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# INTERNATIONAL CONVENTION FOR SUPPRESSION OF ACTS OF NUCLEAR TERRORISM

SEPTEMBER 11, 2008.—Ordered to be printed

Mr. DODD, from the Committee on Foreign Relations, submitted the following

# REPORT

[To accompany Treaty Doc. 110–4]

The Committee on Foreign Relations, to which was referred the International Convention for the Suppression of Acts of Nuclear Terrorism, adopted on April 13, 2005 (the "Convention") (Treaty Doc. 110–4), having considered the same, reports favorably thereon with one reservation, four understandings, and one declaration, as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolution of advice and consent.

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## I. PURPOSE

The purpose of the Convention, which has a structure that is similar to other counterterrorism treaties to which the United States is a party, is to prevent and suppress acts of nuclear terrorism.

## II. BACKGROUND

The International Convention for the Suppression of Acts of Nuclear Terrorism (the "Nuclear Terrorism Convention") was the first

counterterrorism treaty adopted after the attacks of 9/11 by the General Assembly of the United Nations. The United States has strongly supported the Convention since its inception and was the second to sign the instrument when it was opened for signature on September 14, 2005.[1] The Convention has also been praised by the Director General of the International Atomic Energy Agency (IAEA), Mohamed ElBaradei, who has called on all states to "sign and ratify the Convention without delay so nuclear terrorism will have no chance."[2] The Convention entered into force on July 7, 2007. As of July 2008, the Convention had 115 signatories and 41 States Parties.

The Convention establishes an international framework intended to augment cooperation among countries in combating nuclear terrorism and preventing the proliferation of weapons of mass destruction ("WMD"). The Convention has a similar structure to other counterterrorism treaties that the United States is a party to, such as the Terrorist Bombings[3] and Terrorist Financing[4] Conventions. Specifically, the Convention requires States Parties to (1) criminalize certain acts; (2) take "all practicable measures" to prevent and counter preparations for the commission of those acts; and (3) extradite or submit for prosecution alleged offenders. In addition, the Convention provides a legal basis for international cooperation in the investigation, prosecution, and extradition of alleged offenders and obligates States Parties to take certain steps upon seizing or otherwise taking control of radioactive material, devices, or nuclear facilities for safeguarding purposes, following the commission of an offense covered by the Convention. The Convention generally excludes from its scope of application the activities of armed forces during an armed conflict and the activities undertaken by the military forces of a State in the exercise of their official duties, which are already comprehensively governed by other bodies of international law.

## III. MAJOR PROVISIONS

A detailed analysis of the Convention may be found in the Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 110–4. A summary of key provisions is set forth below.

*Offenses Covered by the Convention*

Articles 1 and 2 together serve to define certain offenses covered by the Convention. Article 5 commits each State Party to criminalize these offenses under its national law. The offenses can be summarized as follows:

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[1] Russia was the first to sign the Convention.

[2] "IAEA Director General Welcomes Landmark Convention to Combat Nuclear Terrorism" *available at* http://www.iaea.org/NewsCenter/PressReleases/2005/prn200502.html

[3] International Convention for the Suppression of Terrorist Bombings, adopted by the United Nations General Assembly on December 15, 1997, and signed on behalf of the United States of America on January 12, 1998 (Treaty Doc. 106–6). Entered into force for the United States on July 26, 2002.

[4] International Convention for the Suppression of the Financing of Terrorism, adopted by the United Nations General Assembly on December 9, 1999, and signed on behalf of the United States of America on January 10, 2000 (Treaty Doc. 106–49). Entered into force for the United States on July 26, 2002.

i. The unlawful and intentional 1) possession of radioactive material;[5] or 2) making or possession of a device[6]—with the intent either to cause death, serious bodily injury or substantial damage to property or to the environment.

ii. The unlawful and intentional 1) use of radioactive material or a device; or 2) use of, or damage to, a nuclear facility[7]—in a manner that releases or risks the release of radioactive material with the intent either to cause death, cause serious bodily injury, cause substantial damage to property or the environment, or compel a natural or legal person, an international organization, or a State to do or refrain from doing an act.

iii. A credible threat to commit an offense as set forth in (ii) or an unlawful and intentional demand for radioactive material, a device, or a nuclear facility by threat in a credible manner or by use of force.

iv. An attempt to commit an offense set forth in (i) or (ii) above.

v. To participate as an accomplice in any of the offenses set forth in (i), (ii), (iii), and (iv) above.

vi. To organize or direct others to commit any of the offenses set forth in (i), (ii), (iii), and (iv) above.

vii. To intentionally contribute to the commission of one or more offenses as set forth in (i), (ii), (iii), and (iv) above by a group of persons acting with a common purpose, with either 1) the aim of furthering the general criminal activity or purpose of the group; or 2) the knowledge of the intention of the group to commit the offense or offenses concerned.

*Exceptions from the application of the Convention*

Article 4 excludes from the scope of the Convention 1) the activities of armed forces during an armed conflict, which are governed by international humanitarian law; and 2) the activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law. Article 4 also states that the Convention "does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States."

*Preventing Offenses*

Article 7 of the Convention commits States Parties to take "all practicable measures" to prevent and counter preparations in their respective territories for the commission within or outside their ter-

[5] "Radioactive material" is defined as nuclear material and other radioactive substances which contain nuclides that undergo spontaneous disintegration and which may, owing to their radiological or fissile properties, cause death, serious bodily injury or substantial damage to property or to the environment.

[6] A "device" can be a nuclear explosive device (that is, a device that brings together nuclear material to cause an explosive chain reaction leading to blast effects, heat, light, and radiation), or it could be a radioactive-material-dispersal or a radiation-emitting device (for example, a device that uses a regular chemical explosive to generate heat and blast effects that also has radioactive material mixed in), which owing to its radiological properties may cause death, serious bodily injury, or substantial damage to property or the environment.

[7] "Nuclear facility" includes any nuclear reactor and any plant or conveyance being used for the production, storage, processing or transport of radioactive material.

ritories of the offenses covered by the Convention and described above. Article 7 also provides a legal basis for cooperating by exchanging information and coordinating as appropriate to detect, prevent, suppress and investigate the offenses covered by the Convention.

*Establishing Jurisdiction*

Under Article 9, each State Party must establish its jurisdiction over the offenses covered by the Convention and described above when:

i. The offense is committed in the territory of that State;

ii. The offense is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State; or

iii. The offense is committed by a national of that State.

A State Party is additionally permitted (but not required) to establish its jurisdiction over the offenses covered by the Convention and described above when:

i. The offense is committed against a national of that State;

ii. The offense is committed against a government facility of that State abroad, including an embassy or some other diplomatic or consular premises of that State;

iii. The offense is committed by a stateless person who has his or her habitual residence in the territory of that State;

iv. The offense is committed in an attempt to compel that State to do or abstain from doing any act; or

v. The offense is committed on board an aircraft that is operated by that State.

*Extradite or Prosecute Regime*

Articles 10, 11, and 13 set forth an "extradite or prosecute" regime for persons who have allegedly committed offenses covered by the Convention.

Article 10(1) requires States Parties to take measures to investigate certain alleged offenses. Paragraph 2 requires States Parties in which an offender or an alleged offender is located to take measures under their national law to ensure that person's presence for the purpose of prosecution or extradition. Paragraphs 3, 4, and 5 require States Parties to respect certain rights of alleged offenders or confirmed offenders in their custody, which are consistent with existing U.S. law. Article 11 provides that States Parties in which persons alleged to have committed offenses under the Convention are present shall either extradite such persons or submit the case for prosecution. These provisions are similar to those that appear in other counterterrorism conventions to which the United States is a party, such as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

Article 13 adds to existing extradition treaties between States Parties the offenses covered by the Convention and provides that States Parties shall undertake, in subsequent extradition treaties between them, to include these offenses as extraditable offenses. Paragraph 2 of Article 13 provides that States Parties that make extradition conditional on the existence of an extradition treaty

may use the Convention as an independent legal basis for extradition when there is no applicable extradition treaty. The Secretary of State has noted in her letter of submittal that, consistent with the longstanding U.S. policy to extradite fugitives only to States with which the United States has an extradition treaty, it does not expect to use the Convention as a basis for extraditing persons to countries with which the United States does not have bilateral extradition treaties.

*Treatment While in Custody*

Article 12 requires States Parties to guarantee to persons taken into custody for offenses under the Convention fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law. This provision is consistent with existing U.S. law and can be found in other counterterrorism treaties to which the United States is a party, such as Article 17 of the Terrorist Financing Convention and Article 10(2) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. As is made clear in the declaration included in the draft Resolution of advice and consent and discussed further below, this provision does not confer private rights enforceable in U.S. courts. Nevertheless, individuals with claims relating to their treatment while in U.S. custody, would have other domestic legal avenues through which to pursue such claims.

*Protective Measures*

Article 8 obligates States Parties to "make every effort" to adopt appropriate measures to ensure the protection of radioactive material, taking into account "relevant recommendations and functions of the International Atomic Energy Agency." In response to questions from the committee, the Department of State has asserted that the Department of Energy and the Nuclear Regulatory Commission "already have in place regulations and other documents (such as orders and manuals) to ensure the protection of nuclear and byproduct material."

Article 18 obligates States Parties to take certain steps upon seizing or otherwise taking control of radioactive material, devices, or nuclear facilities, following the commission of an offense covered by the Convention. Specifically, a State Party must take steps to render the material, device, or facility harmless, ensure that any nuclear material is held in accordance with applicable IAEA safeguards, and have regard to physical protection recommendations and health and safety standards published by the IAEA. Moreover, following the completion of any proceedings connected with an offense covered by the Convention, any material, device, or nuclear facility must be returned to the State Party to which it belongs, the State Party of which the person owning such radioactive material, device, or nuclear facility is a national or resident, or to the State Party from whose territory it was stolen or otherwise unlawfully obtained. Article 18 also establishes procedures for the handling of such material when no originating State exists or when a particular State cannot lawfully return, possess, or accept the material.

*Dispute Resolution*

Article 23 provides a binding dispute resolution mechanism for disputes regarding the interpretation or application of the Convention that are not settled through negotiation within a reasonable time; however, Article 23 also provides that a State Party may make a declaration opting out of this dispute resolution mechanism. The committee proposes on the basis of the State Department's recommendation that the United States opt out of the binding dispute resolution mechanism in the treaty. Consequently, the proposed Resolution of advice and consent contains such a reservation.

## IV. Entry Into Force

In accordance with Article 25, the Convention will enter into force for the United States on the thirtieth day following the date on which the United States deposits its instrument of ratification with the Secretary-General of the United Nations.

## V. Implementing Legislation

With the exception of the provisions in the Convention that obligate the United States to criminalize certain offenses, make those offenses punishable by appropriate penalties, and authorize the assertion of jurisdiction over such offenses, this Convention is self-executing. The provisions that are not self-executing would be implemented through legislation.

Some of the offenses States Parties are obligated to criminalize are already covered by existing provisions in the U.S. Code. For example, the Convention's prohibition against the possession or use of a nuclear explosive or radiation dispersal device with the intent to cause death or serious bodily injury may be covered by 18 U.S.C. § 832 (prohibiting the unlawful possession or use of a "radiological weapon") and/or 18 U.S.C. § 2332h (prohibiting the unlawful possession or use of a "weapon" or "device" designed to release radiation). Offenses not covered in existing provisions of the U.S. Code will need to be addressed in further implementing legislation prior to U.S. ratification of the Convention. In light of this, the Department of Justice has submitted a draft bill to Congress entitled the "Nuclear Terrorism Conventions Implementation Act of 2008," which would supplement existing provisions of the U.S. Code in order to fully implement not just this Convention, but also the Amendment to the Convention on the Physical Protection of Nuclear Material. This draft legislation is currently under consideration by the Committees on the Judiciary of the House and Senate. The committee understands that the executive branch will not deposit an instrument of ratification for this Convention until legislation has been enacted that will allow the United States to fully implement the Convention.

## VI. Committee Action

The committee held a public hearing on the Convention on May 7, 2008. Testimony was received from Ms. Patricia McNerney, Principal Deputy Assistant Secretary of State for International Security and Nonproliferation at the Department of State; Mr. John

Demers, Deputy Assistant Attorney General for the National Security Division at the Department of Justice; and Mr. Richard Douglas, Deputy Assistant Secretary of Defense for Counternarcotics, Counter-proliferation and Global Threats at the Department of Defense. A transcript of this hearing can be found in the Annex to this report.

On July 29, 2008, the committee considered the Convention and ordered it favorably reported by voice vote, with a quorum present and without objection.

## VII. Committee Recommendation and Comments

The Committee on Foreign Relations believes that the Convention presents a significant opportunity to strengthen and supplement current efforts by the United States to prevent and suppress nuclear terrorism and the proliferation of weapons of mass destruction. Accordingly, the committee urges the Senate to act promptly to give advice and consent to ratification of the Convention, as set forth in this report and the accompanying resolution of advice and consent.

### RESOLUTION

The committee has included in the resolution of advice and consent a reservation, four understandings, and one declaration.

*Reservation*

The proposed reservation essentially allows the United States to opt out of the binding dispute resolution mechanism provided for in the Convention. This reservation is similar to those made by the United States with respect to the dispute settlement mechanisms in the Terrorist Bombings and Terrorism Financing Conventions.

*First Understanding*

Article 4(2) of the Convention carves from the scope of the Convention the activities of armed forces during an armed conflict, which are instead governed by "international humanitarian law," which is also known as the "law of war." This provision is identical to the one found in Article 19(2) of the Terrorist Bombings Convention. The proposed understanding would make it clear that this carve-out does not include certain situations such as "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature" in an effort to prevent attempts by suspected offenders to claim the benefit of this "armed conflict" exception in order to improperly avoid extradition or prosecution under the Convention. This understanding is the same as the understanding included in the Senate's resolution regarding the Terrorist Bombings Convention with respect to Article 19(2).

*Second Understanding*

Article 4 of the Convention uses the term "international humanitarian law," which is not generally used by the United States armed forces and therefore the committee has included, on the basis of the executive branch's recommendation, this proposed understanding to make clear that the term "international humanitarian law" has the same substantive meaning as "law of war."

*Third Understanding*

Article 4(2) of the Convention carves from the scope of the Convention "activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law." The committee, on the basis of the executive branch's recommendation, has included this proposed understanding in order to clarify that the conduct of certain civilians who direct, organize, or act in support of, the official activities of the military are also exempted from the Convention's scope of application.

*Fourth Understanding*

This proposed understanding would make it clear that existing U.S. law implements the obligations contained in Article 12 of the Convention.

*Declaration*

The committee has included a proposed declaration, which states that the Convention is self-executing, with the exception of those provisions that obligate the United States to criminalize certain offenses, make those offenses punishable by appropriate penalties, and authorize the assertion of jurisdiction over such offenses. In addition, the proposed declaration clarifies that none of the provisions in the Convention confer private rights enforceable in U.S. courts. This declaration is consistent with testimony provided by the Department of State. The Senate has rarely included statements regarding the self-executing nature of treaties in resolutions of advice and consent, but in light of the recent Supreme Court decision, *Medellín* v. *Texas,* 128 S.Ct. 1346 (2008), the committee has determined that a clear statement in the resolution is warranted. A further discussion of the committee's views on this matter can be found in Section VIII of Executive Report 110–12.

## VIII. Resolution of Advice and Consent to Ratification

*Resolved (two-thirds of the Senators present concurring therein),*

**SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A RESERVATION, UNDERSTANDINGS, AND A DECLARATION**

The Senate advises and consents to the ratification of the International Convention for the Suppression of Acts of Nuclear Terrorism, adopted on April 13, 2005, and signed on behalf of the United States of America on September 14, 2005 (the "Convention") (Treaty Doc. 110–4), subject to the reservation of section 2, the understandings of section 3, and the declaration of section 4.

**SECTION 2. RESERVATION**

The advice and consent of the Senate under section 1 is subject to the following reservation, which shall be included in the instrument of ratification:

> Pursuant to Article 23(2) of the Convention, the United States of America declares that it does not consider itself bound by Article 23(1) of the Convention.

**SECTION 3. UNDERSTANDINGS**

The advice and consent of the Senate under section 1 is subject to the following understandings, which shall be included in the instrument of ratification:

(1) The United States of America understands that the term "armed conflict" in Article 4 of the Convention does not include situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.

(2) The United States of America understands that the term "international humanitarian law" in Article 4 of the Convention has the same substantive meaning as the law of war.

(3) The United States of America understands that, pursuant to Article 4 and Article 1(6), the Convention does not apply to: (a) the military forces of a State, which are the armed forces of a State organized, trained, and equipped under its internal law for the primary purpose of national defense or security, in the exercise of their official duties; (b) civilians who direct or organize the official activities of military forces of a State; or (c) civilians acting in support of the official activities of the military forces of a State, if the civilians are under the formal command, control, and responsibility of those forces.

(4) The United States of America understands that current United States law with respect to the rights of persons in custody and persons charged with crimes fulfills the requirement in Article 12 of the Convention and, accordingly, the United States does not intend to enact new legislation to fulfill its obligations under this Article.

**SECTION 4. DECLARATION**

The advice and consent of the Senate under section 1 is subject to the following declaration:

With the exception of the provisions that obligate the United States to criminalize certain offenses, make those offenses punishable by appropriate penalties, and authorize the assertion of jurisdiction over such offenses, this Convention is self-executing. Included among the self-executing provisions are those provisions obligating the United States to treat certain offenses as extraditable offenses for purposes of bilateral extradition treaties. None of the provisions in the Convention, including Articles 10 and 12, confer private rights enforceable in United States courts.

ANNEX.—TREATY HEARING OF MAY 7, 2008

# TREATIES

**WEDNESDAY, MAY 7, 2008**

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. Jim Webb presiding.

Present: Senators Webb and Lugar.

## OPENING STATEMENT OF HON. JIM WEBB, U.S. SENATOR FROM VIRGINIA

Senator WEBB. The committee will come to order. Today, the Committee on Foreign Relations meets to consider four multilateral treaties that would make a significant contribution to the nonproliferation and counterterrorism efforts of the United States in this post-9/11 era. All four treaties build on an existing international criminal law and nonproliferation framework that the United States played a key role in constructing.

The first treaty, the International Convention for the Suppression of Acts of Nuclear Terrorism, stands on its own, but closely follows the structure of older treaties to which the United States is a party, such as the Terrorist Bombings and Terrorist Financing Conventions.

The three remaining treaties on the committee's docket today are an amendment and two protocols to existing treaties that the United States has already joined. There is the Amendment to the 1979 Convention on the Physical Protection of Nuclear Material, commonly known as the Physical Protection Convention; a protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, known as the 2005 SUA Protocol; and a protocol to the related 1988 Protocol Concerning the Safety of Fixed Platforms on the Continental Shelf, known as the 2005 Fixed Platforms Protocol.

All four treaties were concluded after 9/11 and attempt to satisfy, at least in part, the urgent need for a more effective and comprehensive international regime to combat terrorism and nuclear proliferation. Each treaty requires States to criminalize certain acts and then involves a separate requirement to extradite or prosecute people who commit such acts. Additionally, these treaties provide for various forms of cooperation, information-sharing, and the protection of nuclear material and nuclear facilities.

The Nuclear Terrorism Convention is designed to prevent and suppress acts of nuclear terrorism. The convention follows closely the model of other counterterrorism treaties to which the United States is a party, such as the Terrorist Bombings and Terrorist Financing Conventions.

Specifically, the convention requires States Parties to: One, criminalize certain acts; two, take all practical measures to prevent the commission of those acts; and three, extradite or prosecute alleged offenders. In addition, the convention provides a legal basis for international cooperation in the investigation, prosecution, and extradition of alleged offenders and obligates State Parties to take certain steps upon seizing or otherwise taking control of radioactive material, devices, or nuclear facilities for safeguarding purposes following the commission of an offense that is covered by the convention.

The second treaty is an amendment to the Convention on the Physical Protection of Nuclear Material. The Physical Protection Convention, which was originally concluded in 1979 and which the United States ratified in 1982, established an international framework for improving the physical protection of nuclear material used for peaceful purposes only during international transport and for international cooperation in recovering stolen nuclear material when responding to serious offenses involving nuclear material.

When signing the implementing legislation for the Physical Protection Convention, President Reagan declared that joining and implementing the treaty, "symbolizes our firm commitment both to preventing the spread of nuclear explosives and to fighting the scourge of terrorism."

The amendment to the convention supplements the existing framework primarily by articulating new international norms for the physical protection of nuclear material and facilities, including protection from sabotage, when in purely domestic use, storage, and transport as well as in international transport; by strengthening obligations for cooperation among States Parties on matters of physical protection and for the prosecution or extradition of those committing offenses involving nuclear material and nuclear facilities for peaceful purposes; and by adding new criminal offenses to the existing "extradite or prosecute regime" under the Physical Protection Convention, such as sabotage and smuggling.

Finally, the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol amend two older agreements concluded in 1988, which were originally negotiated in response to the 1985 hijacking of the Italian cruise ship *Achille Lauro.*

The principal purpose of the 1988 agreements was to ensure that individuals who committed acts of terrorism that endanger the safe navigation of a ship or the safety of a fixed platform are prosecuted. The older agreements were focused on vessels and fixed platforms, such as the potential target of an attack or other terrorist activity.

The new protocols, however, expand the existing international framework to include scenarios in which vessels or platforms are used as a potential means for carrying out or enabling terrorist activity. Specifically, the protocols establish a framework for investigating, prosecuting, and extraditing any person who, among other things: One, uses or threatens to use a ship or fixed platform as a weapon or as a means to carry out a terrorist attack; two, unlawfully and knowingly by ship transports biological, chemical, or nuclear weapons or equipment, materials, or software that signifi-

cantly contribute to the development and delivery of such systems; or three, transports terrorist fugitives by sea.

In addition, the SUA Protocol creates a ship-boarding regime on the high seas based on flag-State consent if a State Party has reasonable grounds to suspect that an offense covered by the treaty has been, is being, or is about to be committed. As a result, the SUA Protocol in particular would serve to strengthen the maritime interdiction component of the Proliferation Security Initiative.

As the Senate considers these four counterterrorism treaties, it is critical to remember the following points that these treaties all share in common. First, that our Defense Department and our military strongly support these treaties and believe they are consistent with U.S. national security interests. Second, all four treaties will supplement and enhance our international law enforcement framework for combating terrorism and nuclear proliferation.

Third, Senate approval and entry into force by the United States will set an important example and bolster U.S. leadership in promoting universal adherence to counterterrorism treaties, will help advance our Nation's interest in combating terrorism and proliferation, and will allow us to participate fully in relevant international meetings on the implementation of these treaties.

The committee is pleased to have a panel of administration witnesses today to testify in support of these four treaties. Patricia McNerney, the Principal Deputy Assistant Secretary of State for International Security and Nonproliferation. John Demers is the Deputy Assistant Attorney General at the Department of Justice. Richard Douglas, the Deputy Assistant Secretary of Defense for counternarcotics, counterproliferation, and global threats.

I would now ask Senator Lugar for his opening statement.

**STATEMENT OF HON. RICHARD G. LUGAR, U.S. SENATOR FROM INDIANA**

Senator LUGAR. Well, thank you very much, Mr. Chairman.

I join you in welcoming our witnesses and appreciate the opportunity to hear testimony regarding the four treaties, which you have outlined and would help to strengthen the international framework against the proliferation of nuclear weapons and materials.

The Amendment to the Convention on Physical Protection of Nuclear Material updates that agreement by applying it specifically to nuclear terrorism. The International Convention for Suppression of Acts of Nuclear Terrorism enhances efforts to prevent nuclear terrorism through the vehicle of a multilateral agreement.

And finally, as you pointed out, the 2005 protocols related to maritime navigation will criminalize trafficking in nuclear material and update existing agreements to reflect the progress the United States has made in gaining international support for proliferation interdiction efforts.

In April 2004, the U.N. Security Council adopted Resolution 1540, establishing for the first time binding obligations on all U.N. Member States to take and enforce effective measures against the proliferation of weapons of mass destruction, their means of delivery, and related materials. If fully implemented, Resolution 1540

can help ensure that no State or non-State actor is a source of weapons of mass destruction proliferation.

Congress has also taken steps to update the set of tools available to the President to aggressively confront nuclear proliferation and terrorism. In 2006, Congress passed and the President signed into law permanent waiver authority for the Nunn-Lugar Cooperative Threat Reduction Program. This permanent waiver authority was necessary to prevent the annual certification process from unnecessarily hindering the critical work of the Nunn-Lugar program.

In 2006, Congress also passed the Lugar-Obama act, a provision of which authorized the President to conclude agreements with other countries to prevent the transportation of weapons of mass destruction and related materials to non-State actors or States of proliferation concern. The two maritime agreements we will review today provide an international legal base for concluding agreements similar to those envisioned in the Lugar-Obama legislation.

Now I am most hopeful that these treaties will be implemented in such a way as to strengthen our authority to confront the threat of nuclear proliferation. As the Foreign Relations Committee takes up consideration of these treaties, we do so in the context of some administration inconsistencies toward recent treaties that President Bush has asked the Senate to pass.

In 2006 and 2007, I worked with other members of this committee to ensure that two agreements, one related to nuclear nonproliferation and one related to nuclear liability, went through all necessary legislative steps. Yet these agreements still have not entered into force because executive branch action to complete the ratification process has been inexplicably delayed.

I am deeply concerned by the Bush administration's failure to bring into force the additional protocol to our safeguards agreement with the International Atomic Energy Agency. In February 2004, President Bush called on the Senate to promptly ratify the U.S. additional protocol. As chairman of the committee at that time, I initiated the necessary action to ensure that the Senate did what the President had asked. Likewise, after much effort, the Senate passed implementing legislation for the U.S. additional protocol in November 2006.

One would presume that congressional approval would be the most difficult part of the implementation process. But 18 months after passage of the implementing legislation, the Bush administration still has not submitted our instrument of ratification to the IAEA.

Eleven months ago, Senator Biden and I wrote to Secretaries Rice and Gates urging implementation of the U.S. additional protocol. This was followed by a second letter from myself to Secretary Rice last September similarly urging action. I have raised this issue in hearings and private meetings with administration officials without receiving a satisfactory answer as to why implementation of a measure specifically requested by President Bush is taking so long.

I understand there can be legal and policy issues that must be resolved even after Congress passes treaties and associated implementing legislation. But if an administration is committed to a par-

ticular measure, such issues should take weeks to resolve and not years.

I would underscore that the Bush administration supported the changes to the implementing legislation originally reported by our committee, and at no point did the administration state that revisions subsequently added to the legislation would slow implementation. Indeed, in my judgment, there is nothing in the legislation that would warrant such a glacial process of implementation.

The administration has also not submitted its instrument of ratification for the Convention on Supplementary Compensation for Nuclear Damage, the CSC, which the Senate ratified in August 2006 and for which Congress passed implementing legislation in December 2007. The administration has called the CSC critical to providing liability protection for our nuclear industry in India, China, and other areas currently expanding nuclear power capabilities.

All of the treaties we consider today require implementing legislation before they can come into force. Passing these treaties and associated implementing legislation will be a heavy lift. I believe this committee is willing to undertake that task, and I am most hopeful that the chairman shares my enthusiasm.

But the administration, likewise, must fulfill its responsibilities related to previous treaties. With only a few months left in this administration, I am hopeful that our witnesses might shed some light on when we might see completion of work on the additional protocol and on the CSC. Further, in view of our experience, how will you work to ensure that the treaties we examine today will enjoy expeditious executive action, should Congress complete its work?

I look forward to our discussion and your responses to these questions.

I thank you, Mr. Chairman.

Senator WEBB. Thank you, Senator Lugar.

By unanimous consent, I would like to insert a statement for the record by Senator Casey, who is unable to attend this hearing.

[The prepared statement of Senator Casey follows:]

PREPARED STATEMENT OF HON. ROBERT P. CASEY, JR., U.S. SENATOR FROM PENNSYLVANIA

Thank you, Chairman Webb, for holding this important hearing today.

The greatest danger facing our Nation today is the prospect of a terrorist group, possibly in cooperation with a nation-state, smuggling through our borders and detonating an improvised nuclear weapon in an American city. The long-term threat of nuclear terrorism is one that deserves our full attention and so I am pleased that the Senate Foreign Relations Committee is holding this hearing today on two key international agreements that can help mitigate that threat. The international community must establish a comprehensive framework toward combating nuclear terrorism that supplements the existing nonproliferation regime.

The International Convention for the Suppression of Act of Nuclear Terrorism and the Amendment to the Convention on the Physical Protection of Nuclear Material, both of which are before the committee today, would help establish and implement the next steps necessary to an effective international response combating nuclear terrorism. First, the International Convention for the Suppression of Acts of Nuclear Terrorism would play a crucial role in deterring would-be terrorists or accomplices to an act of nuclear terrorism. It calls upon State Parties to develop legal frameworks to enforce appropriate penalties relating to nuclear terrorism. Entry into force of this convention would close loopholes in domestic laws that allow persons who proliferate nuclear materials or component to escape punishment for their actions.

The United States and Russia, the world's largest nuclear powers, already have laws in place to prosecute citizens involved in proliferation. However, the growing number of reports of nuclear material trafficking suggests that many countries do not have the legal systems or the enforcement capacity to make a complete crackdown on trafficking in nuclear materials a national priority. The good news is that the quantities detected so far in trafficking attempts have been small, but the bad news is that, just as with drug trafficking, those transactions that have come to our attention are only a fraction of what may actually be occurring.

We must take action now to ensure that other States take a similar approach to individuals who aid and abet acts of nuclear terrorism. Unless we take steps to ratify and implement this Convention, the United States will lack the moral authority to persuade the other 115 signatories to champion the cause and institute the requisite domestic statues. Aiding and abetting acts of nuclear terrorism is abhorrent and reprehensible. It is my belief that the United States, working in concert with the international community, should go above and beyond this Convention and brand such acts as crimes against humanity, just as we treat acts of slavery and piracy today. But we start down this road by ensuring that all nations enforce and prosecute acts of nuclear terrorism to the fullest extent possible under their domestic statutes, as provided for under this Convention.

Another treaty before this committee today, the Amendment to the Convention on the Physical Protection of Nuclear Material (CPPNM), likewise plays an important role in preventing nuclear terrorism. Today, as many as 40 nations possess the key material and components required to assemble a nuclear weapon. Yet, too many nuclear facilities across the globe do not yet have the security safeguards we must insist upon for stockpiles of fissile material. Neither the United States nor the International Atomic Energy Agency has assembled a comprehensive priority list assessing which facilities around the world pose the most serious threat, according to Dr. Matthew Bunn, a leading expert on nuclear terrorism. The proposed amendment to the CPPNM calls on countries to take required steps to better secure the nuclear material and components under their possession. By establishing international norms to better physically protect nuclear materials and facilities, secure facilities from sabotage, strengthen the obligation to cooperate on the physical protection of nuclear materials and extraditions, and criminalize trafficking and sabotage of nuclear material, this amendment would help establish another layer of security to thwart a preventable catastrophic event.

The United States must work in concert with the international community to fully secure nuclear material and components and deter terrorists from seeking the ultimate weapon. The treaties before the committee today represent an important milestone in establishing a universal, international norm against nuclear terrorism. We do not have the luxury of time when it comes to this threat and so I encourage the committee to take speedy action to mark up and report out these conventions to the full Senate.

Thank you, Mr. Chairman, and I look forward to the testimony of our witnesses.

Senator WEBB. And I would like to welcome our witnesses. As Chairman Biden was unable to be here today, I am obviously standing in for him. And I know that Senator Lugar has worked on this issue long and hard, and I am going to be very interested to hear a number of the questions that he has.

We can begin—we will just start from the left and move to the right here. Mr. Douglas, if you would like to begin?

Mr. Douglas. Thank you, Mr. Chairman.

Senator WEBB. Did you have an order that you would rather proceed in?

Ms. MCNERNEY. We are going to start with State Department and move to Justice to DOD, if that satisfies you?

Senator WEBB. Fine with me.

**STATEMENT OF PATRICIA McNERNEY, PRINCIPAL DEPUTY ASSISTANT SECRETARY, INTERNATIONAL SECURITY AND NONPROLIFERATION, DEPARTMENT OF STATE, WASHINGTON, DC**

Ms. MCNERNEY. Mr. Chairman, Senator Lugar, thank you for the opportunity to appear before the committee today to testify in support of these four counterterrorism and counterproliferation treaties—the Nuclear Terrorism Convention, the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the protocol of—the 2005 Protocol to the Suppression of Unlawful Acts Against the Safety of Fixed Platforms, and the Amendment to the Convention on Physical Protection of Nuclear Material.

The Department of State strongly supports ratification of these treaties for several reasons. First, joining these treaties will enhance U.S. national security by modernizing and strengthening the international legal framework in a manner that is critical for preventing terrorists from acquiring or using weapons of mass destruction.

Second, the treaties support related U.S. policy priorities, such as the Global Initiative to Combat Nuclear Terrorism and the Proliferation Security Initiative. They also further the objectives of the nonproliferation obligations set out in U.N. Security Council Resolution 1540.

Third, each of these treaties fills a gap in preexisting treaty regimes that exist, and these have been successful regimes, timetested, in which the United States is already participating.

Fourth, U.S. ratification of these treaties can be expected to encourage ratification by other nations. The Nuclear Terrorism Convention, which the United States strongly supported and which entered into force on July 7, 2007, is the only one of the 13 international counterterrorism treaties currently in force to which the United States is not a party.

The SUA Protocols and the Physical Protection of Nuclear Material amendment, which have not yet entered into force, were U.S.-led initiatives. We anticipate the U.S. ratification of these treaties will create significant momentum toward additional ratification and entry into force.

Finally, U.S. ratification will reinforce the leading role the United States has played in promoting these treaties in the counterterrorism and counterproliferation treaty regimes in general, and these will strengthen our position in negotiations on additional treaties and amendments.

I would like to briefly go into a little more detail on each of the treaties. The Nuclear Terrorism Convention was signed on September 14, 2005, by the President on the first day the treaty was open for signature, and this was really a part of our agenda to combat nuclear terrorism. The treaty provides a legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit terrorist acts involving radioactive material and nuclear radioactive device, as well as nuclear facilities.

As you mentioned some of the details, the two primary offenses here and a range of ancillary offenses, but the primary offenses

that are additive are that the—makes unlawful the intentional possession of radioactive material or a nuclear radioactive device with the intent to cause death, injury, or other damage. And it also makes unlawful the intentional use of radioactive material or nuclear or radioactive devices or use or damage to a nuclear facility with intent to cause death, injury, or other damage to achieve a terrorist objective.

Similar to other multilateral counterterrorism treaties to which the United States is party, this treaty creates an extradite or prosecute legal requirement and also a mutual legal assistance regime for Parties.

Moving to the SUA Protocol and the fixed platforms protocol, in the wake of 9/11 terrorist attacks, the international community really recognized that the 1988 SUA Convention and Protocol were not adequate in scope. While they treated vessels and platforms as potential objects of terrorism, they did not address the use of vessels and fixed platforms as the means of conducting or enabling terrorist activity.

These 2005 protocols establish, among other things, new principal offenses as well as ancillary offenses and a ship-boarding regime. The protocols are the first multilateral treaty framework for the investigation, detention, prosecution, and extradition of persons who commit terrorist attacks using a ship or fixed platform, transport on a civil ship the WMD or their delivery systems, or related material, such as dual-use items, which was a key part of this negotiation, as well as transport on such ships of terrorist fugitives. The protocols also create a robust framework for criminal liability for ancillary offenses, including attempts and accessory liability.

It is important to note that the WMD-related offense provisions do not affect the rights and obligations under the Nonproliferation Treaty as well as the Biological Weapons Convention and the Chemical Weapons Convention. Parties to the 2005 protocol must criminalize domestically these new offenses, which is also consistent with U.N. Security Council Resolution 1540.

Finally, with regard to the SUA Protocols is the creation of a framework for consensual ship-boarding agreements. This ship-boarding regime, which we are also doing bilateral ship-boarding agreements that are in parallel, will serve to strengthen the international legal basis for interdictions at sea as called for in the Proliferation Security Initiative and will also promote implementation of U.N. sanctions toward Iran and North Korea.

Last, on the 1979 Convention on the Physical Protection of Nuclear Material, or the CPPNM, established physical protection obligations for nuclear material used for peaceful purposes in international transport. But beginning in the 1990s, the United States led an initiative to expand that treaty, which has been an important tool in our protection of nuclear material, to cover physical protection of nuclear facilities domestically as well as nuclear material in use, storage, and transport.

The 9/11 terrorist attacks, greater terrorist interest in acquiring nuclear material, and the increased concerns about illicit trafficking in nuclear materials added urgency to these efforts to expand the CPPNM. The amendment adopted on July 8, 2005, at a diplomatic conference held under the auspices of the International

Atomic Energy Agency is the result of those efforts. And this will significantly expand the original scope of the CPPNM and will, in fact, globalize U.S. physical security practices.

It establishes new international norms for protection of nuclear materials and facilities, including protection from sabotage. It will strengthen the obligations for cooperation among States Parties to the amendment on physical protection, and it will build upon the penal regime provided for in the underlying treaty.

In sum, Mr. Chairman, we urge early ratification for these very important treaties, which will bolster our efforts to prevent terrorists from acquiring or using WMD and enhance the international legal framework for counterterrorism and counterproliferation. I will be happy to answer any other questions and would just ask that my longer statement be placed in the record.

Senator WEBB. Without objection, so ordered.

[The prepared statement of Ms. McNerney follows:]

PREPARED STATEMENT OF PATRICIA A. MCNERNEY, PRINCIPAL DEPUTY ASSISTANT SECRETARY OF STATE FOR INTERNATIONAL SECURITY AND NONPROLIFERATION, DEPARTMENT OF STATE, WASHINGTON, DC

INTRODUCTION

Thank you for the opportunity to appear before this committee today to discuss four multilateral counterterrorism treaties: The International Convention for Suppression of Acts of Nuclear Terrorism ("Nuclear Terrorism Convention" or "NTC"), the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("2005 SUA Protocol"), the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("2005 Fixed Platforms Protocol"), and the Amendment to the Convention on Physical Protection of Nuclear Material ("CPPNM Amendment" or "Amendment").

These treaties are important tools in the international fight against terrorism and the proliferation of Weapons of Mass Destruction ("WMD"). Each fills an important gap in the existing international regime, while building on an existing treaty to which the United States is already a Party:

- The Nuclear Terrorism Convention (Treaty Doc. 110–4), while freestanding, builds upon the Terrorist Bombing Convention and Terrorist Financing Convention by addressing an additional and critical category of terrorist activity: The nexus between terrorism and nuclear weapons and other radioactive materials and devices, such as "dirty bombs."
- The two SUA Protocols (Treaty Doc. 110–8) supplement the 1988 SUA Convention on the Safety of Maritime Navigation and its 1988 Fixed Platforms Protocol by addressing the potential use of vessels and platforms as a means of conducting or enabling terrorist activity, and by addressing the unlawful transport of WMD and related items via commercial ships.
- The CPPNM Amendment (Treaty Doc. 110–6) supplements the 1979 Convention on the Physical Protection of Nuclear Material and expands its scope to address the physical protection of nuclear material used for peaceful purposes in domestic use, storage and transport in addition to that in international nuclear transport, and of nuclear facilities used for peaceful purposes.

The Department of State strongly supports ratification of these treaties for several reasons:

First, joining them will enhance U.S. national security. The treaties modernize and strengthen the international counterterrorism and counterproliferation legal framework in a manner that is critical to our efforts to prevent terrorists from acquiring or using WMD.

Second, the treaties support related USG policy priorities, such as the Global Initiative to Combat Nuclear Terrorism and the Proliferation Security Initiative. Cooperation under the Global Initiative includes efforts to strengthen national legal frameworks to ensure the effective prosecution of, and the certainty of punishment for, terrorists and those who facilitate acts of nuclear terrorism. The treaties also further the objectives of, and support implementation of, the nonproliferation obligations set out in United Nations Security Council Resolutions 1540 (2004).

Third, as noted, each treaty fills a gap in a preexisting treaty regime that has been successful and time-tested, and in which the United States already participates.

Fourth, U.S. ratification of these treaties can be expected to encourage ratification by other countries. Widespread ratification and implementation of the treaties is critical, given their significant national security focus. The Nuclear Terrorism Convention, which the United States has strongly supported and which entered into force on July 7, 2007, is the only one of the 13 international counterterrorism treaties currently in force to which the United States is not a Party. The SUA Protocols and the CPNNM Amendment, which have not yet entered into force, were U.S.-led initiatives. We anticipate that U.S. ratification of those treaties will create significant momentum towards their entry into force.

Finally, U.S. ratification will reinforce the leading role the United States has played in promoting these treaties and the counterterrorism treaty regime and nonproliferation in general, and will strengthen the United States position in other negotiations that involve related matters, such as an effort to amend the aviation counterterrorism treaties.

Based on these considerations, we urge the committee and the Senate to give favorable consideration to all four treaties.

I now would like to turn to a more detailed discussion of each treaty.

### NUCLEAR TERRORISM CONVENTION

The President signed the NTC on September 14, 2005, the first day the treaty was open for signature, as part of his bold agenda to combat nuclear terrorism. The NTC closely follows the model of previously adopted counterterrorism conventions to which the U.S. is a Party, such as the Terrorist Bombings and Terrorist Financing conventions. It provides a specific legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit terrorist acts involving radioactive material or a nuclear or radioactive device or nuclear facilities.

Like previous treaties, the NTC establishes offenses, requires domestic criminalization of those offenses, and obligates Parties to establish jurisdiction over the offenses under certain circumstances. More specifically, the NTC requires Parties to criminalize the unlawful and intentional:

- Possession of radioactive material (including nuclear materials) or the making or possession of a device, which includes nuclear explosive devices and "dirty bombs," with the intent to cause (1) death or serious bodily injury, or (2) substantial damage to property or to the environment; and
- Use of radioactive material or a device, or use or damage a nuclear facility in a manner which releases or risks the release of radioactive material with the intent (1) to cause death or serious bodily injury, (2) to cause substantial damage to property or to the environment; or (3) to compel a natural or legal person, an international organization, or a country to do or refrain from doing an act.

In addition to the principal offenses, the NTC includes ancillary offense provisions that require States to criminalize threats and attempts to commit an act of nuclear terrorism and participation as an accomplice, organizing and directing, and certain contributions to acts of nuclear terrorism.

Similar to other multilateral counterterrorism treaties to which the United States is a Party, the NTC obligates Parties to extradite or submit for prosecution persons accused of committing the relevant offenses and to provide one another assistance in connection with investigations or criminal or extradition proceedings in relation to such offenses. We have successfully relied on equivalent provisions, especially in the Terrorist Bombings and Terrorist Financing Conventions, to support U.S. extradition and provisional arrest requests and as a basis to request mutual legal assistance from other Parties.

The NTC also requires Parties to make every effort to ensure appropriate physical protection for nuclear and radiological material and obligates States to take all practicable measures to prevent and counter preparations in their territories for the commission of the covered offenses.

The Convention entered into force as of July 7, 2007, and there are currently [35] State Parties, including India, Japan, Russia, Spain, and Saudi Arabia.

### 2005 SUA PROTOCOL AND 2005 FIXED PLATFORMS PROTOCOL

In the wake of the 9/11 terrorist attacks, the United States was concerned that the scope of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("1988 SUA Convention") and the accompanying 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms ("1988 Protocol") was not adequate to address maritime-related terrorism.

Specifically, while the 1988 Convention and Protocol covered vessels and fixed platforms at sea as potential objects of terrorist activity, it did not address the use of vessels and fixed platforms as means of conducting or enabling terrorist activity.

As a result, the United States initiated a 3-year process at the International Maritime Organization (IMO) to negotiate multilateral instruments that would provide a more effective international framework to combat maritime terrorism and to conduct maritime interdictions of weapons of mass destruction and prosecutions of unlawful transport of WMD and their delivery systems. The effort culminated in the adoption by a diplomatic conference of the IMO, on October 14, 2005, of the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol (collectively "the 2005 Protocols").

The new Protocols, among other things, set forth new principal offenses and add ancillary offenses and establish a shipboarding regime that will expedite consensual boardings at sea. In terms of establishing offenses, the Protocols are the first multilateral treaty framework for the investigation, detention, prosecution, and extradition of persons who (1) commit terrorist attacks using a ship or fixed platforms; (2) transport by sea WMD, their delivery systems or related materials to be used for WMD, including dual-use items; or (3) transport terrorist fugitives by sea. The Protocols also create a robust framework for criminal liability for ancillary offenses, including accomplice liability, organizing or directing a covered offense, and certain contributions to such offenses. Parties must criminalize domestically the offenses introduced by the 2005 Protocols, and obligations in the 1988 SUA Convention to extradite or submit for prosecution persons accused of committing such offenses and to provide mutual legal assistance extend to the new offense provisions. It is important to note that the WMD-related offense provisions do not affect the rights and obligations under the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention and the Chemical Weapons Convention of Parties to those treaties.

The framework for consensual shipboarding of vessels on the high seas suspected of involvement in the covered offenses is a major development. This shipboarding regime will serve to strengthen the international legal basis for interdictions at sea carried out under the Proliferation Security Initiative (PSI) and will promote implementation of U.N. sanctions on Iran and North Korea.

The 2005 SUA Protocol will enter into force once 12 States have become Parties. The 2005 Fixed Platforms Protocol requires only 3 Parties, but it may enter into force only once the 2005 SUA Protocol has taken effect. As of May 1, 18 States had signed each Protocol subject to ratification. Only two States have become Parties to the SUA Protocol and none have become Parties to the Fixed Platforms Protocol.

### CPPNM AMENDMENT

The 1987 Convention on the Physical Protection of Nuclear Material ("CPPNM") established physical protection obligations for nuclear material used for peaceful purposes in international transport, required criminalization of certain offenses involving nuclear material, and included the "extradite or prosecute" regime and mutual legal assistance provisions common to the other counterterrorism conventions.

Beginning in the late 1990s, the United States led the initiative to expand CPPNM to cover physical protection of nuclear material in domestic use, storage, and transport and of nuclear facilities. The 9/11 terrorist attacks, greater terrorist interest in acquiring nuclear material for nuclear weapons and "dirty bombs," and increased concerns about illicit trafficking in nuclear materials added urgency to the efforts to expand CPPNM. The Amendment to the CPPNM, adopted on July 8, 2005, at a diplomatic conference held under the auspices of the International Atomic Energy Agency (IAEA) in Vienna, Austria, is the result of those efforts.

The CPPNM, as amended, will impose requirements for the physical protection of nuclear material used for peaceful purposes in domestic use, storage, and transport, as well as in international nuclear transport, and of nuclear facilities used for peaceful purposes, thereby significantly expanding the scope of the original CPPNM. The Amendment will, in effect, globalize U.S. nuclear physical protection practices. Specifically, it will, inter alia, establish:

- New international norms for the physical protection of nuclear material and facilities used for peaceful purposes, including protection from sabotage;
- Strengthened obligations for cooperation among State Parties to the Amendment on matters of physical protection and for protection of the confidentiality of physical protection information; and
- New offenses that Parties must criminalize in their domestic law.

The basic physical protection obligations set out in the Amendment require each State Party to establish, implement, and maintain an appropriate physical protec-

tion regime applicable to nuclear material and nuclear facilities used for peaceful purposes under its jurisdiction, with the aim of:

- Protecting against theft and other unlawful taking of nuclear material in use, storage, and transport;
- Ensuring the implementation of rapid and comprehensive measures to locate and, where appropriate, recover missing or stolen nuclear material;
- Protecting nuclear material and nuclear facilities against sabotage; and
- Mitigating or minimizing the radiological consequences of sabotage.

The Convention also sets a series of "Fundamental Principles" covering a number of aspects of physical protection. For example, the principles address the overall responsibility of the State for establishing, implementing, and maintaining a regime to govern physical protection. States are required, insofar as reasonable and practicable, to apply these principles in their physical protection regimes.

Under the Amendment's expanded cooperation and assistance provisions, Parties will be required, in accordance with their national law, to provide cooperation and assistance to the maximum extent feasible on matters within the scope of the amended CPPNM. For example, Parties with knowledge of a credible threat of sabotage of nuclear material or a nuclear facility in another State must decide on appropriate steps to be taken to inform that State as soon as possible and, where appropriate, the IAEA and other relevant international organizations. Further, in the case of sabotage of nuclear material or a nuclear facility in its territory, a Party will be required to take appropriate steps to inform, as soon as possible, other States likely to be radiologically affected, and to inform, where appropriate, the IAEA and other relevant international organizations.

Finally, the amendment builds upon the penal regime provided for in the CPPNM by adding two new principal offenses—nuclear smuggling and sabotage of a nuclear facility—which Parties must criminalize domestically. The amended Convention will also include a range of accessory offenses found in the modern counterterrorism treaties discussed above in relation to the Nuclear Terrorism Convention and the SUA Protocols. Like the CPPNM, the Amended Convention will require Parties to extradite or submit for prosecution persons accused of covered offenses.

The Amendment will enter into force only after two-thirds of the current 134 Parties to the CPPNM join the Amendment. Fifteen countries have ratified to date.

CONCLUSION

In sum, Mr. Chairman, we urge early ratification for these treaties, which will bolster our efforts to prevent terrorists from acquiring or using WMD and enhance the international legal framework for counterterrorism and counterproliferation.

Senator WEBB. And we just were informed that we may have as many as three consecutive votes being called around 3:15 p.m. So, for all of the witnesses, if you want to summarize your statements, your full statement will be entered into the record.

And since I violated protocol last time, who wants to be next?

Mr. DEMERS. I will go next.

Senator WEBB. OK, Mr. Demers.

**STATEMENT OF JOHN DEMERS, DEPUTY ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC**

Mr. DEMERS. Mr. Chairman, Senator Lugar, thank you for the opportunity to discuss the implementation of the four international agreements that are the subject of today's hearing.

These agreements will provide significant tools in our efforts to protect the Nation against terrorism and weapons of mass destruction. First, I will just say a few words about the maritime agreements and our proposed implementing legislation. Then I will address the Nuclear Terrorism Convention and the Amendment to the Convention on the Physical Protection of Nuclear Material.

The maritime agreements are the 2005 SUA Protocols—one protocol applies to ships, and the other applies to fixed maritime platforms—and those have been described already. Last year, the

Department of Justice submitted to the Senate and the House proposed legislation to implement the 2005 SUA Protocols. The proposed legislation would amend sections 2280 and 2281 of title 18, which were the sections implementing the original SUA Convention and Fixed Platform Protocol.

The offenses contained in the proposed legislation mirror those detailed in the protocols. Those offenses involving the transportation of explosives, radioactive material, and weapons of mass destruction or their components would be subject to specific knowledge and intent requirements that ensure the protection of legitimate trade and innocent seafarers.

The conduct prohibited would be consistent with the rights and obligation of States Parties to the treaty on the Nonproliferation of Nuclear Weapons, the Biological Weapons Convention, and the Chemical Weapons Convention. The offenses would also be complementary with the obligations set out in Security Council Resolution 1540.

The SUA Protocol also established a mechanism to facilitate the boarding in international waters of vessels engaged—suspected of engaging in these activities, and the proposed statute accordingly includes certain provisions regarding maritime interdictions.

The proposed amendments to section 2281 would protect fixed maritime platforms, such as offshore oil platforms, from terrorist attacks. Many of the same violent acts prohibited on or against ships would be prohibited on or against platforms. Together, the new offenses from the SUA Protocols will contribute to our counterterrorism, maritime security, and nonproliferation efforts.

I will also briefly address the Nuclear Terrorism Convention and the Amendment to the Convention on Physical Protection. These agreements focus on nuclear and radiological materials. They require parties to criminalize nuclear smuggling, the possession and use of radioactive material and radiological dispersal devices, and attacks on nuclear facilities. Importantly, the conventions will help the United States work with other nations to prevent these activities here at home and abroad and will strengthen the United States security against various forms of nuclear terrorism.

The administration is working on legislative proposals to implement both conventions. Although existing law covers much of the conduct that is the subject of these two agreements, new legislation is needed to implement the conventions fully. The scattered existing statutes do not include all of the jurisdictional bases provided by the conventions and have a different mens rea requirement. Together, the new and existing legislation will ensure the full assertion of permissible authority to combat nuclear terrorism.

In closing, I would like to thank you once again for the opportunity to discuss these important international treaties. I look forward to working with the committee on developing appropriate implementing measures and I would be happy to answer any questions.

[The prepared statement of Mr. Demers follows:]

PREPARED STATEMENT OF JOHN C. DEMERS, DEPUTY ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. Chairman and members of the committee, thank you for the opportunity to discuss the implementation of four important international agreements. These

agreements provide significant tools in our ability to protect the Nation against terrorism and weapons of mass destruction.

Two of these agreements—the Nuclear Terrorism Convention and the Amendment to the Convention on the Physical Protection of Nuclear Material—focus on nuclear and radiological materials. The third set of agreements, the 2005 Protocols to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the "SUA Protocols"), prohibit the use of a ship or a maritime platform as a weapon and prohibit the transport by ship of terrorists, cargo intended for use in connection with weapons of mass destruction programs, and explosives or radioactive material for terrorist purposes.

The administration is currently reviewing legislative proposals to implement the Nuclear Terrorism Convention and the Amendment to the Convention on the Physical Protection of Nuclear Material. The legislative proposals to implement the two SUA Protocols were submitted last year to the House and Senate.

## I. NUCLEAR TERRORISM CONVENTION AND AMENDMENT TO THE CONVENTION ON THE PHYSICAL PROTECTION OF NUCLEAR MATERIAL

President Bush signed the Nuclear Terrorism Convention on September 14, 2005. The Convention requires States Parties to criminalize certain acts relating to the possession and use of radioactive material and radiological dispersal devices and damage to nuclear facilities. The Amendment to the Convention on the Physical Protection of Nuclear Material was adopted by acclamation at a diplomatic conference of States Parties on July 25, 2005. In relevant part, the amendment requires States Parties to criminalize nuclear smuggling and sabotage of nuclear facilities.

Together, these conventions strengthen the United States security against various forms of nuclear terrorism. The conventions prohibit nuclear smuggling, the release of radioactive or nuclear materials, and attacks on nuclear facilities. Importantly, the conventions will help the United States work with other nations to prevent these activities domestically and abroad.

Although existing law may cover portions of these two conventions, new legislation is necessary to ensure that the conventions are fully implemented. For instance, the Nuclear Terrorism Convention's prohibition against the possession or use of a nuclear explosive or radiation dispersal device may be covered by broader existing prohibitions against the unlawful possession or use of a radiological weapon (18 U.S.C. 832) and the unlawful possession of a weapon or device designed to release radiation (18 U.S.C. 2332h). Similarly, the prohibitions against causing damage to a nuclear facility contained in both the Nuclear Terrorism Convention and in the Amendment to the Convention on the Physical Protection of Nuclear Material overlap with section 2284 of title 42, which prohibits sabotage of nuclear facilities. These scattered existing statutes, however, do not include the same mens rea as required by the conventions, and they do not include all the jurisdictional bases provided by the conventions, such as jurisdiction for offenders "found in" the United States. The Nuclear Terrorism Convention includes mandatory and optional jurisdictional bases in order to achieve broad coverage of these nuclear-related offenses, and appropriate legislation will be needed to ensure the full assertion of permissible authority over nuclear terrorism.

## II. SUA PROTOCOLS

Last year, the Department of Justice submitted to the House and Senate proposed legislation to implement the 2005 SUA Protocols. One Protocol applies to ships—the Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation—and the other applies to fixed maritime platforms—the Protocol to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. The proposed legislation would amend sections 2280 and 2281 of title 18, which were the sections implementing the original SUA Convention and the Fixed Platforms Protocol.

The 2005 Protocols require Parties to criminalize the use or targeting of a ship or a fixed maritime platform in a terrorist activity; the maritime transportation of explosives, radioactive material, or biological, chemical, or nuclear weapons or certain of their components, delivery means, or materials, under specified circumstances; and the maritime transport of terrorist fugitives.

Accordingly, the amendments to section 2280 of title 18 would make unlawful the targeting or use of a ship in terrorist acts. Specifically, it would be an offense to use against, on, or from a ship any explosive, radioactive material, or biological,

chemical, or nuclear weapon. It would also be an offense to discharge oil, liquefied natural gas, or another hazardous or noxious substance from a ship. These acts must be done in a manner that causes or is likely to cause death or serious injury or damage. It would also be an offense to otherwise use a ship in a manner that causes death or serious injury or damage.

In accordance with the Protocol pertaining to ships, the new legislation would also forbid the maritime transportation of explosives and radioactive material and biological, chemical, or nuclear weapons, their delivery systems, or related materials. Such offenses would be qualified by the statute's mens rea requirements. Explosive or radioactive material must be intended for a terrorist act. In order for criminal liability to attach, the transport of biological, chemical, or nuclear weapons must be done with knowledge of the items being transported. Transportation of source material, special fissionable material, or related material must be done knowing that the material is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an International Atomic Energy Agency comprehensive safeguards agreement. Transportation of certain dual use items that significantly contribute to the design, manufacture, or delivery system of a biological, chemical, or nuclear weapon or other nuclear explosive device, must be done intending that the items be used for such purposes. The offenses prohibited are consistent with the rights and obligations of States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, the Biological Weapons Convention,[1] and the Chemical Weapons Convention.[2] In fact, the statute includes an exception specifying that certain nuclear transport activities that are consistent with the Treaty on the Non-Proliferation of Nuclear Weapons remain permissible under the statute, in accordance with the SUA Protocol. The offenses are also complementary with the obligations set out in U.N. Security Council Resolution 1540 regarding prohibitions against the transport of biological, chemical, and nuclear weapons and their means of delivery.

The SUA Protocol also established a mechanism to facilitate the boarding in international waters of vessels suspected of engaging in these activities, and the statute accordingly includes certain provisions regarding maritime interdictions.

The amendments to section 2281 of the same title would protect fixed maritime platforms (such as offshore oil platforms) from terrorist attacks. Specifically, the amendments would make unlawful the use against or discharge from a fixed platform of any explosive, radioactive material, or biological, chemical, or nuclear weapon, in a manner that causes or is likely to cause death or serious injury or damage. The amendments would also forbid the discharge from a fixed platform of oil, liquefied natural gas, or another hazardous or noxious substance, in a manner that causes or is likely to cause death or serious injury or damage. Such acts would have to be done unlawfully and intentionally and with a terrorist purpose.

III. CONCLUSION

Again, thank you for the opportunity to discuss these important international treaties. I look forward to working with this committee on developing appropriate implementing measures. At this time, I would be happy to answer any questions.

Senator WEBB. Thank you very much, Mr. Demers.

Mr. Douglas.

## STATEMENT OF RICHARD DOUGLAS, DEPUTY ASSISTANT SECRETARY, COUNTERNARCOTICS, COUNTERPROLIFERATION AND GLOBAL THREATS, DEPARTMENT OF DEFENSE, WASHINGTON, DC

Mr. DOUGLAS. Thank you, Mr. Chairman, Senator Lugar.

I appreciate the opportunity to come and talk about the department's views on these very important treaties. And if I could just recognize our Judge Advocate General brain trust here that came and helped us prepare not only the statement, but the conventions themselves.

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[1] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.

[2] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

The Department of Defense supports and endorses entry into force of all of these agreements. I am here really to talk about SUA and the fixed platforms treaties today, but we just want to make clear that we think all of these agreements move the ball in the right direction in counterterrorism, and we are very happy that the committee has decided to hold hearings on them.

In the interest of time, I am going to go right to the maritime boarding issue. We think that this is a real innovation in the convention. We think that the effect is going to be to strengthen not only what we do in the context of the Proliferation Security Initiative, but to create more certainty and kind of a roadmap that will allow us to work better with other States Parties not only to this convention, but other countries that are interested in PSI and maritime boarding in general.

So we want to make sure that this template that States can use is established in a multilateral setting, and this treaty does the trick.

We would also like to point out that for us the source of these two conventions is notable. These are International Maritime Organization conventions, a technical specialized agency with a lot of skill, a lot of talent, technical talent on things like safety of life at sea, maritime pollution, and we think that is notable because the treaties themselves reflect that technical expertise and the kinds of things you would expect from an organization where you have ship drivers and people who know what it is to go to sea.

And last, I would like to point out that we understand that the industry also has expressed an interest in this convention. The reason we think that is significant is because in the PSI context, we have tried to establish a very good relationship with the industry because supply chain security is so important, and there is a critical role for industry to play in this context. And we understand that the International Chamber of Shipping has submitted some comments to the committee endorsing this. So we thought that was notable to point out.

And with that, in the interest of time and the votes, I will stop here, and my written statement will be submitted for the record, with your permission.

[The prepared statement of Mr. Douglas follows:]

PREPARED STATEMENT OF RICHARD DOUGLAS, DEPUTY ASSISTANT SECRETARY, COUNTER-NARCOTICS, COUNTER-PROLIFERATION AND GLOBAL THREATS, DEPARTMENT OF DEFENSE, WASHINGTON, DC

Mr. Chairman and members of the committee, thank you for the opportunity to testify today. Although I am primarily here to testify in support of the 2005 Protocols to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its accompanying Fixed Platforms Protocol, I would also like to express the Department of Defense's strong support for the multilateral counterterrorism treaties before the committee today. The Nuclear Terrorism Convention and the Amendment to the Convention on the Physical Protection of Nuclear Material, along with the 2005 SUA Protocols, will enhance U.S. national security by modernizing and strengthening the international counterterrorism and counterproliferation legal framework.

As Deputy Assistant Secretary of Defense for Counter-Narcotics, Counter-Proliferation and Global Threats, it is my duty to develop policy and manage various programs that support the efforts of the United States and its allies to combat the transfer and use of weapons of mass destruction. It is with this duty in mind that I come before this committee today to give the Department's strongest support to

these Protocols and ask that they be favorably reported to the full Senate for its advice and consent during the current session.

Sadly, use of the "world's highways" by terrorists is not a new phenomena. The 1988 SUA Convention was, in part, a response to the takeover by Palestinian terrorists of the Italian passenger ship Achille Lauro in 1985, when a wheelchair-bound American passenger, Leon Klinghoffer, was murdered and his body was thrown overboard. That terrorist murder helped lead to the 1988 SUA Convention. In the aftermath of 9/11, it became clear that changes to international law were necessary to address terrorism in the 21st century. The 1988 SUA Convention was viewed as an ideal foundation upon which to build an international legal regime to combat the modern terrorist threat. The Department of Defense strongly supports the 2005 Protocols because they should substantially bolster efforts to combat and prosecute the maritime transportation of terrorists, weapons of mass destruction (WMD), their delivery systems and related materials, and the use of a ship or fixed platform to commit a terrorist attack. The 2005 Protocols do just that and, of particular importance, contain a critical operational mechanism to enforce the Convention's provisions that was lacking in the original Convention—a maritime boarding regime.

September 11 forced the international community to look more closely at potential instruments of terrorism and proliferation. The Department of Defense actively participated and strongly supported a 3-year United States effort to broaden the Convention's scope to include provisions countering the movement of weapons of mass destruction and related items by ship and to address the use of a ship or fixed platform to conduct a terrorist act or transport a terrorist fugitive. In October 2005 State Parties at the International Maritime Organization overwhelmingly supported the United States initiative, and adopted the Protocols that are being considered by the committee today. The Protocols are an important weapon in the Global War on Terror and could contribute substantially to our national security.

The 2005 Protocols represent a significant new tool in the fight against terrorism and WMD proliferation. Instead of treating vessels and fixed platforms at sea as potential objects of terrorist activity, the new protocols treat vessels and platforms as potential means of conducting or enabling terrorist activity. Specifically, they establish the first treaty framework for the investigation, prosecution, and extradition of persons who (1) use a ship or fixed platform as a weapon or as a means to carry out a terrorist attack; (2) unlawfully transport WMD (including "dual use materials") or WMD delivery systems on the high seas; or (3) transport of terrorists by sea.

Additionally, the 2005 Protocols establish the operational enforcement mechanism—a maritime boarding regime. They provide for interdiction on the high seas of vessels suspected of being involved in an offense under the SUA Convention, based on flag-State consent. A State may provide consent to boarding of its flagged vessels in advance through a written agreement, or may provide consent on a case-by-case basis. The United States will not provide advance consent for other States to board U.S.-flagged vessels.

The boarding procedures do not change existing international maritime law or infringe upon the traditional principle of freedom of navigation. Rather they eliminate the need to negotiate time-consuming, ad-hoc boarding arrangements when facing the immediacy of criminal activity.

The 2005 Protocols further other U.S. interests. For example, the boarding procedures and criminal offenses created by these Protocols will support the Proliferation Security Initiative (PSI). Since its inception in May 2003, the United States has joined with like-minded States to develop PSI—a cooperative international effort to combat the common threat posed by the proliferation of WMD, their delivery systems, and related materials. As part of the PSI, participating States are committed to strengthening national and international legal authorities to stop WMD proliferation. The SUA Protocols will strengthen the legal basis for conducting maritime interdictions under PSI and facilitate prosecution of WMD proliferators.

I have discussed what the 2005 Protocols do; now I would like to review what they do not do. The Protocols do not create for the United States any new budgetary or resource obligations. Nor do they restrict U.S. abilities to transport weapons/material by sea. Nothing in the 2005 Protocols prevents the boarding of a ship based on self-defense, nor limits authority to board a ship on any other legal basis. Further, the 2005 Protocols, as well as the other treaties under discussion today, specifically exempt military activities from the scope of their defined criminal offenses. Lastly, the United States is not required to consent to a foreign boarding of a U.S.-flagged ship, and a requesting Party may not board a ship pursuant to the SUA Protocols absent express authorization from the flag State.

Given the leading role of the United States in initiating and promoting the Protocols, prompt U.S. ratification would underscore our authority as a leader in the fight

against terrorism and the spread of WMD. Expeditious U.S. ratification of these Protocols would likely speed their ultimate entry into force, resulting in early availability of a significant tool in the fight against terrorism and WMD proliferation. As was the case for the 3 years at the IMO, other States are looking to the United States for leadership on this important maritime law treaty.

The United States must enact implementing legislation, primarily title 18 provisions, before it can deposit its instrument of ratification. The Department of Defense, is ready to execute its obligations relative to its responsibilities under these Protocols now.

The 2005 Protocols are an important addition to international efforts to combat and prosecute the maritime transportation of terrorists and weapons of mass destruction. They provide the international framework for criminalizing the use of a ship to transport terrorists or WMD, and provide a framework for boarding suspect vessels engaged in these acts. The Protocols play a key role in the Department of Defense's efforts to combat terrorism and the spread of WMD, preserve freedom of the seas, and promote peace and security.

Thank you for the opportunity to express the Department's views on this important matter.

Senator WEBB. Thank you very much, Mr. Douglas.

And as I mentioned earlier, all testimony from the witnesses will be included in the record in their entirety.

I have two questions. One is, Is there anything in any of these treaties that would create a unilateral obligation on the part of the United States, militarily, diplomatically, or legally?

Ms. MCNERNEY. No. Each of the treaties sets out requirements for each participant to the treaty. They don't enter into force until there is a sufficient quorum. It is a different level for each of the treaties, but, basically, each participant in the treaty has the same requirements, the same standards.

Now what is perhaps unique is that the responsibility to implement the treaties is a domestic legal requirement. And so, our implementing legislation will be done consistent with our legal process. Each country will similarly implement this treaty following their normal criminalization of activities, their normal implementation of prosecution of criminal law.

So certainly every system may have a different treatment of the laws, but the obligations overarching those domestic legal requirements are not unique to any one country.

Senator WEBB. Mr. Douglas.

Mr. DOUGLAS. Senator, in terms of the Navy and the Coast Guard, the answer is, "No." These treaties, and I am referring now to the SUA Protocol, requires flag-State consent. And if, for whatever reason, our Government or perhaps another State Party determined that it was not feasible or, I mean, it could be a host of options, we are not obligated to do it. There has to be flag-State consent.

Senator WEBB. Thank you.

Second question is this. All four treaties have a savings clause that carves out from the scope of the convention the activities of armed forces during an armed conflict. Could you describe the applicability or not of that language as is—with respect to international terrorist organizations such as al-Qaeda?

Ms. MCNERNEY. Yes, sir. The review of our lawyer, certainly if you are looking at al-Qaeda, is that this would not apply to an organization like al-Qaeda. They are neither an armed force in the general sense of international understanding, such as wearing uniforms and being visible as an armed force, and they do not respect

the international treaties that define the limitations of what is an armed force. And so, therefore, that exclusion would not apply to an organization like al-Qaeda.

Perhaps my Justice Department colleague; I don't know if you have anything additional?

Mr. DEMERS. No; I have nothing additional, but we fully concur in the State Department's assessment and reading of the treaty.

Senator WEBB. Thank you very much.

Senator Lugar.

Senator LUGAR. Thank you very much, Mr. Chairman.

As preface for my first question, during a period of time, when I chaired the committee in 1985 and 1986, we literally did a house cleaning of treaties. We went into the closet, found all of these treaties, some there for 10, 15 years, and sort of had a general exhuming of all of them. We held hearings on those that seemed relevant and valid and others that were not.

We are not at quite that point now, but I respect the fact that Chairman Biden and Chairman Webb and bipartisan staff have found these four treaties. They are not foundering. But as I pointed out in my opening statement, there are really severe problems with coordination. And this, as the hearing concludes, I hope the three departments here represented, along with whatever administration guidance you have, can try to think through where we stand physically in terms of implementation, passage, and submission of those treaties that still remain.

In other words, this really needs to be done fairly urgently if Chairman Biden is to have the appropriate markups. Committee members who are not present have some sense on what they are voting, and then we try to prevail upon Senator Reid to give us some time. Absent that, not much is going to happen. And these are important documents, and something should happen.

Let me start with you, Ms. McNerney, the transmittals which are the interagency cleared packages that become the treaty documents that we consider here in the Senate did not contain several reservations which the State Department is requesting be included in the Senate-approved resolution of advice and consent for these treaties.

Now, first, why did these reservations not come to us in the Presidential transmittals for these agreements? Second, why is each needed? And third, does each of these requested reservations have the full support of the interagency?

Ms. MCNERNEY. Thank you, Senator.

My understanding is the three that are not original treaties have underlying treaties with a provision for opting out of dispute resolution mechanisms. As a result, during the process of legal review of these treaties, our lawyers missed the fact—I don't want to blame my lawyers as they are very excellent—that you need to look back to these underlying treaties and look at whether there is a dispute resolution mechanism.

My understanding is that for some of these older treaties, the Senate would let them go through without opting out of the dispute mechanism. That is not the current practice. And so, in further review, basically I think through the interagency process, we came

to the agreement that we should ask for that opt-out provision in these amendments to apply at least to these new treaties.

And certainly, I think, given where the Senate has been on these questions, this will probably make it very clear to the Senate that we are not going to be implementing these through any international dispute mechanisms, but rather through U.S. legal procedures.

I also wanted to address your two questions in your opening statement and just let you know that on the compensation convention, we hope to be able to deposit those instruments this month in Vienna at the IAEA. So we are on the cusp of completing the requirements to bring it into force.

On the additional protocol, there are a number of requirements that are in the—the resolution or, sorry, I think the resolution of ratification, and the implementing legislation, and one of the key ones that takes time is doing necessary site vulnerability assessments. This is because of the largesse of our nuclear programs and some of the detailed requirements when you do such assessments.

Unfortunately, this is a bigger task than one might imagine. So I understand your sensitivity to the time. Frankly, we are hearing that from the President as well, and he wants to make sure that this gets done. And so, all of the agencies that are required to undertake these assessements, especially Department of Defense and Department of Energy, because they have ownership of some of these sites, are busily working on the site assessments. And our intent is to have this done before the end of the year.

Senator LUGAR. Well, that is very reassuring on both accounts that you mentioned. Is all of this work now being cleared interagency, so we don't have that problem? In other words, you are busy over there at State, but have Defense and Justice signed off on these situations?

Ms. MCNERNEY. Yes, sir. We do an interagency clearance process for any documents that would come to the Congress.

Senator LUGAR. So we can count on that and not double back asking——

Ms. MCNERNEY. I'd ask my colleagues to shake their head if there is an issue, but I believe we have consensus. Yes; my colleagues agree.

Senator LUGAR. I have asked this question before and received various answers. As each of you know, the various regulations and other preparations have been ongoing. But could each of you provide for the record a final and definitive statement on behalf of the administration as to when all the regulations will be completed, interagency finished, so that the additional protocol on CSC come into force with a date certain?

Now is your answer by the end of the year applicable to all of this?

Ms. MCNERNEY. For the additional protocol, that is sort of the goal at this point, given some of the work that still remains to be done. As mentioned on the other treaty, hopefully, we will deposit those instruments before the end of this month.

Senator LUGAR. OK. So, conceivably, on one of these, we might be able to take action in this Congress probably on at least one——

Ms. MCNERNEY. Hopefully, both of them.

Senator LUGAR. Both.

Ms. MCNERNEY. Yes.

Senator LUGAR. But then——

Ms. MCNERNEY. The President would like to finish this before he leaves office. So that certainly is the goal here.

Senator LUGAR. Well, this is a part of aiding all of this. So if you could sort of summarize these timelines so we can circulate that among our members?

Ms. MCNERNEY. Yes, sir.

Senator LUGAR. We would like to learn what is conceivably doable for the President and for us in this period of time. It would be helpful because I know the chairman is going to try to do the best that he can, but we don't want any further surprises coming out. And if something is really not going to happen in this Congress, we need to think about the next Congress, those of us who are still around during that period would try to deal with that.

Let me just ask another question. In the rationale for inclusion in the Amendment to the Convention on the Physical Protection of Nuclear Material, Senator Webb has talked about the military exclusion provision. But why is there a military exclusion provision at all, leaving aside the definition of al-Qaeda and so forth? Why did this come into play?

Ms. MCNERNEY. Maybe I will turn to my colleague from the Department of Defense to explain the needs?

Senator LUGAR. Very well. Mr. Douglas.

Mr. DOUGLAS. Senator Lugar, thank you, sir.

Just to give you the—I mean, as the Senate knows, in general, in certain kinds of instruments we would like to maintain the flexibility—complete flexibility and prevent sort of misuse of instruments and their provisions to obstruct or interfere with military activity. So there is the general approach.

Given that this agreement and its amendment are more directed to peaceful use, there was a concern within the Department that there could be attempts to use the instrument in a way that would not be consistent with our military activities.

And then, if I may, on the broader question of the understandings, there was great interagency coordination on the effort to get those up here quickly, and we supported all of them because we think that the disagreement resolution provisions in particular are relevant to exactly the question you asked, sir, and the military activities in general. So I just want to assure the committee of that.

Senator LUGAR. Well, I appreciate that response and, likewise, the fact that all three of you are here, talking and listening to each other, as well as to us, so that if there are any questions arising, those might be resolved among you and your staffs and attorneys and what have you.

I just conclude by saying that we appreciate the timeliness of your appearance, and I appreciate especially the chairman's taking time to chair this hearing so that we really could establish what is doable. I keep getting back to the practical aspects that we all are concerned about actual passage of these treaties, and we are close to the finish line, but the pieces that remain.

So itemize those for us if you will—a timeline of when we might anticipate documents so that then our chairman can try to deter-

mine a timeline of what is legislatively doable, given the number of weeks that the Congress may remain in session.

Thank you, Mr. Chairman.

Senator WEBB. Thank you to Senator Lugar. It is always a humbling experience, as the junior member of the Senate Foreign Relations Committee, to chair a hearing alongside the longest serving member of the Senate Foreign Relations Committee. I appreciate all of your wisdom and your advice.

And I appreciate all the witnesses for coming today. And hopefully, we can meet with the chairman and see if we can move something forward here.

Thank you very much.

[Whereupon, at 3:17 p.m., the hearing was adjourned.]

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## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

### RESPONSES OF PRINCIPAL DEPUTY ASSISTANT SECRETARY PATRICIA MCNERNEY TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN

*Question 1.* As of March 20, 2008, 134 States were party to the underlying Convention on the Physical Protection of Nuclear Material, but only 15 States had deposited their instruments of ratification for the amendment. What is the United States doing to persuade more States to ratify the amendment, considering that the amendment requires 87 ratifications to enter into force?

Answer. We take advantage of every opportunity, multilateral and bilateral, to promote early entry into force of the Amendment to the Convention on the Physical Protection of Nuclear Material (CPPNM Amendment). Most of the countries with which we have directly addressed this issue have submitted ratification packages to their respective legislative branches. We believe that U.S. ratification will also help to generate significant momentum toward ratification by other countries and entry into force of the CPPNM Amendment.

*Question 2.* Section 132 of the Atomic Energy Act of 1954, as amended, gives the President the authority to suspend nuclear cooperation with any nation or group of nations which has not ratified the Convention on the Physical Protection of Nuclear Material. Should the failure of other States to ratify and implement the amendment have an impact on civilian nuclear cooperation between the United States and those States? Should the failure of other States to ratify and implement the Nuclear Terrorism Convention have an impact on civilian nuclear cooperation between the United States and those States?

Answer. When the amendment enters into force and a majority of countries have ratified and implemented it, we anticipate examining whether to require in our agreements for peaceful nuclear cooperation that the cooperating parties apply physical protection measures in accordance with the provisions of the amendment, as well as those of the original Convention. This is a similar process to that which we followed with the original CPPNM. We do not believe that there is a parallel case for the Nuclear Terrorism Convention, as the primary focus of that treaty is not on the adoption of physical protection measures.

*Question 3.* Please analyze each of the four counterterrorism treaties under consideration and explain whether the executive branch regards these treaties to be self-executing in any respect. Please be specific.

Answer. With the exceptions noted, the provisions of the treaties are intended to be self-executing, in the sense of having automatic domestic legal effect. These include, for example, provisions obligating the United States to treat certain offenses as extraditable offenses for purposes of bilateral extradition treaties. These do not include provisions that obligate the United States to criminalize certain offenses and subject them to appropriate penalties or provisions that mandate or authorize the assertion of jurisdiction over offenses; such provisions will be implemented either through existing legislation or legislation being sought in connection with ratification. No provisions of these treaties confer private judicially enforceable rights.

*Question 4.* Paragraph 6(2) of the Amendment to the Convention on Physical Protection of Nuclear Material provides that in implementing Article 2A(1) of the Con-

vention as amended, States Parties "shall establish and maintain a legislative and regulatory framework to govern physical protection." Will it be necessary to promulgate new regulations in order to fulfill this obligation under the amendment? If not, please cite the existing regulations that would implement this requirement if we become a party to the amendment.

Answer. No; it will not be necessary to promulgate new regulations to fulfill obligations under the amendment. The amendment, in effect, globalizes the physical security practices that are already in use in the United States. A legislative and regulatory framework is firmly established in this country to govern physical protection of nuclear materials. For commercial licensed facilities, the Nuclear Regulatory Commission (NRC) has the legislative mandate, via a number of statutes (primarily, the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974), to protect nuclear material within its purview. NRC has several layers of agencywide regulations relating to security and physical protection, beginning with Title 10 of the Code of Federal Regulations. 10 CFR Parts 26, 50, 73, 74 and 95 all contain provisions governing physical protection. 10 CFR Part 110 also requires, by establishing them as export licensing criteria, that certain physical security measures be maintained with respect to nuclear materials and production or utilization facilities exported. NRC promulgates other regulatory measures relating to physical protection as part of its security regulation framework, including orders and regulatory guides.

For the Department of Energy (DOE), there are a series of DOE orders and manuals for achieving and maintaining physical protection in DOE facilities. They include the following:

DOE O 470.3A (Order, 11/29/2005, HS) Design Basis Threat Policy (U). The order defines the Design Basis Threat for DOE facilities, including theft/diversion and radiological sabotage.

DOE M 470.4–1 Chg 1 (Manual, 08/26/2005, HS) Safeguards and Security Program Planning and Management. The manual establishes program planning and management requirements for the Department's Safeguards and Security.

DOE M 470.4–2 Chg 1 (Manual, 08/26/2005, HS) Physical Protection. This Manual establishes requirements for the physical protection of safeguards and security interests.

DOE M 470.4–3 Chg 1 (Manual, 08/26/2005, HS) Protective Force. The manual establishes requirements for management and operation of the DOE Protective Force, establishes requirements for firearms operations and defines the firearms courses of fire.

DOE M 470.4–6 Chg 1 (Manual, 08/26/2005, HS) Nuclear Material Control and Accountability. The manual establishes a program for the control and accountability of nuclear materials within the Department of Energy.

DOE O 470.4A (Order, 05/25/2007, HS) Safeguards and Security Program. The Order establishes roles and responsibilities for the Department of Energy Safeguards and Security Program.

*Question 5.* Paragraph 6(2)(b) requires States Parties to "establish or designate a competent authority or authorities responsible for the implementation of the legislative and regulatory framework." What entity will be the "competent authority" for the United States, should the United States ratify the amendment?

Answer. There are two competent authorities for the United States for this purpose. DOE is the competent authority with respect to DOE facilities, and NRC is the competent authority with respect to commercial licensees.

*Question 6.* Paragraph 6 of the Amendment to the Convention on Physical Protection of Nuclear Material requires States Parties to "establish, implement and maintain an appropriate physical protection regime applicable to nuclear material and nuclear facilities under [their] jurisdiction. . . ." Subparagraph 3 states that when implementing this regime, each State Party shall "apply insofar as is reasonable and practicable" various "Fundamental Principles of Physical Protection of Nuclear Material and Nuclear Facilities." Does the United States apply each of the Fundamental Principles listed in Paragraph 6(3)?

Answer. Yes; the United States does apply the Fundamental Principles. NRC applies the Fundamental Principles through its regulations and regulatory process. DOE application of the Fundamental Principles has been reflected in the Orders and Manuals listed in response to question No. 4.

The phrase "insofar as reasonable and practicable" was included in subparagraph 3 of new Article 2A (added by paragraph 6 of the amendment) to permit States Parties the flexibility to adapt the Fundamental Principles to their own nuclear pro-

grams. The amendment is intended for many States with vastly different nuclear infrastructures—from those with no nuclear materials to those that have advanced nuclear programs—so that flexibility in implementation of the Fundamental Principles was essential and was a bottom-line requirement for the United States and many other States as well in the negotiation of the amendment.

*Question 7.* Paragraph 6 of the Amendment to the Convention on Physical Protection of Nuclear Material provides that States Parties may opt out of the physical protection regime in the new Article 2A with respect to nuclear material that a State Party "reasonably decides does not need to be subject" to the regime taking into account certain factors. What is the history of this "opt-out"? Which country proposed it and why? Does the administration intend to make use of this "opt-out" provision?

Answer. The "opt-out" was originally proposed by the United Kingdom, supported by Belgium, during the June 2002 Open-Ended Experts Group meeting. The U.K. stated that it considered that very small quantities of nuclear material should be outside the nuclear regulatory framework, as they are of very little proliferation concern and do not need to be subject to a full nuclear security regime. There was consideration of whether the exclusion of very small quantities of nuclear material could be achieved under the "graded approach" Fundamental Principle, but the U.K. opposed addressing small quantities in that way. Its position was that it was very important to ensure that the graded approach was applied to determining what physical protections measures were appropriate, not to the existence of a physical protection regime at all.

We do not anticipate that the United States would make use of this "opt-out" provision.

*Question 8.* There are two Annexes to the Convention on the Physical Protection of Nuclear Material, which are (according to Article 15 of the Convention) an integral part of the Convention. Paragraphs 14 and 15 of the Amendment to the Convention on Physical Protection of Nuclear Material amend two footnotes of Annex II of the Convention in a nonsubstantive way. Since U.S. ratification of the Convention, aside from the amendment under consideration now, have these annexes been amended? Annex I of the Convention only refers to "Levels of Physical Protection To Be Applied In International Transport of Nuclear Material," but the amendment applies to nuclear material in domestic use, storage, and transport. Why weren't these annexes more substantially amended in the current amendment to the Convention? Do you anticipate that the annexes will be amended in the near future to reflect changes to the body of the Convention effected by the amendment's entry into force?

Answer. The process leading to the 2005 amendment focused on: Ensuring that States established legislative and regulatory frameworks for domestic use, storage, and transport of nuclear material; recommending cooperation among States regarding illicit trafficking and use of best practices in physical protection planning and implementation; including provisions for prosecution of sabotage offenses; and setting forth the concepts underpinning a physical protection regime via the Fundamental Principles and Physical Protection Objectives. There was limited early discussion of changing the Categorization Table in Annex II, but this was sidelined due to the recognized inability to achieve consensus on its revision. Similarly, work toward changing the assignment of specific physical protection measures to categories, as in Annex I, was not undertaken.

We do not anticipate that the annexes will be revised in the near future. It is expected that IAEA INFCIRC/225, which was adopted after the original CPPNM to provide guidance to States on implementing a physical protection regime, will be revised to reflect the Amendment to the CPPNM.

*Question 9.* Paragraph 5(5) of the Amendment to the Convention on Physical Protection of Nuclear Material states that the Convention, as amended, "shall not apply to nuclear material used or retained for military purposes or to a nuclear facility containing such material." How is this carve-out interpreted? For example, is it correct to assume that States Parties would have no obligation under the Convention, as amended, to provide (pursuant to Article 5) cooperation and assistance to a requesting State to the extent feasible in the recovery and protection of nuclear material, if that nuclear material belongs to the military?

Answer. This exclusion merely makes explicit what was implicit in the original CPPNM in regard to nuclear materials used for "peaceful purposes." The term "peaceful purposes" was commonly understood for these purposes as excluding military materials and defense programs. During the amendment negotiation, several countries attempted to weaken further this language, some explicitly including mili-

tary materials and facilities. Thus, in order to preclude any potential for compromise of national security, military materials and facilities were explicitly excluded. The assumption in the question is correct, but we would note that a State is not prohibited from assisting if such assistance is sought, but it is not required to assist by the amendment under the terms of your example.

*Question 10.* In the treaty transmittal packages (110–4, 110–6, and 110–8), a reservation and several understandings were recommended for inclusion in the Senate's resolution of advice and consent to ratification, and ultimately in the U.S. instrument of ratification. At the hearing and in briefing materials submitted to the committee, the administration has recommended that additional reservations be made with respect to the Amendment to the Convention on the Physical Protection of Nuclear Material, as well as the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol, all of which would effectively allow the United States to "opt out" of the binding dispute resolution mechanisms provided for in the treaties these instruments are amending, with respect to disputes concerning the interpretation or application of the amendment and the two protocols. Please provide suggested language for these reservations and confirm whether there are any other changes or additions the executive branch would like to propose to the reservations and understandings included in the transmittal packages.

Answer.

A. SUGGESTED LANGUAGE FOR UNDERSTANDINGS ON DISPUTE RESOLUTION

*Nuclear Terrorism Convention*

Pursuant to Article 23(2) of the Convention, the United States of America declares that it does not consider itself bound by Article 23(1) of the Convention.

*2005 SUA Protocol*

Consistent with Article 16(2) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, the United States of America declares that it does not consider itself bound by Article 16(1) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, with respect to disputes concerning the interpretation or application of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

*2005 Fixed Platform Protocol*

Consistent with Article 16(2) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, and incorporated by Article 2 of the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, the United States of America declares that it does not consider itself bound by Article 16(1) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, with respect to disputes concerning the interpretation or application of the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

*CPPNM Amendment*

Consistent with Article 17(3) of the Convention, the United States of America declares that it does not consider itself bound by Article 17(2) of the Convention with respect to disputes concerning the interpretation or application of the Amendment to the Convention on the Physical Protection of Nuclear Material.

B. ADDITIONAL UNDERSTANDING RECOMMENDED FOR ARTICLE 9 OF THE 2005 SUA PROTOCOL

Article 9 of the 2005 SUA Protocol amends Article 10, paragraph 2, of the 1988 SUA Convention and provides that any person who is taken into custody or otherwise subject to proceedings under the Convention shall be guaranteed fair treatment, including all rights and guarantees under the law of the State in which that person is present. . . ." Article 2 of the 2005 Fixed Platforms Protocol incorporates this (and other) provisions from the 2005 SUA Protocol. Accordingly, we recommend the following understandings, which are consistent with the understanding recommended for an identical provision in the Nuclear Terrorism Convention:

*2005 SUA Protocol*

The United States understands that Article 9 of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("2005 Protocol") imposes no obligation on the United States to provide any individual remedy within its judicial system for any person who alleges a violation of that article or any other terms of the 2005 Protocol.

*2005 Fixed Platforms Protocol*

The United States understands that paragraph 2 of Article 10 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, and incorporated by Article 2 of the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("2005 Fixed Platforms Protocol"), imposes no obligation on the United States to provide any individual remedy within its judicial system for any person who alleges a violation of that article or any other terms of the 2005 Fixed Platforms Protocol.

*Question 11.* Page XIV of the President's transmittal package for the Nuclear Terrorism Convention states that the reservation proposed by the administration "would allow the United States to agree to adjudication by a Chamber of the Court in a particular case, if that were deemed desirable." Although the United States and another country could presumably agree to submit a dispute over the interpretation or application of the treaty to the International Court of Justice, it appears that the reservation only anticipates that the United States might agree to arbitration, either as laid out in Article 23(1) or otherwise—but does not anticipate and would not specifically "allow" the United States to agree to adjudication by a Chamber of the Court in a particular case. Is that reading of this reservation correct?

Answer. Upon further review, we do not consider inclusion of the above-referenced text necessary for purposes of the recommended reservation. It goes without saying that the United States could, in its discretion, choose to submit a particular dispute regarding the interpretation or application of the treaty to third-party dispute settlement. Please see the revised version of the administration's recommendation in the response to question 10 (above).

*Question 12.* Article 8 of the Nuclear Terrorism Convention states that States Parties "shall make every effort to adopt appropriate measures to ensure the protection of radioactive material, taking into account relevant recommendations and functions of the International Atomic Energy Agency." What are the "relevant recommendations" referenced? Will it be necessary to promulgate new regulations in order to fulfill this obligation under the amendment? If not, please cite the existing regulations that would implement this requirement if we become a party to the Convention.

Answer. The principal requirement in Article 8 is to "make every effort to adopt appropriate measures to ensure the protection of radioactive material. . . ." Both DOE and NRC already have in place regulations and other regulatory documents (such as orders and manuals) to ensure the protection of nuclear and byproduct material.

Pertinent NRC regulations include 10 CFR 20.1801 and 20.1802, 10 CFR Part 73, and 10 CFR 110.44. Over the past few years NRC has also issued orders involving increased controls on materials to specific groups of licensees. For DOE, we refer you to the series of DOE orders and manuals referenced in response to Question 4 above with regard to achieving and maintaining physical protection in DOE facilities.

With respect to the requirement that the measures for protection of radioactive material, as that term is defined in the Nuclear Terrorism Convention, take account of relevant recommendations of the IAEA; the IAEA is continually developing recommendations and guidance related to the protection of nuclear material and radioactive sources. USG experts frequently participate in those efforts, bringing U.S. experience and practice in protection of such materials to bear in the development of international guidance. Some of the principal IAEA guidance documents relating to protection of radioactive material are the following:

- IAEA Nuclear Security Series and INFCIRC/225/Rev. 4 (Corrected) The Physical Protection of Nuclear Materials and Nuclear Facilities;
- Code of Conduct on the Safety and Security of Radioactive Sources, and supplementary Guidance on the Import and Export of Radioactive Sources; and
- IAEA Safety Standards Series

DOE and NRC have advised that they do not foresee that any regulatory changes would be necessitated by this Article if the United States becomes a party to the

NTC. We note that DOE is already in the process of issuing an order to reflect the Guidance on the Import and Export of Radioactive Sources listed above.

*Question 13.* Consider the following hypothetical: Two private Iranian citizens "unlawfully and intentionally" transport on board a ship special fissionable material from the territory of Iran to Pakistan knowing that it is intended to be used in nuclear activity that is not under safeguards pursuant to an IAEA comprehensive safeguards agreement. Iran is a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, but if the act is taken by private Iranian citizens acting without the knowledge of their government, would the resulting transfer or receipt of the material be "contrary to such Party's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons"? As a result, would such act be an offense under the treaty?

Answer. Many factors would have to be considered in determining whether an offense under the treaty had occurred in a particular situation. For example, an NPT party could transfer special fissionable material to a safeguarded Pakistani facility consistent with the NPT (notwithstanding the fact that Pakistan does not have a comprehensive safeguards agreement with the IAEA). Moreover, we would need to evaluate the specific facts concerning the actions (or inaction) of the government of the sending State. Thus, it is difficult to provide a definitive answer to hypothetical situations such as this one.

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RESPONSES OF DEPUTY ASSISTANT ATTORNEY GENERAL JOHN C. DEMERS TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN

*Question.* All four counterterrorism treaties (the Nuclear Terrorism Convention, the Amendment to the Convention on Physical Protection of Nuclear Material, the 2005 SUA Protocol, and the 2005 Fixed Platforms Protocol) define offenses that will be prosecutable under an "extradite or prosecute" regime provided for in each treaty. Which of these offenses will be most useful to the United States in its attempts to combat terrorism and nonproliferation? Please provide specific examples, if possible.

Answer. Each of the four counterterrorism treaties provides critical additions to the legal framework addressing the dangers associated with terrorists acquiring and using unconventional weapons. The legislation would play a key role in harmonizing the criminalization of conduct in various nations. Achieving consistency at an international level will help with coordination and cooperation in the repression of illicit conduct involving nuclear material. The extradite or prosecute provisions in particular are useful to make it difficult for perpetrators to find refuge in a country that cannot or will not prosecute. Although these provisions are important to each of the offenses, it is possible that the offenses in the CPPNM Amendment would be more frequently used for prosecution and extradition than the others because they cover a more common range of material or action, like theft or smuggling of nuclear material, than some of the offenses in the other treaties. It is nevertheless important to understand that the criminal legislation would be a success even if it were never used for a criminal prosecution; its mere presence in the U.S. Code may deter threatening activity.

*Question.* The President has urged the Senate to act quickly on these four counterterrorism treaties, yet the administration has not submitted the draft implementing legislation for the Nuclear Terrorism Convention and the Amendment to the Convention on the Physical Protection of Nuclear Material. When do you expect to submit a draft of that legislation? Why is it taking so long to submit the legislation?

Answer. We appreciate the Senate's expeditious consideration of these critically important treaties. The duration of time involved in preparing draft legislation stems largely from two factors. First, because these four conventions affect numerous existing domestic laws, the integration of the legal obligations under these treaties requires additional analysis of existing law. Second, the subject matter of these treaties implicates the interests of numerous Federal agencies. Hence, considerable interagency coordination has been involved in the review of the draft legislation. We are engaged in what we anticipate to be the last round of interagency coordination and will transmit the legislation to the Hill promptly thereafter.

*Question.* Under Article 9(2) of the Nuclear Terrorism Convention, a State Party "may" establish jurisdiction over the offenses covered by the Convention when:

(a) The offense is committed against a national of that State;

(b) The offense is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State;

(c) The offense is committed by a stateless person who has his or her habitual residence in the territory of that State;

(d) The offense is committed in an attempt to compel that State to do or abstain from doing any act; or

(e) The offense is committed on board an aircraft which is operated by the Government of that State.

Which of the grounds above ((a) through (e)) does the administration recommend that Congress establish jurisdiction over in implementing legislation and why?

Answer. We will address the jurisdictional scope in our upcoming draft legislation, which will include a section-by-section analysis.

*Question.* Consider the following hypothetical: Two Indian citizens "unlawfully and intentionally" transport on board a ship special fissionable material from India to Pakistan knowing that it is intended to be used in nuclear activity that is not under safeguards pursuant to an IAEA comprehensive safeguards agreement. In brief, the acts of these two Indian citizens would appear to qualify as an offense under the 2005 SUA Protocol. Neither India nor Pakistan are parties to the 2005 SUA Protocol; however, in this hypothetical the United States has joined the 2005 SUA Protocol. At a later date, the two Indian citizens are found in the United States. We cannot find an interested country to which we might extradite the two Indian citizens and thus, under the Convention, we presumably have an obligation to prosecute them. U.S. courts have generally taken the position that Congress may legislate with respect to conduct outside the United States, even in excess of the limits posed by international law, so long as Congress has indicated its intent to reach such conduct and doing so does not violate the due process clause of the fifth amendment. Please analyze this hypothetical and explain why prosecution under the circumstances described above would not violate the due process clause of the fifth amendment.

Answer. We cannot answer this type of hypothetical question; however, courts have held that, under the fifth amendment's due process clause, U.S. law may be applied to extraterritorial conduct in comparable circumstances unless such application would be arbitrary or fundamentally unfair. See, e.g., *United States* v. *Shi,* 525 F.3d 709 (9th Cir. 2008) (exercise of extraterritorial jurisdiction under 18 U.S.C. § 2280 over foreign national did not violate due process); *United States* v. *Martinez-Hidalgo,* 993 F.2d 1052, 1056 (3d Cir. 1993). The precise manner of applying this due process test has varied, but several courts recognize that the United States joining a multilateral convention requiring prosecution can be sufficient to assert jurisdiction. See, e.g., *Shi,* 525, F.3d at 723–24; *cf. United States* v. *Yunis,* 924 F.2d 1086, 1092 (D.C. Cir. 1991) (recognizing that statute implementing aircraft hijacking convention can support assertion of universal jurisdiction). A somewhat different approach was taken in *United States* v. *Davis,* 905 F.2d 245, 248–49 (9th Cir. 1990), and *United States* v. *Yousef,* 327 F.3d 56 (2d Cir. 2003). In those cases, the ninth and second circuits interpreted the due process clause generally to require some nexus between the United States, or its national interests, and the challenged conduct. But later cases in the ninth circuit have clarified the limited scope of Davis. See *Shi,* 525 F.3d at 722 (nexus requirement applies only when the "rough guide" of international law also requires a nexus); *United States* v. *Caicedo,* 47 F.3d 370, 372 (9th Cir. 1995) (same).

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## RESPONSES OF DEPUTY ASSISTANT SECRETARY RICHARD DOUGLAS TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN

### ON EXPLAINING THE URGENCY OF SENATE ACTION

*Question.* Please explain why it is important for the Senate to act on these treaties now. Is there any real urgency?

Answer. Terrorists have indicated a strong desire to use WMD and these treaties will help stop them.

The 2005 Protocols to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its accompanying Fixed Platforms Protocol, close international legal gaps by criminalizing the use of a ship to transport terrorists or as a weapon and by criminalizing maritime transport of WMD, their delivery systems, and related materials.

In addition to the SUA Amendments, the Nuclear Terrorism Convention and the Amendment to the Convention on the Physical Protection of Nuclear Material will enhance U.S. national security by modernizing and strengthening the international counterterrorism and counterproliferation legal framework. These Conventions complement important U.S. Government priorities, such as the Global Initiative to Combat Nuclear Terrorism and the Proliferation Security Initiative. The United States actively supported the development of these treaties, and in the case of the SUA Protocols and the CPPNM Amendment were U.S. led iniatives. U.S. ratification will reinforce U.S. leadership in this area and encourage ratification by other states.

IMPACT OF 2005 SUA PROTOCOL AND 2005 FIXED PLATFORMS PROTOCOL ON PROLIFERATION SECURITY INITIATIVE

*Question.* Can you explain how joining the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol would strengthen the Proliferation Security Initiative? Please use specific examples, if possible.

Answer. The proliferation offenses and the boarding regime established by the 2005 SUA Protocols will strengthen the international legal basis for conducting maritime interdictions. The protocol is legally binding. PSI is not. PSI is a cooperative activity where like-minded states work together to address proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide, consistent with national legal authorities and relevant international law and frameworks. The 2005 SUA protocols (the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol) further PSI objectives by requiring States Parties to these treaties to criminalize, under their domestic law, offenses involving the transport on SUA-covered ships of WMD, delivery systems, and related materials.

The 2005 SUA protocols complement PSI and further its objectives by expanding upon the international "extradite or prosecute" regime provided for in the 1988 SUA Convention to prosecute those who proliferate WMD by ship, thereby advancing the aims of the PSI. The SUA Convention, as amended by the protocols, will establish a legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit or aid terrorist acts or trafficking in WMD aboard ships at sea or on fixed platforms.

The ship boarding provisions under SUA protocols will facilitate timely coordination of boarding requests from flag-States, some of which are not participating in PSI and may not choose to enter into bilateral agreements with the United States. The SUA Protocols will provide the benefits of a streamlined process in the context of a multilateral convention. The SUA shipboarding regime will serve to strengthen the international legal basis for interdictions at sea carried out under the PSI. The shipboarding regime in the 2005 SUA Protocol will provide a multilateral basis for the interdiction at sea of WMD, their delivery systems, and related materials, as well as terrorist fugitives. It will also provide an internationally accepted model for shipboarding that can be used with States that are not party to SUA or participants in PSI.

As an example, if we had information that a dual-use item that we thought could significantly contribute to the design, manufacture, or delivery of a nuclear, biological, or chemical weapon was being transported aboard a vessel flagged by a party to SUA, we would, with the SUA amendments, have an expeditious structure in place to immediately contact that State to request that they conduct a boarding or authorize the U.S. to board.

IMPACT OF 2005 SUA PROTOCOL AND 2005 FIXED PLATFORMS PROTOCOL ON ENFORCEMENT OF UNSC SANCTIONS AGAINST IRAN AND THE DPRK

*Question.*Can you explain how joining the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol might facilitate the enforcement of U.N. Security Council sanctions against Iran and North Korea?

Answer. The 2005 SUA Protocols require participating States Parties to enact legislation to criminalize the unlawful maritime transport of WMD, a key requirement in stopping the spread of WMD, and an important step in helping to enforce the sanctions in current U.N. Security Council resolutions. The SUA protocols establish a legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit or aid terrorist acts or trafficking in WMD aboard ships at sea or on fixed platforms. The ability of States Parties to prosecute the perpetrators of these acts under the domestic legislation that States Parties must adopt will be a means to impose "consequences" on the perpetrators of these acts. The 2005 SUA Protocol's shipboarding regime will provide a multilateral basis for the interdiction at sea of WMD, their delivery systems, and related materials, as well as terrorist fugitives.

INFORMATION-SHARING INITIATIVES

*Question.* Do you have any concerns about the information-sharing provisions in these treaties? Are you at all concerned that the United States will be required to share information under these treaties, which might be detrimental to our national security?

Answer. No. The United States will not have to disclose sensitive sources and methods when it requests to board a vessel of a State Party to the SUA Convention. Any time a boarding is requested, the pros and cons of revealing the boarding State's interest in a particular ship must be carefully considered. But, there is no requirement that the boarding State share information or reveal collection methods in the process of requesting a boarding. Boarding requests shall be based upon "reasonable grounds" and contain (pursuant to Art. 8*bis*) the following:

—Name of the suspect ship;
—International Maritime Organization (IMO) identification number;
—Port of registry;
—Port of destination and origin; and,
—Any other relevant information.

Accordingly, there is flexibility in determining what to provide to support the request. Moreover, not every boarding is/will be based on classified information.

Article 6.2 of the Convention on the Physical Protection of Nuclear Material, and Article 7.3 of the International Convention for the Suppression of Acts of Nuclear Terrorism, both provide that States Parties are not required to disclose information that they are not permitted to disclose under national law, or that would jeopardize national security.

POSSIBLE OUTCOME OF A FUTURE U.S. ATTACK ON A FOREIGN NUCLEAR FACILITY

*Question.* If the United States were to ratify these four counterterrorism treaties, and then its military forces were to attack a nuclear facility (as defined in either the Nuclear Terrorism Convention or in the Amendment to the Convention on the Physical Protection of Nuclear Material) in another country, could that country reasonably claim under any of these treaties that the United States had breached its obligations under international law? Please explain.

Answer. None of the treaties under consideration would support such a claim. Each treaty contains a provision that excludes the activities of armed forces during an armed conflict, which are governed by the law of war, and activities of the military forces of a State in the exercise of official duties.

ON POSSIBILITY OF POTENTIAL MILITARY OBLIGATIONS

*Question.* Can you identify specific obligations under these four counterterrorism treaties which the United States military might be called upon to participate in the implementation thereof?

Answer. Specific obligations under the SUA Protocols include, among other things, a requirement for State Parties to designate the authority to receive and respond to requests for assistance (for the U.S. it is the U.S. Coast Guard), and when conducting a boarding, to avoid endangering personnel on board, take due account of the security of the ship and its cargo, treat persons on board in a manner which preserves their basic human dignity; notify the master of the impending boarding, and take reasonable efforts to avoid unduly detaining the ship.

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