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TREATIES

WEDNESDAY, DECEMBER 13, 2017

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

The committee met, pursuant to notice, at 2:32 p.m., in Room SD–419, Dirksen Senate Office Building, Hon. James E. Risch presiding.

Present: Senators Risch [presiding], Shaheen, and Kaine.

OPENING STATEMENT OF HON. JAMES E. RISCH, U.S. SENATOR FROM IDAHO

Senator RISCH. The committee will come to order.

And thank you so much, all of you who are attending today. We are going to hear today from the State Department and the Department of Justice regarding five treaties that are pending before this committee.

First of all, we have two extradition treaties with Serbia and Kosovo. These treaties update a century-old treaty with what was then the Kingdom of Serbia. While this earlier treaty continues to govern our extradition law with Serbia and Kosovo, it does not include the modern extradition principles the United States has relied on and included in its extradition treaties in recent years.

For example, both treaties will be updated from so-called list treaties, whereby an offender may only be extradited under a specific list of crimes to dual criminality treaties. Dual criminality allows for extradition for offenses that are crimes in both countries.

Another important improvement is that both of these treaties will now allow for the extradition of nationals. Since 1990, the U.S. has supported the policy of allowing the extradition of nationals, a policy we have pursued with other nations in our recent extradition treaties.

Both these modern principles, dual criminality and the extradition of nationals, were included in last year's extradition treaties with the Dominican Republic and Chile, two treaties approved unanimously by the Senate.

As Mr. Swartz will discuss, these updated treaties will improve the ability of our Department of Justice in fighting terrorism and transnational crime.

Next, we have two treaties, which, if ratified, would establish maritime boundaries between the Republic of Kiribati and the Federated States of Micronesia and the United States. These treaties would formalize boundaries that have been informally adhered to by the parties. Because of improved methods of calculation, the

State Department expects the treaties will create a small net gain of continental shelf jurisdiction and exclusive economic zone for the United States.

Finally, we have the U.N. Convention on the Assignment of Receivables. This treaty was negotiated with significant U.S. assistance. As our witness Mr. Visek will note, the treaty substantially reflects U.S. law and is strongly supported by the U.S. business community.

In a letter to this committee, the Chamber of Commerce has noted that the convention, if ratified, will make it easier for U.S. small——

Senator SHAHEEN. Business. [Laughter.]

Senator RISCH [continuing]. Small business, which we are the chairman and ranking member of, to access additional financing.

For example, if ratified, the convention would provide these businesses with more certainty. They would be able to secure lending based on their sales of goods and services to customers located in other countries that ratify the convention.

Both the ranking member and I are always focused on things that are helpful to small businesses.

The convention's rules will thus facilitate access to asset-based financing in which their foreign receivables serve as collateral.

In February, President Trump signed an executive order on the core principles for regulating the U.S. financial system, establishing principles that will enable American companies to be competitive with foreign forms in domestic and foreign markets, and advance American interests in international financial regulatory negotiations and meetings. By agreeing to this treaty, we will be able to accomplish both of those goals.

The Senate plays a unique constitutional role in providing advice and consent on treaties. This hearing is part of that constitutional responsibility, and we always undertake our constitutional responsibilities soberly.

So with that, gentlemen, do we have a volunteer to go first? That would be you, Mr. Visek.

I am very sorry. I yield to the ranking member.

STATEMENT OF HON. JEANNE SHAHEEN, U.S. SENATOR FROM NEW HAMPSHIRE

Senator SHAHEEN. Thank you, Mr. Chairman.

And thank you to our witnesses for being here today.

I am pleased that the committee is considering these five treaties before us. As was noted by Avril Haines at a hearing last week, deliberations before this committee relative to treaties have reached historic lows. And I think that most of my colleagues on the committee, both Republican and Democrat, are eager to reverse this trend and help enhance U.S. leadership in the world.

The treaties we are deliberating today touch on a range of matters, from international business to maritime boundaries and the rule of law, as the chairman has said. They not only further United States' interests, but they raise standards across the globe. In this increasingly complex, interconnected world, we need the consistency and uniformity that treaties provide now more than ever.

If the Senate provides its advice and consent, the treaties that we are considering today will raise living standards and improve local economies and markets worldwide and in the United States.

And as Chairman Risch has said, he and I serve as chair and ranking member of the Small Business Committee, so it is nice to promote anything that is going to help small businesses in the United States.

The two extradition treaties that are before us also merit special attention because they are a testament to the advancement of the rule of law in our transatlantic community. And 20 years after the devastating war in the Balkans and over a century after the first treaty between the United States and what was then the Kingdom of Serbia, the United States, Kosovo, and Serbia are finally establishing a reliable, modern, legal framework to help prosecute crimes and bring criminals to justice.

And finally, in a world where border disputes continue to lead to bloodshed and war, the maritime border treaties with Micronesia and Kiribati demonstrate the power of diplomacy and dialogue.

Now, while I continue to worry that recent threats and actions to withdraw the U.S. from international agreements will cause long-term damage to U.S. credibility and posture, I am encouraged by this committee's consideration of these important treaties today, and I look forward to hearing from our witnesses and participating in more treaty hearings to come.

So thank you, Mr. Chairman.

Senator RISCH. Thank you, Senator Shaheen.

We will turn to our panel of witnesses. First, Mr. Richard Visek, who is the acting legal adviser at the State Department.

Mr. Visek?

STATEMENT OF RICHARD VISEK, ACTING LEGAL ADVISER, U.S. DEPARTMENT OF STATE, WASHINGTON, DC

Mr. VISEK. Thank you, Mr. Chairman. And thank you, Ranking Member Shaheen.

Mr. Chairman, members of the committee, I am pleased to appear before you today to testify in support of five treaties being considered by the committee. Before proceeding with brief remarks, I would note that I did prepare a more detailed statement, and I would ask that that be submitted.

Senator RISCH. That will be included in the record, Mr. Visek.

Mr. VISEK. Thank you.

Senator RISCH. Thank you very much for doing that.

Mr. VISEK. The five treaties before the committee are the extradition treaties with Kosovo and Serbia, the maritime boundary delimitation treaties with Kiribati and the Federated States of Micronesia, and the United Nations Convention on the Assignment of Receivables in International Trade.

The administration appreciates the committee's prioritization of these treaties. Individually and collectively, these treaties advance U.S. interests.

The extradition treaties will enhance our ability to combat transborder criminal activity. The maritime boundary treaties will improve our ability to explore, benefit from, conserve, and manage the

natural resources of our maritime areas. And the receivables convention will help U.S. businesses gain access to capital.

The administration supports each of these treaties and urges the Senate to provide its advice and consent to their ratification.

Let me say a few words about each of these treaties, and then I will be pleased to respond to the committee's questions.

The two extradition treaties pending before the committee will update our existing treaty relationships with two law enforcement partners, Kosovo and Serbia. The continuing growth in transborder criminal activity underscores the need for increased international law enforcement cooperation. Extradition treaties are essential tools in that effort.

The U.S. extradition relationships with Kosovo and Serbia are currently covered by a 1901 treaty between the United States and the Kingdom of Serbia. The two treaties now before the committee would establish modern extradition relationships with both countries, allowing us to engage in closer and more effective law enforcement cooperation.

For example, as the chairman noted, the proposed treaties adopt a dual criminality approach contained in our other modern treaties. This allows extradition for offenses punishable in both states by imprisonment or deprivation of liberty for a period of one year or more.

The treaties also contemplate the unrestricted extradition by each treaty party of its own nationals by providing that nationality is not a basis for denying extradition. Given that Kosovo and Serbia permit extradition of their nationals only pursuant to a treaty or international agreement, this will allow for each state to extradite its nationals to the United States. My colleague Bruce Swartz from the Department of Justice will address these treaties in further detail.

The maritime boundary treaties with Kiribati and the Federated States of Micronesia delimit the exclusive economic zone, or EEZ, and continental shelf between the United States and these countries. Delimited boundaries provide legal certainty that enhances our ability to explore, benefit from, conserve, and manage the natural resources of our maritime areas, including with respect to our fisheries.

The treaties provide for the delimitation of the boundaries on the basis of equidistance. With appropriate technical adjustments, each treaty formalizes boundaries that have been informally adhered to by the parties and that are very similar to the existing limit lines of the EEZ asserted by the United States for decades.

Because of improved calculation methodologies and minor coastline changes, the four new maritime boundaries in these two treaties will result in a small net gain, primarily with respect to Kiribati boundaries, of the United States' EEZ and continental shelf area, relative to the existing limit lines of our EEZ.

The form and content of the two maritime boundary treaties are very similar to each other and to previous maritime boundary treaties between the United States and other Pacific island countries that have entered into force after receiving the Senate's advice and consent. The treaties clarify the geographic scope of our sovereign rights and jurisdiction, and they reinforce other countries' recogni-

tion of the U.S. EEZ and continental shelf entitlements around the U.S. islands in question.

The Convention on the Assignment of Receivables in International Trade establishes uniform international rules governing a form of financing widely used in the United States involving the assignment of receivables. Expanded access to receivables financing in international trade, which the convention would promote, will provide American businesses an additional source of capital at no cost to the U.S. taxpayer and require no material change to existing U.S laws. This should particularly benefit small- and medium-sized businesses that use receivables financing.

The convention, which is largely based on U.S. law, provides modern, uniform rules for transactions in which businesses either sell their rights to payments from their customers to a bank or other financial institution or use their rights to these payments as collateral for a loan from a lender. Such transactions enable businesses to obtain greater access to capital and credit at lower cost.

The negotiation of the convention was supported by the U.S. Uniform Law Commission and members of the American Law Institute, which developed the applicable provisions of the U.S. Uniform Commercial Code that govern receivables financing in each State in the United States. Members of both organizations participated in the U.S. delegation as the convention was being negotiated.

In addition, a committee of experts, with participation by both organizations, recommended understandings and declarations to accompany U.S. ratification of the convention, aimed at ensuring consistency with practice under U.S. law and facilitating application of the convention in the United States. The executive branch's proposed set of understandings and declarations is consistent with these recommendations.

The convention enjoys wide support in the U.S. business community. Leading U.S. business associations, including the U.S. Chamber of Commerce, have urged U.S. ratification of the convention.

Thank you for the opportunity to testify in support of these treaties. I would be happy to respond the committee's questions about them.

Thank you.

[Mr. Visek's prepared statement follows:]

PREPARED STATEMENT OF RICHARD VISEK

Mr. Chairman, members of the committee, I am pleased to appear before you today to testify in support of five treaties being considered by the committee:

- extradition treaties with Kosovo and Serbia,
- maritime boundary delimitation treaties with Kiribati and the Federated States of Micronesia, and
- the United Nations Convention on the Assignment of Receivables in International Trade.

The administration appreciates the committee's prioritization of these treaties. Individually and collectively, these treaties advance U.S. interests. The extradition treaties will enhance our ability to combat transborder criminal activity. The maritime boundary treaties will improve our ability to explore, benefit from, conserve, and manage the natural resources of our maritime areas. And the Receivables Convention will help U.S. businesses gain access to capital. The administration supports each of these treaties, and urges the Senate to provide its advice and consent to their ratification. During the remainder of my testimony, I will discuss the five treaties in additional detail.

EXTRADITION TREATIES WITH KOSOVO AND SERBIA

The two extradition treaties pending before the committee will update our existing treaty relationships with two important law enforcement partners—Kosovo and Serbia. The continuing growth in transborder crime, including terrorism, other forms of violent crime, drug trafficking, cybercrime, and the laundering of the proceeds of criminal activity, underscores the need for increased international law enforcement cooperation. Extradition treaties are essential tools in that effort.

The U.S. extradition relationships with Kosovo and Serbia are currently governed by the Treaty Between the United States of America and the Kingdom of Servia for the Mutual Extradition of Fugitives from Justice, signed on October 25, 1901 ("the 1901 Treaty"). We have found that this treaty is not as effective as the modern treaties we have in force with other countries in ensuring that fugitives may be brought to justice. The two treaties now before the committee would establish modern extradition relationships with both countries, thereby allowing us to engage in closer and more effective law enforcement cooperation.

Replacing outdated extradition treaties with modern ones (as well as negotiating extradition treaties with new partners where appropriate) is necessary to create a seamless web of mutual obligations to facilitate the prompt location, arrest and extradition of international fugitives. As a result, these treaties are an important part of the administration's efforts to ensure that those who commit crimes against American victims will face justice in the United States.

Both new treaties contain several important 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 period of one year or more in both states. This is the so-called "dual criminality" approach. Our older treaties, including the 1901 Treaty, provide for extradition only for offenses appearing on a list contained in the instrument. The problem with this approach is that, as time passes, the lists grow increasingly out of date. The dual criminality approach eliminates the need to renegotiate treaties to cover new offenses in instances in which both states pass laws to address new types of criminal activity. By way of illustration, so called "list Treaties" from the beginning of the 20th century do not cover various forms of cybercrime or money laundering. The new treaties with Kosovo and Serbia would fix this problem.

Second, these treaties address one of the most difficult and important issues in our extradition treaty negotiations—the extradition of nationals. As a matter of long-standing policy, the U.S. Government extradites United States nationals and strongly encourages other countries to extradite their nationals. Both of the treaties before the committee contemplate the unrestricted extradition of nationals by providing that nationality is not a basis for denying extradition. This provision is particularly important in the context of Kosovo and Serbia because of certain provisions in their domestic law. Kosovo's Supreme Court has ruled that its new constitution only permits the extradition of Kosovo nationals where required by international agreement. Kosovo has been clear that this provision in the treaty will overcome that obstacle, allowing them to extradite their nationals to the United States. Similarly, Serbia has domestic legislation that also permits extradition of nationals only pursuant to an obligation of a treaty to which Serbia is a party. Similarly, they have been clear that the provision on extradition of nationals in the new treaty overcomes this obstacle.

Third, the treaties include a modern "political offense" exception that states that extradition shall not be granted if the offense for which extradition is requested is a political offense, but establishes a number of categories of offenses that shall not be considered political offenses. These categories of offenses cover a range of violent crimes, including murder, kidnapping and hostage taking, and the use of various kinds of explosive devices. These categories of offenses, which did not exist in earlier extradition treaties, constitute exceptions to the political offense exception and align with a major longstanding priority of the United States to ensure that an overbroad definition of "political offense" does not impede the extradition of terrorists.

Fourth, unlike the 1901 Treaty, these new treaties contain a provision 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 (and in some cases the fugitive) so that, for example: (1) charges pending against the person can be resolved earlier while 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.

Fifth, both of these treaties incorporate a number of procedural improvements over the 1901 Treaty, including direct transmission of provisional arrest requests through Justice Department channels, waiver and consent to extradition, and clear statements of the required materials to be included in a formal extradition request.

For all these reasons, U.S. ratification of the extradition treaties with Kosovo and Serbia will help us and our colleagues at the Justice Department further develop two important law enforcement relationships and advance our objective of combatting transnational crime.

MARITIME BOUNDARY TREATIES WITH KIRIBATI AND THE FEDERATED STATES OF MICRONESIA

In an area where more than one country has maritime entitlements under international law, maritime boundaries are needed to clarify where each country may exercise its sovereignty, sovereign rights, and jurisdiction as a coastal State. In this connection, it is often noted that "good fences make good neighbors." Delimited boundaries also provide legal certainty that enhances our ability to explore, benefit from, conserve, and manage the natural resources of our maritime areas, including with respect to our fisheries. Resolving the outstanding maritime boundaries of the United States around the world remains an ongoing project, with about a dozen such boundaries yet to be fully agreed with our neighbors.

These two treaties delimit the exclusive economic zone (or "EEZ") and continental shelf between the United States and Kiribati, and between the United States and the Federated States of Micronesia (FSM), on the basis of equidistance. (Every point on an equidistance line is equal in distance from the nearest point on the coastline of each country.) This approach is wholly in line with international law and practice, and moreover serves to formalize the longstanding status quo regarding each side's asserted rights and jurisdiction in these maritime areas. Accordingly, with appropriate technical adjustments, each treaty formalizes boundaries that have been informally adhered to by the Parties, and that are very similar to the existing limit lines of the EEZ asserted by the United States for decades and published in the Federal Register. Because of improved calculation methodologies and minor coastline changes, the four new maritime boundaries in these two treaties will result in a small net gain, primarily with respect to the Kiribati boundaries, of United States EEZ and continental shelf area relative to the existing limit lines of our EEZ.

The treaty with FSM establishes a single maritime boundary between Guam and several FSM islands. The boundary is approximately 447 nautical miles with 16 turning and terminal points. The treaty with Kiribati establishes three maritime boundaries in the Pacific with respect to the EEZ and continental shelf generated by various Kiribati islands and by each of the U.S. islands of Palmyra Atoll, Kingman Reef, Jarvis Island, and Baker Island. Specifically, the treaty with Kiribati defines three distinct boundary lines: for the boundary line between the United States' Baker Island and the Kiribati Phoenix Islands group, six points are connected by geodesic lines that measure 332 nautical miles in total; for the boundary line between the United States' Jarvis Island and the Kiribati Line Islands group, ten points are connected by geodesic lines that measure 548 nautical miles in total; and for the boundary line between the U.S. islands of Palmyra Atoll and Kingman Reef and the Kiribati Line Islands group, five points are connected by geodesic lines that measure 383 nautical miles in total.

The form and content of the two treaties are very similar to each other, and to previous maritime boundary treaties between the United States and other Pacific island countries that have entered into force after receiving the Senate's advice and consent. Each of the two treaties consists of seven articles, which set out the purpose of each treaty; the technical parameters; the geographic location of the boundary lines; standard language indicating the agreement of the Parties that, on the opposite side of each maritime boundary, each Party will not "claim or exercise for any purpose sovereignty, sovereign rights, or jurisdiction with respect to the waters or seabed or subsoil"; a clause that the establishment of the boundaries will not affect or prejudice either side's position with respect to the rules of international law relating to the law of the sea; a provision for dispute settlement by negotiation or other peaceful means agreed upon by the Parties; and a provision that entry into force would follow an exchange of notes indicating that each side has completed its internal procedures. For the purpose of illustration only, the boundaries are depicted on maps attached to the treaties.

The treaties do not limit how we may choose to manage, conserve, explore, or develop the U.S. EEZ and continental shelf consistent with international law; they merely clarify the geographic scope of our sovereign rights and jurisdiction consistent with international law and with longstanding unilateral U.S. practice, and

they reinforce other countries' recognition of the U.S. EEZ and continental shelf entitlements around the U.S. islands in question.

UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE

The United Nations Convention on the Assignment of Receivables in International Trade establishes uniform international rules governing a form of financing widely used in the United States involving the assignment of receivables. Expanded access to receivables financing in international trade, which the Convention would promote, will provide American businesses an additional source of capital at no cost to the U.S. taxpayer and require no material change to existing U.S. laws. This should particularly benefit small and medium-sized businesses that use receivables financing.

The Convention, which is largely based on U.S. law, provides modern, uniform rules for transactions in which businesses either sell their rights to payments from their customers (known as "receivables") to a bank or other financial institution, or use their rights to these payments as collateral for a loan from a lender (the businesses selling or using their receivables as collateral are referred to as "assignors" and buyers and lenders are referred to as "assignees"). Such transactions enable businesses to obtain greater access to credit at lower cost and thereby expand their operations.

These so-called "assignments of receivables" transactions are well established in the United States as a method of obtaining low-cost credit, and are governed by Article 9 of the Uniform Commercial Code (UCC), which has been adopted by all U.S. States and the District of Columbia, Puerto Rico, and the Virgin Islands. The Convention provides economically-useful rules for cross-border transactions involving receivables typically generated in the exchange of goods or services for payment and from other commercial transactions.

The assignment of these types of receivables is common and relatively easy to effect in the United States when only domestic assignors and domestic receivables are involved. When these transactions cross international boundaries, however, determining whether U.S. law or the law of another country applies is fraught with uncertainty—not only as to which country's laws apply but also the nature of those laws. In addition, even if one can determine which country's laws apply and what those laws say, those laws may not be very helpful for receivables financing. As The Convention addresses both aspects of these problems—the conflict of laws problem and substantive legal rules problem.

1. The Key Conflict of Laws Provision

The Convention governs assignments of receivables that have an international dimension. In particular, the Convention applies both to assignments of receivables when the assignor and the debtor on the receivables ("account debtor" for U.S. law purposes) are located in different countries and to the assignment of receivables when the assignor and the assignee of the receivables are located in different countries. In either case, without the benefit of the Convention, the fact that the transaction involves more than one country creates uncertainty as to which country's substantive law governs because the conflict of laws rules that would determine the answer vary significantly from one country to another. Even after determining which country's law governs, one must determine what that law is and how it applies to the transaction. This uncertainty adds significant risk to these international transactions, making credit based on them harder to obtain and more costly.

One of the most important aspects of the Convention is Article 22, which sets forth a clear rule as to which country's substantive law governs the priority of an assignee's interest in receivables as against competing claimants. Competing claimants may include other assignees of the same receivable, creditors of the assignor who have obtained rights in the receivable, or a bankruptcy trustee of the assignor. Article 22 provides that the law of the country in which the assignor of the receivable is located governs the priority of the assignment against competing claimants. This is critically important because assignees are unlikely to enter into receivables financing transactions on favorable credit terms if there is uncertainty as to the priority of their claim to the receivables.

2. Substantive Rules Governing the Assignment of Receivables

In addition to the conflict of laws rule, the Convention also provides a set of clear substantive rules governing important aspects of receivables financing, including practices that facilitate receivables financing and provide for a predictable resolution of issues that follows the general approach of UCC Article 9. Those Convention rules would override limitations in effect in many countries that restrict the useful-

ness of receivables financing (but not United States law under UCC Article 9, because the Convention rules are largely consistent with UCC Article 9). For example, Article 8 of the Convention, consistent with UCC Article 9, makes effective (1) the assignment of existing and future receivables to secure current and future advances, (2) the bulk assignment of receivables, and (3) the assignment of partial and undivided interests in receivables even if a country's internal law (unlike the United States) would otherwise restrict these transactions. It also reduces the need for excessive formality and documentation costs by permitting the receivables that are assigned to be described generally in the contract of assignment, which is consistent with UCC Article 9.

For assignments within the scope of the Convention, Article 9 of the Convention, like Article 9 of the UCC, overrides certain contractual limitations on assignments of trade receivables. Consistent with UCC Article 9, the treaty provides that the assignment of such a receivable is effective notwithstanding any agreement between the account debtor (i.e. the debtor on the receivable) and the assignor (i.e. the account debtor's creditor) limiting the assignor's right to assign that receivable. This provision is particularly useful in transactions in which a business assigns a large number of its receivables created under a number of transactions because it avoids the otherwise hefty costs of the lender examining each contract creating a receivable to see if the contract limits assignment of the receivable.

The Convention also sets out certain rights and obligations of the assignor and assignee that flow from the assignment of the receivables. For example, under Article 13, the assignee may notify the debtor and request payment. Article 14 sets out the assignee's right as against the assignor to proceeds of receivables (such as cash payments when the receivable has been collected).

Because the Convention contains rules reflecting modern receivables financing practices consistent with those in UCC Article 9, widespread ratification of the Convention will help countries outside the United States modernize their receivables financing laws and enable this type of access to credit for companies engaged in cross-border trade without causing disruption to businesses in the United States that rely on, and have mastered, the rules in UCC Article 9.

3. Relationship to U.S. Law

There is a strong correspondence between the Convention and U.S. law. Negotiation of the Convention was supported by the leadership of the Uniform Law Commission (ULC) and members of the American Law Institute (ALI) (the ULC's partner in developing the UCC). Members of both organizations participated in the U.S. delegation to the United Nations Commission on International Trade (UNCITRAL) as the Convention was being negotiated. In fact, the timing of the Convention coincided with the domestic revision of UCC Article 9, and many of the participants in the U.S. law reform project also participated in the preparation of the Convention.

After the Convention was adopted, a ULC Committee, along with experts from the ALI, reviewed the Convention for the purpose of determining its suitability for ratification by the United States. They issued a committee report, which was approved by the ULC, proposing formulations for declarations and understandings, aimed at assuring consistency with practice under UCC Article 9 and facilitating application of the Convention in the United States. As reflected in the treaty transmittal package, the executive branch has proposed declarations and understandings to accompany the Senate's advice and consent to the Convention. These proposed declarations and understandings are consistent with the recommendations of the ULC and ALI committee of experts. They would provide additional clarity about how the United States will implement the Convention domestically and facilitate its application in a manner consistent with existing practice in the United States under UCC Article 9. Proposed understandings address the scope of the Convention (including its inapplicability to securities and to rights other than contractual rights to payment under intellectual property licenses), the ability of states to provide additional rights to an assignee with respect to the proceeds of a receivable beyond the minimum level of rights required by the Convention, and the meanings of certain terms used in the Convention. Proposed declarations address how the Convention will apply in the context of certain insolvency proceedings, how it will apply to certain contracts entered into by governmental entities or other entities constituted for a public purpose, and rules for determining which U.S. state laws will apply in circumstances where the Convention requires reference to applicable U.S. law. In addition, a proposed declaration provides that the United States will not be bound by optional provisions of the Convention addressing choice of law rules. These proposed understandings and declarations are discussed in detail in the treaty transmittal package.

The treaty would be self-executing, which is consistent with the recommendation of the ULC Committee. There is no need for federal or state implementing legislation. Ratification of the Convention would not change U.S. practice in this area in any material respect. The Convention's rules are largely based on U.S. law and will produce substantially the same results as those under the UCC Article 9.

4. Benefits of U.S. Ratification

Widespread ratification of the Convention would help businesses in the United States gain access to capital to conduct international trade. The importance of these benefits is underscored by the support the Convention has received from the U.S. business community. Industry associations that have written to the committee to express their support for the Convention include the Financial Services Roundtable, the U.S. Chamber of Commerce, the Bankers Association for Trade and Finance, the Commercial Finance Association, the Equipment Leasing and Finance Association, and the U.S. Council for International Business. The American Bar Association and the Uniform Law Commission have also expressed their support for the Convention.

Because the Convention is based on U.S. law, and because of the leading role the United States has played in receivables financing, other countries will be less likely to join the Convention if the United States declines to ratify it. Currently, one country—Liberia—has ratified the Convention. Five countries must ratify it in order for it to enter into force. U.S. ratification could have a particularly important leadership impact in this regard. There are currently a number of regional initiatives underway focused on reforming the law of secured transactions, including in Latin America, Africa, and the Asia-Pacific region. Expanded ratification of the Convention in the near term has the potential to influence these initiatives and to expand the acceptance and use of the Convention's framework for receivables financing in these regions. In addition, the European Union (EU) is currently involved in an effort to develop an internal legal framework concerning the law applicable to third party effects of the assignment of receivables. While there is significant support in the EU for the approach taken in the Convention (and thus under U.S. law), there is also some support for alternative choice of law rules in some cases that would be inconsistent with the Convention and would thus introduce uncertainty into receivables financing governed by the alternative rules. U.S. ratification could helpfully influence the EU process to ensure that the framework adopted is consistent with the Convention (and therefore U.S. law).

In summary, ratification of the Convention is an important step to providing American businesses a significant additional source of capital at no cost to the U.S. taxpayer and no material change to existing U.S. laws. These benefits will be particularly important for small and medium sized businesses that use receivables financing. Widespread ratification of the Convention would give American businesses an additional advantage in international transactions as the Convention mirrors American law and practices.

The administration urges the Senate to provide advice and consent to their ratification.

Senator RISCH. Thank you very much, Mr. Visek.

We are now going to hear from Bruce Swartz, who is Deputy Assistant Attorney General and Counselor for International Affairs.

Mr. Swartz?

STATEMENT OF BRUCE SWARTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. SWARTZ. Thank you. Mr. Chairman, members of the committee, the two modern extradition treaties with Kosovo and Serbia that are before the committee today directly advanced the interests of the United States in fighting international terrorism and transnational crime.

Mr. Chairman, as you noted, both these treaties update and replace the 1901 treaty between the United States and the Kingdom of Serbia. As was typical at the time of the 1901 treaty, these were list treaties at that period. That is, they set out a series of offenses, a rather narrow set of offenses, subject to extradition. Those treaties at the time also did not require the extradition of nationals.

The modern extradition treaties before you, in contrast, update and deal with both of these defects, and, in so doing, protect American citizens and advance our law enforcement interests.

The treaties accomplish this in four different respects.

First, as has been noted, it deals with the issue of nationality as a bar to extradition, and that has practical consequences for U.S. law enforcement. Under the new treaties, nationality will no longer serve as an obstacle to extradition. But under the existing treaties, we have encountered, both with regard to Kosovo and Serbia, what happens when nationality can be a bar.

So, for instance, with respect to Kosovo, the United States sought but was unable to obtain the extradition of a Kosovar national who committed murder and then fled back to Kosovo. Similarly, with regard to Serbia, nationality served as a bar to the extradition of a Serbian national, who while a student in the United States committed a brutal assault on a fellow American and then fled back to Serbia.

Neither of those results will follow under the new, modern extradition treaties with Kosovo and Serbia.

Senator RISCH. Will the new treaties allow us to reach back or not?

Mr. SWARTZ. Mr. Chairman, they will. In the case of the treaty with Serbia, we can reach back as far as 2005. That is, with offenses from 2005 forward, nationality will not be a bar. Prior to that time, it will be discretionary. But we believe that will reach most of the offenses, particularly given the passage of time under the statute of limitations.

But that also leads, Mr. Chairman, to the second respect in which we have a significant advance in these treaties, and that is the substitution of dual criminality, as it is referred to, for an approach that just lists a particular set of crimes. By taking out the perspective that only crimes listed in the treaty are the ones subject to extradition, we now have an approach that deals with the evolution of crime.

So, for instance, the original treaty, the 1901 treaty, did not contemplate such crimes as cybercrime or particular forms of terrorism. Now, however, under the approach of dual criminality—in which an offense that is punishable by more than 1 year of imprisonment in both countries serves as a basis for extradition—we will be able to reach modern forms of criminality, and we will have treaties that evolve as crime evolves. There will be no need to change a list that exists.

The third respect in which these treaties are a significant advance is their reach to extraterritorial offenses. Here, too, we have seen the practical bar that can exist under the 1901 treaty.

For instance, in the case of Kosovo, the United States sought the extradition of an individual who was engaging in material support of terrorism by using his computer in Kosovo to facilitate the travel of foreign terrorist fighters to Iraq and Afghanistan. Because the 1901 treaty does not reach offenses of that nature, extraterritorial offenses, because it only covers offenses that take place within the country seeking extradition, extradition was denied as to that individual. But again, under the modern treaty, extraterritorial of-

fenses will be covered. And that is particularly important for offenses such as terrorism and narcotics trafficking.

And then in the fourth respect, the treaty has a number of provisions that expand and speed extradition. Those include provisions that make clear that, when the United States seeks extradition from Kosovo or Serbia, it will be our statute of limitations that controls, not those of the requested state.

Similarly, it streamlines provisional arrest, which is the ability to arrest a fugitive before a full extradition package is submitted. And it also allows for temporary surrender, which means that we can seek the extradition of someone being held in prison in Kosovo or Serbia for immediate trial in the United States, and then return to have him or her serve out the remainder of their sentence in those countries.

So in all four of these respects, we are overcoming not just theoretical obstacles but practical obstacles that we have encountered with respect to our extradition relationship with Kosovo and Serbia. These represent significant advances, and they are consistent with the approach we have taken in modernizing our extradition treaties and extending the network of extradition treaties.

We are very grateful for the support we have had from this committee for that process. We believe that, together, we have been able to ensure that fugitives have fewer safe havens around the world. And we, therefore, are very happy to have this opportunity to advance these treaties.

We would request, respectfully, favorable consideration by committee. And I look forward to answering any questions you might have.

Thank you, Mr. Chairman.

[Mr. Swartz's prepared statement follows:]

PREPARED STATEMENT OF BRUCE 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 extradition treaties between the United States and the Republics of Kosovo and Serbia. These historic treaties directly advance the interests of the United States in fighting terrorism and transnational crime.

At the outset, I wish to note that the decision to proceed with the negotiation of law enforcement treaties such as these is made jointly by the Departments of State and Justice, after careful consideration of our international law enforcement priorities. The Departments of Justice and State also participated together in the negotiation of each of these treaties. Accordingly, we join the Department of State today in urging the committee to report favorably to the Senate and recommend its advice and consent to ratification.

The Departments of Justice and State have prepared and submitted to the committee detailed analyses of the extradition treaties in the Letter of Submittal. In my testimony today, I will concentrate on why these updated extradition treaties are important instruments for United States law enforcement agencies engaged in investigating and prosecuting terrorism and other serious criminal offenses.

THE U.S.-REPUBLIC OF KOSOVO EXTRADITION AGREEMENT

At the outset, I must note for this committee that the United States and Kosovo currently operate under the 1901 extradition treaty between the United States and the Kingdom of Servia. Kosovo is treated as a successor state under that instrument. The "list" treaty is antiquated and limited, and is not suitable for meeting 21st Century law enforcement challenges. I will further elaborate on this point later in my testimony.

Pursuant to a June 1999 United Nations Security Council resolution, the U.N. established an international civil and security presence in Kosovo, the U.N. Interim

Administrative Mission in Kosovo (UNMIK), which still exists today. In September 2012, international supervision ended, and Kosovo became responsible for its own governance. While an UNMIK team had been handling prosecutions in Kosovo, the Kosovars have now assumed most of this responsibility.Despite being relatively new, Kosovar prosecutors are competent, establishing fair jurisprudence, and observing fundamental due process.

To fully empower both Kosovar and U.S. law enforcement officials with the tools that they need to combat global crime, a new extradition treaty is necessary. The Extradition Treaty before this committee includes both substantive and procedural "improvements" from the 1901 treaty. Allow me now to highlight a few of these critical improvements.

Substantive Improvements

The Extradition Treaty before this committee contains new substantive provisions that did not exist in the 1901 extradition treaty. Perhaps most importantly, the new Extradition Treaty accommodates the requirements of the Kosovar constitution to permit extradition of nationals. The Kosovo Supreme Court has ruled that citizens of Kosovo cannot be extradited under the language of the 1901 treaty, because the treaty provides that neither country is bound to extradite its nationals, and the Kosovo constitution prohibits the extradition of nationals in the absence of a bilateral extradition treaty requiring such extraditions. As a consequence, in recent years, Kosovo denied a U.S. extradition request where the U.S. sought a fugitive for murder. The denial was premised on the fugitive's Kosovo citizenship. Under the new Extradition Treaty, extradition can no longer be refused solely on the basis of the nationality of the person sought.

Moreover, the new Extradition Treaty not only allows for the extradition of nationals, but expands the types of crimes for which extradition can be sought. While the existing 1901 extradition treaty defines extraditable offenses by reference to a list of crimes enumerated in the treaty itself, the treaty before this committee reflects the reality that crimes have become increasingly complex over the last century. A "list treaty" may present limits to extradition for newly emerging forms of criminality that the United States has a strong interest in pursuing, such as cybercrime and environmental offenses. The new Extradition Treaty will replace the old list of offenses with a modern "dual criminality" provision. This means that the obligation to extradite applies to all offenses that are punishable in both countries by a minimum term of imprisonment of more than one year. This is a critical improvement, since extradition will be possible in the future with respect to the broadest possible range of serious offenses, without the need to repeatedly update treaties as new forms of criminality are recognized.

This expansive provision is material to our extradition requests for extraterritorial offenses. For the United States, extraterritorial jurisdiction is important in two areas of particular concern: drug trafficking and terrorism. Under the 1901 treaty, Kosovo recently denied our extradition request for a fugitive wanted for prosecution on charges of providing material support for terrorism—having facilitated the travel of foreign fighters—although communicating from Kosovo with other facilitators via the Internet. The Supreme Court of Kosovo held that the language of the 1901 extradition treaty did not provide for extradition of a person for a crime committed in the requested state. Under the new Extradition Treaty, Kosovo will no longer be able to deny our extradition requests on the sole basis that a criminal act occurred in Kosovo, not in the United States.

Furthermore, the new Extradition Treaty ensures that the only applicable statute of limitations is that of the country making the extradition request. Accordingly, this provision ensures that the U.S. prosecutors will maintain procedural control over the viability of their cases, rather than being at the mercy of foreign statutes of limitations.

Procedural Improvements

In addition to the substantive improvements, the Extradition Treaty before this committee includes procedural enhancements, which streamline the extradition process. For example, the Treaty contains a "temporary surrender" provision, which allows a person found extraditable, but already in custody abroad for another criminal charge, to be temporarily surrendered for purposes of trial. Absent temporary surrender provisions, we face the problem of delaying the fugitive's surrender, sometimes for many years, while the fugitive serves out a sentence in another country. As a result, during this time, the U.S. case against the fugitive becomes stale, and the victims are delayed justice for the crimes committed against them.

Further, the Extradition Treaty also allows the fugitive to waive extradition, or otherwise agree to immediate surrender, thereby substantially speeding up the fugi-

tive's return in uncontested cases. The Treaty also streamlines the channels for seeking "provisional arrest"—the process by which a fugitive can be immediately detained while documents in support of extradition are prepared, translated, and submitted through the diplomatic channel—and the procedures for supplementing an extradition request that already has been presented to the requested country.

Together, the procedural and substantive improvements to the Extradition Treaty will ensure that U.S. prosecutors and law enforcement officials are better positioned to combat crime in an ever globally integrated and interdependent world.

THE U.S.-REPUBLIC OF SERBIA EXTRADITION AGREEMENT

The United States and Serbia also operate pursuant to the same 1901 extradition treaty between the United States and the Kingdom of Servia.

However, unlike Kosovo, as applied to Serbia, the 1901 treaty is augmented by the extradition provisions applicable under multilateral conventions to which Serbia and the United States are parties. As a practical matter, this permits both countries to extradite fugitives for a broader scope of conduct apart from the enumerated list of crimes in the 1901 treaty. For example, both countries are party to the United Nations Transnational Organized Crime Convention, the U.N. Convention against Corruption, and the 1988 Vienna Drug Convention, all of which serve to augment the provisions in existing bilateral extradition treaties.

Nevertheless, none of these multilateral treaties addresses one of the most important aspects of modern extradition practice: allowing for the extradition of nationals. In contrast, much like the proposed U.S.-Kosovo Extradition Treaty, the U.S.-Serbia Extradition Treaty before this committee, allows for the extradition of nationals.

Furthermore, unless the U.S. and Serbia become parties to an exhaustive list of multilateral conventions that cover every possible crime, we leave ourselves vulnerable to the possibility of gaps. The U.S.-Serbia Extradition Treaty before this committee minimizes the possibility of these gaps. As is found in the proposed U.S.-Kosovo Extradition Treaty, the U.S.-Serbia Treaty under consideration includes a "dual criminality" provision, which allows extradition with regards to all offenses that are punishable in both countries by a minimum term of imprisonment of more than one year.

In addition to the provision which allows extradition of nationals, and the inclusion of the critical "dual criminality" method, the U.S.-Serbia Extradition Treaty before this committee includes all of the substantive and procedural improvements as contained in the proposed U.S.- Kosovo Extradition Treaty.

CONCLUSION

In conclusion, Mr. Chairman, we appreciate the committee's support in our efforts to strengthen the framework of treaties that assist us in combatting international crime. For the Department of Justice, modern extradition treaties are particularly critical law enforcement tools. To the extent that we can update our existing agreements in a way that enables cooperation to be more efficient and effective, we are advancing the protection of our citizens. 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 RISCH. Thank you very much. Thank you to both of you.

We are going to do a round of questions here. Before I do, I am going to include two pieces of correspondence the committee has received. One is from the Uniform Law Commission, the National Conference of Commissioners on Uniform State Laws, supporting these. And then also I am going to include a letter signed by a number of primarily financial institutions, and it is also in support of the treaties. And the U.S. Chamber of Commerce is also a signatory to those.

[The information referred to above is located at the end of this hearing transcript.]

Senator RISCH. So with that, we are going to do some brief questions, and then we are going to submit some questions for the record for you.

The first one I have, I do not know which one of you wants to take a swing at this, but can you talk a little bit about the impact that any of these treaties would have as far as small business is concerned, and gauge the importance of these treaties for small businesses here in America?

Mr. Visek, you look like you want to volunteer.

Mr. VISEK. That is just my nature. Thank you, Mr. Chair.

I think the benefits for small- and mid-sized businesses will obviously be most prevalent with respect to the U.N. Convention on the Assignment of Receivables in International Trade.

I think the challenge for small businesses and mid-sized businesses is oftentimes obtaining sufficient cash flow and working capital. And currently, U.S. companies can be hampered in their ability to increase their exports because they have difficulty obtaining working capital financing based on receivables arising from the sale of exported goods.

These companies could obtain financing by offering the receivables as collateral for loans from U.S. banks and other lenders. However, these lenders often are unwilling to make loans secured by receivables owed by customers in other countries whose laws are inconsistent with modern commercial finance practice. They may also be deterred by the fact that they have to be concerned about perfecting their claims in multiple countries because the choice of law rules may not be clear.

Widespread ratification of the convention would go a long way towards remedying this situation. It is hoped that, if the United States were to ratify the convention, which in large measure dovetails with and is based on Article 9 of the Uniform Commercial Code, it would serve as a catalyst and prompt other nations to follow suit.

In turn, that would create greater uniformity and reduce the legal risks associated with cross-border transactions involving those countries, and it would provide uniform rules that would go a long way, if you will, toward making it easier to obtain not only capital but also financing for export receivables.

In turn, this, hopefully, would enable small, mid-size, and large companies to enhance the growth of their exports by U.S. companies, because they would be able to obtain the financing. And in turn that would presumably help U.S. companies compete in the global marketplace and create new jobs in the United States.

Thank you.

Senator RISCH. Mr. Swartz?

Mr. SWARTZ. And, Mr. Chairman, if I might add, extradition treaties also, although they are not oftentimes seen in this respect, serve as a benefit to U.S. companies both large and small. Among other things, it makes possible the return of fugitives who have sought to defraud U.S. companies, and that is important for certainty that punishment will be extended to those who acted against U.S. companies.

And it is particularly important under these modern treaties that cybercrime is now covered as well, since we know that through business email compromise and other types of fraud schemes using the internet, American companies have been taken advantage of.

So we fully expect these treaties will be at the interests of not only the U.S. citizens but U.S. companies as well.

Thank you.

Senator RISCH. Thank you very much.

Mr. Visek, you made reference to Article 9 of the UCC. When I was in law school, I wrote a treatise regarding that, and I am going to spare you the niceties of going into the details of that, at the risk of putting my colleagues to sleep.

One last question. This committee has, at times over the years, considered what we call the Law of the Sea Treaty. It is actually the U.N. Convention on the Law of the Sea. The one treaty we have discussed here between the Republic of Kiribati, the Federated States of Micronesia, and the United States, does it have any connection, any effect, have anything to do with the Convention on the Law of the Sea Treaty?

Mr. VISEK. The short answer is that the accession to the Law of the Sea Convention is a separate issue from the Federated States of Micronesia and Kiribati maritime boundary treaties. The boundary treaties are treaties between the United States and those respective nations, and they establish EEZ limits that in many ways resemble the existing EEZ limits that all the parties informally recognize currently. What it would do is, in effect, codify those in the form of a treaty and, in doing so, would provide greater support for them. But they are independent of what is known as the U.N. Convention on the Law of the Sea.

And with respect to the Law of the Sea Convention, I think Secretary Tillerson, during his confirmation process, said that he will examine the Law of the Sea Convention to determine whether it is in the continued best interests of the United States to become a party. And if I recall correctly, the chair of the committee, Senator Corker, sent a letter to the State Department asking about our treaty priorities, and we are in the process of consulting interagency and conducting that review.

Senator RISCH. I appreciate that.

Back to the ones in front of us, does the text of it make any reference to or suggestion about the Law of Sea Treaty or convention?

Mr. VISEK. Senator, without having an encyclopedic memory, it is my understanding that it does not.

Senator RISCH. Would you double-check that and confirm that in writing?

Mr. VISEK. Yes, we will.

Senator RISCH. Thank you.

Mr. Swartz, do you have anything to add to this?

Mr. SWARTZ. No, Senator, I do not.

Senator RISCH. Okay, thank you very much.

Senator Shaheen?

Senator SHAHEEN. Thank you, Mr. Chairman.

Mr. Visek, currently, only one country, Liberia, has ratified the U.N. Convention on the Assignment of Receivables, and five countries have to ratify the treaty.

Can you tell us which countries after the United States, should we ratify, are most likely to file a suit?

Mr. VISEK. Thank you, Senator.

Unfortunately, I do not have crystal ball. I can tell you that other states that have signed are Madagascar and Luxemburg, in addition to the United States.

I think, though, what makes this convention particularly ripe at this point is that there is increased interest in receivables financing globally, as the global economy develops, both in Asia and Latin America. And the EU itself is looking at the issue of receivables financing.

The convention was, in large measure, based on U.S. law. I am reminded of when I studied the Uniform Commercial Code, which was in 1985, and I felt somewhat emboldened at that point, only to find out that Article 9 had been amended in the late 1990s. But it was also about that time, shortly thereafter, that the convention was being negotiated. So it was very much informed by UCC Article 9.

I think the way we look at this is, if the United States has not ratified the convention that is based on its own Uniform Commercial Code and is consistent with the laws of all 50 States, that sends a negative signal. If we do ratify, and given the nature of our law, we obviously think we should, given the importance of the United States to the economic global environment, I think that would serve as a powerful catalyst for other nations to follow suit.

It would also influence discussions and consideration in various nations and within the EU, for example, on how to approach the financing of receivables.

I hope that answers your question.

Senator SHAHEEN. That is helpful.

Senator Risch has already talked about the potential impact on small and medium-sized businesses in the U.S., which I just want to reiterate that I think is also very important. And as I understand, one of the benefits of this treaty is that it would allow business to use international trade deals that they have already negotiated as collateral for borrowing.

Am I interpreting that correctly?

Mr. VISEK. That is correct.

Senator SHAHEEN. Thank you. So I think it would have a real benefit in that respect to many of our small and medium-sized businesses.

Mr. Swartz, I understand that most extradition treaties bar extradition for political offenses, but the two extradition treaties before us today, as I understand, limit the scope of that exemption.

Can you describe how the exemption has been narrowed? And is this a common feature among extradition treaties?

Mr. SWARTZ. Thank you, Senator.

Yes, we have sought to ensure that the political offense exception is not misused to apply to offenses that we consider to be crimes, such as murder, terrorist offenses, or other similar acts.

So it has been the policy of the United States, and in the prior treaties to which this committee and the Senate have given advice and consent, to have a list of offenses that are not covered by the political offense exception. So that covers multilateral offenses, so the offenses under our various terrorism conventions. It covers murder, kidnapping, assault, and similar offenses.

This treaty, the treaty with Kosovo, and similarly the treaty with Serbia, both add to the offenses, offenses involving chemical, biological, or radiological weapons, a further advance that we wanted to solidify in these conventions to make clear that individuals using such weapons cannot claim that they did so on a political basis and, therefore, should not be subject to extradition.

It also has a number of other provisions that make clear that conspiracy or attempt to engage in such activity is also not a basis for refusing extradition.

Senator SHAHEEN. Thank you.

So how does our Department of Justice account for different perceptions and standards of evidence among the different nations when we are looking at extradition treaties?

Mr. SWARTZ. Senator, thank you for that question, because it does touch on an important point.

When we receive an extradition request, which first is transmitted through diplomatic channels to the State Department and assessed at the State Department for consistency with the treaty before it is sent to the Department of Justice, we at the Department of Justice, at our Office of International Affairs, consider in the first instance whether, as prosecutors, we believe that the evidence submitted establishes the legal standard required in the United States for extradition, and that is probable cause. It is not a hearing or a full trial on the merits, but it is probable cause.

And so the evidence submitted to the Department of Justice, through the State Department from the foreign country, has to be sufficient in our perspective to submit to the court. And then, significantly, the court has to find that probable cause exists on the evidence provided.

So regardless of the standards of evidence in other countries, we consistently apply the same standard to our extradition requests here.

Senator SHAHEEN. Thank you.

Thank you, Mr. Chairman.

Senator RISCH. Senator Kaine?

Senator KAINE. Thank you, Mr. Chairman.

And thanks to the witnesses for you work and for being here today. I find each of these treaties unobjectionable and look forward to supporting them, unless I end up with an odd question or two, in which case I will reach back out to you.

I actually wanted to ask you, as a way of sort of fleshing out philosophy on these matters, we had a hearing recently in this committee about sort of the role of the administration and the Congress on treaties, on things less than treaties, executive agreements. And one that troubled me recently was the decision of the United States to withdraw from the Global Compact on Migration, known as the New York Compact, that the administration announced 2 weeks ago.

Now, I would like you to correct me if I state this wrong. My understanding is the New York Compact was a nonbinding agreement done in the U.N. General Assembly in September 2016 that essentially acknowledged the increasing severity of the global migrant and refugee crisis, and asked nations to commit to participating in a dialog about sort of new best practices for dealing with this.

This is something that the President has spoken about, about the problems of migrants and refugees. And I think the President is right. I may have some different ideas from the President about how to deal with it. We would all have different ideas. But I do not think you can turn a blind eye to the fact that the specter of global refugees not just driven by war or violence but now weather emergencies and droughts and other significant issues are turning refugees and migrants from sort of an episodic emergency management challenge to sort of a permanent reality, which they may well have been throughout time. But I think the world is coming to grips with that.

The compact involved a meeting in Puerto Vallarta last week. And shortly before the meeting, the administration announced it was going to pull out of the compact and not attend this meeting to discuss best practices.

As an editorial opinion, I do not see how the world deals with this problem as effectively as the world could deal with it without the U.S. at the table.

And the administration's asserted rationale for pulling out was that this nonbinding compact would intrude upon U.S. sovereignty.

Now, in each of these instances, the four treaties before you, there could be sovereignty issues that would be raised, and we hashed them out. And it looks like, over time, we have gotten to a good point. But I could not understand why a nonbinding compact would raise sovereignty concerns.

And I wanted to ask either of you whether your offices were involved either in the original work on the New York Compact in September 2016 or the decision or advice around the decision that led this administration to withdraw from the compact and withdraw from the meeting in Mexico.

Mr. VISEK. Senator Kaine, I certainly appreciate your concerns. However, this is an issue that I am not well-versed in. I apologize for not being more so. And what I would commit, though, is if we could take that question back and provide you with a written answer.

Senator KAINE. That would be fine. And I will ask a specific one for a written answer, but can I just ask—the only question I really asked was whether your office was involved in either the discussions around the New York Compact in September 2016 or the decision to remove. I had not asked a substantive question yet, just was this in the province or jurisdiction of your office within the Department of State?

Mr. VISEK. I understand that we were consulted. I do not know the extent of those consultations. But certainly, we could address your question in writing.

Senator KAINE. Then I will ask that specifically for the record.

Mr. Swartz?

Mr. SWARTZ. Thank you, Senator.

From the law enforcement perspective, my office was not involved in this matter, but I will also go back to my colleagues at the Department of Justice and respond more generally.

Senator KAINE. That would be helpful, because I think this is a law enforcement matter. I mean, migrants and refugees are a humanitarian crisis and disaster, but one of the reasons the President

often talks about this, correctly, is that, within migrant or refugee flows, cunning people can hide or spirit people across borders to try to undertake acts of terrorism, to try to involve in poaching, human trafficking. The migrant and refugee problem can often be a mask for real law enforcement concerns.

And I think the idea, as I understood it, for the Puerto Vallarta meeting was to talk about all of those aspects of migrants and refugees. So I am asking a question that has a humanitarian and a national security and a law enforcement perspective.

So we will craft particular questions for the record about this and would look forward to your responses.

Thank you.

Senator RISCH. Thank you, Senator Kaine.

With that, we want to thank you both.

Senator SHAHEEN. I have more questions.

Senator RISCH. Another round, Senator?

Senator SHAHEEN. Yes, please.

Senator RISCH. All right. Senator Shaheen has a little bit more for you.

Senator SHAHEEN. I guess this is for you, Mr. Swartz. I know that we have a lot of extradition requests with countries. Are all our extradition treaties with the United States more or less the same? Are there exceptions?

Mr. SWARTZ. Senator, thank you for that question as well. It does go to the heart of the program we have underway to modernize our treaties. And the answer is no, they are not all the same because they extend back into the 19th century, in some cases, and as you know from this hearing, to 1901, with regard to these two countries before the committee today.

So we have sought in recent times to ensure consistency and uniformity in the new extradition treaties we negotiate. There are some differences, depending on particular countries.

But by and large, we have sought, as, Mr. Chairman, you noted, from the 1990s forward to ensure the extradition of nationals, to eliminate the list treaty approach and go forward with dual criminality. So we seek, in that respect, to try and have a modern approach across all of our treaties.

And if I might ask, Mr. Chairman, if my testimony, which also touches on this question, if my written testimony could be submitted for the record as well, I would be grateful.

Senator RISCH. We would be happy to have that.

Senator SHAHEEN. And just to go back to my other question about the standards of evidence, are there other countries where we have extradition treaties that actually have higher standards of evidence than the United States? Do you know the answer to that?

Mr. SWARTZ. Largely, extradition treaties do have similar standards for both sides. Sometimes, there are issues about exactly how each country interprets the approach. But in virtually all of our experience, the approach is one that looks to see whether or not some form of probable cause or reasonableness exists for the extradition.

Some countries require a fuller production of evidence than would be required in the United States and vice versa. But again, largely across the broad range of our treaties, the approach is similar.

Senator SHAHEEN. Thank you. And this final question is really for both of you.

How do we handle terrorists or armed insurgents under extradition treaties? Do we have any guidance that is different from other potential people that we are trying to extradite?

Mr. SWARTZ. Senator, one of the key aspects of updating our treaty is to reach terrorist offenses, in particular. We have a strong commitment to pursuing terrorists worldwide, to ensure that they do not have safe havens. So we have brought a number of cases from countries around the world where we have extradition treaties, seeking terrorists or others who have committed terrorist acts. And we have brought a number of those individuals back and successfully prosecuted them here in the United States.

Senator SHAHEEN. And do we have any countries who have not been willing to give up terrorists, or people who we would determine to be terrorists and who they have refused to extradite to the United Sates?

Mr. SWARTZ. Senator, it is an unfortunate fact that we do not win all our extradition cases. Of course, that is always our goal.

With our key and trusted partners, we have had a large degree of success with this. If we have denials of extradition, it is usually not based on the individual being a terrorist or otherwise. There is oftentimes consideration such as whether the individual has been prosecuted previously or other factors that may lead a country to deny extradition.

Senator SHAHEEN. Thank you.

Thank you, Mr. Chairman.

Senator RISCH. Thank you very much, Senator Shaheen. That is an excellent question.

And we have also had the unfortunate circumstance that some countries do this informally by simply hiding the individual. That does not happen often, but we all wish that it was a perfect world, but it is not, and particularly with governments.

So with that, again, thank you to both of you for participating.

We are going to keep the record open until the close of business on Friday, and there will be some questions for the record that will be submitted.

Gentlemen, if you would get your answers back as promptly as possible, we will be able to complete this matter.

Senator RISCH. And so with that, the hearing will be adjourned.

[Whereupon, at 3:14 p.m., the hearing was adjourned.]

Additional Material Submitted for the Record

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED TO RICHARD VISEK BY SENATOR TIM KAINE

Question 1. Was the Legal (L) bureau at the State Department or the DOJ involved in negotiating the New York Declaration on Refugees and Migration in 2016? Did you play a role or were you consulted on our withdrawal?

Answer. The Office of the Legal Adviser at the Department of State was consulted and provided input throughout the process of negotiating the New York Declaration on Refugees and Migrants in 2016, as were relevant agencies. I am not in a position to speak specifically to the role of DOJ.

Relevant agencies including the Department of State were also consulted before the decision was made to end U.S. participation in the UN process to develop a global compact on migration. The Office of the Legal Adviser provided advice to Department of State officials as part of that process.

Question 2. Did legal experts in the State Department or DOJ determine the New York Declaration was inconsistent with U.S. domestic law? In what areas? By negotiating as part of this process, could the standards have been elevated to be consistent with U.S. law as in other negotiations on multilateral agreements?

Answer. In all multilateral negotiations in which the United States participates, U.S. negotiators endeavor to ensure that any obligations or commitments that the United States would assume through the instrument are consistent with U.S. domestic law and existing international obligations. The Office of the Legal Adviser supports the Department in this process. To the extent these efforts do not fully succeed, the Department may recommend, for example, reservations or understandings to multilateral treaties or agreements, or explanations of position with regard to instruments that are not legally binding. The Department may also recommend that the United States not become a party to or sign or support a particular instrument. Due to professional obligations of attorneys providing advice to clients, I am not in a position to disclose the legal advice the Office of the Legal Adviser provided to the Department, nor am I in a position to speak to DOJ's conclusions.

Question 3. Do you see any utility in the U.S. withdrawing from this process prior to a final agreement? Could the legal professionals in your offices have helped shaped a compact on migration to be consistent with U.S. law as in the United Nations Convention on the Assignment of Receivables in International Trade?

Answer. As noted above, the State Department and other relevant agencies were consulted before the decision was made to end U.S. participation in the UN process to develop a global compact on migration. Where a policy decision is made to participate in multilateral negotiations, U.S. negotiators, with support from the Office of the Legal Adviser, endeavor to ensure that any obligations or commitments that the United States would assume through the instrument are consistent with U.S. domestic law and existing international obligations. Ultimately the question whether to participate in a multilateral negotiation is a policy judgment, informed by legal advice. Due to professional obligations of attorneys providing advice to clients, I am not in a position to comment on the advice the Office of the Legal Adviser provided on this issue.

Question 4. In negotiations of treaties, international agreements other than treaties, and instruments containing non-legally binding political commitments, in which the Department of State participates, Department negotiators endeavor to ensure that any obligations or commitments that the United States would assume through the instrument are consistent with U.S. domestic law and existing international obligations. The Office of the Legal Adviser supports the Department in this process.

- Can you detail how your offices generally ensure that any international agreement, accord or treaty comply with U.S. law?

Answer. When the Department of State is considering whether the United States (or an agency thereof) should become party to a treaty or an international agreement other than a treaty, or should sign or support adoption of an international instrument containing non-legally binding political commitments, the Department, including the Office of the Legal Adviser, reviews the instrument to ensure that it is consistent with U.S. law and existing international legal obligations of the United States. As appropriate, other agencies of the U.S. Government are consulted as a part of this review. For some instruments, we also consult with any domestic stakeholders who may be affected. As a result of the review, the Department may recommend, for example, reservations or understandings to multilateral treaties or agreements, or explanations of position with regard to instruments that are not legally binding, to ensure that the United States does not take on obligations or commitments that would be inconsistent with U.S. law or existing international obligations.

Question 5. Do you believe non-binding compacts that include voluntary commitments impinge on U.S. sovereignty?

Answer. The Office of the Legal Adviser is responsible for advising on legal issues associated with treaties, international agreements other than treaties, and international instruments that are not legally binding when they are being considered by the Department of State. Whether particular instruments are consistent with U.S. interests is a question that is typically considered by relevant policy officials; the Office of the Legal Adviser provides legal advice and legal policy views as appropriate.

Correspondence in Support of the Treaties

December 12, 2017

The Honorable Bob Corker
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

The Honorable Ben Cardin
Ranking Member
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Re: Support for Convention on the Assignment of Receivables in International Trade

Dear Chairman Corker and Ranking Member Cardin:

The undersigned trade associations, which represent businesses that encompass all sectors of the U.S. economy and employ millions of people, strongly support and endorse the Convention on the Assignment of Receivables in International Trade (the Convention) and respectfully ask that you move expeditiously towards its ratification. Enactment of the Convention would make it easier for U.S. small and medium-sized businesses to access additional financing from lenders based on their sales of goods and services to customers located in other countries that ratify the Convention.

The Convention is self-executing, meaning that no state or federal legislation is needed. Thus, there is no cost to the U.S. government or taxpayers in ratifying the Convention. Experts from the National Conference of Commissioners on Uniform State Laws participated fully in the formulation of the Convention and have determined that there would be no implementation issues in ratifying the Convention.

U.S. small and medium-sized businesses often obtain vital financing by using their receivables as collateral for loans and other forms of financing. Article 9 of the Uniform Commercial Code makes this type of financing uncomplicated and readily available when the receivables are owed by customers located in the United States. However, U.S. lenders often are unable or unwilling to extend credit to U.S. companies seeking to borrow against their receivables owed by customers in other countries because the laws in many foreign countries make it difficult or cost-prohibitive to use foreign receivables as collateral for loans. Deprived of vital working capital, these U.S. companies are unable to grow and produce more U.S. jobs.

The Convention addresses this problem head-on by extending established and effective principles of American law embodied in Article 9 of the Uniform Commercial Code to every country that adopts the Convention.

U.S. ratification of the Convention would not change U.S. law in any material respect because U.S. law already reflects the modern legal principles embodied in the Convention. However, we strongly believe that U.S. ratification of the Convention would be the catalyst that prompts ratification by other countries. As more countries ratify the Convention, it will become easier for U.S. lenders to accommodate the financing needs of U.S. small and medium-sized

businesses, thereby enabling them to compete more vigorously in the international marketplace and foster the growth of American jobs.

Given the significant benefits of ratifying the Convention, its broad-based support, and absence of any impact on existing U.S. law or cost of implementation, we strongly urge you to move forward quickly with its ratification.

Sincerely,

BAFT (Bankers Association for Trade and Finance)
Commercial Finance Association
Equipment Leasing and Finance Association
Financial Services Roundtable
International Swaps and Derivatives Association, Inc.
National Foreign Trade Council
National Law Center for Inter-American Free Trade
Small Business & Entrepreneurship Council
U.S. Chamber of Commerce
U.S. Council for International Business

cc: Members of the Senate Committee on Foreign Relations

April 8, 2016

The Honorable Bob Corker
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

The Honorable Ben Cardin
Ranking Member
Committee on Foreign Relations
United States Senate
Washington, DC 20510

The Honorable Richard Shelby
Chairman
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, DC 20510

The Honorable Sherrod Brown
Ranking Member
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, DC 20510

Re: Support for Convention on the Assignment of Receivables in International Trade

Dear Chairman Corker, Chairman Shelby, Ranking Member Cardin, and Ranking Member Brown:

The undersigned trade associations, which represent businesses that encompass all sectors of the U.S. economy and employ millions of people, strongly support and endorse the Convention on the Assignment of Receivables in International Trade[1] (the Convention) and respectfully ask that you move expeditiously towards its ratification. We believe the American economy would benefit from enactment of the Convention into law by making it easier for U.S. small and medium-sized businesses (SMEs) to access additional financing from lenders based on their sales of goods and services to customers located in other countries that ratify the Convention.

Simply put, the Convention would permit SMEs to access additional financing that is not currently available to them by making it significantly easier for U.S. companies to obtain asset-based financing in which their foreign receivables serve as collateral.

The Convention is self-executing, meaning that no state or federal legislation is needed. Thus, there is no cost to the U.S. government or taxpayers in ratifying the Convention. Experts from the National Conference of Commissioners on Uniform State Laws participated fully in the formulation of the Convention and have determined that there would be no implementation issues in ratifying the Convention.

U.S. SMEs often obtain vitally needed financing by using their receivables as collateral for loans and other forms of financing. In the United States, Article 9 of the Uniform

[1] A copy of the Convention is available at https://www.congress.gov/treaty-document/114th-congress/7/document-text.

Commercial Code makes this type of financing uncomplicated and readily available when the receivables are owed by customers located in the United States. However, U.S. lenders often are unable or unwilling to extend credit to U.S. companies seeking to borrow against their receivables owing by customers in other countries, because the laws in many foreign countries make it difficult or cost-prohibitive to use foreign receivables as collateral for loans. Deprived of vital working capital, these U.S. companies are unable to grow and produce more U.S. jobs.

The Convention addresses this problem head-on by extending, to every country that adopts the Convention, established and effective principles of American law embodied in Article 9 of the Uniform Commercial Code.

U.S. ratification of the Convention would not change U.S. law in any material respect because U.S. law already reflects the modern legal principles embodied in the Convention. However, we strongly believe that U.S. ratification of the Convention would be the catalyst that prompts ratification by other countries. As more countries ratify the Convention, it will become easier for U.S. lenders to accommodate the financing needs of U.S. SMEs, thereby enabling U.S. SMEs to compete more vigorously in the international marketplace and foster the growth of jobs that our country needs.

Given the significant benefits of ratifying the Convention, its broad-based support, and absence of any impact on existing U.S. law or cost of implementation, we strongly urge you to move forward quickly with its ratification. The undersigned members would be happy to discuss the importance of ratifying the Convention at your convenience.

Sincerely,

BAFT (Bankers Association for Trade and Finance)
Commercial Finance Association
Equipment Leasing and Finance Association
Financial Services Roundtable
International Swaps and Derivatives Association, Inc.
Small Business & Entrepreneurship Council
U.S. Chamber of Commerce
U.S. Council for International Business

cc: Members of the Senate Committee on Foreign Relations
Members of the Senate Committee on Banking, Housing, and Urban Affairs

Uniform Law Commission

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March 24, 2016

Honorable Robert Corker
Chairman, Committee on Foreign Relations
U.S. Senate Committee on Foreign Relations
423 Dirksen Senate Office Building
Washington, DC 20510-6225

RE: Ratification of the United Nations Convention on the Assignment of Receivables in International Trade

Dear Mr. Chairman:

In my capacity as President of the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws), I am writing to support Senate review and approval of the United Nations Convention on the Assignment of Receivables in International Trade (the "Convention"). The Convention was transmitted to the Senate for advice and consent by the President on February 10, 2016.

The Uniform Law Commission was founded in 1892 to provide non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. Commissioners are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state and territorial governments to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical. While best known for our work with the Uniform Commercial Code (the "UCC"), over the past century the ULC has provided its member jurisdictions with important statutory advances in such areas as probate and trust and estates law, business entity law, family law, and interstate and international recognition and enforcement statutes.

The Convention provides stable and uniform rules, consistent with U.S. law embodied in Article 9 of the UCC, for the perfection and priority of security interests in foreign receivables and for the rights of the foreign customers. It facilitates asset-based lending, factoring, securitization and project finance by permitting, in countries where such practices are not currently allowed, the assignment of receivables in bulk, the assignment of future receivables, the securing of future advances by existing and future receivables, and in some circumstances an automatic right of the assignee to payments on the receivables in cross-border transactions. It also centralizes the choice of law rule that applies to any question of priorities among competing claimants of the assigned receivables, thus eliminating the need to insure priorities under the laws of multiple countries whose laws might conceivably apply.

The Uniform Law Commission worked closely with the Department of State's Office of Private International Law in developing and reviewing the Convention and to make sure that the Convention was substantially consistent with Article 9 of the UCC. The Uniform Law Commission is satisfied that the Convention should not lead to a result different from current state law under the UCC in most common transactions and in most instances. For this reason, the Uniform Law Commission supports Senate review and approval of the Convention.

Very truly yours,

Richard T. Cassidy
President
Uniform Law Commission

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