efforts on protecting their trademarks in their major markets abroad and hope for the best in their other existing and prospective non-domestic markets. This hope

turns to despair when unscrupulous pirates register in their countries the marks of these U.S. businesses, which effectively closes that country's markets to the products and services of the U.S. business.

If it were to enter into force in the United States, the Protocol would provide a trademark registration filing system that would permit a United States trademark owner to file for registration in any number of member countries by the filing of a single standardized application, in English, with a single set of fees, in the U.S. Patent and Trademark Office (USPTO) Registration could be obtained without retaining a local agent and without filing a separate application in each country.

Equally important, under the Protocol, renewal and assignment of a trademark registration in each country could be made by the filing of a single request with a single set of fees. Thus, those businesses that are now limited in their ability to obtain broad international protection for their trademarks would have easier and more cost-effective access to that protection through the Protocol's trademark registration filing system.

From the perspective of the owners of trademark rights in the United States and of the USPTO, the Protocol would have no effect on the integrity of the trademark registration system in the United States. While the Protocol would provide an additional basis for a foreign national to register a trademark in the United States, such a request would be subject to the same substantive requirements as exist in the law today for domestic and foreign applicants. Once an international registration is extended to the United States, the foreign holder of the international registration would have the same rights, remedies and obligations as a U.S. registrant. Trademark owners with national registrations will be able to merge those registrations into the international registration for ease of maintenance worldwide without losing any rights that accrued to the earlier national registration.

With respect to foreign holders of international registrations seeking extension of protection in the U.S., in addition to incorporating the requirements of the Protocol, S. 671, the legislation that is now being considered by the Senate, will establish a system that provides, within the parameters of the Protocol, that U.S. trademark law will be compatible with the Protocol's international registration filing system. It will accomplish this while maintaining the viability of certain basic principles in our law. These provisions primarily accommodate our use requirements and our extensive preregistration examination.

This legislation also provides that an extension of protection of an international registration to the United States shall have the same effect and validity as a registration on the principal register, entitling the holder to the same rights and remedies under the trademark law.

Substantive trademark law issues are not addressed in the Protocol, since the Protocol is primarily a filing system. The Protocol specifies that the member countries may apply their national law to determine the acceptability of an international registration in that country. The proposed legislation to implement the Protocol incorporates all of the requirements for examination and opposition existing in the trademark law and applies them to requests for extension of protection to the United States. In practice, the law will require the USPTO to apply the same standards in evaluating the acceptability of a mark for protection in the U.S. under both the domestic application process and the Protocol process.

Since legislation will be necessary in the United States to implement the Protocol, S. 671 and its counterpart H.R. 769 provide, in Section 3, that "This Act and the amendments made by this Act shall take effect on the date on which the Madrid Protocol enters into force with respect to the United States."

Therefore, the President would not deposit the instrument of accession by the United States to the Protocol until the Senate has given advice and consent to the accession, Congress has enacted all legislation necessary to implement the Protocol domestically and the U.S. Patent and Trademark Office has had sufficient time to make the operational adjustments necessary to receive and process applications under the Madrid Protocol.

The United States has not joined the Madrid Protocol to date primarily because of concerns surrounding the fact that the Protocol provides that, in addition to states, intergovernmental organizations (IGOs) with regional offices that register marks may become Party. These IGOs will have one vote in the Assembly, in addition to the separate votes of the IGO's member states that are Parties. The purpose of the provisions on IGOs was to establish a link between the Madrid system and the future regional trademark system of the European Community (EC). The EC's regional trademark system will coexist along with the national trademark systems within EC Member States.

Although we generally support efforts of the EC to become a party to treaties in which it has exclusive or shared competence in the subject matter, we usually insist

on a number of safeguards that are absent in the Protocol. These include provisions to require a declaration by an IGO of its relevant competence and to prevent concurrent voting and double counting by an IGO and its Member States.

Since 1997 an interagency group has worked with officials from the European Commission's directorates for external relations and the internal market to address U.S. concerns over EC voting in the Protocol. Both sides agreed to an informal approach. Although we did not achieve a formal modification of the Protocol to do away with its voting provisions, we believe that those voting provisions will be used rarely, if ever. Consensus decision making is expected to be the norm under the Madrid Protocol as it long has been under the original Madrid Agreement and in the World Intellectual Property Organization (WIPO) itself. In fact, we understand that members have only needed to resort to voting twice in the more than 100-year history of the Madrid Agreement.

On January 24, 2000, the European Union's Council of Ministers approved a Statement of Intent to address U.S. objections to the voting provisions. The statement indicated the commitment of the EC and its Member States to a consensus-based decision process. If a consensus position among the United States, the EC and its Member States could not be achieved, the statement indicated that the EC and its Member States would use their voting rights to ensure that the number of votes cast by the EC and its Member States does not exceed the number of the EC's Member States. That statement was subsequently communicated to the Under Secretary of State for Economic, Business and Agricultural Affairs in a letter from the Council of the European Union. Although this action by the Council cannot legally bind the EC from casting an additional vote if it were to so choose, we believe the political commitment that it reflects, is very significant. The President attached a copy of the Statement of Intent to the report to the Senate.

The Statement of Intent not only addresses U.S. concerns about an additional EC vote but also comes at a time when other factors have emerged favoring U.S. accession. In March 2000, the Government of Japan acceded to the Protocol. Japan's entry, in the absence of U.S. membership, is an adverse development for U.S. companies and heightens the desirability of U.S. accession as soon as feasible. Japan's pendency from application filing to the registration of a trademark is several years. However, as a party to the Madrid Protocol, it will have to process, and register, the Protocol requests for extension of protection within the strict Madrid Protocol time limits. As a result, those filers who cannot use the Madrid Protocol will be in the unfortunate position of waiting years for a registration, while Madrid Protocol applicants receive consideration and registration within the 18-month time period, (barring the filing of an opposition). Thus a U.S. trademark owner seeking to protect its mark in Japan will be seriously disadvantaged unless the U.S. becomes a party to the Madrid Protocol. This same situation may occur in other countries. In light of these developments, we understand that affected U.S. companies favor the U.S. becoming a party.

We have concluded that, with adoption of the Statement of Intent, the U.S. has achieved an acceptable solution with respect to the one IGO that we expect may someday be in a position to join the Protocol. Given (1) the passage of time, (2) the strong position we have staked out, in the past decade in opposition to extra votes for IGOs beyond the votes of their member states, and (3) the other avenues available to us in negotiations to prevent recurrence of the other identified concerns regarding an IGO's competencies in future agreements, we believe we should proceed with U.S. accession. This will facilitate efficient and economical trademark registration for U.S. companies.

In closing, let me thank you, Mr. Chairman, for your continued interest in the BIT program and the Madrid Protocol. I am happy to answer any questions.

Senator HAGEL. Secretary Bay, thank you.

Now the elusive Uzbekistan question. I have been waiting and waiting to ask this. As you note in your testimony, because of concerns about the policy environment in Uzbekistan, in the event that the Senate provides its advice and consent to ratification, the President would withhold the exchange of instruments of ratification until further improvements are made by the Government of Uzbekistan.

And again, I remind you, this is Chairman Helms' question. I share your concerns and am also concerned about the investment climate in Uzbekistan. If the situation improves and the adminis-

tration decides to consider bringing the BIT into force, we would like you to give us an update on your thinking before you make your decision. Will you do this for us?

Ms. BAY. Yes, we would certainly be quite willing to update you on developments as they occur. As I said in my testimony, we feel very strongly that by proceeding in the way that we proposed, we will have some additional leverage to try to really push the Uzbeks to make changes in their domestic policies.

Senator HAGEL. I suspect we will be living with this for a while to come, and it is going to be important that we have a clear understanding of how we would proceed in working this issue, so thank you. If there is additional information the chairman requests, obviously we will solicit that from you.

Ms. BAY. Yes, we will certainly keep you updated.

Senator HAGEL. Thank you.

On some of the general questions concerning the different BITs that we're looking at today, what impact will BIT arbitration clauses have on judgments rendered in this country against U.S. subsidiaries of foreign companies, or on the enactment of state and local governments?

Ms. BAY. I assume that you are referring to provisions under NAFTA.

Senator HAGEL. I am sorry, under what?

Ms. BAY. Under NAFTA.

Senator HAGEL. Yes.

Ms. BAY. We appreciate the concerns that the cases have had that have been raised already. But we also believe that the NAFTA commitments serve as an important investment policy because they provide a secure, transparent and fair regulatory environment for foreign investors. And we are committed to insuring that they must not be interpreted or applied in a way that undermines the NAFTA party's well-recognized right to regulate, to protect the environment, health and safety.

We are also committed to insuring that these policy objectives are mutually supportive. Accordingly, we established an interagency task force to develop a U.S. Government position for trilateral discussions that are considering whether clarification is warranted for the expropriation provision of the NAFTA investment chapter and if so, what kind of clarification would be appropriate.

While we are continuing to formulate our U.S. key provisions, one conclusion of the task force is to reaffirm that NAFTA was not meant to extend the definition of expropriation and create new previously unknown bases for finding an expropriation has occurred. The NAFTA cases are raising understandable concerns; we must bear in mind that only two cases have actually gone to an arbitral tribunal and it is too early to judge the potential impact of that decision.

We must also bear in mind that United States investors have been the primary beneficiaries of the mutual benefits contained in our BITs.

Senator HAGEL. Which agencies of the Federal Government are represented on the interagency task force?

Ms. BAY. State Department, USTR, Treasury Department, Justice, EPA, Labor, and Commerce.

Senator HAGEL. And Commerce.

It is the committee's understanding that in Croatia and other countries with pending BITs, there have been problems resolving property confiscation claims, and these claims that we're concerned about, involve our citizens, U.S. citizens. Will U.S. citizens have adequate protection for their foreign investments under the terms of the BITs under consideration? That's one part of the question. And the other is, what additional guarantees will be in place?

Ms. BAY. As you know, the issue with Croatia dates actually from property claims that come from World War II, and we have been pressing the Croatian Government to resolve these restitution claims for a long time. In meetings of May 2000 with officials from the Ministry of Foreign Affairs and the Ministry of Justice, the Department impressed upon the Croatians the U.S. Government's continued interest in resolving property claims of American citizens for property in Croatia. We further expressed the hope that the Croatian Congress would effect the changes to their law as quickly as possible.

The Croatians responded favorably, indicating that an inter-agency committee is studying the issue and is preparing the necessary changes to the law. We also reminded the Croats that the Italians and Austrians are the biggest group of claimants who will benefit from the revised law.

This issue will become highlighted as Croatia seeks to accede to the EU. Both Italy and Austria will have enormous influence regarding Croatia's accession.

American property claims will likely be addressed at the same time Croatia takes up these issues with the EU. The issue of property restitution has been raised by the Department of State on a number of occasions, including most recently by the Secretary of State during the visit of Prime Minister Racan and President Mesic.

We are aware of 31 American property restitution cases on file with the embassy in Zagreb, most of which deal with real estate and most of which have been pending since 1997. The embassy has notified these claimants of the constitutional court decision and its implications. The issue of property restitution has been raised again on a number of occasions, including by the Secretary of State, and we will continue to press the Croatian Government to resolve these issues.

Senator HAGEL. Do you believe these new safeguards are adequate to protect our U.S. citizen property rights?

Ms. BAY. We believe so. The Croats actually had a timetable for trying to pass their new legislation this fall, and we are hopeful that it will be passed by the end of the year.

Senator HAGEL. Is any part of this contingent on passing that legislation in Croatia?

Ms. BAY. Part of our BIT?

Senator HAGEL. Yes.

Ms. BAY. I would have to give you a written response to that. I believe that it is a standard BIT so it probably doesn't have specific provisions about that.

Senator HAGEL. Well, I am a bit concerned with your statement because you kind of left it hanging that we're hopeful this will happen. And I don't know enough about the specifics of whether this would impact the guarantees and protection that are pretty important for our citizens' property rights there. So if you could get back to me if there is a contingency, or what exactly is that legislative issue that you are hopeful the Croatian legislature will pass.

Ms. BAY. OK, I can certainly do that. We really, really believe that the Croatians are quite serious about passing legislation that will resolve these claims, but until it is passed, it isn't passed, and I understand your concern.

[The following response was subsequently received:]

RESPONSE TO SENATOR HAGEL'S QUESTION

The BIT will have no direct effect on the claims of U.S. citizens arising out of WWII property nationalizations, since these are actions that have already occurred and the BIT will not cover claims based on acts that took place prior to its entry into force. The BIT will, however, set the proper policy framework for GOC in dealing with these claims, as the BIT commits the government to address takings within customary international law standards, that is for a public purpose, in a non-discriminatory manner, under due process of law, and accompanied by payment of prompt, adequate and effective compensation.

If a claimant was a U.S. citizen at the time of the nationalization, and the nationalization occurred before November 1965, his or her claim was covered through separate claims settlement agreements between the United States and Yugoslavia from 1948 and 1965. If there are claimants who were U.S. citizens at the time of the nationalization and the nationalization took place after November 1965, their claims would not have been covered by the agreements. Therefore, these claimants should be able to pursue their claims under the "Law on Compensation for Property Taken During Yugoslav Communist Rule" once it is properly amended. If a claimant was not a U.S. citizen at the time of the taking and has since become a U.S. citizen, he or she should be covered by the "Law on Compensation for Property Taken During Yugoslav Communist Rule" once it is properly amended.

The law was passed by the Croatian Sabor (parliament) in October 1996 and entered into force in January 1997. Provisions in Article 9 and Article 11 of that law have been the basis for the USG claim of discrimination by the GOC against U.S. citizens. On April 21, 1999, the Croatian Constitutional Court annulled six specific provisions of the "Law on Compensation for Property Taken During Yugoslav Communist Rule." Among these were provisions under which such compensation was reserved exclusively to Croatian Citizens. According to the April 21, 1999 ruling, the provisions cited below become null and void only after the Sabor passes a revised version of the same law to conform to the Constitutional Court's decision. The Sabor has been granted a 9 month extension of the deadline for changing the law until the end of 2000. Although the discriminatory clauses about which the USG has repeatedly protested have been declared unconstitutional and struck down by the highest court in Croatia, U.S. and other non-Croatian citizens who seek restitution or compensation for property seized during Yugoslav Communist rule must wait until new, remedying legislation is enacted.

In meetings in May 2000 with officials from the Ministry of Foreign Affairs and Minister of Justice, the Croatians indicated to USG officials that an interagency committee is studying the issue and is preparing the necessary changes to the law. The GOC hopes to move quickly to approve it before the end of 2000. The issue of property restitution has been raised by the Department of State on a number of occasions including most recently by the Secretary of State during the visit of Prime Minister Racan and President Mesic. State will continue to monitor GOC progress on these claims and continue to press the importance of this issue with high level GOC officials. This issue will become highlighted as Croatia seeks to accede to the EU, as the Italians and Austrians are the biggest group of claimants who will benefit from the revised law.

Senator HAGEL. Thank you.

Which of the BIT countries we're talking about today represents the most U.S. investment to date?

Ms. BAY. Altogether, it is a rather large amount of money. As you know, many of these are small countries. I can give you some—

Senator HAGEL. Give me what you have and then if you could break that down, and I don't expect it right now, but give me what you have there, and then if you could get back to me on the other numbers.

Ms. BAY. Sure. We would be pleased to provide that for you.

In the case of Azerbaijan, on a historic cost basis, the stock of investment at the end of fiscal year 1999 was \$1.6 billion.

In the case of Bahrain, I don't have the numbers totaled up, but there is a \$33 million tissue factory, a large Coca Cola investment, a large U.S. pipeline investment. DHL has a \$12 million dollar regional distribution center. And there are a couple of other large U.S. investments.

In the case of Bolivia, the major sectors where there are large amounts of foreign investment are natural gas, mining and agriculture, and there is about \$204 million stock of investment as of the end of 1999.

In the case of Croatia, Coca Cola is the largest investor, with about \$12 million, and there's an energy company with another \$10 million investment.

In the case of El Salvador, there is a large power generating plant that's estimated at over \$140 million and again, large investments from a number of U.S. investors, which include Kimberly Clark, Texaco, Duke, Sarah Lee, Xerox, AIG, and several electrical distribution companies.

In the case of Honduras, there are numerous U.S. companies in the apparel industry, a number of service sector companies, financial services companies, and also several industrial and agricultural companies. We think the stock is about \$56 million at the end of 1999.

In the case of Jordan, there are also, again, several companies with interest there. The stock of investment is about \$30 million.

And in the case of Lithuania, the stock is about \$62 million.

In the case of Mozambique, where there are about 50 U.S. firms, the stock is smaller, it's about a million dollars.

In the case of Panama, the stock is about \$33 billion, a rather large U.S. investment in that country.

And in the case of Uzbekistan, I think as I said earlier, there is about \$500 million that has gone into Uzbekistan from the time of independence in 1991 up to 1999.

I will provide you a concise list.

[The following response was subsequently received:]

RESPONSE TO SENATOR HAGEL'S QUESTION

1999—U.S. DIRECT INVESTMENT IN BIT HEARING COUNTRIES

[In millions of U.S. dollars]

	U.S. Direct Investment Position on a Historic Cost Basis ¹
Azerbaijan	\$1,159
Bahrain	2-92

	U.S. Direct Investment Position on a Historic Cost Basis ¹
Bolivia	204
Croatia	³ 817
El Salvador	722
Honduras	56
Jordan	30
Lithuania	62
Mozambique	1
Panama (protocol)	33,429
Uzbekistan	⁴ 500
Grand Total	36,888

Source: Bureau of Economic Analysis, USDOC, unless noted otherwise.

¹The direct investment position is measured as the year-end value of U.S. parents' equity in (including retained earnings), and net outstanding loans to, their foreign affiliates. Historical cost valuation measures direct investment at its book value, which in most cases is the initial acquisition price.

²According to U.S. embassy reports, approximately 105 U.S. companies were operating, in one form or another, in Bahrain as of July 2000. Many of the U.S. firms are in the services sector and thus do not have a large capital investment in Bahrain despite a significant local presence. Largest investments include \$33 million Kimberly Clark tissue plant and \$12 million DHL regional distribution center.

³Croatia was not included in the DOC/BEA country-by-country data in 1999. In 1998 U.S. FDI position was \$817 million.

⁴Data suppressed to avoid disclosure of data of individual companies. In 1998 U.S. embassy reports that U.S. FDI totaled \$500 million since Uzbekistan's independence.

Senator HAGEL. Thank you. Did you work closely with the U.S. private sector as you negotiated these agreements?

Ms. BAY. Over the course of the years, we have had a quite extensive dialog with U.S. private sectors. These BITs, as I pointed out in my oral testimony and also provided in more detail in my written testimony, are mostly following our prototype treaties, and so there aren't variations really between them. They are standard in form.

Senator HAGEL. If I have additional questions, we discussed two or three on the BITs, I will provide those in writing. Let me turn to the Madrid Protocol now.

You have touched upon this in your testimony. Is there any additional legislation required to bring the United States into compliance with the Madrid Protocol?

Ms. BAY. No. The implementing legislation.

Senator HAGEL. Yes, of course, but nothing else.

Ms. BAY. No.

Senator HAGEL. Would you explain the benefits of the Madrid Protocol in improving our ability to protect the intellectual property rights of Americans?

Ms. BAY. There isn't exactly a direct benefit. The primary benefit is that the Madrid Protocol will simplify the process for obtaining and maintaining protection for the trademark of a U.S. business in foreign countries. The trademark owner will be able to file a single application in English, paid in U.S. dollars, and potentially obtain protection in 48 countries that are Madrid Protocol members. Without U.S. membership in the Madrid Protocol, the trademark owner is forced to file a separate application with the trademark office for each country. Such an application must be in the local language,

paid for in local currency, and usually prosecuted by the local counsel. So we see that this is really going to be a terrific benefit to U.S. filers for trademarks, because they will have a very simple process and manage to get in all 48 markets with one application.

Senator HAGEL. And this would benefit both small companies as well as large ones.

Ms. BAY. Absolutely.

Senator HAGEL. Does the World Intellectual Property Organization [WIPO], have any discretion to decline registration of marks for any reason?

Ms. BAY. I would probably have to give you a written response to that. They do have certain procedures that need to be followed, but I'm not an expert on the technical merits that have to be filed. It's only on procedures, it would not be a substantive veto.

Senator HAGEL. Partly why I asked that question is to understand the procedures for getting to a judgment by bureaucrats as they interpret some of these issues, and obviously—and I don't use that in a pejorative way, bureaucrats as opposed to someone in my party, but—that's a joke, of course.

If you watch television, you know what I am speaking of. We might have done rats a terrible disservice by linking them to politicians, so I don't know.

But that is a real life issue and we do the best we can in forming and framing and going through the procedural process here, but when we get to the true life dynamic of who makes the calls and the judgments and so on, that becomes a little more of a question, and I know there is no guarantee to that. But anything you could say to help enlighten the committee on that part of it would be helpful.

Ms. BAY. OK. Well, we will agree to provide you with information regarding the procedures, but again, I would reiterate, these are not substantive procedures, they are definitely technical procedures that are required in order to place that application.

Senator HAGEL. Let me ask the counsel if the committee has any additional questions—we may, again, have questions that we will submit in writing. Any additional questions? On the Democratic side?

Senator Helms will have a question or two, for the record. He has some prerogatives around here, as you know.

Now, my understanding is that our next Foreign Relations Committee Business Meeting is September 27, and we will make every effort to get all this bundled up for that meeting on the 27th. Obviously I can't guarantee that, but that is what we will shoot for. So of course, any questions that we shoot over to you, if you would move those around and get them back to us in a timely fashion, that will help as well.

We have one other piece of business here. I'm reminded to leave the record officially open until Friday, close of business. So you know how it works; if my colleagues or anyone has additional questions, or if you have additional comments, the record will stay open until close of business on Friday.

We also have another piece of business, which I don't think involves you directly, but you are certainly welcome to stay, and that is a confirmation hearing for a distinguished public servant, and

we always welcome those hearings. But officially, thank you, I would say to both of you. Ambassador West, good to see you again. Secretary Bay, good luck. Give our regards to all our friends over there, and this part of the hearing is complete.

(The hearing concluded at 3:15 p.m.)

ADDITIONAL QUESTIONS FOR THE RECORD

RESPONSES OF JANICE F. BAY TO ADDITIONAL QUESTION FROM SENATOR JESSE HELMS

BITS AND THE MADRID PROTOCOL

Question 1. Will enterprises from or controlled by North Korea, Cuba, Communist China, or other countries hostile to the United States have the same right of access to the Madrid Protocol regime as United States enterprises?

Answer. We very much appreciate this question because it provides an opportunity to address what appears to be a fundamental misconception about the purpose and impact of the Madrid Protocol. The Madrid Protocol is a filing mechanism that allows a trademark owner, from a state that is a member of the Protocol, to file its application through the International Bureau of the World Intellectual Property Organization (WIPO) which, if the United States were to become a party, would then forward it to the United States Patent and Trademark Office (USPTO) if the applicant designates the United States.

The Protocol makes no changes in substantive U.S. trademark law. Essentially, the Madrid Protocol makes it more efficient for trademark filers to do what they are already entitled to do—file trademark applications. Thus, even if the United States joins the Madrid Protocol, only those who meet the legal requirements for filing a trademark application at the USPTO will be able to file through the Protocol. The Madrid Protocol will not add any substantive bases for filing in the United States and will therefore not expand the universe of eligible filers.

As far as the United States is concerned, because the Madrid Protocol is just a filing mechanism, it offers no legal benefit to applicants from North Korea (Democratic People's Republic of Korea), Cuba, and China (People's Republic of China) that they do not already enjoy. All of these countries are parties to the Paris Convention for the Protection of Intellectual Property, as is the United States. Therefore, citizens and enterprises of these countries already are entitled to file trademark applications in the United States. The Madrid Protocol would not change that ability.

Most important, however, is the fact that the Madrid Protocol has *no effect* on substantive U.S. trademark law. In other words, applicants from North Korea, Cuba, and China would need to meet the same criteria to register their trademarks in the United States that they now must meet, and this would be true regardless of whether they were to file under the Madrid Protocol or were to use the current filing system.

Question 2. Are North Korea, Cuba, Communist China, Iran or Iraq now parties to the main Madrid Agreement? What about the Protocol?

Answer. As of August 8, 2000, North Korea (Democratic People's Republic of Korea), Cuba, and China (People's Republic of China) were each party to both the Madrid Agreement and the Madrid Protocol.

Iran and Iraq are not currently parties to either the Madrid Agreement or the Madrid Protocol.

China, Cuba, Iran, Iraq, and North Korea are all parties to the Paris Convention for the Protection of Intellectual Property, as is the United States. Therefore, nationals from each of these countries are currently entitled to file trademark applications in the United States.

The right to file an application is not the same thing as the right to use a trademark. There should be no misimpression that, merely because a national from one of these countries of concern files a trademark application, the applicant somehow will automatically become entitled to use the trademark in the United States. Further, because the Madrid Protocol is just a filing mechanism, it offers no substantive benefits to trademark owners who choose to file through it.

We note that, with the exception of China, the number of trademark applications filed by nationals of China, Cuba, Iran, Iraq, and North Korea is best characterized as "insignificant."

China—301 trademark applications filed in FY99.
 Cuba—No trademark applications filed in FY99.
 Iran—No trademark applications filed in FY99.
 Iraq—No statistics (no applications filed in at least the past 5 years).
 North Korea—5 trademark applications filed in FY99.

Question 3. What if they, their agents, or their licensees seek to register trademarks under the Madrid Protocol which are the illegally—perhaps even violently—confiscated intellectual property of a U.S. person or enterprise? May such trademarks be freely registered via the Madrid Protocol by these outlaw applicants?

Answer. The Madrid Protocol is simply a vehicle for filing a trademark application. It does not provide a “back door” to legal protection of trademarks which otherwise would not be available to trademark applicants—no matter what their nationality.

Trademark applicants located in countries that are party to the Madrid Protocol may use the Protocol to file their trademark applications (called “requests for an extension of protection” in the language of the Madrid Protocol). The Madrid Protocol makes it easier for all applicants, including U.S. citizens wishing to file abroad, to get their trademark applications in process.

The Madrid Protocol does not override substantive national law. It should be noted, for example, that neither H.R. 769 or S. 671 (the House and Senate versions, respectively, of legislation necessary to implement the Madrid Protocol) requires an amendment to 15 U.S.C. § 1051(2), the section of the Trademark Act which identifies the substantive trademark refusals routinely made by the United States Patent and Trademark Office. Applications filed by foreign nationals under the Madrid Protocol would be subject to precisely the same examination as applications filed by U.S. citizens.

Even after examination by the United States Patent and Trademark Office (USPTO), any party with an interest in the trademark may file an opposition proceeding questioning whether the trademark is entitled to be granted an extension of protection (registration) under U.S. law and may introduce evidence in the proceeding regarding ownership of the trademark. An opposition proceeding occurs only if the USPTO has found no statutory or regulatory basis for refusal. In fact, substantive refusals are not uncommon. Finally, even if a trademark registration issues, any party with an interest in the trademark may file a request for cancellation of the mark.

Question 4. Will the true U.S. owners of such marks be hampered by the Madrid Protocol, either in their own country or elsewhere, in their efforts to recover their intellectual property or defend their rights? Will they be helped? Please explain your answers.

Answer:

Will U.S. Trademark Owners be hampered by the Madrid Protocol?

The U.S. owners of trademarks would in no way be hampered by the Madrid Protocol, in the United States or elsewhere, in their efforts to recover their intellectual property or defend their rights. This is because the Madrid Protocol does not establish rights or ownership in any trademark. The Protocol is simply a mechanism or means for filing applications for protection for trademarks in countries that are members of the Madrid Protocol.

Requests for extensions of protection (applications) and grants of extension of protection (registrations) are all subject to the laws of the member countries. The fact that a trademark is the subject of an International Registration under the Madrid Protocol does not change or affect the rights that exist under the laws of the member countries.

Will the Madrid Protocol Help U.S. Trademark Owners?

The Madrid Protocol can be of tremendous assistance to the true owners of trademarks. In some countries (typically, civil-law countries), the true trademark owner can't even get into court to pursue an infringer unless and until the trademark owner obtains a trademark registration. (Neither a trademark application nor a registration is necessary to establish or assert trademark rights in the United States.) Unfortunately, the registration process in many countries is lengthy. Years can be lost before the registration issues to the true owner and that owner is finally able to pursue an infringer in court.

Under the Madrid Protocol, members will have to notify applicants of all refusals within 18 months. As a practical matter, this will not affect processing of trademark applications in the United States, where refusals are currently issued in an average of 5.7 months from the date of filing. However, in countries where the domestic processing queue is long, the 18-month time limit for Madrid Protocol processing

would be of significant benefit to U.S. trademark owners who otherwise would have to wait for years before their applications would even be reviewed.

In addition, a U.S. applicant under the Madrid Protocol would be in the same position to defend its rights under the laws of the member country as is a domestic applicant in the other country. Members of the Madrid Protocol must treat these trademark applications in the same manner as applications filed through domestic processes, and accord all rights to an applicant under the Madrid Protocol as would apply to a domestic applicant. Thus, the Madrid Protocol will facilitate access to the intellectual property protection regimes in member countries, thereby allowing owners of U.S. trademarks to protect their marks in those countries.

Question 5. During a briefing on the Madrid Protocol on Tuesday September 12, 2000, Administration briefers reportedly told the Committee staff that the Madrid Protocol will assist in the struggle to prevent piracy of intellectual property by People's Republic of China. However, during her testimony before the Committee on September 13, 2000, Deputy Assistant Secretary Janice Bay directly contradicted this statement, testifying instead that there is no enforcement aspect associated with the Madrid Protocol. Please explain this contradiction.

Answer. Deputy Assistant Secretary Janice Bay correctly stated that there is no enforcement aspect associated with the Madrid Protocol.

When the Administration was briefing Committee staff on September 12, a similar question was asked. In answering the question, it was stated that the Madrid Protocol per se would not provide an enforcement mechanism for U.S. trademark owners who are attempting to protect their trademarks in China (People's Republic of China) or attempting to stop use of their trademark on counterfeit goods. This is absolutely true. The Madrid Protocol, as has been noted, is not a substantive law treaty. It in no way affects the substantive law applied to determinations of infringement or registrability. However, in many countries, the first step required in any enforcement action is proof by the complainant that it owns a valid and existing trademark registration, for the mark it seeks to protect, in that national system. While this is not a prerequisite in the United States, in countries where it is, the enforcement action cannot even commence without such a registration. The Madrid Protocol would make it easier, cheaper and faster for the U.S. trademark owner to obtain the necessary national registration in order to protect its valuable mark.

The fact that the Madrid Protocol requires that the request for extension of protection be treated the same as a regularly filed national application means that domestic applicants cannot be given preferential treatment. Any deviation from a policy of "first in, first out" with respect to review of applications would raise immediate questions.

In addition, since U.S. applicants will be able to file their Madrid Protocol application with the USPTO, in English, the practical barriers to application, such as translation issues, are eliminated. To the degree that substantive trademark rights in a particular country are only created by registration of the trademark, the Madrid Protocol will significantly speed the process for obtaining such trademark rights.

During the September 12 testimony, it was suggested that another benefit of the Madrid Protocol arises in respect to those countries with a reputation for less than rigorous enforcement of, or adherence to, intellectual property rights. It creates a community of interest with other nations and may eventually reinforce an appreciation of the need to provide consistent and strong protection to these important property rights. Although this will not happen overnight, or as a direct result of being a party to the Madrid Protocol, membership in the Madrid Protocol does bring these countries to the table and establishes an agenda focused on equal protection and enforcement of intellectual property rights.

RESPONSES OF JANICE F. BAY TO ADDITIONAL QUESTIONS FROM SENATOR JOSEPH R. BIDEN, JR.

THE MADRID PROTOCOL

Question 1. The letter of submittal from the Secretary of State to the President makes reference to "Rules" (e.g., page IX of the Senate Treaty Document) and "Regulations" (e.g., page XVI of Senate Treaty Document)

Are these references both to the same document, that is, the "Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement?" If not, please explain the difference between the Rules and Regulations.

Answer. As the question suggests, references to the “Rules” and “Regulations” are references to portions of the same document, the “Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement.” The “Common Regulations” document is divided into nine chapters. Each chapter contains “Rules,” of which there are forty.

How are these Regulations agreed to among parties to the Protocol?

Answer. The Common Regulations under the Madrid Agreement and Protocol were adopted by the Assembly of the Madrid Union in January 1996 and became effective on April 1, 1996. As their title indicates, the “Common Regulations” govern procedures under both the Agreement and the Protocol. Their effective date marked the coming into force of the Protocol.

The Common Regulations resulted from discussions in the framework of the Working Group on the Application of the Madrid Protocol, which met six times between 1990 and 1994. A number of minor amendments to the Regulations were adopted by the Assembly in September 1997 and became effective on January 1, 1998.

A Working Group on the Modification of the Common Regulations Under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement is scheduled to meet from October 9–13, 2000, to discuss proposed modifications to the Common Regulations. Otherwise, there has been no general review of the Regulations since they became effective over four years ago.

Are there any other “notifications” (such as the notification that the United States is planning to make under rule 7(2)) that the United States intends to make at the time of accession?

Answer. The only “notifications” that the United States anticipates making at the time of accession are those specified in Rule 7(2), which, in its entirety, reads as follows: “[Intention to Use the Mark] Where a Contracting Party requires, as a Contracting Party designated under the Protocol, a declaration of intention to use the mark, it shall notify that requirement to the Director General. Where that Contracting Party requires the declaration to be signed by the applicant himself and to be made on a separate official form annexed to the international application, the notification shall contain a statement to that effect and shall specify the exact wording of the required declaration. Where the Contracting Party further requires the declaration to be in English even if the international application is in French, or to be in French even if the international application is in English, the notification shall specify the required language.” Of course, these “notifications” are distinct from the three “declarations” that the United States intends to make at the time of its accession and that were described in the Department of State report submitted to the Senate with the Madrid Protocol.

Question 2. The letter of submittal from the Secretary of State makes reference to a “Committee of Experts.” (p. X of Senate Treaty Document)

What is this committee? What are its terms of reference?

Answer. The Committee of Experts refers to the “Working Group on the Application of the Madrid Protocol of 1989” and was the committee that negotiated and discussed the implementing regulations for the Madrid Protocol. This Committee has been replaced by the “Working Group on the Modification of the Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement.” The Working Group on the Application of the Madrid Protocol consisted of representatives from states that were members of the Madrid Agreement, representatives of WIPO member states, the European Union, and non-governmental observers. This group was charged with negotiating the common regulations for the Madrid Agreement and the Madrid Protocol that were eventually adopted by the Assembly of the Madrid Union in January of 1996. The United States was represented at all of the meetings of the Working Group on the Application of the Madrid Protocol of 1989 and presented its views on all issues that would relate to U.S. implementation of the Madrid Protocol.

Will the United States be represented on the Committee if the United States becomes a party to the Protocol?

Answer. Yes.

Question 3. Please elaborate on Article 5bis.

What is meant by “exempt from any legalization as well as from any certification . . .” Please explain what the terms “legalization” and “certification” [mean] as used in the Protocol.

Answer. Article 5*bis* prohibits parties to the Madrid Protocol from requiring any formal certification or authentication of evidence provided to support the legitimacy of a trademark applicant's use of armorial bearings, escutcheons, portraits, honorary distinctions, titles, trade names, names of persons other than the applicant, or like inscriptions.

In some countries, evidence of this type might otherwise have to be notarized, or supported by certificates of authenticity and/or validity, issued by a government agency or accepted private authority. No change in domestic procedure would be required for the United States to comply with Article 5*bis*.

Article 5*bis* makes it much easier for applicants to provide relevant, credible evidence without the barrier of unhelpful formalities.

Question 4. Would any amendments to the Protocol adopted pursuant to Article 13 be subject to Senate advice and consent?

Answer. As noted in the July 11, 2000, Department of State report submitted with the Madrid Protocol, it is a common practice in multilateral intellectual property treaties that include provisions for an Assembly to facilitate treaty implementation, to permit certain provisions of the treaty to be amended by a super-majority of the Assembly, without the need for a revision conference. This is true of the Madrid Protocol.

Under the Madrid Protocol, the requisite super-majority is three-fourths of the votes cast in the case of an amendment to Article 11, 12, 13(1) or 13(3); it is four-fifths of the votes cast in the case of an amendment to Article 10 or 13(2). As described in Article 13(3) of the Protocol, an amendment to Articles 10, 11, 12, or 13 that is adopted by the requisite super-majority enters into force for all parties one month after written notifications of acceptance, *effected in accordance with their respective constitutional processes*, have been received by the Director General of WIPO from three-fourths of those States and intergovernmental organizations which, at the time the amendment was adopted, were members of the Assembly and had the right to vote on the amendment. For the United States, Senate advice and consent is a part of our constitutional process with respect to amendments to the Madrid Protocol.

While it is possible that an amendment to Article 10, 11, 12, or 13 could enter into force for all parties in circumstances in which the United States is not one of the parties that has notified the Director General of its acceptance of the amendment in accordance with its constitutional processes, that situation is unlikely to occur given the longstanding leadership role of the United States in the field of intellectual property. Moreover, it bears noting that there is no mechanism within the Madrid Protocol to adopt changes to the Protocol that would affect substantive national trademark law.

Question 5. Does the United States intend to make any declarations under Article 14(5)?

Answer. Article 14(5) of the Madrid Protocol notes that States and intergovernmental organizations that are eligible to be parties to the Protocol may, upon accession to the Protocol, declare that the protection resulting from any international registration effected under the Protocol before the date of entry into force of the Protocol with respect to it cannot be extended to it. The United States does not intend to make such a declaration when it deposits its instrument of accession to the Protocol.

Question 6. Does the United States consider the commitment of the European Community and its member states to be binding? If not, why did we not seek a binding agreement?

Answer. The United States does not consider the statement of intent communicated in the February 2, 2000, letter of Margarida Figueiredo to be a legally binding commitment. Rather, it constitutes a political commitment, which the United States regards as a serious undertaking in the political (as contrasted to legal) context. A legally binding agreement was not practical for various reasons, including the fact that neither the European Community nor the United States was a party to the Madrid Protocol at the time and the fact that any legal agreement to modify the Protocol's voting provisions would have required an amendment to the Madrid Protocol itself. Moreover, the European Community was not willing to proceed in that manner, which would have been very time-consuming.

Ultimately, after several years of discussion and in the context of developments described in detail in the documents submitted with the Madrid Protocol, the United States accepted the concept of a unilateral statement reflecting the intent of the European Community and its Member States. This represents a practical means of responding to concerns raised by the voting provisions of the Protocol so that the

United States would be in a position to accede to the Madrid Protocol. Accession to the Madrid Protocol has become important to U.S. businesses that want a more efficient way to obtain protection for their important and valuable trademarks in countries that are parties to the Madrid Protocol. This is especially so now that Japan's participation in the Protocol will shorten the time frame within which Japan will process applications filed thereunder.

BILATERAL INVESTMENT TREATIES

Question 1—El Salvador BIT. Please elaborate on the definition of “small commerce, small industry, and small service providers” under the 1970 El Salvador law referenced in paragraph 3 of the Annex.

Answer. El Salvador provides financial assistance to certain “micro-enterprises” with capitalization under a predetermined level. In order to address a Salvadoran law prohibiting the purchase of these subsidized entities by non-Salvadorans, El Salvador requested an exception from its general obligation to accord national treatment to covered investments. To avoid the imprecision of the term “micro-enterprises,” the exception was tied to the definition of “small commerce, small industry, and small service providers,” set forth in the *Ley Reguladora del Ejercicio del Comercio e Industria*, as published in “Diario Oficial” No. 23, 4 February 1970. The law defines “small commerce” for natural persons as an enterprise with a capitalization under 100,000 colones (USD 11,467 at current exchange rates); small industry for natural persons as an enterprise with a capitalization under 50,000 colones (USD 5,733); “small corporations” for commerce as an enterprise with a capitalization under 200,000 colones (USD 22,933); and “small corporations” for industry as an enterprise with a capitalization of under 100,000 colones (USD 11,466).

Question 2—Azerbaijan BIT. Do the parties have a common understanding on the length of the “transition period to a market economy” described in paragraph 3 (as renumbered by the exchange of notes)?

Answer. The parties understand the transition to a market economy as a process rather than a discrete series of steps or milestones with a specific ending date. While the process is not yet complete, Azerbaijan has made significant progress. Over the past year, for example, the Government of Azerbaijan has worked closely with the Embassy and the American Chamber of Commerce to improve the investment and business climate in Azerbaijan. This included the formulation of a new tax code, work on privatization, and the creation of a foreign investment agency. National treatment is not yet accorded with respect to the ownership of real estate, although foreign investors may own buildings but cannot own land. Foreign entities may lease land for periods of up to 99 years, with the possibility of extension.

ADDITIONAL STATEMENTS SUBMITTED FOR THE RECORD

AMERICAN PETROLEUM INSTITUTE,
1220 L STREET, NW,
Washington, DC, September 12, 2000.

The Honorable JESSE HELMS, *Chairman,*
Senate Committee on Foreign Relations,
SD-450,
Washington, DC.

DEAR MR. CHAIRMAN:

The American Petroleum Institute, Independent Petroleum Association of America, International Association of Drilling Contractors, National Ocean Industries Association, and the United States Oil and Gas Association appreciate this opportunity to provide the Committee with our views on the treaty between the United States and Mexico regarding Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 nautical miles, also known as the Western Gap Treaty. These five trade associations represent virtually the entire offshore oil and natural gas exploration and production industry and service industry in the Gulf of Mexico.

The United States State Department and Minerals Management Service have consulted on several occasions with the oil and gas industry about the treaty, and the oil and gas industry fully supports swift ratification of the Western Gap Treaty by the United States Senate.

Background of Maritime Boundary Treaty

In 1978, the U.S. and Mexico signed a maritime boundary treaty that divided the seabed, subsoil, and water column between the U.S. and Mexico off the Pacific Coast and in the Gulf of Mexico. The purpose of the treaty was to establish a permanent maritime boundary and eliminate overlapping jurisdictional claims between the U.S. and Mexico for fishing grounds, oil and natural gas, and other natural resources.

Under the treaty, the maritime boundary was drawn as an equidistant line from the coastlines of the two countries giving full effect to habitable islands. The treaty divided the areas where Mexican and U.S. exclusive economic zones (EEZs) overlapped, but left two areas, referred to as the eastern and western “donut holes,” or gaps, unresolved. These two gaps are beyond the 200-mile EEZ claimed by both countries. Mexico ratified the 1978 boundary treaty in 1979, and the U.S. ratified it in 1997.

Western Gap Treaty

Upon ratification of the Boundary Treaty in 1997, the U.S. and Mexican governments began negotiations to establish the maritime boundary within the Western Gap; a 5,092 square nautical mile area more than 200 miles from either country's border. This treaty represents the culmination of those negotiations and, as indicated earlier, is fully supported by the offshore petroleum industry. Under the treaty, an additional 1,913 square nautical miles or about 1.6 million acres of the Gulf of Mexico would fall under United States jurisdiction. Portions of the Western Gap could be made available for oil and natural gas leasing as early as March 2001 if the treaty is ratified this year. Approximately 160,000 acres of U.S. controlled acreage located directly adjacent to the Gap boundary would be made available 10 years after the treaty is ratified by both the United States and Mexico.

Today, industry has the technology to explore for oil and gas in water depths up to 10,000 feet and to produce hydrocarbons in over 5,000 feet of water. Since oil and gas exploration has moved into the deep water Gulf of Mexico in close proximity to the existing maritime boundary, negotiators sought to establish a regime to encourage information transfer and consultation regarding potential trans-boundary resources within the Western Gap. To that end, the treaty establishes a 2.8 nautical mile buffer zone—1.4 nautical miles on either side of the boundary line—where a special regime would be established to address potential trans-boundary resources within the gap.

Specifically, within the buffer zone, the treaty establishes a 10-year moratorium on all exploration and production activities with the exception of geological and geophysical (G&G) studies. The 10-year period begins upon ratification of the treaty by both governments and may be shortened upon mutual agreement. During this period, the treaty encourages the two countries to consult and share public data—consistent with their respective laws and regulations—to determine the presence and distribution of trans-boundary resources. At the end of the 10-year period, the two governments are obliged to advise each other of any decision to offer the acreage on their side of the buffer zone for lease, license, auction, etc., or to develop the acreage in advance of first production in the buffer zone.

Ratification This Year Important

Ratification of the treaty by this Congress will clear the way for the U.S. Minerals Management Service to begin offering for lease about 1.5 million additional deep water acres in the Gulf of Mexico as early as next year and trigger the clock on the 10-year buffer zone period described earlier.

Ratification of this treaty will be beneficial for U.S. energy needs once exploration and production is allowed to commence in the Western Gap. If the MMS began offering tracts immediately and industry began exploration tomorrow in this area, it could be 10 years before the U.S. consumer would see those products in the market place. Moreover, leases within the Western Gap could potentially generate significant revenues for the U.S. Treasury.

The petroleum industry has been very concerned over reduced domestic production and greater reliance on imports. In recent years, domestic areas available for exploration have been significantly diminished; ratification of this treaty will be a step towards making an additional 1.5 million acres of the Gulf of Mexico available for leasing next year. As a result, industry supports the Western Gap Treaty and strongly encourages the U.S. Senate to ratify it this year.

Thank you for the opportunity to comment on this important treaty. Since there will be a hearing held on this treaty on Wednesday September 13, 2000, we would

appreciate if you would please make industry's comments part of that hearing record.

Sincerely,

MARK RUBIN, *Upstream General Manager.*

INTERNATIONAL TRADEMARK ASSOCIATION,
1990 M STREET, NW, SUITE 340,
Washington, DC, September 13, 2000.

STATEMENT IN SUPPORT OF MADRID PROTOCOL

Chairman HELMS and Members of the Committee on Foreign Relations:

The International Trademark Association (INTA) is pleased to lend its strong support for U.S. adherence to the Madrid Protocol. INTA respectfully requests that the Senate Foreign Relations Committee approve the Madrid Protocol and send it to the floor so that the Senate may provide its "advice and consent" prior to the conclusion of the 106th Congress. We are equally pleased to have lent our support to the implementing legislation for the Madrid Protocol (H.R. 769/S. 671), which was approved by the House last year, has been approved by the Senate Judiciary Committee, and is now awaiting consideration by the Senate.

INTA is a 122-year-old not-for-profit organization comprised of over 3,900 members. It is the largest organization in the world dedicated solely to the interests of trademark owners. The membership of INTA, which crosses all industry lines and includes both manufacturers and retailers, values the essential role trademarks play in promoting effective commerce, protecting the interests of consumers, and encouraging free and fair competition. INTA has worked closely with the international business community, the administration and congressional staff in the preparation of this treaty instrument.

The Madrid Protocol is tremendously important to U.S. businesses exporting their products overseas. Because the Protocol contains improvements sought by the U.S. to the original treaty, the Madrid Agreement, it would broaden the participants in the current system for the international registration of trademarks. This is a simple concept that has existed for over 100 years, yet is even more essential in today's global trade environment where competition is fierce. Under the Madrid Protocol, a trademark owner based in the U.S. would be able to gain protection for its trademark in as many Protocol countries as desired by filing a single application at the U.S. Patent and Trademark Office (USPTO) in a single language—English—upon payment of a single set of fees. Without such a centralized system, a U.S. company can protect its mark only by enduring the rigors of hundreds of differing registration schemes in each of the countries where the products might be sold.

This "one-stop" filing mechanism has particular value for small U.S. companies who simply cannot afford to retain counsel around the world in order to register their trademark(s) in each country in which protection is sought. Registration is important, since unlike the U.S., many countries offer no trademark protection at all unless the mark is registered with the appropriate national authority. The lack of a registration leaves the small company open to attack by counterfeiters and others seeking to capitalize on the goodwill and investment associated with the mark.

Large U.S. companies will also benefit from U.S. adherence to the Madrid Protocol. With so many products to sell in a variety of countries, the "one-stop" approach will greatly ease the ability of these companies to increase awareness and sales.

Here are just a few examples as to how adherence to the Madrid Protocol would benefit U.S. companies in terms of saving time and money when securing protection for their trademarks:

- A U.S. trademark owner wishing to register a mark in 10 different countries currently needs to file 10 separate applications. The costs of these 10 applications, which include official and attorney fees, would at a minimum be over \$14,000. Under the Madrid Protocol, the fee, depending on the amount that the national office has agreed with World Intellectual Property Organization (WIPO)¹ to charge, would be preset and would be about \$4,700—a savings of more than 67% in total fees.
- An even greater economic benefit would be realized after an international registration has been obtained. Let us assume that a U.S. company has 1,000 trademark registrations in 10 countries and needs to make an amendment due

¹ WIPO is the entity that administers the Madrid Protocol.

to a simple change in address. Without the Madrid Protocol, that would require 10,000 amendment applications being filed at costs in the thousands of dollars. Under the Protocol, only one amendment application needs to be filed at a cost of about \$100.

- Under the Madrid Protocol, member countries must examine and act upon the international application for registration within 18 months. In many countries, a registration through the national office can take up to 4 years, thus denying trademark protection in this age of global communication and rapidly changing markets. The Madrid Protocol helps to expedite the process.

Mr. Chairman and Members of the Committee, the Madrid Protocol will provide meaningful access to international trademark protection for small and medium sized companies, while cutting the costs and providing a more streamlined process for U.S. companies of every size. In adhering to the Madrid Protocol, the U.S. will join many other leaders of the global economy, including China, France, Germany, Italy, Japan, Spain, and the United Kingdom. For these and other reasons, INTA respectfully requests that the Foreign Relations Committee act without delay and report the Madrid Protocol to the floor so that the Senate may provide its "advice and consent."

Thank you.

KRAFT FOODS,
1341 G STREET, NW, SUITE 900,
Washington, DC, September 8, 2000.

The Honorable JESSE HELMS, *Chairman,*
Committee on Foreign Relations,
United States Senate,
Washington, DC.

DEAR MR. CHAIRMAN:

We understand that the White House has now sent the Madrid Protocol to the Senate for "advice and consent." Kraft Foods is pleased to register its strong support for the Madrid Protocol, and we respectfully request that you move as expeditiously as possible with respect to this treaty.

The Madrid Protocol is a non-controversial, but important treaty that is designed to provide a mechanism for obtaining multi-national trademark protection and maintaining international registration rights through a centralized system for trademark owners in Protocol member nations and intergovernmental organizations having their own trademark system. Under the Madrid Protocol, Kraft Foods, which owns thousands of famous trademarks (like JELL-O, MAXWELL HOUSE, and OSCAR MAYER, to name just a few) would be able to file in the U.S. Patent and Trademark Office an application for protection in as many Protocol countries as desired through the filing of a single application in English for a single fee.

The benefits of the Madrid System for companies like Kraft are tremendous. Of particular significance will be the cost savings of the system; we will literally save thousands of dollars each year, and will also be able to cost effectively expand our protection to more markets around the world. Importantly, the Protocol will also enable us to obtain protection in an expedited manner, providing an incentive to expand our new product introductions.

Simply put, in an increasingly diverse and highly competitive global marketplace, the Madrid Protocol is a "one stop shop," that makes protecting American icons like KRAFT and POST a great deal easier. On behalf of Kraft Foods, we ask that the Senate provide its "advice and consent" prior to the conclusion of the 106th Congress.

Thank you for your assistance. Your continued support of U.S. intellectual property owners is greatly appreciated.

Sincerely,

FRANCES M. NORRIS, *Vice President,*
Government Affairs—Food.

UNITED STATES SENATE,
Washington, DC, September 11, 2000.

The Honorable JESSE HELMS, *Chairman,*
Senate Committee on Foreign Relations,
SD-450,
Washington, DC.

DEAR MR. CHAIRMAN:

I understand the Foreign Relations Committee has scheduled a hearing for September 13 on the treaty to establish the boundary between the U.S. and Mexico in the "Western Gap" of the Gulf of Mexico, the Delimitation of the Continental Shelf, Treaty Doc. 106-39 (Mexico). As you recall, this is one of two areas left undelineated by the 1997 U.S./Mexico maritime boundary treaty which was ratified by the Senate under your leadership in 1997.

This treaty will confirm U.S. sovereignty over an additional 6,562 square kilometers of the Western Gulf of Mexico. The Western Gap is an important area in terms of potential oil and gas resources. The Minerals Management Service of the Department of the Interior has said no leases will be offered in the Western Gap until the treaty is ratified. The U.S. needs to start leasing those tracts so that any oil and gas resources found in the region may be brought into production as soon as possible.

I know you share my concern for maintaining our nation's energy independence. I urge you to move expeditiously to have the treaty ratified before the Senate adjourns. Thank you for your careful consideration.

With kindest regards, I am
Sincerely,

MARY L. LANDRIEU,
United States Senator.

PREPARED STATEMENT JOSEPH PAPOVICH, ASSISTANT U.S. TRADE REPRESENTATIVE,
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

INTRODUCTION

I am pleased to provide testimony with respect to the Bilateral Investment Treaties (BITs) submitted for the Senate's approval. These treaties are an important part of the Administration's efforts to create jobs and foster growth here at home, strengthen U.S. competitiveness and promote a level playing field in the global economy. The Office of the United States Trade Representative strongly believes that these treaties are in the national interest, and we ask that the Senate approve them without delay.

Investment is increasingly important in today's world. Foreign direct investment in the international economy is growing rapidly: from 1990 to 1998, foreign direct investment grew 11% annually, versus 6.5 percent for trade and 2.0 percent for GDP. The United States is the recipient of more foreign investment than any other country—to our benefit, as some 5.6 million people are employed by U.S. affiliates of foreign companies. Because of the economic linkages between U.S. parent companies and their overseas affiliates, U.S. outward investment has also become a crucial component of our economy, with the investment stock totaling over \$1.1 trillion in 1999.

U.S. investors face tough competition from other countries and the Administration wants to ensure that they enjoy all possible advantages vis-a-vis this competition. These investors assert that the ability to manage their operations on an international basis is no longer a choice, it is essential if they are to survive in the global marketplace. One way to strengthen the position of our companies internationally is to provide a framework within which they are entitled to the benefits of a level playing field and specific protections in countries where they decide to invest. The Bilateral Investment Treaties are designed to provide these necessary protections and enable U.S. investors to compete in a world of new and changing opportunities. As President Clinton has noted, "We welcome foreign investment in our businesses, knowing that with it (come) new ideas as well as capital . . . but as we welcome that investment, we insist that our investors should be equally welcome in other countries."

UNITED STATES POLICY ON INVESTMENT

While the protection of United States investment property abroad is the central objective of BITs and other United States investment agreements, this objective is consistent with and a component of a broader belief in the value of open international trade and investment regimes. United States foreign trade and investment policy has long recognized the benefits that foreign investment brings to host and home governments alike. As the world's largest recipient of foreign investment and largest exporter of capital, as well as a country with one of the world's most open investment regimes, the United States stands the most to gain from investment treaties that remove restrictions on investment.

From the vantage point of a capital exporter, U.S. investment abroad creates additional export opportunities. The popular notion that foreign investment supplants exports is not supported by the facts. Instead, foreign investment allows U.S.-owned companies to deliver goods and services abroad where direct exports of finished products would be prohibited by transportation costs or are blocked by trade barriers. Foreign affiliates are better positioned than their parents to design, manufacture, distribute, and service products for the special requirements of the host-country. Exports from companies in the United States to their foreign affiliates totaled \$185.4 billion or 27% of U.S. exports in 1998.

Moreover, inward investment stimulates competition in the host country, introduces new technologies and management skills, increases employment, and provides links to the international marketplace. Foreign-owned manufacturing establishments in the United States, on average, are larger, pay higher wages, and are more productive than U.S.-owned establishments. Nearly 5 million jobs were supported by non-bank affiliates in the United States in 1996. The compensation per employee of these affiliates is about 10% higher, on average, than that of U.S.-owned establishments.

While the competitive pressures of the "global economy" are now more acute than ever, the origins of the protection of American investment property abroad date back at least to the early nineteenth century when such protections were embodied in provisions of Friendship, Commerce and Navigation Treaties. Elements of those first treaties remain in today's investment treaties, but U.S. BITs also reflect Congressional and business community concerns that have developed over time, the evolution of customary international law, and historic circumstances affecting U.S. overseas investment property. For example, U.S. investors have seen repeated waves of expropriation: in the Soviet Union after 1917; in China in the 1930's and 1940's; in Eastern Europe after WWII; in Cuba in 1959; in many developing countries (especially in Latin America) in the 60's and 70's; and in Iran beginning in 1979. Accordingly, United States investment agreements, including the BITs, contain very specific protections with respect to expropriation.

In addition to responding to the confiscation and other mistreatment of United States investment property abroad, the treaties also respond to the aggressive steps taken by other capital exporting countries to gain market access and obtain the best operating conditions for their nationals investing overseas. A primary impetus for the initiation of the BIT program was an aggressive effort on the part of a number of European countries to establish investment agreements with developing countries in the 1960's and 1970's. The number of bilateral investment treaties continues to grow. There are currently between 1,500 and 1,600 bilateral investment agreements worldwide.

Thus, the BITs were not conceived as a tool to promote foreign investment, rather they were a response to the vulnerability faced by U.S. investments overseas. The BITs are part of our larger investment policy to protect American investment abroad. For example, since 1976, the United States has been a party to investment instruments containing some of the same principles with industrialized countries under the auspices of the OECD. For decades, the Overseas Private Investment Corporation has provided political risk insurance to U.S. investment operating in developing countries. The U.S. Government has been working closely with APEC members to lay the groundwork for eventual commitments. It has negotiated basic investment commitments with China in the China WTO Agreement. The Administration has just begun a negotiation to upgrade the commitments in the WTO General Agreement on Trade in Services which not only assists United States businesses to supply services across borders, but also provides certain basic investment protections. An investment presence is crucial to the ability to supply many services overseas. The WTO Agreement on Trade-Related Investment Measures removes restrictions that burden both trade and investment. The WTO Agreement on Trade-Related Aspects of Intellectual Property requires parties to protect assets that are often the core of an investment.

The BIT program also complements Administration efforts to combat corruption, which is a burden for U.S. investors. Specifically, the BIT promotes greater legal and regulatory transparency and assures foreign investors of access to binding international arbitration. These BIT provisions promote good government and reinforce the anti-corruption initiatives in the OECD and the international financial institutions.

This Administration and its predecessors view the BIT investment protections not only as ends in themselves, but as standards that generally lead to the advancement of customary international law as well as the practices of host governments. The high standards of U.S. BITs create pressure on other governments to match these protections in their investment agreements, thereby solidifying the place of those standards that the United States already considers to form a part of customary international law, as well as expanding the state practice with respect to those standards that have not yet entered customary international law. The existence of the BITs prompts non-signatories to unilaterally improve their investment conditions in order to remain attractive investment locations.

THE MODEL BILATERAL INVESTMENT TREATY

The BIT's objectives to protect U.S. investment abroad, to encourage the adoption of market-oriented economic policies and support the development of international law standards are achieved through several basic principles.

First, the BITs entitle U.S. companies to operate under the best conditions available to other foreign and domestic investors. This protection (the better of MFN or national treatment) obligates host governments not to take discriminatory acts against our investors on the basis of their nationality, and prevents host governments from imposing special burdens or restraints on our companies. Subject to limited exceptions set forth in annexes or protocols to the treaties, this principle applies throughout the life of the investment, including initiation of the investment.

Thus, the treaty not only permits U.S. investors to operate on an equal footing with their competitors when they are in like circumstances, it provides market access.

Second, the BITs establish clear limits on the expropriation of investments. As is the case under U.S. law and international law, investors are entitled to be fairly compensated, and the expropriation may only take place for a public purpose, in a nondiscriminatory manner, and under due process of law. Compensation must be promptly paid, adequate and effective.

Third, BITs provide U.S. investors the right to transfer funds into and out of the host country without delay using a market rate of exchange. This covers all types of transfers related to an investment, including interest, proceeds from liquidation, repatriated profits and infusions of additional capital. The ability to make payments and receive funding as required is indispensable to the effective operation of an investment.

Fourth, BITs limit the ability of host governments to require U.S. investors to adopt inefficient and trade distorting practices. For example, requirements such as local content or export quotas are prohibited. This provision can open up new markets for U.S. producers and increase U.S. exports. U.S. investors protected by BITs can purchase competitive U.S.-produced components and capital equipment without uneconomic restrictions on those inputs, and thus renders their products more competitive. They cannot be forced, as a condition of establishment or operation, to export locally produced goods back to the United States or third country markets.

Fifth, BITs give U.S. investors the right to engage the top managerial personnel of their choice regardless of nationality. This enables investors to manage their investments as expertly as possible, and preserves their control of the investment.

Finally, BITs give U.S. investors the right to submit disputes with the treaty partner's government to international arbitration. Disputes with treaty partners may also be raised by the U.S. Government, both through consultations and through arbitration. These different means of addressing disputes permits flexibility, effectiveness and impartiality in their resolution.

Thus, BITs shield our investors from a variety of arbitrary actions of foreign governments and help our investors should trouble arise. This can be a significant benefit for U.S. investors who may suddenly find themselves confronted with unfriendly host country governments, anti-American local authorities or a local judiciary in which the investor lacks confidence. There are foreign governments that have ordered, for example, that foreign (not domestic) businesses build roads as a condition of entry into the market, or have forced foreign businesses to purchase low quality, high cost, local products at the expense of U.S.-produced inputs. Host governments have used foreign business capital as involuntary "loans" to Central Banks or cam-

paign contributions. All of these BIT provisions supplement existing U.S. Government mechanisms and procedures for resolution of business disputes, such as dispute settlement at the World Trade Organization, ongoing consultations with foreign governments by our trade negotiators and other Administration officials, and actions under Section 301 of the Trade Act of 1974.

The BIT has retained its fundamental principles over time, but it has been closely reviewed and revised periodically. This is to take account of experience with its operation and to make sure it is kept current with other agreements, customary international law, and the needs of investors. The last review was undertaken in 1994. Another review is planned for next year as soon as resources permit.

THE BIT PROGRAM

This Administration, as previous Administrations, has been active in negotiating BITs—we now have 45 concluded in countries all over the world, of which 31 are in force. We have ongoing negotiations or discussions underway with five countries and others have expressed interest in such talks. We have 10 BITs and one protocol before you today.

U.S. companies advise the Administration that, while they consider the dispute settlement provisions of BITs to be very effective, they value the presence of the BIT provisions more for their deterrent effect. Our companies have repeatedly stated that, by calling attention to BIT obligations, they have been able to persuade host governments not to take particular harmful actions. The U.S. government itself has also seen benefits through the ability to point to treaty commitments to dissuade countries from adopting retrograde economic policies that would disadvantage U.S. investors. For example, Poland and Romania were considering legislation to limit the transfer of capital to and from their countries. The Administration reminded the executive and legislative branches of each country of its respective commitment under the treaty to permit inward and outward transfers by U.S. investors, and the provision was taken out of the legislation or otherwise resolved. In the Czech Republic, a law restricting foreign investment in the gaming industry was amended so as not to impact foreign investors. This was accomplished as a result of our interventions reminding the Czech Republic of its BIT obligations. In Cameroon, a law adversely affecting U.S. security firms was passed, but by noting Cameroon's obligations under the BIT, Cameroon agreed not to apply the law to U.S. firms.

Bahrain, Jordan, Bolivia, El Salvador, Honduras, Lithuania, Croatia, Uzbekistan, Azerbaijan, and Mozambique represent our efforts to facilitate investment in quite different, but equally important, regions of the world. My colleagues from the Department of State have provided strong testimony as to the specific issues these agreements will address in our investment relationship with each of the signatories, as well as the broader foreign policy interests these agreements will serve in each country and region.

From the perspective of the United States Trade Representative, we would like to add that these agreements serve an important U.S. general economic objective to bring these countries into the world trading system as comprehensively as possible. That is, BITs are one element of a network of trade and investment obligations we seek with other countries. Most important among these relationships is WTO membership. The investment and trade regimes of aspiring members are reviewed for compatibility with the WTO framework. The BITs pave the way for WTO commitments and foreclose opportunities to circumvent WTO rules.

For example, Jordan joined the WTO in 1999. Croatia has been approved for WTO membership. Lithuania is on the verge of concluding its accession negotiations, and Azerbaijan and Uzbekistan have commenced negotiations. The BITs supplement that broader trade and investment framework. Various academics have shown that when investment and trade liberalization take place together, the economic benefits of trade liberalization are greatly multiplied. Stated another way, the absence of investment liberalization can thwart the positive effects of trade liberalization.

CONCLUSION

Today's hearings are of critical importance to the BIT program and to our larger efforts to promote trade and protect U.S. investment overseas. Senate advice and consent to these treaties will provide America's investors with the primary protections they need to do business in a time of expanding opportunities and changing markets. Advice and consent will also send a signal to the countries with which we are now negotiating that we are serious about the program and about our very high standards in the investment area. Finally, advice and consent to these BITs now will expand the web we are creating of open, solid investment regimes around the globe, which should lead to a gradual raising of standards everywhere.

PEPSICO, INC.
700 ANDERSON HILL ROAD,
Purchase, NY, September 11, 2000.

The Honorable JESSE HELMS
*United States Senate,
Dirksen Senate Office Building,
Washington, DC.*

RE: Madrid Protocol

DEAR SENATOR HELMS:

I am writing to express this company's strong support for the United States' adoption of the Madrid Protocol, which has been sent to the Senate for ratification and will shortly be considered by your Foreign Relations Committee. As you may be aware, PepsiCo, Inc. is a North Carolina corporation. In addition to selecting North Carolina as our corporate domicile, we employ hundreds of people in that State and are proud of our North Carolina heritage dating back to 1898 with the creation of the PEPSI-COLA soft drink.

It is our belief that for too long, U.S. companies such as PepsiCo, Inc. have been precluded from sharing in the benefits of multi-national trademark registration under the Madrid Protocol, which are freely available to our competitors abroad. Ratification of this long-standing treaty will yield important cost savings and efficiencies not only for PepsiCo, but for other U.S. multi-nationals as well in every field of endeavor. Removing artificial barriers and improving the competitiveness of U.S. companies around the world should be a high priority for your Committee and for the Senate as a whole. We have no doubt that this important objective will be well served by ratification of the Madrid Protocol.

I respectfully urge you to lend your support to the early and decisive ratification of this treaty.

Very truly yours,

ELIZABETH N. BILUS,
Intellectual Property Counsel.

PREPARED STATEMENT OF SHELL EXPLORATION & PRODUCTION COMPANY

Mr. Chairman and Members of the Committee:

Shell Exploration & Production Company is a leading producer of hydrocarbons and leaseholder in the Gulf of Mexico. Shell has been operating in the Gulf of Mexico for five decades. As a major Gulf of Mexico stakeholder, Shell is pleased to go on record in support of Senate ratification of the treaty between the United States and Mexico delimiting the Continental Shelf in the Western Gulf of Mexico.

Technological advances have opened the deepwater frontier for petroleum exploration and production leading to a renaissance in the Gulf of Mexico. The deepwater Gulf has developed into one of the premier exploration plays in the world today. Shell has been a leader in industry's march into deepwater, setting numerous deepwater drilling and production records in the process—all in the Gulf of Mexico. Industry's increased activity level has resulted in thousands of new jobs and billions of investment dollars flowing into the Gulf Coast economy and has generated hundreds of millions of dollars in revenue for the U.S. treasury.

Industry has the technology to explore for hydrocarbons within the Western Gap, the area covered by this treaty. Since leasing in the gap has been delayed until the maritime boundary is established, it is not surprising that industry is united in its support for treaty ratification. The treaty principles are consistent with both U.S. and international law, and an equidistance line has been used to divide the area.

Over 1.6 million Gulf of Mexico acres will become U.S. territory upon ratification of this treaty. Ninety percent of that acreage can be made available for oil and gas exploration and production in the near term with the remainder of the acreage being made available 10 years after ratification of the treaty by both the U.S. and Mexico.

Ratification of the treaty this year will clear the way for the U. S. Minerals Management Service to offer for lease about 1.5 million additional deep water acres in the Gulf of Mexico as early as next year and will trigger the clock on the 10-year buffer zone established under the treaty. Expeditious ratification is in the best interest of the United States, Mexico, the Gulf Coast economy, and the offshore petroleum industry. This is an issue whose time has come, and Shell strongly encourages the Senate to ratify the treaty this year.

VF CORPORATION,
628 GREEN VALLEY ROAD, SUITE 500,
Greensboro, NC, September 7, 2000.

The Honorable JESSE HELMS
*United States Senate,
Dirksen Senate Office Building,
Washington, DC.*

DEAR SENATOR HELMS:

We understand that the White House has now sent the Madrid Protocol to the Senate for "advice and consent." V.F. Corporation is pleased to register its strong support for the Madrid Protocol, and we respectfully request that you and your colleagues on the Senate Foreign Relations Committee move as expeditiously as possible to this treaty.

The Madrid Protocol is a non-controversial, but important treaty that is designed to provide a mechanism for obtaining multi-national trademark protection and maintaining international registration rights through a centralized system for trademark owners in Protocol member nations and intergovernmental organizations having their own trademark system. Under the Madrid Protocol, a U.S. trademark owner like V.F. Corporation would be able to file in the U.S. Patent and Trademark Office an application for protection in as many Protocol countries as desired through the filing of a single application in English for a single fee.

We cannot overemphasize the importance of the United States joining the Madrid Protocol and how this will revolutionize the process for protecting trademarks worldwide. The practical benefits of the Madrid System for companies such as V.F. Corporation, including ease of applying for and renewing trademark registrations internationally, will be of tremendous benefit to U.S. companies. Of particular significance will be the tremendous cost savings of the system. U.S. adoption of the Madrid Protocol will greatly lower costs, thus enabling U.S. companies to obtain the protection for their trademarks in key markets in an efficient and expedited manner.

Simply put, in an increasingly diverse and highly competitive global marketplace, the Madrid Protocol is a "one stop shop," that makes protecting an American trademark in other nations a great deal easier. On behalf of V.F. Corporation we request that the Senate Foreign Relations Committee approve the Madrid Protocol and ask that the Senate provide its "advice and consent" prior to the conclusion of the 106th Congress.

Thank you for your assistance. Your continued support of U.S. intellectual property owners is greatly appreciated.

Sincerely,

CANDACE S. CUMMINGS,
Vice President-Administration & General Counsel.

