

PROTOCOLS OF 2005 TO THE CONVENTION CONCERNING
THE SAFETY OF MARITIME NAVIGATION AND TO THE
PROTOCOL CONCERNING THE SAFETY OF FIXED PLAT-
FORMS ON THE CONTINENTAL SHELF

SEPTEMBER 16, 2008.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 110-8]

The Committee on Foreign Relations, to which was referred the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the “2005 SUA Protocol”) and 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 “2005 Fixed Platforms Protocol”), both adopted at London on October 14, 2005, and signed by the United States of America on February 17, 2006 (Treaty Doc. 110-8), having considered the same, reports favorably thereon with reservations, understandings, and declarations, as indicated in the resolutions of advice and consent for each treaty, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolutions of advice and consent.

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I. PURPOSE

The purpose of the 2005 SUA Protocol and the 2005 Fixed Plat-
forms Protocol is to strengthen and update the Convention for the

Suppression of Unlawful Acts against the Safety of Maritime Navigation (the “1988 SUA Convention”) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the “1988 Fixed Platforms Agreement”) (Treaty Doc. 101–1), in order to create a more effective international regime to prevent and punish maritime terrorism and the proliferation of weapons of mass destruction (“WMD”).

II. BACKGROUND

The 2005 SUA Protocol and the 2005 Fixed Platforms Protocol were negotiated under the auspices of the International Maritime Organization (“IMO”) and would amend two agreements adopted by the IMO in 1988 to which the United States is already a party: the 1988 SUA Convention and the 1988 Fixed Platforms Agreement. The 1988 SUA Convention and the 1988 Fixed Platforms Agreement were originally negotiated in response to the 1985 hijacking of the Italian-flag cruise ship the *Achille Lauro* and the murder of American passenger Leon Klinghoffer. These two 1988 agreements established an international legal framework requiring that States Parties either extradite or submit for prosecution persons who have committed certain offenses identified in each treaty in an effort to ensure that individuals who commit acts of terrorism that endanger the safe navigation of a ship or the safety of a fixed platform are either prosecuted in the state in which they are found or extradited to another state for prosecution.

While the 1988 SUA Convention and the 1988 Fixed Platforms Agreement focus respectively on vessels and fixed platforms at sea as the potential target of a terrorist attack or other terrorist activity, the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol expand this international framework to include scenarios in which vessels or platforms are used as a potential means for carrying out or enabling terrorist activity. Specifically, they establish a framework for investigating, prosecuting, and extraditing persons who commit certain offenses, including using a ship or fixed platform as a weapon or as a means to carry out a terrorist attack; the unlawful transport of biological, chemical, and nuclear weapons and other nuclear explosive devices and related delivery systems on the high seas; the transport of terrorist fugitives by sea; and various accessory offenses. In addition, the 2005 SUA Protocol creates a shipboarding 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. In response to questions from the committee, administration officials noted that the shipboarding regime and the offenses established by both Protocols are expected to strengthen the international legal basis for conducting maritime interdictions and facilitate the enforcement of UN sanctions against countries such as Iran and North Korea. In particular, Deputy Assistant Secretary of Defense Richard Douglas stated as follows:

The [2005 SUA Protocol and the 2005 Fixed Platforms Protocol] 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 UN Security Council resolutions. [Both 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.

The 2005 SUA Protocol and the 2005 Fixed Platforms Protocol were adopted by the IMO on October 14, 2005, and signed on behalf of the United States on February 17, 2006. The President’s submittal indicates that the Departments of State, Justice, Homeland Security, and Defense all join in recommending early action on these treaties.

III. MAJOR PROVISIONS

A detailed analysis of these two Protocols may be found in the Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 110–8. A summary of several key provisions is set forth below.

A. 2005 SUA PROTOCOL

New Offenses

Paragraphs 5–7 of Article 4 of the 2005 SUA Protocol add new offenses to the Convention that fit into four categories:

1. Terrorism Offenses
2. Proliferation Offenses
3. Transportation of Terrorist Fugitives Offense
4. Accessory Offenses

1. Terrorism Offenses (Article 3bis(1)(a)):

Any person commits an offense if that person unlawfully and intentionally, when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act—

- i. Uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon (Article 2 of the 2005 SUA Protocol defines “BCN weapons” as biological, chemical, and nuclear weapons and other nuclear explosive devices) in a manner that causes or is likely to cause death or serious injury or damage;
- ii. Discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance (not already covered by (i) above) in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
- iii. Uses a ship in a manner that causes death or serious injury or damage; or

- iv. Threatens, with or without a condition, as is provided for under national law, to commit an offense set forth above in (i), (ii), or (iii).

2. Proliferation Offenses (Article 3bis(1)(b) & (2)):

Any person also commits an offense if that person unlawfully and intentionally transports on board a ship—

- i. Any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act;
- ii. Any BCN weapon, knowing it to be a BCN weapon;
- iii. Any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it 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 (IAEA) comprehensive safeguards agreement; or
- iv. Any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

Article 4(5) of the 2005 SUA Protocol adds to the Convention, *inter alia*, a new Article 3bis(2), which provides that certain nuclear transport that would otherwise be an offense under Article 3bis(1)(b) remains permissible, in order to preserve the right of a State Party to the Treaty on Non-Proliferation of Nuclear Weapons (the “NPT”) to engage in legitimate nuclear transport. This provision, in combination with the general provision in Article 2bis(3) declaring that the Convention shall not affect the rights and obligations of States Parties under the NPT, ensures that the Convention is consistent with the rights and obligations of the States Parties to the NPT (except to the extent that the Convention goes beyond the NPT with respect to nuclear weapon delivery systems). Specifically, Article 3bis(2) provides that the Convention would not require criminalization of the transport to or from the territory of, or under the control of, an NPT State Party of source or special fissionable material, or of equipment or material especially designed or prepared for the processing, use or production of special fissionable material, as long as the resulting transfer or receipt of such items or materials is not contrary to the NPT obligations of the NPT State Party. This is the case even when a non-NPT party (for instance, India) is on the “other end” of the transport to or from (or under the control of) the NPT State Party.

3. Transportation of Terrorist Fugitives Offense (Article 3ter):

Article 4(6) of the 2005 SUA Protocol adds Article 3ter to the Convention, which makes it an offense for a person to unlawfully and intentionally transport another person on board a ship, with the intent to assist that person in evading criminal prosecution and

knowing that the person has committed an act that constitutes an offense set forth in Articles 3, *3bis*, or *3quater* of the amended SUA Convention or an offense set forth in one of the treaties listed in the Annex to the Convention. Currently, there are nine treaties listed in the Annex and the United States is a party to all nine.

4. Accessory Offenses (Article 3quater):

Paragraph 7 of Article 4 of the 2005 SUA Protocol adds Article *3quater* to the Convention, which makes it an offense for a person to—

- a. Unlawfully and intentionally injure or kill any person in connection with the commission of any of the offenses set forth in Articles 3(1), *3bis*, or *3ter* of the amended SUA Convention;
- b. Attempt to commit an offense set forth in Articles 3(1), *3bis*(1)(a)(i), (ii), (iii), or *3quater*(a) of the amended SUA Convention;
- c. Participate as an accomplice in an offense set forth in Articles 3, *3bis*, *3ter*, *3quater*(a), or *3quater*(b) of the amended SUA Convention;
- d. Organize or direct others to commit an offense set forth in Articles 3, *3bis*, *3ter*, *3quater*(a), or *3quater*(b) of the amended SUA Convention; or
- e. Contribute to the commission of one or more offenses set forth in Articles 3, *3bis*, *3ter*, *3quater*(a) or *3quater*(b) of the amended SUA Convention by a group of persons acting with a common purpose, intentionally and either:
 - i. With the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offense set forth in Articles 3, *3bis*, or *3ter* of the amended SUA Convention; or
 - ii. In the knowledge of the intention of the group to commit an offense set forth in Articles 3, *3bis*, or *3ter* of the amended SUA Convention.

Shipboarding Regime

Article 8(2) of the 2005 SUA Protocol adds Article *8bis* to the Convention, which creates a shipboarding regime by establishing a comprehensive set of procedures and protections designed to facilitate the boarding of a vessel flying the flag of a State Party by another State Party when that Party has reasonable grounds to suspect that the vessel or a person on board the vessel is, has been, or is about to be involved in the commission of an offense covered by the Convention.

The authorization and co-operation of the flag State Party is required before the requesting State Party can board and search the vessel. States Parties may, however, provide their consent in advance by notifying the IMO Secretary-General that any other State Party may board and search one of its vessels if that State Party has reasonable grounds to suspect that the vessel or a person on board the vessel is, has been, or is about to be involved in the commission of an offense covered by the Convention. Alternatively, States Parties may declare in advance (by notifying the IMO Secretary-General) that any other State Party may board and search one of their vessels under such circumstances, if they don't respond

to a State Party's request for authorization within four hours. The United States will not file a notification with the IMO Secretary-General granting either of these two forms of advance consent. Paragraph 10 of Article 8*bis* establishes a number of safeguard provisions to protect seafarers and carriers during the course of shipboardings.

In response to questions from the committee, the Department of Defense described how the shipboarding regime would strengthen international cooperation in conducting maritime interdictions intended to counter terrorism and proliferation as follows:

The ship boarding provisions under [the 2005 SUA Protocol] will facilitate timely coordination of boarding requests from flag states, some of which are not participating in [the Proliferation Security Initiative or "PSI"] and may not choose to enter into bilateral agreements with the United States. The [2005 SUA Protocol] 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.

B. 2005 FIXED PLATFORMS PROTOCOL

Incorporation of Relevant Provisions of the 1988 SUA Convention, as Amended by the 2005 SUA Protocol

Article 2 of the Fixed Platforms Protocol amends Article 1 of the 1988 Fixed Platforms Agreement to incorporate all of the substantive provisions of the 1988 SUA Convention, as amended by the 2005 SUA Protocol, with the exception of those provisions that address transport offenses and the shipboarding regime, which are not relevant in the context of fixed platforms. These provisions include, among other things, (1) definitions of terms used in the treaty; (2) the obligation to make offenses punishable under domestic law; (3) the establishment of liability for legal entities; (4) a guarantee of fair treatment to those held in custody; (5) the obligation to extradite or prosecute; (6) the framework for transferring persons in custody; (7) obligations to assist with criminal investigations under the treaty; and (8) obligations to share information and to take all "practicable measures" to prevent preparation for the commission of offenses covered by the treaty.

New Offenses

Article 4 of the Fixed Platforms Protocol adds two new Articles (Articles 2*bis* and 2*ter*) to the 1988 Fixed Platforms Agreement, which define new offenses to be covered by the framework. The offense under new Article 2*bis* is as follows:

Any person commits an offense if that person unlawfully and intentionally, when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act—

- a. Uses against or on a fixed platform or discharges from a fixed platform any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage;
- b. Discharges, from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance (not already covered by (a) above) in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
- c. Threatens, with or without a condition, as is provided for under national law, to commit an offense set forth above in (a) or (b).

The new Article 2*ter* makes it an offense for a person to—

- a. Unlawfully and intentionally injure or kill any person in connection with the commission of any of the offenses set forth in Articles 2(1) or 2*bis* of the amended Fixed Platforms Agreement;
- b. Attempt to commit an offense set forth in Articles 2(1), 2*bis*(a), 2*bis*(b), or 2*ter*(a) of the amended Fixed Platforms Agreement;
- c. Participate as an accomplice in an offense set forth in Articles 2, 2*bis*, 2*ter*(a), or 2*ter*(b) of the amended Fixed Platforms Agreement;
- d. Organize or direct others to commit an offense set forth in Articles 2, 2*bis*, 2*ter*(a), or 2*ter*(b) of the amended Fixed Platforms Agreement; or
- e. Contribute to the commission of one or more offenses set forth in Articles 2, 2*bis*, 2*ter*(a), or 2*ter*(b) of the amended Fixed Platforms Agreement by a group of persons acting with a common purpose, intentionally and either:
 - i. With the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offense set forth in Articles 2 or 2*bis* of the amended Fixed Platforms Agreement; or
 - ii. In the knowledge of the intention of the group to commit an offense set forth in Articles 2 or 2*bis* of the amended Fixed Platforms Agreement.

IV. ENTRY INTO FORCE

In accordance with Article 18, the 2005 SUA Protocol will enter into force 90 days following the date on which 12 States have expressed their consent to be bound by the Protocol. If the United States deposits an instrument of ratification after 12 States have expressed their consent to be bound by the 2005 SUA Protocol, the Protocol will enter into force for the United States 90 days after the deposit of the U.S. instrument. To date, 6 States have joined the 2005 SUA Protocol.

In accordance with Article 9, the 2005 Fixed Platforms Protocol will enter into force 90 days following the date on which three States have expressed their consent to be bound by the Protocol, but will not enter into force before the 2005 SUA Protocol. If the

United States deposits an instrument of ratification after the 2005 SUA Protocol has entered into force and after three States have expressed their consent to be bound by the 2005 Fixed Platforms Protocol, the 2005 Fixed Platforms Protocol will enter into force for the United States 90 days after the deposit of the U.S. instrument. To date, 4 States have joined the 2005 Fixed Platforms Protocol.

V. IMPLEMENTING LEGISLATION

With the exception of the provisions in the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol that obligate the United States to criminalize certain offenses, to make those offenses punishable by appropriate penalties, and to authorize the assertion of jurisdiction over such offenses, these Protocols are self-executing. The provisions that are not self-executing require implementing legislation. In light of this, the Department of Justice submitted on May 8, 2007, a draft bill to Congress that would amend Sections 2280 and 2281 of Title 18, United States Code, in order to fully implement both Protocols. Another draft of that legislation was subsequently submitted by the Department of Justice on July 28, 2008. According to the Department of Justice, this second draft has been adjusted “to ensure consistency in legislation implementing various counterterrorism conventions.” The draft legislation submitted in July 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 instruments of ratification for either of these Protocols until the necessary legislation has been enacted to allow the United States to fully implement the Protocols.

VI. COMMITTEE ACTION

The committee held a public hearing on these two Protocols 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 Executive Report 110–23.

On July 29, 2008, the committee considered the 2005 SUA Protocol and the 2005 Fixed Platforms Protocol and ordered them favorably reported by voice vote, with a quorum present and without objection.

VII. COMMITTEE RECOMMENDATION AND COMMENTS

The Committee on Foreign Relations believes that these two Protocols will enhance U.S. national security by modernizing and strengthening the international counterproliferation and counterterrorism legal framework. As noted by the Department of Defense, these agreements will “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.” The shipboarding regime estab-

lished by the 2005 SUA Protocol will also provide a stronger international legal basis for conducting maritime interdictions and, when combined with the offenses established in both Protocols, the new regime will complement and improve existing 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. Moreover, these Protocols facilitate the enforcement of United Nations Security Council sanctions against countries such as Iran and North Korea, and complement and further the objectives of the nonproliferation obligations set forth in United Nations Security Council Resolutions 1540 (2004).¹ Resolution 1540, which is generally reaffirmed by Resolutions 1673 (2006) and 1810 (2008),² among other things, requires all States to enact laws to prohibit “any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes.” Accordingly, the committee urges the Senate to act promptly to give advice and consent to ratification of these Protocols, as set forth in this report and the accompanying resolution of advice and consent.

A. AMENDMENTS TO THE ANNEX

Article 7 of the 2005 SUA Protocol adds an Annex to the 1988 SUA Convention, which relates to a new offense established by Article 4(6) of the 2005 SUA Protocol. Article 4(6) makes it an offense for a person to unlawfully and intentionally transport another person on board a ship, with the intent to assist that person in evading criminal prosecution and knowing that the person has committed an act that constitutes an offense covered by the amended SUA Convention or an offense set forth in one of the treaties listed in the Annex added by Article 7 of the 2005 SUA Protocol. Currently, there are nine treaties listed in the Annex and the United States is a party to all nine.³

Article 22 of the 2005 SUA Protocol provides a procedure for amending the Annex to add new treaties, but only if they (1) are open to the participation of all States; (2) have entered into force; and (3) have been ratified, accepted, approved, or acceded to by at least 12 States Parties to the 2005 SUA Protocol. Article 22(3) provides that a proposal to amend the Annex in accordance with Article 22 will be deemed adopted after more than 12 of the States Parties to the 2005 SUA Protocol consent to it by written notification

¹ S/RES/1540, April 29, 2004, *available at* http://www.un.org/Docs/sc/unsc_resolutions04.html

² S/RES/1673, April 27, 2006, *available at* http://www.un.org/Docs/sc/unsc_resolutions06.htm; S/RES/1810, April 25, 2008, *available at* http://www.un.org/Docs/sc/unsc_resolutions08.htm. Resolutions 1673 and 1810 generally reiterate and reaffirm the decisions and requirements included in Resolution 1540 and they each extend the mandate of a Committee that was established under Resolution 1540.

³ (1) Convention for the Suppression of Unlawful Seizure of Aircraft, Treaty Doc. 92-1; (2) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Treaty Doc. 92-32; (3) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Treaty Doc. 93-36; (4) International Convention against the Taking of Hostages, Treaty Doc. 96-49; (5) Convention on the Physical Protection of Nuclear Material, Treaty Doc. 96-43; (6) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Treaty Doc. 100-19; (7) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Treaty Doc. 101-1; (8) International Convention for the Suppression of Terrorist Bombings, Treaty Doc. 106-6; (9) International Convention for Suppression of the Financing of Terrorism, Treaty Doc. 106-49.

to the IMO Secretary-General, but in no case will a State Party be bound by the amendment to the Annex unless it deposits an instrument of ratification, acceptance, or approval for that amendment.⁴

In the Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 110–8, it is noted that if the Senate has already provided advice and consent to the treaty that is the subject of an amendment to the Annex, the executive branch would expect to proceed to deposit an instrument of acceptance for the amendment without separately seeking the advice and consent of the Senate for that amendment.⁵ On the other hand, if the amendment provides for the addition of a treaty that has not received the advice and consent of the Senate, the executive branch would expect to seek the advice and consent of the Senate prior to consenting to the amendment.⁶

The committee recognizes the reasoning behind this suggested approach by the executive branch to amendments to the Annex, and agrees that any amendment that provides for the addition of a treaty to the Annex that has not received the advice and consent of the Senate, would require the advice and consent of the Senate. The committee, however, believes that it is also possible that an amendment to the Annex adding a treaty to which the Senate has already provided its advice and consent, could require the advice and consent of the Senate. The committee, therefore, expects the executive branch to consult with the committee in a timely manner regarding such amendments, which would in any case be likely to require implementing legislation, in order to determine whether advice and consent is necessary before the United States consents to be bound by the amendment.

B. RESOLUTION

I. 2005 SUA Protocol

The committee has included in the resolution of advice and consent for the 2005 SUA Protocol one reservation, five understandings, and one declaration.

Reservation

With this reservation the United States would opt out of the binding dispute resolution mechanism provided for in the 1988 SUA Convention with respect to disputes concerning the interpretation or application of the 2005 SUA Protocol. 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 3 of the 2005 SUA Protocol, which adds Article 2*bis* to the 1988 SUA Convention, excludes from the scope of the amended Convention the activities of armed forces during an armed conflict, which are instead governed by “international humanitarian law” (also known as the “law of war”). This carve-out is identical to the one found in Article 19(2) of the Terrorist Bombings Convention, as

⁴ See Article 22(4) of the 2005 SUA Protocol.

⁵ See the Secretary of State’s Letter of Submittal, Treaty Doc. 110–8 at XXIX.

⁶ *Ibid.*

well as Article 4 of the Nuclear Terrorism 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 3 of the 2005 SUA Protocol, which adds Article 2*bis* to the 1988 SUA Convention, uses the term “international humanitarian law.” This term is not generally used by the United States armed forces and therefore the committee has included, on the basis of the State Department’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 3 of the 2005 SUA Protocol, which adds Article 2*bis* to the 1988 SUA Convention, excludes from the scope of the amended 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 State Department’s recommendation, has included this proposed understanding in order to clarify that the conduct of certain civilians who direct or organize or act with the military are also exempted from the Convention’s scope of application.

Fourth Understanding

Article 3 and 4(5) of the 2005 SUA Protocol add two new articles to the 1988 SUA Convention: Article 2*bis* and Article 3*bis*. Article 2*bis*(3) of the amended Convention provides that nothing in the amended Convention shall affect the rights, obligations, and responsibilities of States Parties under various associated non-proliferation treaties,⁷ and Article 3*bis*(2) of the amended Convention, which constitutes a nonproliferation “savings clause” by specifying that nuclear transport activities remain permissible under the amended Convention in certain circumstances, notwithstanding the wording of the offenses in Article 3*bis*(1)(b). Article 3*bis*(1)(b) of the amended Convention makes it an offense to transport certain items as described in subparagraphs (i), (ii), (iii), and (iv) on board a ship. In particular, Article 3*bis*(1)(b)(iii) provides that it is an offense to transport on board a ship any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use, or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement. The committee,

⁷The Treaty on the Non-Proliferation of Nuclear Weapons, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

on the basis of the State Department's recommendation, has included the proposed understanding in order to clarify the applicability of Article 2*bis*(3) and Article 3*bis*(2) of the amended Convention to the offense established in the new Article 3*bis*(1)(b)(iii) of the amended Convention.

Fifth Understanding

This proposed understanding would make it clear that existing U.S. law implements the obligations contained in Article 9 of the 2005 SUA Protocol.

Declaration

The committee has included a proposed declaration, which states that the 2005 SUA Protocol 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 2005 SUA Protocol 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.

II. 2005 Fixed Platforms Protocol

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

Reservation

With this reservation the United States would opt out of the binding dispute resolution mechanism provided for in the 1988 SUA Convention and incorporated by reference into the 2005 Fixed Platforms Protocol with respect to disputes concerning the interpretation or application of the 2005 Fixed Platforms Protocol. 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 2 of the 2005 Fixed Platforms Protocol incorporates by reference Article 2*bis*(2) of the amended SUA Convention, which excludes from the scope of the Fixed Platforms Agreement, as amended by the Fixed Platforms Protocol, the activities of armed forces during an armed conflict, which are instead governed by "international humanitarian law" (also known as the "law of war"). This carve-out is identical to the one found in Article 19(2) of the Terrorist Bombings Convention, as well as Article 4 of the Nuclear Terrorism 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 ef-

fort 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 2 of the 2005 Fixed Platforms Protocol incorporates by reference Article 2*bis* of the amended SUA Convention, which uses the term “international humanitarian law.” The term “international humanitarian law” is not generally used by the United States armed forces and therefore the committee has included, on the basis of the State Department’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 2 of the 2005 Fixed Platforms Protocol incorporates by reference Article 2*bis*(2) of the amended SUA Convention, which excludes from the scope of the Fixed Platforms Agreement, as amended by the Fixed Platforms Protocol, the “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 State Department’s recommendation, has included this proposed understanding in order to clarify that the conduct of certain civilians who direct or organize or act with 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 10(2) of the amended SUA Convention, which is incorporated into the 2005 Fixed Platforms Protocol through Article 2.

Declaration

The committee has included a proposed declaration, which states that the 2005 Fixed Platforms Protocol 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 2005 Fixed Platforms Protocol 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, *Medellin 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. RESOLUTIONS OF ADVICE AND CONSENT TO RATIFICATION

2005 SUA PROTOCOL

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 Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted on October 14, 2005, and signed on behalf of the United States of America on February 17, 2006 (the “2005 SUA Protocol”) (Treaty Doc. 110–8), 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:

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 with respect to disputes concerning the interpretation or application of the 2005 SUA Protocol.

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 3 of the 2005 SUA Protocol (which adds, *inter alia*, paragraph 2 of Article 2*bis* to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation) does not include 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 3 of the 2005 SUA Protocol (which adds, *inter alia*, paragraph 1 and 2 of Article 2*bis* to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation) has the same substantive meaning as the “law of war.”

(3) The United States of America understands that, pursuant to Article 3 of the 2005 SUA Protocol (which adds, *inter alia*, paragraph 2 of Article 2*bis* to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation), the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005, 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:

A. Article 3 and Article 4(5) of the 2005 SUA Protocol (which add, *inter alia*, Article 2*bis*(3) and Article 3*bis*(2), respectively, to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (together referred to as “the NPT savings clauses”)) protect from criminal sanction under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, the transport of source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use, or production of special fissionable material:

- i. from the territory of, or otherwise under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”) to the territory of, or otherwise under the control of, another NPT State Party or a state that is not an NPT party; and
- ii. from the territory of, or otherwise under the control of, a state that is not an NPT party to the territory of, or otherwise under the control of, an NPT State Party,

where the resulting transfer or receipt of such items or materials is not contrary to the NPT obligations of the NPT State Party.

B. The following are illustrative examples of transport of source material, special fissionable material, and equipment or material especially designed or prepared for the processing, use, or production of special fissionable material that would not constitute offenses under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, by virtue of the savings clauses:

- i. Transport of source material or special fissionable material (from either an NPT State Party or a State that is not an NPT party) to an NPT nuclear-weapon State Party, as that term is defined in the NPT, regardless of whether the source material or special fissionable material will be under safeguards in the NPT nuclear-weapon State Party, because the resulting receipt of the material is not contrary to the NPT obligations of the nuclear-weapon State Party;
- ii. Transport of source material or special fissionable material to a non-nuclear-weapon State Party, as such term is used in the NPT, for non-nuclear use without safeguards, in accordance with the provisions of the recipient country’s IAEA comprehensive safeguards agreement allowing for exemption of the source material or special fissionable material from safeguards or the non-application or termination of safeguards (e.g., for specified *de minimis* amounts, or for use in a non-proscribed military activity which does not require the

application of IAEA safeguards or in a non-nuclear use such as the production of alloys or ceramics);

iii. Transport of source material or special fissionable material or especially designed or prepared equipment, as described in Article 4(5) of the 2005 SUA Protocol (which adds Article 3*bis*(1)(b)(iii) to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation), from an NPT State Party to a State that is not an NPT party, so long as the relevant material is for peaceful purposes and placed under IAEA safeguards, consistent with the NPT State Party's obligations under Article III.2 of the NPT. If the source or special fissionable material transferred for peaceful purposes is subject to an IAEA safeguards agreement but is not required by that agreement actually to be under safeguards (e.g., under an exemption for *de minimis* amounts or a provision permitting safeguards termination for non-nuclear use), the transport would not constitute an offense under Article 3*bis*(1)(b)(iii) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005.

(5) 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 9 of the 2005 SUA Protocol 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, the 2005 SUA Protocol 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 of the 2005 SUA Protocol, including Article 9, confer private rights enforceable in United States courts.

2005 FIXED PLATFORMS PROTOCOL

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 Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, adopted on October 14, 2005, and signed on behalf of the United States of America on February 17, 2006 (the "2005 Fixed Platforms Protocol") (Treaty Doc. 110–8), 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:

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 2005 Fixed Platforms Protocol, the United States of America declares that it does not consider itself bound by Article 16(1) of the Convention and incorporated by Article 2 of the 2005 Fixed Platforms Protocol, 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.

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” as used in paragraph 2 of Article 2*bis* of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, and incorporated by Article 2 of the 2005 Fixed Platforms Protocol, does not include 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,” as used in paragraphs 1 and 2 of Article 2*bis* of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, and incorporated by Article 2 of the 2005 Fixed Platforms Protocol, has the same substantive meaning as the “law of war.”

(3) The United States of America understands that, pursuant to paragraph 2 of Article 2*bis* of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, and incorporated by Article 2 of the 2005 Fixed Platforms Protocol, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005, 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 paragraph 2 of Article 10 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

tion, 2005, and incorporated by Article 2 of the 2005 Fixed Platforms Protocol, 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, the 2005 Fixed Platforms Protocol 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 of the 2005 Fixed Platforms Protocol, including those incorporating by reference Articles 7 and 10 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005, confer private rights enforceable in United States courts.

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