

HEARING ON LAW ENFORCEMENT TREATIES:

TREATY DOC. 107-18, INTER-AMERICAN CONVENTION AGAINST TERRORISM;
TREATY DOC. 108-6, PROTOCOL OF AMENDMENT TO THE INTERNATIONAL
CONVENTION ON THE SIMPLIFICATION AND HARMONIZATION
OF CUSTOMS PROCEDURES; TREATY DOC. 108-11, COUNCIL OF EUROPE
CONVENTION ON CYBERCRIME; TREATY DOC. 108-16, U.N. CONVENTION
AGAINST TRANSNATIONAL ORGANIZED CRIME AND PROTOCOLS ON
TRAFFICKING IN PERSONS AND SMUGGLING OF MIGRANTS

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS

UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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JUNE 17, 2004
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THURSDAY, JUNE 17, 2004

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

The committee met, pursuant to notice, at 9:34 a.m. in SD-419, Dirksen Senate Office Building, Hon. Richard G. Lugar (chairman of the committee), presiding.

Present: Senator Lugar.

OPENING STATEMENT OF SENATOR RICHARD G. LUGAR, CHAIRMAN

The CHAIRMAN. This hearing of the Senate Foreign Relations Committee is called to order. The committee meets today to hear testimony on a series of law enforcement treaties. These are the Council of Europe Convention on Cybercrime; the Inter-American Convention Against Terrorism; the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures; and the United Nations Convention Against Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants.

In addition, the last treaty is accompanied by two protocols addressing trafficking in persons and alien smuggling. All of these agreements are designed to enhance our ability to join with other countries in fighting crime internationally.

Within the Congress, the Senate Foreign Relations Committee is charged with the unique responsibility of reviewing treaties included by the administration. Our colleagues in the Senate depend upon us to make timely and judicious recommendations on treaties. This is a serious responsibility, and I know that all members of this committee understand the importance of our role in this process.

In advance of this hearing, the committee has worked hard with the administration to prepare this set of law enforcement treaties

for committee consideration. Committee staff has reviewed these treaties carefully. We have held two formal committee briefings covering the treaties, and the administration representatives have been available to answer questions. I appreciate the support and cooperation of the ranking member, Senator Biden, and his staff during this procedure.

The Council of Europe Cybercrime Convention is aimed at improving the capacity of parties to fight computer crime. This Convention was negotiated under the auspices of the Council of Europe. The United States participated in these negotiations in its capacity as an observer to the Council of Europe.

The Convention establishes a number of substantive crimes that parties agree to prohibit under their domestic law. It requires parties to adopt improved procedures for investigating computer crimes, and it provides for international cooperation in the investigation of those crimes.

The Inter-American Convention Against Terrorism was adopted by the Organization of American States in the aftermath of the September 11 terrorist attacks on the United States. It calls on parties to accede to a number of pre-existing international conventions addressing various forms of terrorism. It also obligates parties to track and to prevent the financing of terrorist activities, and to enhance the effectiveness of law enforcement efforts aimed at preventing terrorists. These tools will improve cooperation among countries in this hemisphere to fight terrorism.

The Customs Harmonization Protocol is the product of a long-standing, multilateral effort to harmonize national customs procedures. It incorporates the many developments in trade and customs processing that have occurred since the conclusion of the 1973 Convention on Customs Simplification and Harmonization.

The Protocol complements U.S. initiatives to promote homeland security. It promotes the use of advanced customs procedures that will enable officials in the United States and abroad to identify high-risk cargo that may be headed for the United States. Wide adherence to the Protocol would also benefit United States business by creating more predictable, efficient, and standardized customs procedures worldwide.

The United Nations Convention Against Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants and two Protocols, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, and the Protocol Against Smuggling of Migrants by Land, Sea and Air, are the first multilateral treaties to address the phenomenon of transnational organized crime. The Convention requires parties to criminalize certain conduct, such as participation in an organized criminal group, money laundering, bribery of public officials, and obstruction of justice.

The Convention also strives to improve cooperation among parties on extradition and mutual legal assistance in relation to these crimes. It would enhance the United States' ability to render and receive assistance on a global basis in the common struggle to prevent, investigate, and prosecute transnational organized crime.

The two Protocols require parties to criminalize trafficking in persons and the smuggling of migrants. They provide standardized

definitions for a number of trafficking and smuggling-related offenses which parties undertake to criminalize. They also contain provisions calling on parties to make available certain procedures and assistance to victims of such crimes.

I commend the United States officials who have worked on these agreements for negotiating documents that command wide support. Some of these agreements are the product of years of dedication and patient negotiations. Prompt ratification of these agreements will help the United States continue to play a leadership role in international law enforcement and will advance the security of Americans at home and abroad.

We are pleased to have with us today a panel of administration witnesses with deep expertise on these treaties. We'll hear from Mr. Michael Schmitz, Acting Assistant Commissioner for International Affairs at the Bureau of Customs and Border Protection; Mr. Bruce Swartz, Deputy Assistant Attorney General in the Criminal Division of the Department of Justice; and Mr. Samuel Witten, Deputy Legal Adviser at the Department of State. We look forward to their insights on these treaties.

We welcome you to the committee this morning. I'm advised by staff that the testimony order has been changed. The order now is Mr. Witten, Mr. Swartz, and Mr. Michael Schmitz. If this will not interrupt your line of thought unduly, first of all we'll hear from Mr. Witten.

**STATEMENT OF SAMUEL M. WITTEN, DEPUTY LEGAL ADVISER,
U.S. DEPARTMENT OF STATE**

Mr. WITTEN. Thank you very much, Mr. Chairman. Mr. Chairman, I'm pleased to appear before you today to testify in support of six multilateral instruments, five relating to international law enforcement cooperation, and one concerning customs procedures.

The five specifically law enforcement treaties address the major criminal concerns of terrorism, cybercrime, transnational organized crime, and trafficking and smuggling of persons. The customs protocol seeks to meet the needs of international trade and customs services and protect international security through the simplification and harmonization of customs procedures.

The Department of State greatly appreciates this opportunity to address these international instruments. Mr. Swartz will provide more information on the direct benefits to U.S. law enforcement of the law enforcement conventions. Mr. Schmitz will discuss the importance of the new customs protocol. I will provide the committee with a general overview of these instruments and their value to the United States. It is worth emphasizing that we have worked and succeeded to ensure that the United States can comply with all of these instruments without the need for any implementing legislation.

The multilateral law enforcement conventions before you today reflect that the U.S. has been working together with other countries, indeed leading efforts at the United Nations as well as regional organizations like the Council of Europe and the Organization of American States, to improve our collective abilities to prevent and punish terrorist crimes, computer crimes, and organized crimes, such as those involving the exploitation of persons.

These conventions break new ground legally and provide essential and practical tools for international cooperation. I will say just a few words about each one and my prepared testimony will provide additional details.

The CHAIRMAN. Let me just add that the full testimony that you have prepared will be made a part of this record. If you summarize, be assured that the full text will be a part of the record.

Mr. WITTEN. Thank you, Mr. Chairman. The Inter-American Convention Against Terrorism was negotiated as a direct response to the attacks on the United States of September 11, 2001. Within 10 days of the attacks, the foreign ministers of the OAS member states endorsed the negotiation of a regional Convention against terrorism, and the resulting Convention was adopted by the OAS General Assembly and opened for signature on June 3, 2002.

Thirty-three OAS members states have signed the Conventions, which entered into force on July 10, 2003, and as of last week, eight states are party to the Convention, including Canada, Mexico, Peru, and Venezuela. The Convention builds upon other multilateral and bilateral instruments already in force. It incorporates by reference the offenses set forth in 10 counter-terror instruments listed in article 2 of the Convention, to which the United States is already a party.

The cooperative measures set forth in the rest of the Convention will thus be available for a wide range of terrorism-related offenses, including hijackings, bombings, attacks on diplomats, and financing of terrorism.

The Council of Europe Convention on Cybercrime is, as you mentioned, Mr. Chairman, the product of years of study and work by the experts from a wide range of countries. Although it was negotiated in a European forum, the United States played a leading role in its development. The United States has since worked to ensure that the Convention, the only one of its kind, is used worldwide as a model by countries seeking to address the newly emerging area of computer crime.

The Convention was opened for signature and was signed by the United States on November 23, 2001. As of last week, 38 countries have signed the Convention and six have also ratified it. It will enter into force on July 1, 2004. The Convention has three main parts. I'll simply highlight them, and Mr. Swartz will provide more detail. It provides that any member state must criminalize certain conduct relating to computer systems. As one example, article 2 requires parties to criminalize illegal access into computer systems, including activities known as hacking.

Second, it requires parties to ensure that certain investigative procedures are available to enable their domestic law enforcement authorities to investigate cybercrime offenses effectively and obtain electronic evidence, such as computer data, of crime.

And finally, Mr. Chairman, in a manner analogous to other law enforcement treaties to which the United States is a party, the Convention requires parties to provide each other broad international cooperation in investigating computer-related crime and obtaining electronic evidence in addition to assisting in the extradition of fugitives sought for crimes under the Convention.

Next, the U.N. Convention Against Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants is the first and only global instrument designed specifically to combat the dangerous contemporary phenomenon of criminal groups operating internationally. During the second half of the 1990s, the U.S. and its G-8 allies, concerned about the rapid spread of organized crime across borders no longer frozen by cold war geopolitics, recognized the need for coordinated international action. As of last week, 147 countries, including the United States, have signed the Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants Convention and 78 are already parties to it.

The Convention has been in force since September 29, 2003. The Convention focuses on the offenses that are characteristic of transnational organized crime and on key methods of international cooperation for combating it. Two of its protocols on trafficking in persons and alien smuggling are also before the committee today.

The Convention not only requires parties to ensure that their national criminal laws meet the criteria set forth in the Convention with respect to offenses characteristic of transnational organized crime, but also provides a blueprint of international cooperation. Many countries, particularly in the developing world, lack existing bilateral extradition or mutual legal assistance treaty relationships with one another, but once they become a party to this Convention, they will be able to rely on the Convention to fill that legal gap for many serious crimes.

Finally, with respect to the Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants Convention, as I mentioned, there are two Protocols before the committee. The formal name of the first is the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. This was originally proposed and drafted in its earliest forms by the United States and has the potential to be a powerful international law enforcement instrument requiring countries to criminalize trafficking and providing a broad framework for international cooperation to prosecute traffickers, prevent trafficking, and protect trafficking victims.

As of last week, 117 countries, including the United States, have signed the trafficking protocol, and 61 countries are already parties to it. The trafficking protocol has been in force since December 25, 2003.

And the Protocol Against the Smuggling of Migrants by Land, Sea and Air is designed to prevent and combat the smuggling of migrants and to promote cooperation among state parties to that end, while protecting the rights of smuggled migrants. As of last week, 112 countries, including the United States, have signed the Migrant Smuggling Protocol, and 55 countries are parties to it. The Migrant Smuggling Protocol has been in force since January 28, 2004.

Finally, the State Department urges Senate approval of the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures. Mr. Schmitz will provide additional detail about this instrument. I would note that the Customs Protocol represents the kind of modernization

and customs harmonization that is becoming increasingly necessary to U.S. exporters and other traders alike. It responds to the modernization in business and administrative methods and to the control of international trade, without compromising standards of customs control.

Accession to the Protocol will facilitate greater economic growth, increased foreign investment, and stimulate U.S. exports. The Protocol amends the original Convention done at Kyoto on May 18, 1973, and replaces the annex to the 1973 Convention with a general annex and 10 specific annexes, all of which is considered the, "Revised Customs Convention."

By acceding to the Protocol, we would also encourage other countries to sign on and implement procedures that will make trade and goods across our borders more predictable, and therefore, potentially more secure. The Protocol will enter into force 3 months after 40 contracting parties have consented to be bound by it. As of last month, 32 countries have consented to be bound, including some of our largest trading partners, for example, Australia, Canada, China, Japan, and most members of the European Union.

With that, Mr. Chairman, I'll conclude my remarks. We appreciate the committee's decision to consider these important treaties, and I'll be happy to answer any questions the committee may have.

[The prepared statement of Mr. Witten follows:]

PREPARED STATEMENT OF SAMUEL M. WITTEN

Mr. Chairman and members of the Committee:

I am pleased to appear before you today to testify in support of six multilateral instruments, five relating to international law enforcement cooperation and one concerning customs procedures. The law enforcement treaties address the major criminal concerns of terrorism, cybercrime, transnational organized crime, and trafficking and smuggling of persons. The customs protocol seeks to meet the needs of international trade and customs services through the simplification and harmonization of customs procedures. The Department of State greatly appreciates this opportunity to address these international instruments.

In recent years, the world community as a whole has had to confront a rising tide of trans-border crime of many types. The multilateral law enforcement conventions before you today reflect that the United States has been working together with other countries—indeed, leading efforts—at the United Nations as well as at regional organizations like the Council of Europe and the Organization of American States, to improve our collective abilities to prevent and punish terrorist crimes, computer crimes, and organized crimes such as those involving the exploitation of persons. They break new ground legally, and provide essential and practical tools for international cooperation.

These law enforcement instruments are innovative in containing definitions of certain serious crimes—computer crime and trafficking in persons, for example—on which there never previously had been an international consensus. Now we not only agree collectively on what constitutes such crimes, but also commit ourselves to punish them comparably and to extradite fugitives and otherwise assist in the investigation and prosecution of persons who commit them.

These instruments also contain breakthroughs in methods for providing and obtaining assistance to and from other countries. The investigation of computer crimes, for instance, requires real-time coordination in tracing electronic communications across borders, and the Cybercrime Convention commits parties to do just that. The Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants Convention similarly details procedures for mutual legal assistance that will be able to function effectively without the need to resort solely to cumbersome domestic law processes. And to ensure that fugitive terrorists in our hemisphere are brought to justice, the OAS Terrorism Convention eliminates the possibility that they could hide behind assertions that their crimes are "political offenses."

The customs protocol, meanwhile, represents the kind of modernization and customs harmonization that is becoming increasingly necessary to U.S. exporters and other traders alike. It responds to the modernization in business and administrative methods and to the growth of international trade, without compromising standards of customs control. Accession to the protocol would facilitate greater economic growth, increase foreign investment, and stimulate U.S. exports.

I will address each of the instruments individually.

THE INTER-AMERICAN CONVENTION AGAINST TERRORISM

The Inter-American Convention Against Terrorism was negotiated as a direct response to the attacks on the United States of September 11, 2001. Within 10 days of the attacks, the foreign ministers of the OAS member states endorsed the negotiation of a regional convention against terrorism, and the resulting convention was adopted by the OAS General Assembly and opened for signature nine months later on June 3, 2002.

Thirty-three OAS member states have signed the Convention, which entered into force on July 10, 2003. As of last week, eight states are party to the Convention, including Canada, Mexico, Peru and Venezuela.

The Convention builds upon other multilateral and bilateral instruments already in force. Following the model of the 1999 International Convention for the Suppression of Financing of Terrorism, the Convention incorporates by reference the offenses set forth in ten counter-terrorism instruments listed in Article 2 of the Convention to which the United States is already a party. The cooperative measures set forth in the rest of the convention will thus be available for a wide-range of terrorism-related offenses, including hijackings, bombings, attacks on diplomats, and the financing of terrorism. My colleague from the Department of Justice will provide an overview of these measures in his testimony.

Parties are required under the Convention to “endeavor to become a party” to these ten counter-terrorism instruments. In addition to facilitating the implementation of the Convention, this obligation also furthers the United States’ interest in securing the broadest possible adherence to these instruments and advances implementation of United Nations Security Council Resolution 1373, which calls upon states to become parties to these instruments “as soon as possible.”

The Convention provides that a state may declare that the obligations contained in the Convention shall not apply to the offenses set forth in any of the listed counter-terrorism instruments if it is not yet a party to that instrument or if it ceases to be a party. This procedure provides flexibility for states that are considering becoming parties to this Convention, without undermining our interests in having all states ultimately become parties to the other counter-terrorism instruments. The United States will not need to make such a declaration since it is already a party to the ten instruments.

Existing Federal authority is sufficient to discharge our obligations under this Convention, so no implementing legislation is required. The State Department’s report on the Convention recommended two Understandings, one relating to Article 10 and the other relating to Article 15. Upon further review, we have determined that the Understanding relating to Article 10 is unnecessary and we are therefore no longer recommending its inclusion in the Senate’s resolution of advice and consent.

PROTOCOL OF AMENDMENT TO THE INTERNATIONAL CONVENTION ON THE SIMPLIFICATION AND HARMONIZATION OF CUSTOMS PROCEDURES

I am also pleased to speak in support of the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures. The Protocol amends the original Convention done at Kyoto on May 18, 1973, which entered into force for the United States on January 28, 1984, and replaces the Annexes to the 1973 Convention with a General Annex and 10 Specific Annexes, all of which I will refer to as the “Revised Customs Convention.”

Over the past two decades, changes in technology and patterns of international trade have made the original Convention outdated. The United States took an active role in negotiating these amendments in order to produce the kind of modernization and customs harmonization that is becoming increasingly necessary to U.S. exporters and other traders alike. The revision process also included participation by the private sector through various groups such as the International Chamber of Commerce, the International Federation of Customs Brokers Association and the International Express Couriers Conference. On June 26, 1999, after 4 years of study and deliberation, the members of the World Customs Organization adopted the Protocol in Brussels, Belgium.

The Revised Customs Convention aims to meet the needs of international trade and customs services through the simplification and harmonization of customs procedures. It responds to the modernization in business and administrative methods and to the growth of international trade, without compromising standards of customs control.

Accession to the Protocol by the United States would contribute to important U.S. interests. First, accession would benefit the United States and U.S. businesses by facilitating greater economic growth, increasing foreign investment, and stimulating U.S. exports through more predictable, standard and harmonized customs procedures governing cross-border trade transactions. These achievements can best be pursued by the United States as a Party to the Revised Customs Convention.

Second, acceding to the Protocol will enable the United States to continue its leadership role in the areas of customs and international trade facilitation. Accession signals to our trading partners that the U.S. is committed to an international Convention that establishes a blueprint for modern customs procedures throughout the world.

By acceding to the Protocol, we also encourage other countries to sign on and implement procedures that will make trade in goods across our borders more predictable and, therefore, potentially more secure. Our understanding from U.S. Customs and Border Protection is that the Revised Customs Convention will not limit the U.S. Government's ability to institute necessary measures to provide for our own national security.

U.S. industry has been consulted throughout the negotiation process and has expressed its very strong interest and support for obtaining the Senate's consent to accession. Strong supporters include the U.S. Council for International Business (USCIB) and the American Electronics Association (AeA), which includes companies such as Hewlett Packard and Microsoft.

By acceding to the Protocol, the United States would consent to be bound by the amended 1973 Convention and the new General Annex. At the same time, or anytime thereafter, Parties have the option of accepting any of the Specific Annexes (or Chapters thereof), and may enter reservations with respect to any Recommended Practices contained in the Specific Annexes. After careful study, we have proposed that the United States accept most of the Specific Annexes, and enter the reservations to certain Recommended Practices proposed by U.S. Customs and Border Protection as set forth in the Report by the Secretary of State, attached to the President's transmittal of the Protocol. We have made these recommendations with current U.S. legislation or regulations in mind. With them, no new implementing legislation would be necessary for the United States to implement the Revised Customs Convention.

The Protocol and proposed U.S. reservations have been circulated and cleared through the U.S. Inter-Agency Working Group on the Customs Cooperation Council, which includes, among others, the Departments of State, Treasury, Commerce, and Homeland Security and the Office of the U.S. Trade Representative. U.S. Government agencies are not aware of any opposition to the Revised Customs Convention.

The Protocol will enter into force three months after 40 contracting parties have consented to be bound by it. As of last month, 32 countries have consented to be bound, including some of our largest trading partners (Australia, Canada, China, Japan, and most members of the European Union).

COUNCIL OF EUROPE CONVENTION ON CYBERCRIME

The Committee also has before it the Council of Europe Convention on Cybercrime, the product of years of study and work by experts from a wide range of countries. Although it was negotiated in a European forum, the United States played a leading role in its development.

In 1997, the Council of Europe established a Committee of Experts on Crime in Cyber-space, with participants from the United States, Canada, Japan, and South Africa, as well as Council of Europe member states, to undertake negotiation of the Cybercrime Convention. Beginning in April 2000, at the urging of the United States, supported by other countries, the Council of Europe published drafts of the Convention to allow for review and comment by interested members of the public. In addition, U.S. Government officials made information about the Convention available to interested members of the public. The Convention was opened for signature—and was signed by the United States—on November 23, 2001. As of last week, 38 countries have signed the Convention, and six have also ratified it. The Convention will enter into force on July 1, 2004.

The Convention has three main parts, each of which provides important law enforcement benefits for the United States. First, it requires Parties to criminalize cer-

tain conduct related to computer systems. For example, Article 2 requires parties to criminalize “illegal access” into computer systems, including activities known as “hacking.” By requiring Parties to establish these kinds of substantive offenses, the Convention will help deny safe havens to criminals, including terrorists, who can cause damage to U.S. interests from abroad using computer systems.

Second, it requires Parties to ensure that certain investigative procedures are available to enable their domestic law enforcement authorities to investigate cybercrime offenses effectively and obtain electronic evidence (such as computer data) of crime. In this way, the Convention will enhance the ability of foreign law enforcement authorities to investigate crimes effectively and expeditiously, including those committed by criminals against U.S. individuals, U.S. government agencies, and other U.S. institutions and interests.

Third, in a manner analogous to other law enforcement treaties to which the United States is a party, the Convention requires Parties to provide each other broad international cooperation in investigating computer-related crime and obtaining electronic evidence, in addition to assisting the extradition of fugitives sought for crimes identified under the Convention. It provides mechanisms for U.S. law enforcement authorities to work cooperatively with their foreign counterparts to trace the source of a computer attack and, most importantly, to do so immediately when necessary, 24 hours a day, 7 days a week. The Convention would therefore enhance the United States’ ability to receive, as well as render, international cooperation in preventing, investigating, and prosecuting computer-related crime. Because such international cooperation is vitally important to our efforts to defend against cyber attacks and generally improve global cybersecurity, support for the Cybercrime Convention has been identified as a key initiative in the 2003 National Strategy to Secure Cyberspace.

The Convention would not require implementing legislation for the United States. As discussed at length in the Secretary of State’s report accompanying the transmittal of the Convention, the Administration has recommended six reservations and four declarations, all envisaged by the Convention itself, in connection with this Convention. To make clear that the United States intends to comply with the Convention based on existing U.S. federal law, we have also recommended that the Senate adopt an understanding to that effect.

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The United Nations Convention against Transnational Organized Crime (“TOC Convention”) is the first and only global instrument designed specifically to combat the dangerous contemporary phenomenon of criminal groups operating internationally. During the second half of the 1990’s, the United States and its G-8 allies, concerned about the rapid spread of organized crime across borders no longer frozen by Cold War geopolitics, recognized the need for coordinated international action. The United Nations also embraced the idea, and negotiations on the Convention took place under UN auspices in 1999 and 2000. Developing and developed countries from all regions participated actively, reflecting their awareness of the serious threat transnational organized crime poses to the effectiveness of their governments.

As of last week, 147 countries, including the United States, have signed the TOC Convention, and 78 countries are Parties to it. The Convention has been in force since September 29, 2003. On June 28, the Parties to the TOC Convention will meet collectively for the first time to elaborate procedures for promoting and reviewing its implementation. The United States will participate in this conference as a signatory but not yet a Party; the farther along we are on the road to ratification, the more effective we can be at the Conference of the Parties in ensuring that the Convention is implemented in ways consistent with our own anti-crime philosophy and priorities.

The Convention focuses on the offenses that are characteristic of transnational organized crime and on the key methods of international cooperation for combating it. It is buttressed by three protocols concentrating on particularly problematic manifestations of transnational organized crime, all of which were negotiated simultaneously with the main Convention. Two of these protocols, on trafficking in persons and on alien smuggling, are before you today. Adherence to each of the protocols is optional. States can only join the Protocols if they also join the main Convention, because the protocols rely directly upon the cooperation and other mechanisms set out in the Convention.

One of the Convention’s key achievements is to require Parties to ensure that their national criminal laws meet the criteria set forth in the Convention with respect to four offenses characteristic of transnational organized crime—participation in an organized criminal group, laundering of the proceeds of serious crime, corrup-

tion of domestic public officials, and obstructing justice by intimidating witnesses and justice and law enforcement officials. Since the relevant U.S. criminal laws already provide for broad and effective application in these areas, we can comply with the Convention's criminalization obligations without need for new legislation. The value of these Convention provisions for the United States is that they oblige other countries that have been slower to react legislatively to the threat of transnational organized crime to adopt new criminal laws in harmony with ours.

As further described by my Department of Justice colleague, a second important feature of the Convention is that it provides a blueprint for international cooperation. Few global criminal law conventions are so detailed and precise in setting out mechanisms for extraditing fugitives and assisting foreign criminal investigations and prosecutions. Many countries, particularly in the developing world, lack existing bilateral extradition or mutual legal assistance treaty relationships with one another, but now will be able to rely on this Convention to fill that legal gap for many serious crimes.

For the United States, the Convention will not create entirely new extradition relationships, as we will continue to rely on our extensive web of bilateral treaties for that purpose, but it will broaden some of our older existing treaties by expanding their scope to include the offenses described above. By contrast, we will be able to use the Convention as a basis for new relationships with countries with which we lack bilateral mutual legal assistance treaties (MLATs), primarily those in parts of Asia, Africa, and the Middle East. The Convention fully incorporates all the safeguard provisions the U.S. insists upon in our bilateral MLATs, and thereby ensures that we may deny requests that are contrary to our essential interests or are improperly motivated.

Finally, the Convention is noteworthy for its capacity to adapt to the many faces of transnational organized crime. It enables and facilitates international cooperation not only for the specific offenses it identifies, but also for serious crime generally that is transnational in nature and involves an organized group. Such groups operate for financial benefit, of course, but not always exclusively. Terrorist groups are known to finance their activities through the commission of offenses such as kidnapping, extortion, and trafficking in persons or commodities. The TOC Convention thus can open doors for the United States in securing the help of other countries in investigating and prosecuting terrorist crimes.

The Administration has proposed several reservations and understandings to the Convention and its two Protocols. With these reservations and understandings the Convention and the Protocols will not require implementing legislation for the United States.

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The Committee is considering two protocols to the Transnational Organized Crime Convention as well. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, originally proposed and drafted by the United States, has the potential to be a powerful international law enforcement instrument, requiring countries to criminalize trafficking and providing a broad framework for international cooperation to prosecute traffickers, prevent trafficking, and protect trafficking victims. As of last week, 117 countries including the United States, have signed the Trafficking Protocol, and 61 countries are Parties to it. The Trafficking Protocol has been in force since December 25, 2003.

As my Justice Department colleague will describe in more detail, the Trafficking Protocol, the first binding international instrument to define the term "trafficking in persons," creates obligations to make certain acts criminal. It also contains provisions designed to protect the victims of trafficking and addressing prevention, cooperation, and other measures.

I want to highlight some of the groundbreaking victim protection provisions in this Protocol, which recognizes that protection of victims is as important as prosecuting traffickers. In addition to requiring that victims are offered the possibility of obtaining compensation, and that Parties facilitate and accept the return of their nationals and permanent residents who are trafficking victims, the Protocol calls on Parties to make available to trafficking victims certain protections and assistance, including protection of their privacy and physical safety, as well as provisions for their physical, psychological, and social recovery. Similarly, States Parties are to consider providing temporary or permanent residency to victims of trafficking in appropriate cases. In recognition of the fact that legal systems and available resources

will affect how States Parties implement these particular measures, the Protocol includes language providing appropriate discretion and flexibility.

The Protocol obligates States Parties to take measures to prevent and combat trafficking in persons and to protect victims from revictimization, and to do so in appropriate cooperation with non-governmental organizations. Among other things, States Parties are called upon to take measures, including research and mass media campaigns, to prevent and combat trafficking.

The Protocol also requires States Parties to exchange information, in accordance with their domestic law, in order to enable them to better detect traffickers and their routes. This provision does not affect mutual legal assistance relations, many aspects of which are instead governed by treaties for that purpose, and by provisions such as Article 18 of the Convention itself.

Finally, without prejudice to international commitments to the free movement of people, the Protocol provides for the strengthening of border controls, as necessary, to prevent and detect trafficking in persons. States Parties are obliged to take measures, within available means, to ensure that their travel and identity documents are of such a quality that they cannot easily be misused and cannot readily be falsified, altered, replicated or issued.

With the reservations and understandings that have been proposed by the Administration, the Protocol will not require implementing legislation for the United States. In this connection, the Trafficking Victims Protection Act of 2000 ("TVPA") sets out a comprehensive framework for protecting victims of trafficking and combating trafficking in persons domestically and abroad. A Cabinet-level interagency task force, chaired by the Secretary of State, ensures the appropriate coordination and implementation of the Administration's anti-trafficking efforts.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR,
SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The second protocol supplementing the Transnational Organized Crime Convention is the Protocol against the Smuggling of Migrants by Land, Sea and Air. The purposes of this protocol are to prevent and combat the smuggling of migrants, and to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants. As of last week, 112 countries, including the United States, have signed the Migrant Smuggling Protocol, and 55 countries are Parties to it. The Migrant Smuggling Protocol has been in force since January 28, 2004. Subject to the recommended reservations and understandings, the Protocol would not require implementing legislation for the United States.

In the Migrant Smuggling Protocol, the Parties designed an instrument that balances law enforcement provisions with appropriate protection of the rights of smuggled migrants. Here to, my Justice Department colleague will address the Protocol's law enforcement benefits, such as the obligations to make certain acts criminal, while I will concentrate on the migrant-protection provisions.

First, the Protocol obligates States Parties to accept the return of smuggled migrants who are its nationals or permanent residents at the time of return. It is the first binding international instrument to codify this longstanding general principle of customary international law. Consistent with their obligations under international law, states parties must also take appropriate measures to preserve and protect certain rights of smuggled migrants. Parties are not precluded from prosecuting a smuggled person for illegal entry or other criminal violations.

The Protocol recognizes the pervasiveness of migrant smuggling via the seas, and sets forth procedures for interdicting vessels engaged in such smuggling. States Parties taking measures against a vessel engaged in migrant smuggling must ensure the safety and humanitarian handling of the persons on board and, within available means, that any actions taken with regard to the vessel are environmentally sound. States Parties must take care not to endanger the security of the vessel or its cargo, or prejudice the commercial or legal interests of the flag State or any other interested State. The Protocol also contains provisions requiring international cooperation to prevent and suppress migrant smuggling by sea in accordance with the international law of the sea.

The Protocol contains several useful cooperation and prevention provisions. States Parties, consistent with their domestic legal and administrative systems, are to exchange among themselves certain types of information for the purpose of achieving the Protocol's objectives, such as embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected or being used by an organized criminal group engaged in alien smuggling. States Parties are also required to have programs to ensure that the public is aware of the criminal

nature of migrant smuggling and the risks it poses to migrants, as well as to promote development programs to combat the root socio-economic causes of the smuggling of migrants.

Finally, the Migrant Smuggling Protocol encourages States Parties to conclude bilateral or regional agreements or arrangements to implement the Protocol. This was an important Article to the United States, as we have bilateral migration agreements with a number of countries.

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

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

The CHAIRMAN. Thank you very much, Mr. Witten, for your comprehensive testimony. We look forward now to hearing from you, Mr. Swartz.

STATEMENT OF BRUCE SWARTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. SWARTZ. Thank you, Mr. Chairman, and thank you for this opportunity to express the strong support of the Department of Justice for the Inter-American Convention Against Terrorism, the Council of Europe's Cybercrime Convention, and the U.N. Convention Against Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants, including its Protocols Against Trafficking in Persons and Migrant Smuggling.

These Conventions address three of the most dangerous forms of transnational crime: terrorism, cybercrime, and organized criminal activity. Each of the Conventions addresses these problems in a similar and comprehensive fashion with a single goal. That is to ensure that there are no safe havens, whether for terrorists, cyber criminals, or members of organized crime groups.

The Conventions seek to accomplish these goals through two means. First, by ensuring that each state party has in place enforcement mechanisms, key enforcement mechanisms that will be directed against this type of criminal activity. Second, the Conventions also require that each state party have in place international operation cooperation mechanisms that will allow mutual legal assistance in the investigation and prosecution of these matters.

The United States already has laws that will allow us to meet each of the requirements that we would undertake under these Conventions. In turn, these Conventions will advance our law enforcement interests by ensuring that our law enforcement partners have the domestic enforcement mechanisms in place, as well as the international enforcement—excuse me, cooperation mechanisms in place that will allow us to effectively investigate and prosecute international crime of these types.

Turning first to the Inter-American Convention Against Terrorism, this treaty will allow us to effectively move against not only terrorist organizations with global scope, such as al-Qaeda, but also against terrorist groups in this hemisphere, such as the FARC and the AUC, which are matters of great concern to the United States.

In order to ensure that terrorists do not find safe havens in this hemisphere, the Convention builds upon the already existing 10 key U.N. anti-terrorism Conventions, as well as U.N. Security Council Resolution 1373. It provides important mechanisms that facilitate extradition and mutual legal assistance for terrorism of-

fenses and to prevent abuse of the asylum process by terrorists. For example, article 11 of the Convention prohibits refusal of extradition or mutual legal assistance on the grounds that an offense covered by the U.N. terrorism Conventions would constitute a political offense. That's an important step forward for many of our older treaties.

The Convention likewise provides important tools that can be used by law enforcement to ensure that terrorist funds will find no safe haven in this hemisphere. The Convention requires that the offenses set forth in the 10 U.N. terrorism Conventions be treated as predicate offenses for money laundering prosecutions and for freezing and confiscation of crime-related assets.

The Council of Europe's Cybercrime Convention likewise is designed to deny safe havens to cyber criminals. This is the first multilateral treaty to address specifically not only the growing problem of computer crime, but also the important issue of the preservation of electronic evidence for prosecutions and investigations internationally.

The Convention first requires parties to criminalize acts that are directed against computers or computer systems, such as unauthorized intrusions into computer systems or attacks using computer viruses or worms. Those kinds of attacks pose great dangers not only in terms of economic loss, but to the security of the United States.

Under the Convention, parties must prohibit further the carrying out of a number of traditional crimes, crimes in the physical world that are increasingly being committed now by computers, such as forgery, child pornography, fraud, and copyright piracy. For criminal liability to attach to each of these offenses, the conduct in question must be conducted either intentionally or willfully and without right. These are important safeguards to protect legitimate computer users and Internet service providers.

It's also important to note that these types of criminal offenses already exist under United States law. In contrast, countries that do not have adequate criminal laws governing these types of conduct have become havens for cyber criminals. Thanks to the Convention, that will no longer be the case.

The procedural sections of the Convention are equally important, given the difficulty of locating and securing electronic evidence before it is deleted or otherwise disappears. This is true not only in cases of computer crime per se, but also in a number of other cases, terrorism cases, organized crime cases, cases really that cover the entire range of criminal offenses.

The Convention requires each party to have the power on an expedited basis to, among other things, preserve and disclose stored computer data, including traffic data. Now, these powers and procedures are already provided for under United States law and have proved invaluable to many investigations. And as is the case with the substantive offenses, the Convention contains safeguards on the use of these procedural tools.

Finally, the Convention contains important provisions on international cooperation. It provides a basis for U.S. law enforcement to obtain on an expedited basis preservation of electronic evidence stored in another country relevant to a U.S. criminal or terrorist

investigation and to trace in real time electronic communications by criminals to their source in another state.

The U.N. Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants Convention likewise is intended to end safe havens for international organized crime groups. The Convention first requires parties, as you noted, Mr. Chairman, to establish a number of criminal offenses and related measures that already exist under United States law, but that do not yet exist in some countries. These are gaps that organized criminal groups exploit.

In particular, the Convention requires countries to criminalize conspiracy to commit a broad range of serious crimes. It also requires the criminalization of money laundering, bribery, and obstruction of justice.

And the second area from which important benefits will flow from the Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants Convention is in the area of international cooperation. The Convention's provisions on international extradition, mutual legal assistance, and police cooperation provide a legal basis for other parties to provide broad cooperation, both to the United States and among one another.

Article 16, for instance, will significantly expand the reach of older United States extradition treaties that contain a list approach to offenses by requiring parties who treat any serious crime committed by an organized crime group as a basis for extradition. Article 18 contains a mini-MLAT that provides a basis for mutual legal assistance where other treaty relationships are not available.

The Trafficking Protocol to the Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants Convention also advances important law enforcement interests of the United States, which are reflected, for instance, in the Trafficking Victims Protection Act of 2000. Among the most important elements of the Trafficking Protocol is that it provides for the first time a definition of trafficking which will allow for international cooperation on that basis.

The Migrant Smuggling Protocol likewise benefits the United States by requiring other countries to criminalize the smuggling of migrants and the production of fraudulent documents for the smuggling. With migrant smuggling an ever-present problem for the United States, these are important developments that will advance our interests significantly.

Mr. Chairman, in conclusion, I would like to thank you for your leadership and the committee's leadership on these issues, and I'd like to express my thanks as well to my colleagues in the State Department and in the numerous sections in the Department of Justice that have worked on these Conventions. As you've pointed out, these Conventions have taken months and years in some cases of very hard work. We believe that they significantly advance the safety and security of the United States and we look forward to answering questions about them further. Thank you.

[The prepared statement of Mr. Swartz follows:]

PREPARED STATEMENT OF BRUCE SWARTZ

A. INTRODUCTION

Mr. Chairman and members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice on the Inter-American Convention against Terrorism, the Council of Europe Cybercrime Convention, the UN Convention against Transnational Organized Crime, and the Protocols to the Transnational Organized Crime Convention on Trafficking in Persons and Smuggling of Migrants. Each of these treaties will directly advance the law enforcement interests of the United States. Moreover, with the respective reservations, declarations or understandings recommended by the Administration, each convention can be implemented on the basis of existing U.S. law.

These conventions were negotiated by the Departments of Justice and State, as well as the Commerce Department in the case of the Council of Europe Convention on Cybercrime, and the Department of the Treasury in case of the Convention against Transnational Organized Crime. We join the Departments of State, Treasury and Commerce today in urging the Committee to report favorably to the Senate and recommend its advice and consent to the ratification of these treaties.

The Secretary of State has submitted letters that describe in detail each of these multilateral instruments. In my testimony today, I will concentrate on why they provide important benefits for United States law enforcement.

I am not testifying today with regard to the Protocol of Amendment to the International Convention on Simplification and Harmonization of Customs Procedures, and I defer to my colleagues in the Departments of State and Homeland Security as to that instrument. In this connection, I would note that, as a general matter, enhancement of customs procedures is of benefit to the broad law enforcement community.

B. OAS TERRORISM CONVENTION

With respect to the Inter-American Convention against Terrorism, as indicated in Mr. Witten's testimony, the elaboration of that treaty was a part of the hemispheric actions taken subsequent to the events of September 11.

In light of existing terrorism conventions on a wide array of subjects, the OAS Convention does not seek to elaborate a comprehensive and new definition of terrorism or punish such conduct as a criminal offense. The Convention is structured to provide for a range of modern law enforcement mechanisms that facilitate cooperation in combating the forms of terrorism already prohibited by 10 key UN counter-terrorism conventions. Some of these mechanisms are already found in the two most recent UN counter-terrorism conventions the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism—but not in older UN counter-terrorism conventions. Others are enhanced versions of law enforcement tools called for by UN Security Council Resolution 1373.

The tools in this treaty increase the ability of U.S. law enforcement to obtain cooperation from other States in the hemisphere in combating terrorist groups. They are therefore important to our efforts against globally active groups such as Al Qaida, and those in the hemisphere, such as the Revolutionary Armed Forces of Colombia (FARC) and the Autodefensas Unidas de Colombia (AUC), whose members have been charged with a range of offenses against the United States. I will review its most significant benefits.

First, the Convention provides mechanisms that facilitate extradition and mutual legal assistance for terrorism offenses. For example, Article 11 prohibits refusal of extradition or mutual legal assistance for the conduct set forth in the UN Conventions on the grounds that the offense is considered political in nature. Modern U.S. extradition treaties, and some mutual legal assistance treaties, limit the invocation of the so-called political offense exception as a ground for refusal of cooperation in terrorism cases, as do the two most recent UN counter-terrorism conventions. However, older extradition treaties, and many mutual legal assistance treaties, do not contain this limitation.

Similarly, Article 10 provides a legal framework for Parties to temporarily transfer persons who are in custody to another Party so that they may give testimony or otherwise assist with respect to terrorism offenses, irrespective of whether or not there is a mutual legal assistance treaty in place between the States concerned containing such a provision. The ability to arrange such temporary transfers may facilitate the taking of testimony in a U.S. terrorism prosecution, as well as the gathering of other evidence of terrorism, and is typically contained in mutual legal assistance treaties to which the United States is party. Here, too, only the two most

recent UN counter-terrorism conventions provide for this mechanism; the OAS Convention will allow Parties to apply it among themselves with respect to the range of conduct addressed in the earlier UN counter-terrorism conventions as well.

Second, the Convention provides important tools that can be used by law enforcement to halt the flow of funds to terrorist groups. Article 7 requires that Parties establish effective regulatory oversight of financial institutions for purposes of detecting efforts to finance terrorism, and provide for Financial Intelligence Units to facilitate the international exchange of information that has been gathered. Building on the similar but less specific provisions of the 1999 UN Terrorism Financing Convention, UN Security Council Resolution 1373, and the UN Convention on Transnational Organized Crime, the Convention provides stronger regulatory measures to address financing of terrorism than any convention to date.

The provisions of Article 5 (on asset confiscation) and Article 6 (on designation of money laundering predicate offenses) also helpfully go further than prior conventions by requiring that the offenses set forth in the 10 UN counter-terrorism conventions be designated as predicate offenses for purposes of prosecuting the laundering of proceeds of crime, and freezing and confiscating crime-related assets. Given that in many cases the terrorist acts will not have been committed in the jurisdiction in which assets are hidden or money laundering transactions take place, it is particularly important that these acts be considered predicate offenses wherever committed.

Finally, Articles 12 and 13, based on more general language in UNSCR 1373, prohibit Parties from granting refugee or asylum status to persons who there are reasonable or serious grounds to believe committed one of the offenses covered by the 10 UN conventions. These articles, which are fully consistent with U.S. law, constitute the farthest reaching regime to date in an international convention with respect to immigration measures that must be taken against terrorists, and they are important mechanisms for preventing members of terrorist groups from abusing the asylum system to establish footholds in States in this hemisphere.

C. COUNCIL OF EUROPE CYBERCRIME CONVENTION

Turning next to the Council of Europe Cybercrime Convention, this is the first and thus far only multilateral treaty to address specifically the problem of computer-related crime and electronic evidence gathering. With the growth of the Internet, attacks on computer networks have caused large economic losses and created great risks for critical infrastructure systems. In addition, criminals around the world are using computers to commit or assist a great variety of traditional crimes, including kidnapping, child pornography, child sexual exploitation, identity theft, fraud, extortion, and copyright piracy. Computer networks also provide terrorist organizations and organized crime groups the means with which to plan, coordinate, and commit their crimes. This Convention contains significant law enforcement tools to be applied against all of these activities.

The Convention focuses on three types of measures that must be taken to effectively address these types of criminal behavior: First, establishment of domestic criminal offenses; second, adoption of procedural tools for investigating crimes effectively in the Internet age; and third, establishment of strong mechanisms for international cooperation, since computer-related crimes are often committed via transmissions routed through numerous countries. With respect to each of these areas, the Convention provides important safeguards to protect civil liberties and legitimate commercial interests. I will now briefly review the key features of the Convention.

The Convention first requires Parties to criminalize “classic” computer crime offenses—such as unauthorized intrusions into computer systems; unauthorized interception and monitoring of computerized communications; attacks on computers and computer systems, such as denial of service attacks, or attacks using computer viruses or worms; and the misuse of devices, such as passwords or access codes, to commit offenses involving computer systems. Parties must further prohibit the carrying out of a number of more traditional crimes committed by means of a computer system, such as forgery, fraud, the production, advertisement, and distribution of child pornography, and copyright piracy. For criminal liability to attach for each of these offenses, the conduct in question must be committed intentionally or willfully, and “without right,” thereby protecting legitimate computer users and researchers as well as Internet Service Providers engaged in the provision of legitimate services. The Explanatory Report to the Convention, which has been submitted to the Senate for its information, describes in great detail the manner in which these provisions should be applied, so that these legitimate activities are protected.

These types of criminal offenses already exist under U.S. law; however, countries that do not have adequate criminal laws governing these types of conduct have become havens for cybercriminals. The Convention's requirement that Parties establish these criminal offenses will therefore serve as a deterrent to the commission of crimes that threaten U.S. national security and financial interests.

The procedural section of the Convention arose from a recognition that—with respect to both computer-related and traditional crime—the speed and efficiency of electronic communications make electronic evidence of crime difficult to locate and secure. Such evidence may be in transit, and can be quickly altered, moved or deleted. To ensure that Parties are able to investigate effectively the offenses established under the Convention and to collect electronic evidence regarding other criminal offenses, such as terrorism, organized crime and violent crimes, the Convention requires each Party to have the power—on an expedited basis—to preserve and disclose stored computer data, including traffic data, to compel the production of electronic evidence by ISPs, to search and seize computers and data, and to collect traffic data and content in real time. These powers and procedures are already provided for under U.S. law, and have proved invaluable to many investigations.

As with the substantive offenses, the Convention contains safeguards on the use of these procedural tools. For example, the powers and procedures may be used only in connection with “specific” criminal investigations or proceedings; there is no general obligation on service providers to collect and retain data on a routine basis, and ISPs are required only to preserve data in specific cases that they already have gathered for commercial purposes. The Convention also requires that the procedural powers I have described be subject to conditions and safeguards under domestic law that protect civil liberties.

Finally, the Convention contains important provisions on international cooperation. Modern telecommunications facilitate the commission of crimes without regard to national borders, making cooperation between law enforcement in different countries more important than ever. Recognizing this need, the Convention provides enhancements to extradition regimes in force among the Parties, and obliges Parties to afford mutual assistance “to the widest extent possible” as to both the computer-related criminal offenses established under the Convention, and where electronic evidence needed for the investigation and prosecution of other serious criminal conduct.

With respect to extradition, the Convention obliges the Parties to consider the criminal offenses they establish as extraditable offenses under their applicable extradition treaties and laws. The Convention does not, however, require the U.S. to extradite persons in the absence of a bilateral treaty, and we will continue to apply the relevant terms and conditions of our bilateral extradition treaties to the offenses established by the Convention.

Similarly, the Convention augments existing mutual legal assistance relationships to account for computer-related crime and creates new relationships where necessary. Mutual legal assistance is generally to be provided through existing MLATs between the Parties. If the requesting and requested States do not have an MLAT in place between them, the Convention—in an analogous manner to the Transnational Organized Crime Convention—provides certain mechanisms to be applied between them, including grounds for refusal so that cooperation can be denied in appropriate cases, such as where execution of a request would prejudice the sovereignty, security, or other essential interests of the requested State.

Whether operating through existing MLATs or under the Convention, Parties are required to have key procedural mechanisms available for use in international cases. Thus, the Convention provides a basis for U.S. law enforcement to obtain, on an expedited basis, preservation of electronic evidence stored in another country relevant to a U.S. criminal investigation, and to trace in real time electronic communications by criminals to their source in another State. Another key innovation by which the Convention helps ensure the rapidly expedited international cooperation required to combat cybercrime effectively is the establishment of a 24/7 network of emergency contacts. Such contacts are to be available at any time, day or night, and comprised of professionals having both the technical means and the legal mechanisms to respond to urgent requests for information from their foreign counterparts.

The adoption of these tools by other countries will give U.S. investigators a much better chance of obtaining evidence needed to successfully prosecute criminals who endanger our national security and economic interests. In the past, if an electronic transmission's trail led to another country, the chances were slim of successfully tracing the communication to its source or securing the evidence before deletion. With the tools provided for under the Convention, however, the ability of U.S. law enforcement to obtain international cooperation in identifying major offenders and

securing evidence of their crimes so that they can be brought to justice will be significantly enhanced.

The Administration has recommended that the United States deposit a number of reservations and declarations designed to ensure that we can discharge our obligations under the Convention through existing federal law. These reservations and declarations will enable the U.S. to apply additional threshold requirements to the offenses of illegal access to data, misuse of access devices, computer-related forgery, and data interference; limit application of the offenses of misuse of devices, child pornography and copyright piracy; and—like the reservations proposed for the UN Convention on Transnational Organized Crime—limit application of the jurisdiction article in cases involving crimes committed on ships or aircraft registered under U.S. law, and clarify that the U.S. will implement its obligations in a manner consistent with our federal system of government and existing federal law.

D. UN TRANSNATIONAL ORGANIZED CRIME CONVENTION

With respect to the UN Convention on Transnational Organized Crime (“TOC”), Mr. Witten’s testimony describes its role as a modern framework for combating organized crime. Prior to the TOC Convention, there was no meaningful multilateral framework for addressing the phenomenon of organized crime. The TOC Convention and its protocols create a broad regime modeled on the most recent and effective of the multilateral drug trafficking treaties—the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, also known as the 1988 Vienna Narcotics Convention.

From the Transnational Organized Crime Convention, we anticipate law enforcement benefits flowing from the obligations on States Parties to establish criminal offenses and related domestic measures, and to provide international cooperation as to a broad range of organized criminal activity.

The Convention first requires Parties to establish a number of criminal offenses and related measures that already exist under U.S. laws, but that do not yet exist in some countries—a gap that is exploited by organized crime groups. For example, it is important to an overall strategy for fighting organized crime that all States have laws which enable prosecution of leaders, advisors or other persons whose role in criminal enterprises is indirect and insulated from the actual commission of the financial and violent crimes that enable the enterprise to maintain its wealth and power. Accordingly, Article 5 requires countries to criminalize conspiracy or criminal association with respect to a broad range of serious crimes.

Also significant are the Convention’s provisions on money laundering, bribery and obstruction of justice. Article 6 of the TOC Convention requires the criminalization of money laundering with respect to a comprehensive range of predicate offenses associated with organized crime activities and therefore builds upon and expands earlier commitments with respect to drug trafficking predicate offenses in the 1988 Vienna Narcotics Convention. Moreover, Article 7, based on the groundbreaking prior work of the Financial Action Task Force, is the first provision in an international convention to require the establishment of a comprehensive regulatory regime for combating money laundering.

Since organized crime groups often seek to maintain their influence through corruption, as well as disruption of investigative and prosecutive efforts against them, Articles 8 and 23 also require Parties to criminalize both bribery of domestic public officials and a wide range of activities that obstruct justice.

Finally, from our century-long experience in combating organized crime in the United States, we know that there are other domestic measures law enforcement must employ in order to effectively address organized crime, including a system for protecting witnesses from the criminal groups that may seek to intimidate or harm them, and means of penetrating secretive organized crime groups through lawful inducements for group members to cooperate with law enforcement. Articles 24 and 26 of the Convention provide for States Parties to adopt such measures.

The second area from which important benefits will flow from the TOC Convention is in the area of international cooperation. Foreign countries already obtain excellent cooperation from the U.S. in extradition, mutual legal assistance and police cooperation; however, the legal framework for obtaining reciprocal benefits is not always present. The Convention’s provisions on international extradition, mutual legal assistance and police cooperation provide a legal basis for other Parties to provide similarly broad cooperation, both to the United States and among one another.

Of particular note are the provisions in Articles 16 and 18. Article 16 requires that the Parties deem as extraditable offenses under their applicable treaties the offenses established by the Convention, as well as *any* crime that has been committed by an organized criminal group, and that is punishable by a maximum term

of at least four year's imprisonment under the law of both the requesting and extraditing States. The practical import of the broad scope of this Article will be to significantly expand the reach of older U.S. extradition treaties that contain a "list" of extraditable offenses.

Article 18 on mutual legal assistance establishes a similarly broad obligation to provide mutual legal assistance under the following terms: Where the State requesting assistance already has a mutual legal assistance treaty in force with the State from which assistance is sought, that treaty will continue to govern requirements for obtaining assistance. However, where there is no such treaty, the Article contains a "mini-MLAT," meaning that paragraphs 9-29 of the Article serve, in effect, as a mutual legal assistance treaty governing in great detail cooperation between the States Parties for offenses covered by the Convention. Paragraph 21 provides for grounds for refusal that would enable the U.S. to decline assistance in politically motivated cases and other appropriate circumstances. Also significant is that Article 18 requires on a global scale measures that have long been a standard aspect of U.S. mutual legal assistance practice, but that are not always applicable in other countries—such as a prohibition on invoking bank secrecy to bar cooperation. An analogous article in the 1988 Vienna Narcotics Convention has increased cooperation obtained by the United States from other countries in narcotics cases, and we would anticipate a similar increase in cooperation in organized crime cases pursuant to this provision.

The Administration has submitted to the Senate three proposed reservations and one understanding and one declaration. With these reservations, understanding and declaration, existing federal law is sufficient to enable the United States to discharge the obligations undertaken in the Convention.

E. PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS,
ESPECIALLY WOMEN AND CHILDREN (THE "TRAFFICKING PROTOCOL")

The Trafficking Protocol also advances important policy interests of the United States, which are reflected, for example, in the Trafficking Victims Protection Act of 2000 and the reauthorization legislation of 2003. Those laws make clear the importance the United States places on all countries adopting effective criminal laws against trafficking in persons, and on international cooperation to combat this phenomena.

Article I of the Trafficking Protocol (as with the Migrant Smuggling Protocol also pending—before the Committee) requires Parties to apply all of the benefits and obligations of the Main Convention to the offenses established in the protocols. Thus, the extradition, mutual legal assistance, confiscation of assets, witness protection obligations and other key parts of the main Convention also apply, for Parties to the Protocols, to the offenses of trafficking in persons and smuggling of migrants.

Among the most important elements of the Trafficking Protocol is that it provides for the first time in an international treaty a definition of trafficking in persons, and requires all Parties to criminalize conduct included within the definition of trafficking in persons. Having a common definition will allow countries to cooperate more effectively in providing mutual legal assistance, granting extradition, and providing police-level information and intelligence sharing.

Article 3, which sets forth the definition, may be divided into three components: conduct, means and purpose. First, the *conduct* covered by "trafficking in persons" is the recruitment, transportation, transfer, harboring or receipt of persons. Second, the *means* element can be satisfied by any of the following: the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (in essence, the buying and selling of persons). Third, the *purpose* of exploitation includes, at a minimum, exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs. Article 3 further provides that, once any of the means set forth above has been used, the consent of the victim to the intended exploitation is irrelevant.

With respect to children, the Article makes it clear that any of the conduct set forth above, when committed for the purpose of exploitation, constitutes "trafficking" even if none of the means set forth above are used. Thus, any recruitment or harboring of a child for prostitution or other sexual exploitation would constitute trafficking.

I would like to point out that the negotiating record sets forth several statements intended to assist in the interpretation of the definition of "trafficking in persons." One of those statements makes clear that the Protocol is without prejudice to how

States Parties address prostitution in their respective domestic laws. Thus the practices and policy choices related to prostitution of individual States in the United States are unaffected by this protocol.

Further, both the Trafficking Protocol and the Migrant Smuggling Protocol establish for the first time in a multilateral instrument the obligation of States Parties to take back their own citizens and to facilitate such returns when necessary, for example, by issuing necessary travel documents. In the Trafficking Protocol, this obligation is set forth in paragraph 1 of Article 8 (“Repatriation of victims of trafficking in persons”).

The United States has recommended two Reservations and three Understandings with respect to the Trafficking Protocol.

F. PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR

The Migrant Smuggling Protocol provides all of the benefits I have already mentioned that flow from the interplay of the Protocols with the main Convention (such as in facilitating extradition, mutual legal assistance, and asset confiscation with respect to smuggling offenses), and from specific provisions common to both Protocols (such as the obligation to accept the return of citizens).

Of course, most importantly, it also benefits the United States by requiring other countries to criminalize the smuggling of migrants, and the production of fraudulent documents that furthers smuggling. With migrant smuggling an ever-present problem for United States law enforcement, these obligations will help fill gaps in the current abilities of many countries to effectively address smuggling crimes domestically, and open the door to increased international cooperation in such cases.

Article 6 (“Criminalization”) is the critical article that contains these obligations. The article requires States Parties to criminalize three distinct types of conduct: (1) “smuggling of migrants” as that term is defined in Article 3; (2) document fraud when committed for the purpose of enabling the smuggling of migrants; and (3) enabling a person to reside illegally in a State by means of document fraud or any other illegal means.

The Protocol also contains important provisions regarding boarding and searching vessels suspected of smuggling migrants. We anticipate that these provisions will help promote interdiction efforts by States Parties, and they should enhance cooperation in a number of practical ways, including through the obligation on the vessel’s “flag State” to expeditiously respond to requests for boarding and search, as well as through the providing of an express basis in international law for the search of vessels suspected of engaging in migrant smuggling.

We do suggest one Reservation and two Understandings with respect to the Migrant Smuggling Protocol to enable us to implement our obligations through application of our current laws.

We have not sought the same Reservations and Understanding with respect to jurisdiction and federalism issues as in the Main Convention and Trafficking Protocol. Since U.S. federal law comprehensively covers migrant smuggling into U.S. territory, including any such crime occurring on a ship or aircraft, as well as related document offenses, in our view such limitations are not required with respect to this instrument.

G. CONCLUSION

In conclusion, the Department of Justice appreciates the opportunity to explain the terms of these instruments. Each convention and protocol will aid our law enforcement efforts, both by enhancing the ability of many countries to address these very serious forms of criminality, and by facilitating enhanced international cooperation with the United States in specific cases. We urge the Senate to give rapid advice and consent to ratification of these conventions.

Mr. Chairman, that completes my prepared remarks. At this time I would be pleased to respond to any questions that you or other members of the Committee may have.

The CHAIRMAN. Well, thank you very much, Mr. Swartz. I would say that we appreciate very much the cooperation of so many people in the Department of Justice who have worked very carefully. I will again identify the witnesses. We’ve heard from Mr. Witten from the State Department, and now we’ve heard from Mr. Swartz in the Justice Department. It’s our pleasure to welcome now Mr. Michael Schmitz of the Bureau of Customs and Border Protection.

**STATEMENT OF MICHAEL T. SCHMITZ, ACTING ASSISTANT
COMMISSIONER FOR INTERNATIONAL AFFAIRS, BUREAU OF
CUSTOMS AND BORDER PROTECTION, U.S. DEPARTMENT OF
HOMELAND SECURITY**

Mr. SCHMITZ. Thank you, Mr. Chairman, and thank you for the opportunity to testify this morning on the importance of the United States' accession to the Protocol of Amendment to the 1973 Convention on the Simplification and Harmonization of Customs Procedures, or what I will refer to as the Revised Customs Convention.

The Revised Customs Convention presents a blueprint for modern and efficient customs procedures in the 21st century. Accession by the United States will present a significant step forward in the promotion of economic growth, national security, and customs integrity at both the national and international level.

The Revised Customs Convention under consideration today provides a global framework for modern customs procedures that are transparent, simple, predictable, efficient, and effective. This Convention is the World Customs Organization's, or WCO's, acknowledgment of the critical role customs administrations play in facilitating legitimate international trade while still affecting national customs controls. The Revised Customs Convention is a global call for professionalism and integrity in all customs administrations.

The Revised Convention is also the WCO's response to heightened security concerns related to the movements of goods and people across national borders. Accession to the Revised Customs Convention by the United States would send a clear message to both the international trade community and governments around the world that this country stands firmly behind customs procedures that facilitate the secure movement of legitimate trade across national borders.

This WCO instrument of the Revised Customs Convention has involved both the Customs and Border Protection as well as U.S. industry in leadership roles in all WCO initiatives that facilitate trade and secure international supply chains. The U.S. traders and Customs and Border Protection have worked hand in hand at the WCO to bring this Convention forward.

The original Convention dates from 1973 and the United States acceded in 1983. But as the 21st century approached, the huge growth in international trade plus advancements in information technology meant that the existing Customs Convention was outgrowing its usefulness. WCO members recognized the need for a more modern Customs Convention that would meet the demands and challenges of international trade and security in the 21st century.

More specifically, WCO members sought to enter the new century with a modernized Customs Convention that set standardized procedures that were simple, transparent, and effective. The non-binding nature, aspects of the original Customs Convention created a global customs environment that lacked the transparency, uniformity, and efficiency required to facilitate the increasing movement of goods across national borders. WCO members wanted a Customs Convention that contained standards and procedures that were binding on all parties, but also had enough flexibility to accommodate inevitable change.

Consequently, in 1994, the WCO undertook a 5-year revision of the original 1973 Customs Convention. This revision culminated in 1999 with the unanimous adoption of the Revised Customs Convention we are here to discuss today.

The Revised Customs Convention is based on the following principles: standard, simplified customs procedures; continuous development and improvement of customs control techniques; maximum use of information technology; and partnership between customs administrations and the international trade community. Unlike the original Customs Convention, the Revised Customs Convention contains a body and general annex whose standards are binding on all parties. The general annex includes standards for core customs functions, such as collection of duties and taxes, risk management, the use of information technology, pre-arrival processing, transparency of customs regulations, appeal procedures, and consultation between customs and the trade community.

In addition to the body and general annex, the Revised Customs Convention contains 10 specific annexes that address more specialized customs procedures. These annexes contain standards and recommended practices on such topics as warehousing, transit, temporary admission, and drawback. Unlike the general annex, contracting parties have more flexibility to select which annexes or portion of annexes they will accede to.

Effective customs control and risk management techniques embodied in the Revised Customs Convention complement the border security initiatives already undertaken by Customs and Border Protection and the Department of Homeland Security. As an example, the Convention includes a commitment to use and standardize import information. Advanced electronic data on inbound cargo and travelers is a prime element of Customs and Border Protection's effort to push our borders outward and protect our society from dangerous goods and people before they reach U.S. soil.

The standardization of information also helps prevent the movement of dangerous goods or people across borders by enabling customs authorities to coordinate in real time with their international counterparts, other government agencies, and the trade community.

In addition to their economic and security benefits, the more transparent customs procedures of the Revised Customs Convention are also a key component of customs anti-corruption initiatives. By requiring transparency in customs procedures, the Revised Customs Convention will promote the integrity and professionalism of customs administrations worldwide and reduce the susceptibility of American businesses and citizens to corrupt foreign customs practices.

The United States is already compliant with all provisions of this Convention that we propose to accept. As permitted by the Revised Convention, we propose taking reservations to several provisions because they conflict with our national legislation or because there is no national legislation that allows their application.

The Revised Customs Convention will come into force 3 months after 40 parties to the original Customs Convention have expressed their consent to be bound by it. As of today, 32 countries have adhered to the Revised Customs Convention. As this number is quick-

ly moving toward 40, it is important that the United States become a party, because upon entry into force, the WCO will establish a management committee to oversee implementation and management of the new Convention. It is imperative that the United States be an active member of this management committee from the start so that we can help ensure that the Convention is implemented in a manner that contributes to our economic growth and national security.

Many in the international trade community and other governments are following our deliberations on this Convention. For American companies, the significance of U.S. accession is not the impact on customs procedures here in the United States, but rather the impact on customs procedures abroad and the predictability it will bring them as they export their products. Other governments are looking to the United States for leadership as they decide whether they should accede to the Revised Customs Convention and be legally bound to apply customs standards and procedures that are modern, transparent, simple, and predictable.

In conclusion, the Revised Customs Convention is a necessary tool for facilitating trade, ensuring economic growth, and improving the security of the international trade system. Mr. Chairman, accession to the Revised Customs Convention by the United States would send a clear message here at home and abroad that the public and private sector truly can work together to facilitate trade and that trade and security are not mutually exclusive.

Mr. Chairman, I thank you again for the opportunity to testify this morning and am open to any questions that you may have.

[The prepared statement of Mr. Schmitz follows:]

PREPARED STATEMENT OF MICHAEL T. SCHMITZ ON REVISED CUSTOMS CONVENTION

Mr. Chairman and Members of the Committee, thank you for this opportunity to testify this morning on the importance of United States accession to the Protocol of Amendment to the 1973 Convention on the Simplification and Harmonization of Customs Procedures, or what I will refer to as the Revised Customs Convention.

The Revised Customs Convention presents a blueprint for modern and efficient customs procedures in the 21st century. Accession by the United States will present a significant step forward in the promotion of economic growth, national security and customs integrity at both the national and international level. The Revised Customs Convention under consideration today provides a global framework for modern customs procedures that are transparent, simple, predictable, efficient and effective. The Revised Customs Convention is the response of customs' stakeholders, both public and private, to the increased globalization of the world economy and reduced tariff barriers, particularly at the end of the last century. This Convention is the World Customs Organization, or WCO's, acknowledgement of the critical role of customs administrations in facilitating legitimate international trade while still effecting national customs controls. The Revised Customs Convention is also a global call for professionalism and integrity in all customs administrations. Lastly, but certainly of no less significance, the Revised Customs Convention is the WCO's response to heightened security concerns related to the movements of goods and people across national borders. Accession to the Revised Customs Convention by the United States would send a clear message to both businesses and governments that this country stands firmly behind customs procedures that facilitate, and do not deter, the legitimate and secure movement of people and goods across borders.

Let me take a moment to share with you some brief background on the Revised Customs Convention and why U.S. accession to it is under discussion here today. The Revised Customs Convention is the main customs facilitation instrument of the World Customs Organization. The WCO is an independent, inter-governmental body whose mission is to promote the efficiency and effectiveness of customs administrations. Headquartered in Brussels, Belgium, it currently has 162 Members, including the United States, and is the only global body focused exclusively on customs issues.

Both U.S. Customs and Border Protection and U.S. industry have taken a leadership role in WCO initiatives to facilitate trade and secure supply chains.

The WCO concluded the original Convention in 1973 in Kyoto, Japan. This original Convention had 63 Parties, including the United States, which acceded to it in 1983. Since that time, the Convention has been the main international framework for customs procedures applied to the cross-border movement of goods and people.

As the 21st century approached, however, globalization, the growth of international trade, and advancements in technology since 1974 resulted in a global customs Convention that was outgrowing its usefulness. WCO Members called for a more modernized Convention that would meet the demands and challenges of international trade and security in the 21st Century. More specifically, Members sought to enter the new century with a modernized Convention that set standardized procedures that were simple, transparent and effective. The non-binding nature of aspects of the original Convention created a global customs environment that lacked the transparency, uniformity and efficiency required to facilitate the increasing movement of goods and people across national borders. WCO Members wanted a Convention that contained standards and procedures that were binding on all Parties, but that also had enough flexibility to accommodate inevitable change.

Consequently, in 1994, the WCO undertook a five-year extensive review of the original 1973 Convention. This review culminated in 1999 with the unanimous adoption of the Revised Customs Convention we are here to discuss today. This review included input not only from customs administrations, but also from other government agencies, several international organizations and industry. The United States took a lead role in this review to ensure provisions that maximized benefits to U.S. industry and CBP's ability to carry out effective customs controls. In fact, it was not only CBP that championed this new Convention. Several American companies also took a keen interest and an active role. At the international level, private sector stakeholders such as the International Chamber of Commerce, the International Federation of Brokers Associations and the International Express Couriers Conference all contributed to the revision process and have expressed strong support for the finished product.

The Revised Customs Convention is based on the following principles:

- Standard, simplified procedures
- Continuous development and improvement of customs control techniques
- Maximum use of information technology
- Partnership between customs administrations and industry

Unlike the original Convention, the Revised Convention contains a Body and General Annex whose standards are binding on all Parties. This General Annex includes standards for core customs functions, such as collection of duties and taxes, risk management, the use of information technology, pre-arrival processing, transparency of customs regulations, appeals procedures, and consultation between customs and industry. Standards must generally be implemented within thirty-six months of entry into force. For certain Transitional Standards, this period is extended to sixty months.

In addition to the Body and General Annex, the Revised Customs Convention contains ten Specific Annexes that address more specialized Customs procedures. These Annexes contain standards and recommended practices on such topics as warehousing, transit, temporary admission and drawback. Unlike with the General Annex, Contracting Parties have more flexibility to select which Annexes, or portions of annexes, that they will apply.

The Revised Customs Convention does not only facilitate trade. Its role in advancing global security is even more significant today than we ever envisioned in the pre-9/11 world in which we revised the original Convention. Effective customs controls and risk management techniques embodied in this Convention complement our homeland security initiatives. As an example, the Convention includes a commitment to use and standardize information technology. Advance electronic data on inbound cargo and travelers is a prime element of CBP's efforts to push our borders outward and protect our society from dangerous goods and people before they reach U.S. soil. The standardization of information also helps to prevent the movement of dangerous goods or people across borders by enabling customs authorities to coordinate not only with their international counterparts, but also with other agencies and industry in a timely manner.

In addition to their economic and security benefits, the more transparent customs procedures of the Revised Customs Convention are also a key component in customs anti-corruption initiatives. By requiring transparency in customs procedures, the Revised Customs Convention will promote the integrity and professionalism of cus-

toms administrations worldwide and reduce the susceptibility of American businesses and citizens to corrupt foreign customs practices.

At this point, I would like to stress that the United States is already compliant with all the provisions of this Convention that we propose to accept. These provisions represent approximately 90% of all provisions in the General Annex and ten Specific Annexes. Excluding the one Specific Annex to Which we would not accede, the United States is already compliant with approximately 90% of this Convention. As permitted by the Revised Convention, we propose taking reservations to the remaining provisions, either because they conflict with our national legislation or because there is no national legislation that allows their application. As is stipulated in the Convention, CBP will review the United States' reservations to this Convention every three years with a view of determining whether the United States can accept them or whether changes in legislation should be sought. However, it should be emphasized that accession to the Protocol of Amendment will require no change to current national legislation at this time.

The Revised Customs Convention will come into force three months after 40 Parties to the original Convention have expressed their consent to be bound by it. As of today, 32 countries have adhered to this Convention. As this number rapidly grows towards 40, it is even more critical that the U.S. become a Party. Upon entry into force, the WCO will establish a Management Committee to oversee implementation and its management. It is imperative that the United States be an active member of this Management Committee from the start so that we can help ensure that the Convention is implemented in a manner that contributes to our economic growth and national security.

I can assure the Members of this Committee that many businesses and Governments are following our deliberations here today very closely. For American companies, the significance of U.S. accession is not necessarily the impact on customs procedures here in the United States, but rather the impact on customs procedures abroad and the predictability it will bring them as they export their products. Other Governments are looking to the United States for leadership as they decide whether they should adhere to the Revised Customs Convention and be legally bound to apply customs standards and procedures that, again, are modernized, transparent, simple, and predictable.

In conclusion, the Revised Customs Convention is a necessary tool for facilitating trade, ensuring economic growth, improving the protection of society and, consequently, for opening more markets for American businesses, both large and small.

As we move forward in the 21st Century, the need for modernized customs procedures is critical. These procedures must promote both trade and security. Mr. Chairman and Members of this Committee, the Revised Customs Convention provides such a global customs framework. Accession to this Convention by the United States would send a clear message here at home and abroad that the public and private sector truly can work together to facilitate trade and that trade and security are not mutually exclusive.

Again, thank you for this opportunity to testify before you today.

The CHAIRMAN. I thank you very much, Mr. Schmitz. I'm going to proceed now through each of the four treaties, and then the protocols accompanying the last one, so that our hearing record will be as complete as possible in terms of your testimony, and your responses. For the benefit of both witnesses and all who are following the hearing, I will begin with a short summary of what we're talking about one by one.

First of all, the Inter-American Convention Against Terrorism. This Convention was concluded by the Organization of American States, as you have pointed out, following the September 11 terrorist attacks on the United States. The Convention's provisions are designed to strengthen prohibitions against acts of terrorism and to promote international cooperation in investigating and prosecuting such acts. It contains a list of 10 existing multilateral treaties addressing terrorism, to which parties of the Convention agree to endeavor to join if they have not already done so.

The Convention also obligates parties to develop domestic capacities to track and to disrupt the financing of terrorist activities and

to freeze assets used or intended to be used to finance terrorist activities. In addition, the Convention promotes international cooperation on border controls as well as efforts to investigate and prosecute acts of terrorism.

The Convention further establishes that for offenses covered by the Convention, a state may not decline a request for extradition or for mutual legal assistance on the ground that the offense in question was inspired by political motives.

Several of the signatories to the Convention have yet to ratify one or more of the underlying international terrorism-related agreements listed in article 2 of the Convention. There are 10 such existing multilateral treaties. Has the Convention provided a catalyst for more widespread ratification by the signatories? Mr. Swartz or Mr. Witten, do you have a view on this?

Mr. WITTEN. Thank you, Mr. Chairman. The Convention is one of several efforts that are ongoing to get countries that have not yet signed on to the 10 listed conventions to become party. Security Council Resolution 1373 addresses this issue. The United States for several years, even before September 11, has been diplomatically advocating that countries in this hemisphere and throughout the world join these Conventions.

I understand that within the OAS system this instrument has provided a focal point for discussion of the importance of parties joining. With respect to specific developments in the last 20 months or 22 months or so since the Convention has been enforced, I think there has been some progress. For those countries that have not yet become party, the United States is doing what we can to urge them, persuade them to become a party as part of the broader efforts that our country is making.

The CHAIRMAN. Thank you. Do either of you have anything further to add to that? Very well. Let me proceed with a second question. The administration has recommended an understanding related to the meaning of the term, "international humanitarian law," as it appears in paragraph 2 of article 15, under which the term would have, "the same substantive meaning as the law of war."

What do you understand the "law of war" to mean in this context?

Mr. WITTEN. Mr. Chairman, I can address this, and if necessary supplement for the record. This understanding parallels the understanding that we sought from the Senate in connection with the Convention on the Suppression of Terrorist Bombings, because the term, "international humanitarian law," is one that the United States understands to mean the "law of war." I was involved in those negotiations for the Terrorist Bombing Convention, and recall that a number of countries agreed with us, but others were uncertain. So the United States and perhaps other countries made clear during the negotiation that this had the meaning of the "law of war." My understanding is that this would encompass at a minimum the 1949 Geneva Conventions and the protocols to which nations have become party.

The CHAIRMAN. Very well. A third question. Article 11 of the Convention provides that a request for extradition or mutual legal assistance may be refused solely because it concerns a political of-

fense. But article 14 allows a party to refuse a request when it has substantial grounds for believing the request has been made for the purpose of punishing a person on account of that person's political opinion. Is there any risk article 14 will provide a basis for negating article 11?

Mr. SWARTZ. Mr. Chairman, we do not believe that that will be a possibility in the sense that article 14 is designed to address the issue of political opinions as opposed to actions taken that would be offenses under the international Conventions that have been the key U.N. counter-terrorism Conventions.

The CHAIRMAN. So you're drawing a distinction between opinions and actions?

Mr. SWARTZ. Yes, Mr. Chairman.

The CHAIRMAN. Very well. That concludes the questions I have on the first of the Conventions. I would just note that clearly this is a product of negotiation among members of the Organization of American States. The activities involved there once again show our support for the OAS, our respect for those members and their work with us in this hemisphere. That is obviously an important aspect of this, in addition to the legal framework that we have been discussing today.

Now, I want to take up the Council of Europe Convention on Cybercrime. This Convention addresses crimes directed against or involving the use of computers. It requires parties to prohibit certain computer-related crimes under their domestic laws, to develop and be prepared to use certain investigative methods with respect to computer-related crimes and computer-stored evidence of other crimes, and to cooperate with other Convention parties to investigate and prosecute such crimes.

Crimes that the Convention requires parties to prohibit include unauthorized access to a computer system, unauthorized interception of data from a computer system, unauthorized damage or deletion of computer data, unauthorized interference with the operation of a computer system, computer-related forgery, and computer-related fraud. All of these offenses are already prohibited under United States law. Investigative techniques the Convention requires parties to develop and be prepared to use include the ability to preserve, search, and seize stored computer data, the ability to collect in real time and preserve data being communicated between computers, and the ability to intercept certain content of the data.

The Convention also adds computer-related crimes covered by the Convention to those offenses for which extradition may be sought under extradition treaties in force among parties to the Convention and obligates parties to provide mutual legal assistance with respect to such crimes and with respect to computer-related evidence of other crimes.

Let me ask first of all, what effect would the Convention's prohibitions have on legitimate activities by U.S. businesses, such as actions by Internet service providers to monitor traffic on their own networks, or security testing and research?

Mr. SWARTZ. Mr. Chairman, the Convention will have no effect on such legitimate activity. As you've pointed out, the Convention will be implemented in the United States under our existing statutes and has a number of safeguards built in. Among other things,

the activity in question must be done without right and it must be done intentionally or willfully, depending on the nature of the crime. Those safeguards, and in addition the safeguards that are set forth in article 15 with regard to human rights, ensure that legitimate activity will not be criminalized by this Convention as indeed it is not criminalized under existing United States law.

The CHAIRMAN. I'm curious because this Convention, of course, was negotiated by members of the Council of Europe with the United States in strong observer status. Who may finally accede to this Convention? Is it likely to be just the European states and the United States, or is this likely to have a broader application?

Mr. WITTEN. During the negotiation, Mr. Chairman, in addition to members of the Council of Europe, a number of other states participated actively in observer status. As I understand it, the United States, Canada, Japan, other major countries with an interest, participated. The Council of Europe has a mechanism for countries outside the Council of Europe and countries that did not participate to join, and at this time it's hard to predict how widely the Council of Europe Convention will be joined.

It's our view that just among those that were active observers and those that are members of the Council of Europe, if they all join or a substantial number join, that's a huge advance for the United States with respect to the ability of countries to cooperate in this area.

The CHAIRMAN. Do any of you, just a matter of curiosity, have some estimate of, in the event that all of the European countries acceded to the treaty, plus Japan and Canada and the United States, what percentage of computers in the world might be covered by that situation? How much is left out at this point that would not be cooperative?

Mr. WITTEN. Mr. Chairman, we'll submit something for the record¹ on that.

The CHAIRMAN. Very well. Thank you.

Mr. SWARTZ. Mr. Chairman, if I may add briefly to Mr. Witten's point, we also see this Convention as a model for further development should other countries not accede to this, but as a model for bilateral, other instruments with regard to cybercrime.

The CHAIRMAN. Well, it's an extraordinary advance, as we all know, leaving aside the criminal aspects. Today we're discussing the use of computer technology in countries all over the world for conveying information to parties who may not have that information. It's extremely important in democracy building, in the extension of liberty. These are issues outside of our purview today. But I simply am curious, as I'm certain you are, about the advent of this technology, how this information spreads, but also how it can be subverted. Viruses become inoperative or sometimes, as was suggested, I think by Mr. Witten, hackers may create commercial and governmental damage here, but likewise, people who are attempting to suppress thought throughout the world have their own means of subverting this situation. This is an extraordinarily interesting subject that I think will have legs for further discussion.

¹ See responses to additional questions for the record provided by Mr. Witten on page 48.

Let me ask, would the U.S. accession to the Convention create any new obligations on U.S. Internet service providers to collect and maintain data?

Mr. SWARTZ. Mr. Chairman, it will not. The schema set forward by the Cybercrime Convention is not one of data retention. There are no requirements for data retention, but rather data preservation. That is, in connection with a specific case, if an Internet service provider already, for other reasons, is collecting that data, that data can be preserved in connection with the investigation and prosecution, but it does not impose obligations to retain data.

The CHAIRMAN. What safeguards does the Convention provide for the civil rights and privacy interests of individuals?

Mr. SWARTZ. Mr. Chairman, I think it provides both structural and specific protections in that safeguard. First, with regard to its overall structure, it is clearly a Convention that relates to investigation of specific crimes. It is not a broad-based Convention that deals with things beyond criminal activity. Beyond that, specific provisions of the Convention make clear that the activities have to be done without right, that is, illegitimately. They have to be done intentionally or willfully to meet the mens rea requirement. And then beyond that, further protection is provided by article 15, which speaks of human rights having to be protected by the parties to the Convention.

The CHAIRMAN. Mr. Witten.

Mr. WITTEN. Mr. Chairman, just to add a footnote to Mr. Swartz's comment. Where legal assistance is provided pursuant to the legal assistance articles, primarily article 27, which would apply in cases where there's no other treaty arrangement in place, there is a specific right that all parties have to deny assistance in cases where they deem it in their essential interests, which could include areas where we would view it inappropriate to provide assistance to another treaty partner. This is a provision that's analogous to the provision that appears in our bilateral MLAT provisions and in other multilateral instruments. Thank you, Mr. Chairman.

The CHAIRMAN. Finally, would the substantive crimes created under the Convention affect the ability of U.S. Government officials to take actions in relation to computer systems necessary to investigate crimes or to protect national security?

Mr. SWARTZ. Mr. Chairman, there is nothing in the Convention we believe that would stop the United States from taking the actions necessary to protect its security. In fact, we believe this will greatly advance our security by ensuring that other countries put in place the same types of offenses, the same types of mechanisms that we have under our laws.

The CHAIRMAN. Very well. Let's consider now the U.N. Convention on Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants. The United Nations Convention Against Transnational Organized Crime and two Protocols, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, and the Protocol Against Smuggling of Migrants by Land, Sea or Air are the first multilateral treaties to address the phenomenon of transnational organized crime.

The Convention and Protocol would be effective tools to assist in the global effort to combat transnational organized crime in many forms. The instruments require states parties to criminalize certain conduct, such as participation in an organized criminal group, money laundering, bribery of public officials, obstruction of justice, trafficking and smuggling of persons. The Convention and Protocols strive to improve cooperation among the states parties on extradition and mutual legal assistance in relation to these crimes.

The trafficking protocol aims to prevent and combat trafficking in persons, particularly women and children, to protect and assist the victims of such trafficking, and to promote cooperation among states parties in meeting these objectives. And similarly, the smuggling protocol requires nations to criminalize the smuggling of migrants. In addition, the states parties are required to criminalize behavior such as providing false documents that enable migrants to remain illegally in a country. The agreements would thus enhance the United States' ability to render and receive assistance on a global basis in the common struggle to prevent, investigate, and prosecute transnational organized crime.

Now, my questions. The first conference of the parties to the Convention Against Transnational Organized Crime and Protocols on Trafficking in Persons and Smuggling of Migrants will take place in less than 2 weeks to establish, among other things, the procedural mechanism for the Convention and the Protocols. What do you expect to come from this initial meeting? And do we anticipate the parties heading in a certain direction? And then, when is it likely that the next conference will take place?

Mr. WITTEN. Thank you, Mr. Chairman. The conference of the parties will be largely organizational, adopting rules of procedure, setting the framework. It will be the first of several. It's hard to say exactly what all the outcomes will be, but—

The CHAIRMAN. Who do we anticipate will be at this conference?

Mr. WITTEN. We anticipate that those countries that have already become a party will attend, because as I mentioned in my prepared testimony, this Convention and the two Protocols are already in force. We anticipate that there will be other countries that have signed, such as the United States. Obviously we won't be a party unfortunately in time to participate fully, but the countries that have already become a party will be in a slightly stronger position than we are to the extent they will be participating as parties. However, the United States has been at the center of this exercise for years, and we anticipate that although we will not be participating as parties, we will play a major role as observers and active participants.

Mr. SWARTZ. Mr. Chairman, if I may add to that as well, as signatories, it's our understanding we'll be able to participate in the discussions at the convention of parties, and since decisionmaking is largely by consensus, we expect that our views will be heard. As Mr. Witten points out, we have played a major role in this and believe that we will continue to play such a role.

The CHAIRMAN. We're a signatory and therefore we have a place at the table. To be a party, that would require the ratification procedure be completed presumably.

Mr. SWARTZ. Yes. As a non-party, we cannot vote on matters, but insofar as consensus and discussion is involved, we can participate as we understand it.

The CHAIRMAN. Well, thinking through the housekeeping in our own situation, on what date does the conference commence?

Mr. SWARTZ. I've been informed it's a week from Monday.

The CHAIRMAN. A week from Monday. I'm trying to think through the procedures. After we complete our work today, we will have to rely upon the committee to have the proper business meeting to take action as a committee, and then, of course, the leadership of the Senate will determine the priority of items that we will discuss on the floor.

But taking the very best of circumstances—that the committee acts, and that the Senate acts as a whole, by, say, a week from tomorrow, a week from Friday—presumably we could then be a party at that conference. Is that correct?

Mr. WITTEN. Mr. Chairman, any forward movement is helpful even if we're not a party by the time the conference—

The CHAIRMAN. Even this hearing today, I suspect.

Mr. WITTEN. Even this hearing today. I suspect that the U.S. delegation will mention the fact that the committee has taken this Convention up. I understand from my colleague, Liz Verville, who chaired the delegation for much of the negotiation, that—and I'll confirm this—but I understand that even after we deposit our instrument, there's a 30-day clock before we're formally a party.

The CHAIRMAN. I see.

Mr. WITTEN. That being so, that's why in my comment a moment ago I indicated that we would not be a party. However, as I mentioned, the forward movement of having the hearing and your positive comments will be very helpful with respect to our position in Vienna.

The CHAIRMAN. Well, you may be able to take the record and even the tape of the proceedings to the meeting for the edification of other delegates.

Article 18 of the Convention contains a "mini," mutual legal assistance treaty, and requires states parties to assist each other in investigating and prosecuting the offenses covered by the Convention. How will this provision improve our ability to fight transnational organized crime? The United States currently has over 45 bilateral mutual legal assistance treaties. How will the Convention affect these existing agreements?

Mr. SWARTZ. Mr. Chairman, I will begin and Mr. Witten will also add on to this. The provision of the article will not affect our bilateral mutual legal assistance agreements. Where we have such treaties, we will proceed under those treaties. It does provide, however, a very valuable assistance to us with regard to countries where we do not have mutual legal assistance arrangements, and sets out, as you say, a mini-MLAT that will govern and facilitate expedited assistance with regard to these very important crimes. And I think Mr. Witten has some examples of countries where that would be the case.

Mr. WITTEN. Thank you, Mr. Swartz. Yes, we actually have gone through the list of countries that have already become party to this to identify new legal assistance treaty relations, and there is a sub-

stantial list, and I will mention a number of countries that once we become a party will have article 18 MLAT relations. Costa Rica, Denmark, El Salvador, Finland, Honduras are all examples of countries that at this point we don't have a bilateral mutual legal assistance treaty, but by virtue of article 18 and the treaty relationship under the framework of this multilateral Convention we will have bilateral legal assistance treaty relations.

The CHAIRMAN. The Convention defines, "organized criminal group," as a, "structured group, of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with the Convention in order to obtain directly or indirectly a financial or other material benefit." Explain how this definition might encompass a terrorist group and assist with our war on terrorism.

Mr. SWARTZ. Mr. Chairman, most directly this definition would encompass a terrorist group if it acted in part for financial or other material benefit. Beyond that, given the interrelationships we increasingly see between terrorist groups and organized crime groups and the problem that organized crime groups present, particularly in the failed state context, we see this as a chance to address what might be potential terrorists or terrorist facilitators in an early stage when they're acting in an organized crime capacity.

But again, it allows us to directly move against terrorist groups insofar as they fit within this definition, and many will, and allows us to deal with organized crime groups before they can become terrorists.

The CHAIRMAN. So the early stage idea, I suppose, comes back to three or more persons. That's not many. Three get together for a period of time and then act in concert with the aim of committing one or more serious crimes and so forth. So this, as you say, is getting to the roots of the situation at an early point.

What mechanisms will be in place to monitor the domestic laws of states parties to guarantee their compliance with the Convention and Protocols? What are the penalties if a state party fails to adopt laws criminalizing the offenses covered by the agreements, or to take other measures required under the agreements?

Mr. SWARTZ. Mr. Chairman, I can begin generally to say that the conference of parties we expect to be the initial body that will oversee implementation and review the conduct of parties under the Convention. Mr. WITTEN may add to that.

Mr. WITTEN. Thank you. Yes, I think that's right. Part of the role of the conference of the parties—not all multilateral law enforcement conventions have such ongoing entities as a conference of the parties that meets even biennially. The goal here of the conference of the parties is that so many countries are ratifying that don't have domestic laws that are good matches with the crimes established in articles 5, 6, 8, and 33, and also the two protocols, that there will be model laws made available through the conference, there will be technical assistance that can be requested and offered.

And this body, this ongoing contact—it's a living instrument, and we have high hopes that this can be a tool whereby a lot of countries, including developing countries that don't have very developed

systems of criminal law, can use it as a tool, and the United States through the conference of the parties and upon request and other contacts that we have will encourage that.

The CHAIRMAN. So a layperson listening to this would anticipate that the conference will meet periodically, that delegates will come, including delegates from the United States to the conference, and that in preparation perhaps for participation in the conference, we and others would have monitored the laws or lack of laws in the participating countries. In other words, systematically, if there were 50 participants, we go down ad seriatim as to how each of these countries is doing. Have they adopted the right laws, or have they denied their responsibilities? If each of the participants in the conference has done his or her homework, why we identify periodically in a systematic way who is doing what.

Mr. SWARTZ. Yes, Mr. Chairman. The conference of parties is called upon to conduct that kind of assessment. And in addition, in the interim periods, the Convention will serve as a framework both for our technical assistance efforts, and we expect for the U.N.'s technical assistance efforts. It will allow a chance to say to developing countries in particular, as Mr. Witten has suggested, these are the kind of provisions that you need to work with to establish to deal with organized criminal activity.

The CHAIRMAN. Now, I have some questions on the Trafficking and Smuggling Protocol. Articles 6 and 7 of the Trafficking Protocol focus on the rights of trafficking victims. However, most of the language is not mandatory and simply requires states parties to consider taking measures to provide for the physical and psychological needs of victims, and to permit victims to remain in their countries. How effective will these discretionary provisions be in protecting the rights of trafficking victims?

Mr. WITTEN. Thank you, Mr. Chairman. These provisions were the consensus provisions among the negotiators as to what sorts of protections would be appropriate. I think that in a Convention of this character there's always a distinction between obligations and the Convention performing a framework for facilitating the implementation of particular issues.

For something like these provisions on protection, in terms of how it would be followed up, I think obviously a part of the conference of the parties and the ongoing contact with respect to trafficking, this would be a part of the dialog. But just as we were talking earlier about the other international instruments, for the United States, for example, provisions along the lines of article 6 and article 7 are a part of a bigger picture. We have our annual trafficking in persons exercise where we analyze the efforts that other countries are making to address the problems of trafficking, protect those victims, and so forth. We have bilateral contacts pursuant to that and we anticipate that that, as long as this problem exists, which unfortunately could be quite a long time, we anticipate that this will be a major diplomatic effort on the part of the United States and the part of other countries. Thank you.

The CHAIRMAN. Article 18 of the Smuggling Protocol provides that states parties have an obligation to facilitate and accept without unreasonable delay the return of a person who is smuggled, and article 16 imposes additional requirements on states to pre-

serve and protect the rights of such individuals. Do these requirements have any implications upon U.S. detention policy for migrants, such as when, for example, a migrant is detained as a material witness to testify against smugglers?

Mr. SWARTZ. Mr. Chairman, we do not believe that it would affect the United States' ability to detain an individual, as you say, for a witness in those circumstances, or otherwise have a negative effect on the United States' ability to deal with individuals. It is an important advance, we believe, that does call upon other countries to accept the repatriation of these individuals and not one that will have consequences that will be damaging to the United States.

The CHAIRMAN. Let me ask now questions about the Protocol of Amendment to the Convention on Harmonization and Simplification of Customs Procedures. This Protocol is designed to update and modernize the existing international Convention on the Simplification and Modernization of Customs Procedures by incorporating the developments in trade and customs processing that have occurred in the 30 years since the original Convention was concluded.

The Convention calls for parties to continuously modernize their customs procedures; to apply their customs procedures predictably, consistently, and transparently; to make available information on their customs laws, regulations, guidelines, and practices; to adopt modern techniques, such as risk management, audit-based controls, and the maximum use of information technology to cooperate with the customs authorities of other countries; to implement relevant international standards; and to provide a transparent system of administrative and judicial review of customs decisions.

The Protocol also contains a series of detailed changes to existing customs rules and practices, which parties undertake to implement. United States customs laws and procedures currently comply with most of the Protocol's provisions. The administration has proposed taking reservations to these provisions that are not consistent with existing law. Such reservations would obviate the need for any implementing legislation for the Protocol.

Now, my questions. What economic benefit does the administration expect this Protocol will have for the United States economy?

Mr. Schmitz.

Mr. SCHMITZ. Mr. Chairman, our partners in the international trade community have for the last 20 years raised their concerns about the cost of customs, clearing customs in other countries. In the developed world, European Union, Japan, procedures are fairly efficient. But of the 162 members of the World Customs Organization, you would probably only classify 40 of those as developed. And as customs revenue is often the single biggest source of government finance, the customs can end up as a bottleneck, customs procedures can end up as a bottleneck, because it is the one point where you can do taxation. Along with taxation often comes corruption.

But it is sometimes the delays in getting the goods into the country, the customs delays can be for days. We're not talking hours, we're talking days. And that is the economic benefit that we see to countries having to adopt a standard, a uniform standard.

And the other part of this is that the individual companies do not have to learn 140 separate sets of customs procedures to deal with any country that they wish to trade with.

The CHAIRMAN. Well, how many countries are likely to accede to this new Convention?

Mr. SCHMITZ. The number that will accede, the European Union has just deposited their instrument, which is going to mean that then the individual members, so that will probably very quickly push it over 40. Like our colleagues here, we are going to Brussels next week for the annual council meeting of the World Customs Organization. They too will be interested in what has occurred here today because the mere fact that we have had this hearing is very useful in getting other countries to come forward, because if the United States, Japan, and the European Union adopt a process, the market forces push others to do it.

The least developed countries are the slowest to come along, but those that are moving forward come forward more quickly, and when they move and they see the increase in their revenues and the increase in their own trade, it begins to sell itself.

The CHAIRMAN. I'm just curious as a matter of technical expertise. There are many countries, and you've broadly categorized them as less developed. Would they have the mechanical tools to be able to expedite the process? You've described scenes of days of waiting for goods and materials. If technical expertise is required, who might under all these procedures or organizations provide that, so that, in terms of worldwide trade, there will be more simplification and a broader unity of outlook on this?

Mr. SCHMITZ. Mr. Chairman, in my experience, the funding agencies that generally come forward to help—because you are absolutely correct, there are countries you say, well, can they even afford this technology that will make this possible? In conferences that I have attended in Africa, the World Bank, the Asian Development Bank, here in the Americas the American Development Bank, some U.N. organizations have funding for this. Then you have individual countries. The Japanese are very large in capacity building in the developing world, particularly Asia, of course. Within Africa, the South Africans have taken a leadership role.

But it is a matter of funding that these countries do not have and they do look to the international organizations to fund it. There are some places in Africa that have actually fairly surprisingly modern data management systems, and the Africans are in certain groupings, certain regional groupings, are also trying to work out a standardized process where they could pool their resources to get the technology that they need, because the number of ports of entry that they have is small.

But it is an ongoing problem. The World Customs Organization does seek out donors to help countries afford and learn how to use this technology.

The CHAIRMAN. Well, this is encouraging news. Our committee is very supportive of AGOA, the African Growth and Opportunity Act, and it is currently promoting legislation that may keep that agreement vital and alive. But my curiosity arises. On the one hand, we are attempting to help other states come into enterprise, as opposed to aid, and at the same time, that denotes customs and goods

and services going across borders, and maybe a greater complexity of affairs. So, while the one hand is trying to help one process, we want to make certain that the other hand complements that, so that this is a holistic view of things.

Let me ask, what impact will the Protocol have on our homeland security interests? I mentioned that in the opening statement, and so have you in your testimony. Since the revised Convention was adopted in 1999, border security needs have become a paramount concern of our country and of others. How do the trade facilitation goals of the revised Convention interact with U.S. border security requirements? And are these goals and requirements complementary, or do they hinder each other? To what extent can effective trade facilitation and border security be achieved simultaneously under the Convention?

Mr. Schmitz.

Mr. SCHMITZ. Mr. Chairman, our experience here in the United States is that appropriate border security can actually increase trade facilitation because we attempt to risk manage the threat. And what we did here in the United States, and certainly this Convention will permit this same kind of activity throughout the world, but we took our 200-year-old authority on vessel manifests immediately after the 9/11 attack and we had always had the right to receive this information. A vessel manifest, you have to present it to customs before you could unload your merchandise. We took that and pushed it, you're going to have to give us this manifest information 24 hours before you lade it overseas.

We then worked with our international business trade partners here in the United States to make that apply, not necessarily 24 hours, but different rules for advanced information to rail, air, and surface traffic. What we see in this Convention is the push to get this pre-arrival information. If you have pre-arrival information, you have the time to risk manage that.

We just concluded a meeting with the European Union here, who are looking at our container security initiative, and we've signed a separate agreement with the European Union, and they came over to visit to take a look at our National Targeting Center and how we process this information 24/7. And what it gives us is a chance with this information to screen everything that is coming. I'm not saying searching. We screen at least the documents saying what is coming into this country.

Based on criteria that are in the screening systems, certain things are identified. We do then further work on those. If we are not satisfied, we then target our effort, our search effort, on those limited number of shipments, and then let the regular importer, Chrysler, GM, the people that we know, we focus on those that we don't. We do have CBP inspectors currently stationed in 18 ports overseas. This is a reciprocal agreement. The Japanese and the Canadians have people in our ports here in the United States, and what we ask our foreign counterparts to do is, if we have identified a particular shipment and we think that that particular shipment should be looked at, we do it first on a non-intrusive, essentially an x-ray, and if that isn't satisfactory, then what we ask our foreign counterparts is to search the container there. They make the same requests of us.

As this pre-arrival information spreads throughout the world, I think more and more countries are going to say, listen, we can facilitate our trade. If we only have to focus on x number of containers that are coming in rather than this wave that comes at us, we can all be more efficient. But the United States and the European Union are going to be the leaders in this also, and it is our responsibility to bring along the developing countries to the same type of standard.

The CHAIRMAN. Let me ask one question about modifications to current practice and fiscal impact. How will this change, this Convention, our customs operations and infrastructure? What fiscal impact will it have on United States customs? Or describe new problems, fiscal or otherwise?

Mr. SCHMITZ. I'm happy to report that there would be no financial impact and no impact on our current procedures.

The CHAIRMAN. That is the best of news. Well, I very much appreciate the detailed responses of our witnesses. Obviously, you have been negotiating in these areas for a long time, are well prepared to respond to these questions. I have wished to ask them, and to have your responses, for the sake of as complete a record as possible. These treaties and protocols are important. We thank you for coming in a timely way to our conference this morning to this meeting.

We will likewise try to take action in a timely way on our part, and encourage our colleagues to become familiar with the issues and the questions and answers that we have had this morning. Having said that, our hearing is adjourned.

[Whereupon, at 10:56 a.m., the committee adjourned, to reconvene subject to the call of the Chair.]

ADDITIONAL STATEMENTS SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF SENATOR GEORGE ALLEN

Thank you Mr. Chairman for holding today's hearing on these four law enforcement treaties.

I would like to take a moment to say a few words about Treaty Document 108-11, the Council of Europe Convention on Cybercrime. The Internet is a powerful tool that expands people's educational, economic, and communicative opportunities across the globe. However, as the Internet has grown, so too has cybercrime; the tools to conduct these crimes are widely available throughout the world. The nature of increasing cyber attacks requires effective computer security practices, and better law enforcement deterrence to thwart these attacks.

I recently had the pleasure of meeting with chief executive officers of companies that are important players in Internet security and who are members of the Business Software Alliance. These innovators gave me several reasons why it is important for the Senate to move promptly to ratify this Convention. I would like to share the conclusions on cybersecurity of these executives with the committee.

- First, the tools to conduct cyber crime are widely available around the world to any person or group, regardless of their motivation or location. Internet attacks are easy, low risk, and hard to trace. And because the methods of attack are so similar regardless of the attacker, the methods of defending against cyber attacks are similar as well. Good computer security practices, improved corporate governance, and better law enforcement deterrence are essential in deterring these types of attackers.
- Second, cyber criminals are not constrained by national boundaries. In fact, perpetrators are likely to route attacks through several countries to decrease the probability of being caught. That is why our cybersecurity depends on the secu-

rity practices of every country, every business, and every citizen to which we are connected. It is also why we depend on effective international law enforcement cooperation on a very wide scale, if we are to find and capture perpetrators. As with terrorism, there must be no safe havens.

- Third, because most of the information infrastructures that we rely upon, even for many government functions, are in the private sector, security cannot be achieved by governments alone. We need a broad partnership between government and private industry in all of our countries.
- Finally, as the number of intruders capable of executing attacks climbs, we must simultaneously increase our commitment to combating them.

The Council of Europe Convention on Cybercrime will play an important role in helping us to become a more secure and productive nation, because it criminalizes acts such as hacking and the production, sale, or distribution of hacking tools. It is important to note that while the treaty helps with successful investigation and prosecution of cybercriminals, it does not require changes in technology or business practices. Furthermore, it helps raise awareness throughout the world that computer viruses, worms, and other attacks are not clever acts of mischief, but instead serious crimes with serious penalties.

Cybercrime is a real threat and it is growing by the day. According to the latest CSI/FBI survey, 56% of respondents reported unauthorized access to their computer systems in the last 12 months alone. In addition, data theft has grown more than 650% in the past three years. Increased cybercriminal activity is also financially costly, as the average reported loss from unauthorized intrusions was \$2.7 million per incident.

As we can see, the threat of cyber crime is evident and requires prompt action. I urge the Senate to move swiftly to address these problems that threaten the wellbeing of our nation by ratifying the Council of Europe Convention on Cybercrime.

AeA,
601 PENNSYLVANIA AVE., N.W.,
NORTH BUILDING, SUITE 600,
Washington, DC, July 8, 2004.

The Honorable RICHARD G. LUGAR,
Senate Foreign Relations Committee,
450 Dirksen Senate Office Building,
Washington, DC 20515

The Honorable JOSEPH R. BIDEN, JR.,
Senate Foreign Relations Committee,
450 Dirksen Senate Office Building,
Washington, DC 20515

DEAR SENATORS:

On behalf of AeA, I would like to thank you for your work in moving the International Convention on the Simplification and Harmonization of Customs Procedures, otherwise known as the Revised Kyoto Convention, closer to Senate consideration. As was indicated in the June 17th Senate Foreign Relations Committee hearing, this is a noncontroversial issue that serves to improve customs procedures as well as benefit national security.

AeA has been a strong advocate of the Revised Kyoto Convention given the many benefits that ratification of this convention will bring to the U.S. high tech industry and to national security. We urge the Senate to take up and approve the Revised Kyoto Convention.

AeA is the nation's largest high-tech trade association, representing more than 3,000 U.S.-based technology companies. Membership spans the industry product and service spectrum, from semiconductors and software to computers, Internet, and telecommunications systems and services. With 18 regional U.S. offices and offices in Brussels and Beijing, AeA brings a broad industry and grassroots perspective to the public policy arena.

Sincerely,

WILLIAM T. ARCHEY,
President and CEO.

ELECTRONIC PRIVACY INFORMATION CENTER
1718 CONNECTICUT AVE. NW, SUITE 200
Washington, DC, June 17, 2004

Chairman RICHARD G. LUGAR
Ranking Member JOSEPH R. BIDEN, JR.
Senate Committee on Foreign Relations
United States Senate
Washington, DC 20510

DEAR CHAIRMAN LUGAR AND SENATOR BIDEN,

We are writing on behalf of the Electronic Privacy Information Center (EPIC) to urge opposition of ratification of Treaty 108-11, the Council of Europe's Convention on Cybercrime ("the Cybercrime Convention"). EPIC is a leading civil liberties organization that has reported on developments in privacy and human rights around the world for several years.¹ We believe for the reasons stated below that it would be a mistake for the United States to support adoption of this treaty. We ask that this statement be included in the June 17, 2004 hearing record of the Senate Committee.

THE CONVENTION THREATENS CORE UNITED STATES CIVIL LIBERTIES INTERESTS

The Convention Lacks Adequate Safeguards For Privacy

We object to the ratification of the Cybercrime Convention because it threatens core legal protections, in the United States Constitution, for persons in the United States. The treaty would create invasive investigative techniques while failing to provide meaningful privacy and civil liberties safeguards, and specifically lacking judicial review and probable cause determinations required under the Fourth Amendment. A significant number of provisions grant sweeping investigative powers of computer search and seizure and government surveillance of voice, e-mail, and data communications in the interests of law enforcement agencies, but are not counterbalanced by accompanying protections of individual rights or limit on governments' use of these powers.

Individual Privacy Is Fundamental to Good Security Practices

The Cybercrime Convention sets out a strong commitment to security measures, while failing to acknowledge the commonly held position that the protection of individual privacy is in fact fundamental to good security practices,² and the fact that many of the Convention's provisions, when put into practice, may actually detract from security.³ For example, Article 14 (Search and Seizure of Stored Computer Data) requires countries to enact legislation compelling individuals to disclose their decryption keys in order to allow for law enforcement access to computer data.⁴ Besides the contradiction between this requirement and the prevalent right against self-incrimination, which would otherwise be safeguarded under the United States Constitution, the disclosure of these keys can drastically reduce the security of a wide range of computer systems.⁵

Vague and Weak Privacy Protections

In response to objections from privacy and human rights groups, the working group added Article 15 (Conditions and Safeguards), which provides, *inter alia*, that each party must ensure that "the establishment, implementation, and application of the powers and procedures provided for in this Section [Procedural Law] are subject to conditions and safeguards provided for under its domestic law, which shall pro-

¹See, e.g., PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS (EPIC 2003) (A 545 page report on recent developments in over fifty-five countries around the world), available online at <http://www.privacyinternational.org/survey/phr2003/>. See also EPIC, *Cybercrime Convention*, available online at <http://www.epic.org/privacy/intl/ccc/html>.

²Banisar & Gus Hosein, *A Draft Commentary on the Council of Europe Cybercrime Convention*, Oct. 2002, available online at http://privacy.openflows.org/pdf/coe_analysis.pdf.

³*Id.*

⁴Council of Europe: Convention on Cybercrime, Nov. 23, 2001, 41 I.L.M. 282, Art. 14. Article 14, para. 4 provides, *inter alia*, that participating countries shall enact legislation that would empower law enforcement authorities "to order for the purposes of criminal investigations or proceedings any person who has knowledge about the functioning of the computer system or measures applied to protect the computer data therein to provide all necessary information, as is reasonable, to enable the undertaking" of the seizure of such data.

⁵Banisar, *supra* note 1, at 32.

vide for the adequate protection of human rights and liberties.”⁶ This provision is quite vague, and is not reiterated with specific and detailed protections within any of the specific provisions. For example, provisions on expedited preservation of stored computer data⁷ and expedited preservation and partial disclosure of traffic data⁸ make no mention of limitations on the use of these techniques with an eye to protection of privacy and human rights. Furthermore, the vagueness of this provision (and others) introduces the risk of enhancement of the flaws and benefits of the Cybercrime Convention overall, as the Convention is transposed into the laws of ratifying countries which may have drastically different pre-existing privacy and human rights protections.⁹

Insufficient Recognition of International Human Rights Obligations

References to the protection of human rights, including the right to privacy, are brief at best, especially when compared with myriad espousals of the importance of serving the interests of law enforcement agencies.¹⁰ Examination of the Preamble is extremely illuminating on this point, with eight clauses related to the interests of law enforcement, crime-prevention, and national security, and only two oriented toward protection of privacy and human rights.¹¹

Coupled with the lack of consideration of, and compliance with, important international conventions on human rights, it becomes clear that the Cybercrime Convention is much more like a law enforcement “wish list” than an international instrument truly respectful of human rights. The Cybercrime Convention fails to respect fundamental tenets of human rights espoused in previous international Conventions, such as the 1948 Universal Declaration of Human Rights¹² and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.¹³ The Cybercrime Convention also ignores a multitude of treaties relating to privacy and data protection, including the Council of Europe’s 1981 Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data,¹⁴ and the European Union’s 1995 Data Protection Directive.¹⁵

The Cybercrime Convention Lacks a Dual-Criminality Requirement

Article 25 (General Principles Relating to Mutual Assistance) introduces broad principles of mutual assistance across international borders, but lacks a “dual-criminality” provision, under which an activity must be considered a crime in both countries before one state could demand cooperation from another. Thus, the treaty would require U.S. law enforcement authorities to cooperate with a foreign police force even when such an agency is investigating an activity that, while constituting a crime in their territory, is perfectly legal in the U.S. No government should be put in the position of undertaking an investigation of a citizen who is acting lawfully, regardless of mutual assistance provisions and the laws of other countries.¹⁶

THE CYBERCRIME CONVENTION WAS DRAFTED IN A SECRETIVE AND UN-DEMOCRATIC MANNER

The drafting of the treaty has been conducted in a very secretive and undemocratic manner. The Council of Europe’s Committee of Experts on Crime in Cyberspace (“the Committee”) completed nineteen drafts of the Convention before the document was released to the public.¹⁷ Between 1997 and 2000, no draft was released and no public input was solicited.¹⁸ The Convention was drafted by persons and

⁶ Convention on Cybercrime, *supra* note 3, at Art. 15.

⁷ *Id.* at Art. 16.

⁸ *Id.* at Art. 17.

⁹ Giovanni Buttarelli, Remarks in Washington, D.C., *Promoting Freedom and Democracy: A European Perspective*, May 21, 2004, available online at <http://www.epic.org/privacy/intl/buttarelli-052104.html>.

¹⁰ Convention on Cybercrime, *supra* note 3, at Preamble.

¹¹ *Id.*

¹² Available online at <http://www.un.org/Overview/rights.html>, reprinted in MARC ROTENBERG, ED., *PRIVACY LAW SOURCEBOOK: UNITED STATES LAW, INTERNATIONAL LAW AND RECENT DEVELOPMENTS* 316-21 (EPIC 2003).

¹³ Available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

¹⁴ Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data, available online at <http://www.coe.fr/eng/legaltxt/108e.htm>.

¹⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, available at http://europa.eu.int/comm/internal_market/en/media/dataprot/law/index.html.

¹⁶ See Greg Taylor, *The Council of Europe Cybercrime Convention: A Civil Liberties Perspective*, Electronic Frontiers Australia, available online at http://www.crimeresearch.org/eng/library/CoE_Cybercrime.html.

¹⁷ *Id.*

¹⁸ Banisar, *supra* note 1, at 5.

groups primarily concerned with law enforcement, and reflects their concerns almost exclusively, to the detriment of privacy and civil liberties interests.¹⁹ Since the release of Draft 19, the Committee has made little effort to acknowledge and incorporate concerns and suggestions of privacy and human rights groups. The Council of Europe set up an e-mail address only late in the negotiation process (after the release of Draft 19), to which members of the public could submit comments. However, few of these suggestions appear to have been translated into substantive changes to the document.²⁰

We also note that, as with the process of drafting the Cybercrime Convention, there is markedly one-sided representation at today's hearing, as all three witnesses are government officials. For legislation that so touches on individual rights and freedoms, there should be a broader range of voices heard on this topic.

MOST EUROPEAN COUNTRIES HAVE FAILED TO RATIFY THE CYBERCRIME CONVENTION

Despite the ceremonial act of thirty-eight countries in signing the Convention, only six countries have yet ratified the Cybercrime Convention.²¹ As of June 16, 2004, only Albania, Croatia, Estonia, Hungary, Lithuania, and Romania ratified the Cybercrime Convention. The Cybercrime Convention remains very controversial in Europe, in particular the provisions relating to the lack of protections for the use, collection, and distribution of personal data. In Europe, personal data protection has come to be considered a fundamental right, and Europe's legislators are committed to safeguarding this right.²² Europeans are concerned that while the Cybercrime Convention aims to achieve a noble end of fighting cyber-crime, the extensive surveillance tools that are being shaped to achieve this end are threats to a democratic society.²³

In summary, the Cybercrime Convention threatens core legal rights established by the United States Constitution. It constructs a sweeping structure of vast and invasive law enforcement activity without a corresponding means of oversight and accountability. It speaks in very specific terms about the new authorities to pursue investigations but in only generalities with regard to legal rights.

The Cybercrime Convention is the result of a process that excluded legal experts and human rights advocates. It is a one-sided document that fails to reflect the broad commitment to the rule of law and the protection of democratic institutions that has otherwise characterized the treaties proposed by the Council of Europe.

It is therefore not surprising that the vast majority of the countries of the Council of Europe have thus far failed to ratify the Cybercrime Convention. We urge the United States not to support this deeply flawed proposal.

Sincerely yours,

MARC ROTENBERG,
EPIC President.

CÉDRIC LAURANT,
EPIC Policy Counsel.

TARA WHEATLAND,
EPIC IPIOP Law Clerk.

MICROSOFT CORPORATION,
LAW AND CORPORATE AFFAIRS,
1401 EYE STREET NW, SUITE 500,
Washington, DC, October 7, 2004.

The Honorable RICHARD G. LUGAR,
The Honorable JOSEPH R. BIDEN, JR.,
*430 Dirksen Senate Office Building,
Washington, DC 20510.*

DEAR CHAIRMAN LUGAR AND RANKING MEMBER BIDEN:

¹⁹ *Id.* at 2.

²⁰ *Id.* at 5.

²¹ Council of Europe, Convention on Cybercrime, Status as of 16/6/2004, at <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=8&DF=&CL=ENG>>.

²² Buttarelli, *supra* note 8.

²³ *Id.*

I want to thank each of you for your leadership in holding a hearing on the Council of Europe Convention on Cybercrime, and also express Microsoft's strong support for the treaty's ratification.

The information technology and Internet revolution have brought the United States' and the global economy significant benefits. Continuing innovation promises even greater benefits for all, but to extend this growth, we must continue to enhance trust in and the trustworthiness of the online environment.

At Microsoft, security is a top priority. Through our Trustworthy Computing Initiative, we are making our technology more secure and easier to maintain securely. Unfortunately, we will always face online criminals who search for new ways to harm the public. Some of their attacks may be mere nuisance, but others may pose real risks to global security, public safety and economic development.

Many of the most serious of these crimes travel across international borders, making them much more difficult for law enforcers to investigate and prosecute. Therefore, Microsoft urges the Senate to ratify the Council of Europe Convention on Cybercrime, which was transmitted to the Senate on November 23, 2003. It reduces critical obstacles that restrict international investigations and prosecutions of online crime by requiring countries to establish appropriate criminal offenses and legal tools, and by providing the means for international cooperation and assistance. The Convention also contains safeguards for civil liberties and, as I understand, does not require any change to existing United States law.

The Convention is the first multilateral agreement drafted specifically to address the problems posed by international online crime, and its widespread adoption would improve security in the United States and around the world. The United States has helped lead the international fight against cyber crime, and I urge the Senate to continue that leadership by rapidly reviewing and ratifying the Convention.

Sincerely,

SCOTT CHARNEY,
Chief Trustworthy Computing Strategist.

REVISED KYOTO CONVENTION ON CUSTOMS MODERNIZATION COALITION

AeA—Air Courier Conference of America—American Association of Exporters & Importers—Joint Industry Group—National Association of Manufacturers—United States Business Alliance for Customs Modernization—United States Council for International Business

June 25, 2004.

The Honorable RICHARD G. LUGAR,
Senate Foreign Relations Committee,
450 Dirksen Senate Office Building,
Washington, DC.

DEAR MR. CHAIRMAN:

As chairman of the Revised Kyoto Convention on Customs Modernization Coalition, I am writing to express the Coalition's support for the Revised Kyoto Convention.

We were pleased with the June 17th hearing on this issue as the Coalition has been working for the passage of the Revised Kyoto since 2000. The Convention will bring numerous benefits to U.S. business involved in international trade such as:

- reduction of inefficient customs procedures and policies that impede access to markets and unnecessarily increase costs;
- facilitation of product market introduction;
- more efficient customs procedures overall;
- standardization of customs implementation and administrative procedures worldwide—across participating countries;
- reduced cycle time due to more predictability in the customs entry and release process, which also results in inventory savings (inventory costs can run as high as \$20 million per day);
- greater understanding of compliance requirements resulting from increased transparency so that industry is better able to meet “time-to-market” objectives;
- implementation of special procedures for low-risk importers;

- reduced opportunities for extortion of facilitation payments as a result increased transparency and automation.

The attached documents provide more detail on the benefits of the Revised Kyoto. We appreciate all the work you have done on this issue and look forward to Senate approval.

Sincerely,

WILLIAM A. MAXWELL,
Chairman.

REVISED KYOTO CONVENTION ON CUSTOMS MODERNIZATION BACKGROUND

In today's global trade environment, inefficient customs processes and procedures pose significant and costly barriers to U.S. trade. U.S. businesses need more consistency and predictability in the customs environment in order to trade goods in a timely and cost-effective manner. The Revised Kyoto Convention on Customs Modernization offers an opportunity to achieve such consistency and predictability as it is an international instrument designed to simplify and harmonize customs procedures and policies worldwide.

The World Customs Organization (WCO) adopted the original Kyoto Convention in 1974. Due to the changing nature of global trade through the 1980s and 1990s, the WCO adopted a revised version of the Convention in June 1999—i.e., the Revised Kyoto Convention on Customs Modernization. For this Convention to come into effect, 40 of the 61 current subscribers to the 1974 Convention must ratify it. The United States was one of the original subscribers.

Upon ratification, actions that were voluntary under the 1974 Convention would become obligatory. Customs authorities in acceding countries would be committed to:

- Making information on Customs requirements, laws, rules, and regulations easily available to everyone;
- Providing a transparent system of appeals with respect to Customs rulings and decisions;
- Maximizing the use of automated systems (i.e. improving data collection, exchange and analysis, etc. through the use of information technology systems);
- Employing risk management techniques to focus on high-risk shipments in order to use customs resources more effectively.
- Using pre-arrival information to facilitate the rapid clearance of shipments;
- Specifying the terms of the relationship between Customs authorities and "agents" (customs brokers, freight forwarders, carriers and other such agents acting on behalf of importers and exporters) to clearly define requirements such as licensing;
- Establishing formal consultative relationships between Customs authorities and importers, exporters and their various agents (commonly referred to collectively as "the trade") to resolve matters and commonly work towards solutions;
- Using electronic fund transfers to more accurately collect tariffs and fees, reduce fraud and expedite shipments through the customs clearance process; and
- Interfacing with other government agencies responsible for imports and exports to coordinate requirements for and clearance of such transactions.

BENEFITS OF RATIFICATION OF THE REVISED KYOTO CONVENTION ON CUSTOMS MODERNIZATION

- *Reduction of inefficient customs procedures and policies that impede access to markets and unnecessarily increase costs*

A WCO analysis demonstrates that inefficient global customs procedures add 7% to the cost of information technology (IT) goods traded globally. Unpredictable clearance delays often render perishable or time-sensitive high tech shipments valueless; as a result companies find themselves forfeiting the goods rather than pay inflated tariffs or any attendant fines. Such experiences lead companies to abandon promising export markets.

- *Facilitation of product market introduction*

Many U.S. IT companies source components in multiple countries where they undergo complex supply chain operations. U.S. IT companies must get their products to market with speed, predictability and at the lowest logistics costs to remain competitive. Harmonization and simplification of customs procedures under the Revised Kyoto will greatly reduce supply-chain problems and address the time sensitive nature of products with short life cycles.

- *More efficient customs procedures overall*

The Revised Kyoto Convention will reduce the number of steps that slow Customs clearance and impede compliance such as: manual instead of automated clearance procedures and processing of documentation; lack of automated risk management tools to expedite clearance of lower-risk shipments; and lack of transparency of customs procedures. Greater efficiency will also enhance enforcement and security as well as facilitation missions. Bringing foreign Customs agencies to the Revised Kyoto standard of efficiency will mean more efficient allies in the United States' campaign against terrorism, drugs and corruption.

- *Standardization of customs implementation and administrative procedures worldwide—across participating countries*

The Revised Kyoto calls on all participating countries to conform to the same set of standards in order to promote the consistency, predictability and efficiency that are necessary for global trade today.

- *Reduced cycle time due to more predictability in the customs entry and release process, which also results in inventory savings (inventory costs can run as high as \$20 million per day)*

When clearance times vary even within one country it is very costly to the importer and exporter (e.g. customs clearance could take five hours for shipments in one week and two days for the same shipments during the next week). The more predictable the entry and clearance processes, the more importers and exporters can accurately plan their supply chain logistics and minimize inventory-carrying costs.

- *Greater understanding of compliance requirements resulting from increased transparency so that industry is better able to meet "time-to-market" objectives*

Importers and exporters require information about legal requirements and customs initiatives in order to be compliant and follow the rules of trade. The Revised Kyoto promotes transparency—the publication of regulations, rulings, decisions, and other customs communications in a public manner either in a circular or on the Internet. Such transparency leads to higher rates of compliance among importers and exporters, and helps them meet time-to-market objectives. It will also benefit small and medium sized exporters.

- *Implementation of special procedures for low-risk importers*

The Revised Kyoto Convention includes requirements for the use of risk management techniques, that is, profiling traders to identify high-risk importers requiring examination and attention, and designating low-risk importers in programs that will allow expedited treatment for entry and clearance procedures. This type of system not only allows the trader to move goods more expeditiously, but also allows customs authorities to focus resources on the greatest areas of risk and threat to the country's borders.

- *Reduced opportunities for extortion of facilitation payments as a result increased transparency and automation*

Requirements under the Revised Kyoto require customs administrations to have much better visibility and tracking of duty payments, refunds and other types of financial transactions. These requirements build in a system of internal controls to reduce the possibility of unauthorized diversion of funds and to support a more accurate and "audit-proof" customs accounting system.

REVISED KYOTO CONVENTION ON CUSTOMS MODERNIZATION QUESTIONS AND ANSWERS

What is the Revised Kyoto Convention?

The Revised Kyoto Convention is an amendment to the Kyoto Convention, formally known as the "International Convention on the Simplification and Harmonization of Customs Procedures". It is an international instrument maintained by the

World Customs Organization (WCO) offering countries a comprehensive, coherent solution for the simplification and harmonization of their customs procedures.

What is the World Customs Organization?

Established in 1952 as the Customs Co-operation Council, the WCO is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of customs administrations. With 161 Member Governments, it is the only intergovernmental worldwide organization competent on customs matters.

What is the bottom line impact of adopting the Revised Kyoto Convention?

The WCO estimates that archaic customs procedures and practices add 5 to 7% to the cost of items that flow in international trade. Adherence to the Revised Kyoto would significantly reduce if not eliminate this wasteful surcharge.

Does the Revised Kyoto help U.S. security?

The Revised Kyoto promotes the use of risk management procedures and pre-arrival information for screening and other purposes, enabling customs administrations to identify and target higher risk transactions more effectively. Customs administrations also must commit to the employment of automated systems, which are inherently more reliable and secure.

Why was the original Kyoto Convention created?

One of the main aims of the WCO, since its inception, has been to secure the highest degree of harmony and uniformity in the customs systems of its member countries. Despite the volume and importance of the work done in different fields, however, until now there was no international instrument offering countries a comprehensive, coherent solution for the simplification and harmonization of their customs procedures.

When was the original Convention created and implemented?

The Kyoto Convention was established in Kyoto, Japan, on May 18, 1973 and entered into force on September 25, 1974.

When was the Revised Kyoto Convention created and implemented?

The Revised Kyoto was unanimously adopted in June 1999 by the 114 Customs administrations that attend the WCO's 94th Session.

How does the Revised Kyoto come into force?

There are 63 "Contracting Parties" to the original Kyoto Convention. Forty of the Contracting Parties, must ratify the Revised Kyoto in order for it to enter into force and replace the original Kyoto Convention.

Three months after 40 Contracting Parties have acceded to the Revised Kyoto, the remaining 23 Contracting Parties do not automatically accede. They have two options:

1. deposit their instrument of ratification
2. accede

The non-original Contracting Parties will then be able to accede to the Revised Kyoto as specified in Article 8 of the Revised Kyoto. Prior to this, the non-original Contracting Parties can only accede to the original Kyoto Convention.

How many of the 63 Contracting Parties have ratified the Revised Kyoto?

As of May 2004, 32 countries have ratified the Revised Kyoto. They include: Algeria, Australia, Austria, Belgium, Bulgaria, China, Canada, Czech Republic, Denmark, European Community, Finland, France, Gambia, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Latvia, Lesotho, Lithuania, Morocco, Netherlands, New Zealand, Slovakia, Slovenia, Spain, Sweden, Uganda, United Kingdom, South Africa and Zimbabwe.

Who are the 63 original Contracting Parties?

The 63 original Contracting Parties include: Algeria, Australia, Austria, Belgium, Botswana, Bulgaria, Burundi, Cameroon, Canada, China, Congo (Democratic Republic of), Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, European Community, Finland, France, Gambia, Germany, Greece, Hungary, India, Ireland, Israel, Italy, Japan, Kenya, Korea (Republic of), Latvia, Lesotho, Lithuania, Luxembourg, Malawi, Malaysia, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Poland, Portugal, Rwanda, Saudi Arabia, Senegal, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Uganda, United Kingdom, United States, Vietnam, Yugoslavia, Zambia, and Zimbabwe.

How do countries implement the Revised Kyoto Convention?

Contacting Parties are obligated to bring the Standards, Transitional Standards and Recommended Practices that they have accepted into force nationally. Standards must be implemented within 36 months of ratification, while transitional standards have a 60-month implementation period. Contracting Parties' national legislation must include at least the basic rules from the General Annex, with detailed regulations for their implementation. Such regulations are not necessarily restricted to Customs legislation and may include official notification, charters, or ministerial decrees or similar instruments. National legislation should include the conditions under which the Customs procedures will be accomplished. Customs administrations are obliged to ensure that their regulations are transparent, predictable, consistent and reliable.

Why was the original Kyoto Convention revised?

Since its implementation in 1974 the growth in international cargo, developments in information technology and a highly competitive international business environment have created conflict with traditional customs methods and procedures. As a result, the WCO revised and updated the Kyoto Convention to ensure that it meets the current demands of international trade.

What revisions were made to the original Kyoto Convention?

The revision preserves many of the elements of the original Kyoto Convention, together with new elements to meet current conditions, and it is restructured to improve the harmonization of practices. The primary revisions follow:

- The core customs policies and procedures have been reorganized so that they are now found in a General Annex. Implementation of the standards set out in the General Annex is mandatory for countries that accede. (In the original Kyoto text countries could accede to provisions on an a la carte basis.)
- New core concepts such as the obligations to automate data systems, to cooperate with trade, and to implement risk management techniques have been incorporated.
- A mechanism is provided to maintain and update the Kyoto Convention (Management Committee to review and update the Convention at regular intervals).
- Detailed guidelines and best practices to assist countries in understanding how to implement the Kyoto Convention are provided in the Guidelines to the Convention.

Does U.S. implementation of the Revised Kyoto Convention require any changes in U.S. law?

The United States has chosen to opt out of provisions that would require changes in U.S. law. U.S. Customs officials have indicated that changes might be considered sometime in the future for certain valid reasons. For instance, if rules of origin were no longer relevant then the United States would need to revise its laws to reflect this change.

Will implementation of the Revised Kyoto Convention allow customs administrations to maintain controls while focusing on trade facilitation?

The standards in the Revised Kyoto promote harmonized common procedures that enable Customs to be more efficient in carrying out enforcement and revenue functions, and are vital to improved trade facilitation. Enforcement, compliance, and security functions are inseparable from trade facilitation in modern customs procedures, which are needed to address high volumes and rapid movement of goods. Implementing the Revised Kyoto will therefore enable more countries to have effective security and enforcement practices, while bringing improvements in trade facilitation.

Does the Revised Kyoto Convention benefit all modes of transport?

The principles for efficient and simple clearance procedures in the Revised Kyoto apply equally to all goods and all means of transport that move goods into or out of a customs territory. The formalities for all carriers on entering or leaving a customs territory are also uniform.

Is the Revised Kyoto Convention adapted to the needs of developing countries?

Encouraging national economic growth is one of the key objectives for developing countries. Simplifying the procedures to move goods across borders will reduce administrative barriers, thereby encouraging more international trade and investment, which spur economic growth. Simplified procedures also help small and medium-sized enterprises to become involved in international trade. A number of developing

countries played an active role during the revision of the Revised Kyoto. This has ensured that the revised provisions address their particular concerns.

Does the Revised Kyoto Convention help governments to deal with the new challenges of electronic commerce?

Recognizing the changes in today's business practices and the role of electronic commerce, the Revised Kyoto requires customs administrations to apply information technology to support customs operations, wherever it is cost-effective and efficient for both Customs and the trade. It provides administrations with detailed guidelines on how to apply and implement information technology for the clearance of goods, carriers and persons, thus assisting Customs administrations to deal with the demands generated by electronic commerce.

Is it realistic to anticipate that all WCO Members will accept the Revised Kyoto Convention?

WCO member countries invested four years in updating and modernizing this important instrument. By unanimously adopting the Revised Convention in June 1999, the then 151 WCO members signaled their approval of these new principles and rules for simplified and harmonized customs procedures, and their willingness to work towards full implementation.

Is it reasonable to expect Customs administrations to commit to implementing all of the 600 Standards and Recommendations and Practices contained in the Revised Kyoto?

The Body of the Convention (relating to the procedures for its adoption and administration) and the General Annex are binding on Contracting Parties and form the minimum requirement of the contract. This is essential to ensure the harmonization of procedures in all countries that become contracting parties. However, the Specific Annexes of recommended practices, dealing with specialized topics such as transit or free zones are optional. In addition, the General Annex differentiates between standards and transitional standards; the latter have longer implementation periods. It is clear that many countries will require training and assistance to implement the Revised Kyoto.

Does acceding to the Revised Kyoto Convention gives a Customs administration less autonomy?

The Revised Convention imposes obligations but provides flexibility and different time limits for implementation. The General Annex is the base, while the Specific Annexes can be added at the pace desired by a Customs administration. There are features such as Transitional Standards and Guidelines to aid governments to meet the obligations undertaken, and a Management Committee to give all Contracting Parties a voice in the further development and administration of the agreement.

Does the Revised Kyoto Convention apply to all geographic regions?

The core principles of the Revised Kyoto have been developed for universal standardization and harmonization of customs procedures. They apply in the territory of each Contracting Party that accedes to it regardless of its geographical location.

Can a single General Annex really cover every aspect of trade facilitation as well as targeted control procedures in order to permit smoother legitimate trade?

Implementation of the General Annex would be a great step toward simplified common customs procedures worldwide for the key elements covered in the General Annex. Together with Specific Annexes the Revised Kyoto provides a blueprint for worldwide procedures that would address most facilitation issues. It would not address them all; for example, there would still be issues regarding the amount and uniformity of data requirements, which are being addressed in another project, the WCO Customs Data Model (formerly the G-7 data initiative).

How will the Revised Kyoto Convention be enforced?

The Revised Kyoto does not have a formal enforcement mechanism. However, signatories are expected to meet their obligations. Contracting Parties should settle any disputes between them by negotiation. Any disputes not settled by negotiation are referred to the Management Committee, which was created under the Revised Kyoto. The Committee, which is made up of representatives from the Contracting Parties, would consider the dispute and make recommendation to settle it. Contracting Parties may agree in advance that the recommendation of the Management Committee will be binding.

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

RESPONSES OF SAMUEL M. WITTEN TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED BY SENATOR RICHARD G. LUGAR

QUESTIONS ON THE CONVENTION ON CYBERCRIME (TREATY DOC. 108-11)

Question 1. The Secretary of State's September 11, 2003 letter of submittal for the Convention indicates that the administration considers some of the Convention's provisions to be self-executing. Please indicate which articles or provisions of the Convention the administration considers to be self-executing.

Answer. As noted in the transmittal letter, most of the provisions of the Convention are not self-executing but rather require Parties to enact legislation to implement them. For the United States, no new implementing legislation is required, because existing U.S. Federal law is sufficient to satisfy the Convention's requirements.

The administration considers the provisions of Articles 24-25 and Articles 27-33 of the Convention to be self-executing. These provisions—on extradition and mutual legal assistance—can be directly invoked by the government. They do not create any private rights of action. Nor do the mutual legal assistance provisions give individuals or other private entities any right to obtain, suppress, or exclude evidence, or to impede the execution of a request.

Question 2. Article 27(4)(b) of the Convention indicates that a party to the Convention may refuse to provide mutual legal assistance in response to a request made under the Convention if "it considers that the execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests." What does the administration understand the scope of this provision to be? Would it, or would other provisions of the Convention, permit the United States to decline to provide assistance to countries with respect to whose judicial processes or due process standards the United States has concerns? Would it, or would other provisions of the Convention, permit the United States to decline to comply with a request on the ground that the conduct being investigated by the requesting state is Constitutionally protected in the United States?

Answer. This type of provision is common to the over 40 Mutual Legal Assistance Treaties to which the United States has become a party in recent decades. We view such provisions, which give the party receiving a request the right to deny assistance in particular, designated circumstances, as important to preserving our essential interests and legal principles. The Department of Justice will carefully review each request to determine the potential for abuse, and will make a determination whether to deny or condition assistance. The administration considers this provision to authorize the denial of assistance where providing the assistance would impinge on United States Constitutional protections, such as free speech, and intends to deny assistance in such situations.

Question 3. What steps does the administration plan to take to review incoming requests for mutual legal assistance under the Convention to ensure their consistency with the Convention?

Answer. The Department of Justice, Criminal Division, Office of International Affairs (OIA) will be responsible for scrutinizing incoming mutual legal assistance requests arising under the Convention to ensure compliance with applicable legal requirements. OIA has executed thousands of requests under the many bilateral and multilateral treaties providing for such law enforcement cooperation, and has been careful not to provide assistance in inappropriate cases. The Department of Justice, Criminal Division, Computer Crime and Intellectual Property Section will undertake similar review of requests for assistance that come in through the 24/7 network contemplated in Article 35 of the Convention rather than as formal requests for mutual legal assistance. The administration views this review process as providing an important operational safeguard to ensure compliance with the Convention's terms and the U.S. policies described in the answer to the prior question.

Question 4. Article 15 of the Convention states that "Each party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights. . . ." What provisions of U.S. law regarding protection of human rights does the administration understand to apply in connection with the Convention pursuant to Article 15?

Answer. The U.S. Constitution and a number of provisions of U.S. law establish conditions and safeguards that protect individual rights with respect to the powers and procedures provided for in Section 2 of the Convention. For example, U.S. implementation of these investigative measures is fully subject to the Constitution; particularly relevant in this context are the individual rights and limits on government action established by the Fourth and Fifth Amendments. Similar protections can be found in various Federal statutes, including the Federal Rules of Criminal Procedure and Title 18 of the U.S. Code (in particular, Chapters 119, 121, and 206 as amended by the Electronic Communications Privacy Act), which require, among other things, judicial supervision of requests for interception or disclosure of electronic communications and other safeguards set out in Article 15 of the Convention and its Explanatory Report.

Question 5. Under what circumstances will private parties in the United States asked to provide information to respond to requests made under the Convention be entitled under U.S. law to reimbursement for costs they incur in complying with such requests?

Answer. We are aware that a number of Internet service providers have sought confirmation that, should the United States become party to the Convention, the United States will continue its current practice of reimbursing them for costs they incur in the course of the execution of foreign mutual legal assistance requests. The Convention has no effect on U.S. law governing reimbursement of such costs, and it is not the intention of the administration to change its reimbursement policy as a result of the entry into force of this Convention.

Question 6. If all member countries of the Council of Europe, plus the United States, Japan, and Canada become parties to the Convention, what percentage of the world's computers would be within jurisdictions that are parties to the Convention?

Answer. If all Council of Europe members plus the United States, Japan, and Canada became parties to the Convention, computers in many highly-networked countries would be covered. Those countries would include the United Kingdom, France, Germany, Italy, the Netherlands, Finland, Norway, and Sweden. Although the administration cannot independently vouch for the accuracy of the following figures, 2002 statistics published by the International Telecommunication Union suggest that approximately 70% of the world's computers would be covered in that scenario. The relevant statistics are as follows:

Computers in Use (in 1000s)
United States—190,000
Canada—15,300
Japan—48,700
Europe—167,430
Total—421,430
Worldwide Total—588,775

See <http://www.itu.int/ITU-D/ict/statistics/at—glance/InternetO3.pdf>

RESPONSES OF SAMUEL M. WITTEN TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

QUESTIONS ON THE CONVENTION AGAINST TERRORISM (TREATY DOC. 107-18)

Question 1. To date, only 8 of the 33 signatories have become parties to the Convention. Why is ratification proceeding so slowly?

Answer. Although the United States already has the necessary legal authorities and regulatory structures in place to fully implement the Convention, some of the other signatories to the Convention will require legislation or make other domestic arrangements in order to be in a position to implement the Convention. This can be expected to take time, as action by a number of different governmental ministries may be required before these countries will be in a position to ratify the convention. In this connection, it should also be noted that the Convention incorporates by reference the offenses set forth in the ten multilateral counter-terrorism conventions listed in Article 2 of the Convention. While the United States is a party to all ten of these conventions, other OAS member states that are not yet party to one or more of these conventions will need to determine whether they will become a party, or instead will make a declaration pursuant to paragraph 2 of Article 2.

The United States Mission to the Organization of American States has been working to facilitate the ratification process for signatories by, among other things, assisting the OAS in conducting workshops to help countries determine whether implementing legislation is necessary, and if so, to suggest how to draft such legislation. In addition, the Inter-American Committee Against Terrorism (“CICTE”) plans to conduct a workshop for signatory states on implementing the Convention this year. Prompt ratification of the Convention by the United States will put us in a stronger position to press the remaining OAS member states to become party to the Convention.

Question 2. The Inter-American Convention on Mutual Assistance in Criminal Matters was signed over a decade ago, and, as of June 2004, less than half of the members of the OAS are parties to it. Given this slow pace of ratification, why should the committee expect that this Convention will enjoy broad support among OAS member states?

Answer. The United States itself did not become party to the Inter-American Convention on Mutual Legal Assistance in Criminal Matters until May of 2001. From the date the Convention opened for signature in 1994 until the U.S. became party, only three other OAS member states had become party to it. However, in the three years since the U.S. became a party, ten other countries have joined (we note that Trinidad and Tobago became a party on June 8, as did El Salvador on July 16). We believe our becoming a party has positively influenced the pace of ratification, and has enabled us to press more vigorously for other states to join the convention.

With respect to the Inter-American Convention Against Terrorism, there has been a very strong level of support for the Convention among OAS member states since its inception. Delegations from member states negotiated the Convention in less than eight months—a remarkable achievement for a multilateral convention—and the Convention was adopted by the OAS and signed by thirty OAS member states on June 3, 2002. During the two years following its opening for signature, eight countries have become party, a pace that exceeds that of the Mutual Legal Assistance Convention. In January 2004, the Special Summit of the Americas called upon all member states that had not yet done so to ratify the Terrorism Convention and to “urgently consider signing and ratifying” the Inter-American Convention on Mutual Legal Assistance in Criminal Matters. As with the Mutual Legal Assistance Convention, we would hope that our becoming party to the Terrorism Convention will encourage other ratifications, and put us in a better position to press for similar action by the remaining non-parties.

Question 3. What is the nature of the obligation in Article 3? Does it commit parties to make best efforts to become a party to the international instruments listed in Article 2? Or is it something less than that?

Answer. We understand Article 3 to require a party to the Convention to take steps toward becoming a party to any international instrument listed in Article 2 to which it is not yet a party. At the same time, however, the Article explicitly recognizes that such steps must be in accordance with the party’s constitutional procedures and would include adopting the necessary measures to implement those instruments. It is thus somewhat more complex than a “best efforts” formulation. This requirement reflects the member states’ desire to advance the implementation of United Nations Security Council Resolution 1373, which “calls upon” states to become parties to these same instruments “as soon as possible,” while preserving the prerogatives of legislative bodies in the domestic approval/ratification process. (It should be noted that at the time of the negotiations, the United States itself had not yet ratified the International Convention for the Suppression of Terrorist Bombings or the International Convention for the Suppression of Terrorist Financing.)

Question 4. Which agency of the United States will be designated as the “financial intelligence unit” under Article 4(1)(c).

Answer. The administration intends to designate the Financial Crimes Enforcement Network (FinCEN) at the Department of the Treasury as the financial intelligence unit for the purposes of implementing the Convention.

Question 5. What are the Federal laws in the United States that would be utilized to implement Articles 5 and 6? Do these apply, as required by the Convention, to offenses committed outside U.S. territory?

Answer. With respect to Article 6, the offenses listed in Article 2 of the Convention are money laundering predicate offenses under 18 U.S.C. 1956(c)(7)(A), which covers terrorism offenses by virtue of 18 U.S.C. 1961(1)(G). In addition, the following offenses listed in Article 2 of the Convention are predicate offenses under 18

U.S.C. 1956(c)(7)(D): 49 U.S.C. 46502, 46504-46506 (aircraft hijacking and sabotage), 18 U.S.C. 32 (sabotage), 18 U.S.C. 37 (violence at airports), 18 U.S.C. 1116 (attacks on internationally protected persons), 18 U.S.C. 1203 (hostage taking), 18 U.S.C. 831 (protection of nuclear material), 18 U.S.C. 2280 (violence against maritime navigation), 18 U.S.C. 2281 (violence against fixed platforms), 18 U.S.C. 2332f (terrorist bombings), 18 U.S.C. 2339A (providing material support to terrorists), 18 U.S.C. 2339B (providing material support or resources to a designated foreign terrorist organization), and 18 U.S.C. 2339C (prohibiting the financing of terrorism).

Offenses committed outside the U.S. that are against a foreign nation and listed in 18 U.S.C. 1956(c)(7)(B) are also money laundering predicates. Such offenses include all crimes of violence, and murder, kidnapping, robbery, extortion, and destruction of property by means of explosive or fire. In addition, 18 U.S.C. 1967(c)(7)(B)(vi) covers conduct as to which the U.S. is obligated by multilateral treaty to extradite or submit the case for prosecution if the offender is found in the United States. The U.S. has such an obligation as to each of the offenses set forth in the counterterrorism instruments listed in Article 2 of the Convention.

With respect to Article 5, 18 U.S.C. 981(a)(1) (A), (B), (C), (G)(ii) and (iii) and (H), 18 U.S.C. 982, and 18 U.S.C. 1963 provide for forfeiture of the assets involved in the conduct set forth in Article 2 of the Convention, since they also apply to the predicate offenses described above. The legal basis for forfeiture with respect to conduct committed outside U.S. territory is set forth at 18 U.S.C. 981(a)(1) (A), (B) and (C), which permits the forfeiture of property involved in offenses listed in 18 U.S.C. 1956(c)(7)(B).

Question 6. Article 7 obligates states parties to cooperate and exchange information to “detect and prevent the international movement of terrorists and trafficking in arms or other materials intended to support terrorist activities.” In connection with this obligation, did the negotiators discuss the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms? When does the executive branch expect that it will be prepared to proceed with Senate consideration of that Convention?

Answer. Negotiators of the Convention did discuss the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, and anticipated that the two Conventions could supplement one another for those States that choose to be parties to both instruments. The executive branch could proceed with Senate consideration of the trafficking convention as soon as the Senate takes it up.

Question 7. Article 10(1)(a) requires informed consent of a prisoner before transfer to another state party. Paragraph 3 of Article 10 provides a means for bringing charges against a person transferred if the state party from which the person is transferred consents. When would such consent from the state party be sought? Is it prior to obtaining the informed consent of the prisoner for the transfer itself?

Answer. This provision is based on the virtually identical provisions of Article 13 of the UN Convention for the Suppression of Terrorist Bombings and Article 16 of the UN Convention on the Suppression of the Financing of Terrorism. Neither the OAS provision nor its UN predecessors are intended to be a substitute for extradition. However, we could anticipate cases in which, prior to transfer, a prisoner might agree to waive the protection of paragraph 3. There might also be rare cases in which the agreement of the transferring state was sought and provided subsequently. For example, should the prisoner’s sentence come to a conclusion during the transfer, he or she might be released and remain in the state of transfer. In this case, paragraph 3 would require the state of transfer to seek permission of the transferring state prior to detaining the person for acts preceding the transfer.

Question 8. How many current bilateral treaties on extradition and mutual legal assistance between the United States and OAS member states will be effectively amended by Article 11? That is, which current treaties have a broader political offense exception than is contemplated by this article?

Answer. There are sixteen extradition treaties between the U.S. and other OAS member states that do not provide for such limitations on invocation of the political offense exception: Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Panama, Dominican Republic, Suriname, Uruguay, and Venezuela. Four of these countries (El Salvador, Nicaragua, Panama and Venezuela) are already party to the OAS Terrorism Convention, so our extradition treaty with those countries would be augmented immediately upon our becoming a party.

We have mutual legal assistance treaty (MLAT) relationships with 25 OAS Members. Seventeen of these are through bilateral MLATs with the following countries:

Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Brazil, Canada, Dominica, Grenada, Jamaica, Mexico, Panama, St. Kitts and Nevis, Santa Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Uruguay. (Canada, Grenada, Mexico, Panama, and Trinidad and Tobago are also party to the OAS MLAT.) Eight of these treaty relationships are solely through the OAS MLAT, which the United States joined in 2001: Chile, Colombia, Ecuador, El Salvador, Guatemala, Nicaragua, Peru and Venezuela.

Of these twenty-five treaty relationships, the treaty in force with twenty-two of these countries expressly permits assistance to be denied on political offense grounds: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Chile, Colombia, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Jamaica, Mexico, Nicaragua, Panama, Peru, St. Kitts and Nevis, Santa Lucia, St. Vincent and the Grenadines, Uruguay, and Venezuela. Antigua and Barbuda, El Salvador, Mexico, Nicaragua, Panama, Peru and Venezuela are already Parties to the OAS Terrorism Convention; accordingly, upon our becoming party to the OAS Terrorism Convention, the political offense provisions in our MLAT relationships with each of these countries would be narrowed. As other countries named in this paragraph eventually become party to the OAS Terrorism Convention, there will be a similar effect upon our MLAT relationships with them.

Question 9. Is there a difference between the standards in Articles 12 and 13 and the standards on determining refugee status and asylum under U.S. law? Please elaborate.

Answer. The obligations we would undertake under these two articles are functionally equivalent, and fully in accordance with existing U.S. law. The use in Article 13 of “reasonable grounds to believe” was not intended by the drafters to articulate a lesser legal standard than “serious reasons for considering” as set forth in Article 12. Specifically, under U.S. immigration law, only those aliens who meet the definition of “refugee” as set forth in Section 101(a)(42) of the Immigration and Nationality Act (INA) are eligible for refugee status and/or asylum. Therefore, the United States’ requirements under Articles 12 and 13 will apply to the same class of persons, i.e. only those aliens meeting the definition of “refugee.”

An alien who is otherwise eligible for refugee status, but has been deemed inadmissible to the United States pursuant to INA section 212(a)(3)(B) (Terrorist Activities), would be denied refugee status and may not be admitted to the United States. Pursuant to INA section 207(c)(3), the Secretary of Homeland Security may not waive a finding of inadmissibility under 212(a)(3)(B). Similarly, under INA section 208(b)(2)(A), asylum may not be granted to an alien who is inadmissible under section 212(a)(3)(B) or removable under section 237(a)(4)(B) (engaging in terrorist activities). Thus, existing law is sufficient to fully implement both Articles 12 and 13.

RESPONSES OF BRUCE SWARTZ TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

QUESTIONS ON THE CONVENTION ON CYBERCRIME (TREATY DOC. 108–11)

Question 1. What is the Executive Branch’s view of the authoritative nature of the Explanatory Report?

Answer. The Explanatory Report provides guidance in interpretation and application of the Convention’s provisions. Although the provisions of the Explanatory Report are not binding on the Parties, they reflect the understanding of the Parties, on the basis of which the Convention’s provisions were drafted. The Explanatory Report can provide a fundamental basis for interpretation of the Convention, and the Parties and the Council of Europe refer to it in practice.

Question 2. Are there any related exchange of notes, official communications, or statements of the U.S. negotiating delegation not submitted to the Senate with regard to the Convention that would provide additional clarification of the meaning of provisions of the Convention?

Answer. No. The meaning of provisions of the Convention is governed in the first instance by the Convention itself. In addition, as mentioned in the answer to the prior question, the Explanatory Report may serve as a fundamental basis for interpretation of the Convention. Additional perspective on the meaning of provisions is provided in the Department of State’s letter of submittal, which sets forth an article-by-article analysis.

Question 3. The Convention was signed by the United States on November 23, 2001. Why did it take nearly 2 years until it was submitted to the Senate?

Answer. An extensive interagency review took place, during which the detailed package transmitting and explaining the Convention was prepared. Among other things, the Convention was carefully reviewed by the Justice Department to ensure that the obligations the United States would undertake as a Party to the Convention could be met under current law.

Question 4. To date, 38 states have signed the Convention, but only six have ratified it. Why have so few states ratified the Convention? Has any state that signed it indicated that it is reconsidering its support for the Convention?

Answer. It is not uncommon for states to proceed deliberately in the ratification of complex multilateral instruments such as the Convention. Many signatories may engage in the same type of extensive, interagency review that took place in the United States. In addition, we believe the United States becoming a Party may positively influence the pace of ratification, as the United States has the largest number of computers and the largest amount of computer data of any signatory state. The United States becoming a Party will also enable us to press more vigorously for other states to join the Convention. To our knowledge, no state that has signed the Convention is reconsidering its support for the Convention.

Question 5a. The Convention is open to accession by any state provided that there is unanimous consent of the Contracting State.

- Have there been any discussions among the members of the Council or the states that participated in the drafting of the Convention about inviting other states to accede to the Convention? If so, have the United States and the other states discussed criteria for extending such invitations?

Answer. During the negotiations that led to the Convention, the delegations were aware and contemplated that, at the appropriate time, states other than those currently eligible to join the Convention would be invited to accede to the Convention. Indeed, Article 37 of the Convention, patterned on a model clause included in many Council of Europe treaties, specifically contemplates accession by other states. The negotiators modified the model provision, however, to make explicit that no state could be invited to accede to the Convention without the unanimous consent of State Parties to the Convention, and not merely those State Parties that are members of the Council of Europe. The United States would, therefore, as a Party to the Convention, have a specific role in the process.

Although the negotiators did not set out any formal criteria for extending invitations, it was discussed generally that the type of states receiving invitations would be those that possess the capability to render assistance as contemplated by the Convention and adhere to a human rights framework comparable to that of members of the Council of Europe and other states that participated in the negotiations.

Question 5b. The Convention is open to accession by any state provided that there is unanimous consent of the Contracting State.

- It is anticipated that invitations will be extended to states outside of Europe? If so, which states are likely to be considered?

Answer. As described in the prior answer, it was contemplated by the negotiators, and it is still anticipated, that invitations would be extended to states outside of Europe. We are unaware of any discussions of specific states to which invitations might be extended.

Question 5c. The Convention is open to accession by any state provided that there is unanimous consent of the Contracting State.

- Is it anticipated that invitations will be extended to states that do not provide for “adequate protection of human rights and liberties” as that term is used in Article 15(1)?

Answer. We are not in a position to predict to which states invitations to accede to the Convention will be extended. The issue of human rights, however, is one that we anticipate would be considered at the time of any potential invitation in connection with this, we note that the Statute of the Council of Europe provides that all members “must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.” Similarly, states can obtain observer status at the Council of Europe, as the United States has, only if they are willing to accept the same principles.

Question 6. Do the extradition or mutual legal assistance provisions of the Convention implicate the President's powers as Commander-in-Chief under Article II of the Constitution? Please elaborate.

Answer. The extradition and mutual legal assistance provisions of the Convention will be administered by the Executive Branch under the supervision of the President. Legal authority for carrying out these provisions derives from the clause in Article II of the Constitution stating that the President "shall take Care that the Laws be faithfully executed," as well as from applicable statutes. The Commander in Chief authority of Article II is not necessary for implementation of these provisions of the Convention, nor is it affected by them.

Question 7. The United States has mutual legal assistance relationships in place with many states in Europe. Of the states that have signed, ratified, or acceded to the Convention to date, which states do not have a mutual legal assistance relationship with the United States?

Answer. Of the 6 states that have ratified the Convention to date—Albania, Croatia, Estonia, Hungary, Lithuania, and Romania—the United States does not have a mutual legal assistance treaty (MLAT) in force with two—Albania and Croatia. Of the 28 European states that have signed but not ratified the Convention to date—Armenia, Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Ukraine, and the United Kingdom—the United States does not currently have an MLAT in force with 14—Armenia, Bulgaria, Denmark, Finland, Germany, Iceland, Ireland, Malta, Moldova, Norway, Portugal, Slovenia, Sweden, and the former Yugoslav Republic of Macedonia. In the absence of a treaty, the U.S. has ongoing law enforcement relationships in the field of mutual legal assistance in criminal matters with all of the signatory states and Parties to the Convention. It should be noted that no states have acceded to the Convention.

Question 8. What steps does the Executive Branch take under existing MLATs, or intend to take under the Convention, to prioritize foreign requests made that will place production or other burdens on private industry?

Answer. If a requesting state has indicated that its request is urgent, the Justice Department will—as it currently does with respect to mutual legal assistance and letters rogatory requests—review the request, if necessary consult with the requesting state, and determine how urgently the request should be executed. The custodian of the data sought, in this case generally an Internet Service Provider, will be asked to provide the data with the appropriate urgency. We are not aware that current volumes of requests are unduly burdening ISPs, and do not expect a significant increase in the number of requests as a result of United States ratification of the Convention. However, should such a situation arise, the Justice Department is prepared to work with ISPs to reach acceptable solutions.

Question 9. The New York Times recently reported on an extradition case in the Eastern District of New York (William Glaberson, "Bowling to an Extradition Deal, U.S. Will Forgo Death Penalty," June 19, 2004). The news report suggested that, in this particular case, the United States had initially decided not to honor the terms of an extradition order from a court in the Dominican Republic that was conditioned on the defendant not being subject to the death penalty. This matter has implications for many other extradition cases, now and in the future. Please describe:

- the circumstances of this matter;
- U.S. policy on commitments made to treaty partners not to seek the death penalty when requested by the treaty partner, including whether the United States has modified that policy in the last 12 months.

Answer. The article refers to Alejandro De Asa Sanchez, who was extradited from the Dominican Republic. Our extradition treaty with the Dominican Republic dates from the 1930s, and it contains no provision addressing the death penalty. Moreover, in this case, as in similar cases, the Government of the Dominican Republic did not seek and the United States did not provide an assurance that the death penalty would not be sought as a condition of Mr. De Asa Sanchez's extradition. However, in this case, as in others of persons extradited from the Dominican Republic, the Department of Justice exercised its discretion not to seek the death penalty in view of our very active and positive extradition relationship with the Dominican Re-

public and of our understanding of the Dominican Republic's concerns that its citizens, if extradited, not be subject to the death penalty.

When the United States provides an assurance to a treaty partner that it will not seek the death penalty as a condition of extradition, it abides by that condition. This has been and continues to be the position of the United States.

Question 10. What is the scope of the term "suitable for processing" as used in Article 1(b)? Does it encompass any document that may be transmitted via electronic mail?

Answer. Data "suitable for processing" as that term is used in Article 1(b), is meant to include data that can be directly processed by a computer system—in other words, data in electronic form or stored on optical or magnetic media. See Paragraph 25 of the Explanatory Report. Information in a form that cannot be directly processed, such as printed text or an image on paper, which requires an intermediary step such as scanning before it can be processed, is outside the scope of the definition.

Any document transmitted via electronic mail would come within the scope of "data suitable for processing," because the electronic mail attachments and documents in electronic form are processed and transmitted by email servers and clients as part of the normal transmission process for electronic mail.

Question 11. Under Article 2 of the Convention, would the transmission of "cookies" or "spyware" by a Web site to an individual computer without the consent of the computer owner constitute illegal access? Is such transmission currently a violation of U.S. law?

Answer. "Cookies" and "spyware" are different, and our answer accordingly discusses each concept separately.

The transmission and receipt of "cookies" (small text records maintained by a Web browser containing information—e.g., user name, viewing preferences—that a Web server has requested be stored so that the Web browser may provide it during a subsequent visit to the Web site) by themselves would not typically be considered "illegal access without right," as noted in Paragraph 48 of the Explanatory Report, as cookies are sent as part of established Web browsing protocols and the operator of the browser has the ability to reject or delete such cookies. Paragraph 38 of the Explanatory Report also notes that "legitimate and common activities inherent in the design of networks, or legitimate and common operating or commercial practices should not be criminalized." The normal uses of cookies would fit within these principles, and not be considered illegal access under the Convention. The transmission and receipt of normal HTTP cookies is not criminalized under United States law. See generally *In re DoubleClick Inc. Privacy Litigation*, 154 F.Supp.2d 497 (S.D.N.Y. 2001) (in civil case involving Electronic Communications Privacy Act and Computer Fraud and Abuse Act, court concluded that use of cookies did not violate either act).

The general concept of "spyware" encompasses a fairly broad range of programs installed on computers for various reasons. Indeed, whether a program is or is not spyware may be a matter for disagreement between program distributors and users. In general, however, if an entity causes a program to be installed surreptitiously on a user's computer system, whether by exploiting a vulnerability in a system or by deceiving the user, that conduct could be punished by current statutes that would implement Article 2, 3, 4, or 5 of the Convention, depending on the precise behavior of the spyware. For example, if the purpose of the spyware is to record keystrokes and transmissions of the user, it would be prohibited by statutes implementing Article 3 of the Convention (in the United States, the relevant statute would be 18 U.S.C. § 2511(1)). If the purpose of the spyware is to copy personal information from the hard drive of the user and transmit it to the distributor, it would likely be prohibited by statutes implementing Article 2 of the Convention (in the United States, the relevant statute would be 18 U.S.C. § 1030(a)(2)).

Question 12. What provision or provisions of U.S. law implement Articles 2 through 10, and Articles 16 through 21?

Answer. The following statutes implement the Articles listed. Particular facts of cases may implicate additional statutes (for example, a computer fraud committed upon a financial institution may additionally violate the bank fraud statute, 18 U.S.C. § 1344). The following list, however, encompasses the core sections implementing the specified Articles.

<i>Articles 2, 4, & 5:</i>	18 U.S.C. § 1030;
<i>Article 3:</i>	18 U.S.C. § 2511;
<i>Article 6:</i>	18 U.S.C. § 1029, 1030, and 2512;
<i>Articles 7 & 8:</i>	18 U.S.C. § 1030 and 1343;
<i>Article 9:</i>	18 U.S.C. § 2251, et seq.;
<i>Article 10:</i>	17 U.S.C. § 501, et seq., and 18 U.S.C. § 2318, et seq.;
<i>Articles 16 & 17:</i>	18 U.S.C. § 2703;
<i>Article 18:</i>	18 U.S.C. § 2703 and Federal Rules of Criminal Procedure 6, 17;
<i>Article 19:</i>	Constitution of the United States, Amendment IV, Federal Rule of Criminal Procedure 41, and 18 U.S.C. § 2703;
<i>Article 20:</i>	18 U.S.C. § 3121, et seq.;
<i>Article 21:</i>	18 U.S.C. § 2510, et seq.

Question 13. The commentary in the Secretary’s letter accompanying the second proposed reservation regarding Article 6 states that “United States law does not directly criminalize the possession or distribution of data interference and system interference devices.”

- Does U.S. law criminalize the production or sale of data interference or system interference devices? If so, why is the proposed reservation drafted so broadly so as to include such offenses?

Answer. At present, United States law does not *directly* criminalize the production or sale of data interference or system interference devices. Possession or distribution of viruses, distributed denial-of-service tools, and similar articles is not specifically prohibited under United States law, although possession or distribution of access and interception devices with intent to defraud or to intercept is prohibited (18 U.S.C. § 1029, 2512).

In appropriate cases, a person developing, possessing, or distributing a virus or denial of service tool could be charged with either attempting to cause damage or aiding damage to a computer system, if the government could prove that the possessor intended to or did cause the item to damage a computer system or systems.

Because no federal statute directly implemented the items covered by the reservations, the United States sought and obtained a reservation possibility on this issue, and we have drafted and submitted to the Senate a proposed reservation that makes clear that United States law does not directly include those offenses. If the United States were a Party to the Convention and later criminalized the possession or distribution of such items, we would have the option to withdraw the reservation in whole or in part. The presence of the reservation, however, relieves the United States from any obligation to so criminalize those acts.

Question 14. Article 25(4) provides that, “[e]xcept as otherwise specifically provided for in articles in this chapter, mutual assistance shall be subject to the conditions provided for by the law of the requested party or by applicable mutual assistance treaties . . .” In the view of the executive branch, what are the specific exceptions to this proviso that are contained in his chapter?

Answer. The specific exceptions referred to in Article 25(4) (described to some extent in Paragraph 258 of the Explanatory Report to the Convention) consist of:

1. the requirement of Article 25(2) that each Party must provide for the types of cooperation that the other articles require (such as preservation, real time collection of data, search and seizure, and maintenance of a 24/7 network), even when these measures are not already included in the Party’s mutual legal assistance laws, treaties or equivalent arrangements;
2. Article 25(4)’s requirement that cooperation may not be denied as to the offenses set forth in Articles 2-11 on the grounds that the requested Party considers it to be a “fiscal” offense, notwithstanding anything to the contrary in a mutual legal assistance law or treaty;
3. the requirement of Articles 27 and 28 that they are to be applied in lieu of domestic law, where there is no MLAT or equivalent agreement in force between the requesting and requested Parties;
4. the stipulation in Article 29(3)-(4) that a Party may not refuse to comply with a request for preservation on dual criminality grounds (the possibility of a reservation is provided for as to this requirement).

Question 15. Please describe the process that the executive branch intends to follow if the United States receives requests for assistance under Articles 29 through 33.

Answer. In general, and in accordance with current practice, the Department of Justice, Criminal Division, Office of International Affairs (OIA), as Central Authority for mutual legal assistance, will process incoming mutual legal assistance requests arising under the Convention to ensure compliance with applicable legal requirements and will oversee execution of requests by United States Attorneys Offices. Where particularly rapid action is sought, requests may also be submitted to the United States through the 24/7 network contemplated in Article 35 of the Convention. At present, the Department of Justice's Computer Crime and Intellectual Property Section (CCIPS) acts as the point-of-contact for the United States in a similar network of 37 countries that was originally established by the G8 in 1997, and it is contemplated that it would play this role for purposes of Article 35 of the Convention. In such cases, CCIPS will work in coordination with OIA in reviewing and executing the request. (Note that Article 32 of the Convention does not contemplate requests for assistance;)

Question 16a. The provisions on legal assistance permit a state to refuse assistance if it is "likely to prejudice its sovereignty, security, *ordre public* or other essential interests."

- Under what circumstances would the United States expect to refuse a request for legal assistance on grounds that it is likely to prejudice essential interests?

Answer. This type of provision is common to the over forty Mutual Legal Assistance Treaties to which the United States has become a party in recent decades. The administration considers this provision to authorize the denial of assistance where, for example, providing the assistance would impinge on United States Constitutional protections, such as free speech, or jeopardize national security for any reason. The Department of Justice will carefully review each request to determine the potential for abuse, and will make a determination whether to deny or condition assistance.

Question 16b. The provisions on legal assistance permit a state to refuse assistance if it is "likely to prejudice its sovereignty, security, *ordre public* or other essential interests."

- The standard of the provision is "likely to prejudice" the particular interest, not that it is certain to do so. What is the process for making such a determination?

Answer. As previously stated, similar provisions appear in over forty bilateral and multilateral treaties providing for mutual legal assistance in criminal matters, in which the Department of Justice, Criminal Division, Office of International Affairs (OIA), acts as Central Authority. OIA will also be responsible for reviewing formal mutual legal assistance requests arising under the Convention. As now, the facts and charges on which requests are based will be scrutinized carefully, and OIA will consult with relevant Department of Justice components and other agencies, to ensure that assistance is not provided in inappropriate cases. This standard provides OIA with discretion to refuse assistance in cases such as those described in response to the prior question.

Question 16c-1. The provisions on legal assistance permit a state to refuse assistance if it is "likely to prejudice its sovereignty, security, *ordre public* or other essential interests."

- Similar provisions are found in other bilateral mutual legal assistance treaties.
 1. How often does the United States invoke this sort of provision as a basis for refusing to provide assistance? Please provide examples.

Answer. The United States rarely, if ever, has to formally invoke such a provision as a basis for refusing to provide assistance, but we have denied assistance or persuaded foreign states not to make formal requests where, for example, the implementation of the request would impinge on First Amendment protections. Our experience is that other countries are often aware of our Constitutional protections and therefore either consult with us prior to making a request that is likely to be refused or generally avoid making requests to the United States that would implicate such protections. In other cases, other grounds for refusal may be invoked.

Question 16c-2. The provisions on legal assistance permit a state to refuse assistance if it is "likely to prejudice its sovereignty, security, *ordre public* or other essential interests."

- Similar provisions are found in other bilateral mutual legal assistance treaties.
 2. Would the United States refuse assistance under the Convention in a case such as *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp.2d 1181 (N.D. Cal. 2001)?

Answer. While each case will turn on its own facts, *Yahoo* is an example of a case in which the U.S. would refuse assistance.

Question 16d. The provisions on legal assistance permit a state to refuse assistance if it is “likely to prejudice its sovereignty, security, *ordre public* or other essential interests.”

- Some states that have signed the Convention do not fully respect civil liberties. For example, the State Department’s most recent country reports on human rights indicates that the government of Moldova interfered with freedom of the press in a variety of ways: “the Government sometimes restricted these rights [of freedom of the press], applying the electoral law, the Civil Code, and a calumny law . . .” Given that the Convention does not require dual criminality for the provision of legal assistance, how does the executive branch expect to respond to requests for assistance from nations that do not respect fundamental rights and which seek to use the Convention to suppress those rights?

Answer. The Convention need not have a dual criminality requirement to fully authorize the United States to protect freedom of the press. As stated above, assistance can be denied on the basis of the provisions of the Convention, such as the grounds cited in the question or the political offense provisions of Article 27(4), as well as on grounds currently available pursuant to applicable treaty or domestic law. The executive branch, through the Department of Justice, expects to address requests for assistance on an individual basis. The Department of Justice will carefully review each request, regardless of the country from which it comes, to ensure that compliance with it would not impinge on U.S. fundamental principles and policy, and that U.S. implementation of foreign requests would not be inconsistent with relevant Constitutional protections.

Question 17. Article 33(1) states that it shall be governed “by the conditions and procedures provided for under domestic law.” By contrast, Article 34 states that assistance shall be provided “to the extent permitted under their applicable treaties and domestic law.” Is there a reason that the language in the two provisions is different? Is not Article 33 to be governed by any applicable mutual legal assistance treaty? If not, why not?

Answer. Article 33 imposes a categorical obligation to provide assistance to other Parties with respect to the real time collection of traffic data, while Article 34 does not provide a general obligation to assist another Party with respect to interception of content data.

Each Party must have the power to provide the form of cooperation set forth in Article 33 to other Parties; however, the drafters recognized that each country would specify the conditions under which cooperation would be provided in its “domestic law.” The reference to “domestic law” may include application of conditions that may be provided for by treaty; in this regard, see Paragraph 295 of the Explanatory Report to the Convention.

In contrast, with respect to interception of content of communications under Article 34, the drafters recognized that international cooperation of this kind may not be available at all, at least in some circumstances, under some legal regimes (such as that of the United States). Accordingly, there is no general obligation to provide this form of cooperation; rather, assistance is available only “to the extent” the treaties and laws of the requested state provide for it.

Question 18. The amendment processed under Article 44 provides for proposed amendments to be reviewed by a committee of experts and approved by the Committee of Ministers, after “consultation with the non-member States Parties.” As a non-member of the Council of Europe, would the United States have only this consultative role in review and approval of proposed amendments? Is there an understanding between COE members and non-members who participated in the elaboration of the Convention about the nature and scope of this consultation?

Answer. Under Article 44 of the Convention, the United States, if it became a Party to the Convention, would have two opportunities to review proposed amendments to the Convention. First, as noted in the question, States Parties that are not members of the Council of Europe would be consulted by the Council of Europe Committee of Ministers before that Committee adopted any amendment. In addition, as provided in Article 44(5) of the Convention, any amendment adopted by the Committee of Ministers can come into effect only after all Parties to the Convention have indicated their acceptance of the amendment. Therefore, if the United States were a Party to the Convention, no amendment could be adopted without its consent.

RESPONSES OF SAMUEL M. WITTEN AND BRUCE SWARTZ TO ADDITIONAL QUESTIONS
FOR THE RECORD SUBMITTED BY SENATOR JOSEPH R. BIDEN, R.

QUESTIONS APPLICABLE GENERALLY TO THE UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND PROTOCOLS ON TRAFFICKING IN PERSONS AND SMUGGLING OF MIGRANT (TREATY DOC. 108-16)

Question 1. Are there any related exchange of notes, official communications, or statements of the U.S. negotiating delegation not submitted to the Senate with regard to the Convention or the two protocols that would provide additional clarification of the meaning of terms of the Convention or the Protocols?

Answer. No. The meaning of terms used in the Convention and Protocols is governed in the first instance by the definitions provided in those instruments, as well as by their context in the Convention. In addition, Interpretive Notes for the official records (*travaux préparatoires*) serve as a supplemental means of interpretation of certain terms in the Convention and Protocols. Additional perspective on the meaning of terms is provided in the Department of State's letter of submittal, which sets forth an article-by-article analysis.

Question 2. The Convention and Protocols were signed on December 13, 2000. They were submitted to the Senate on February 23, 2004.

a. What was the cause of the delay in submitting the treaties to the Senate?

Answer. The interval between United States signature of the Convention and Protocols and their submission to the Senate for advice and consent to ratification results from their complexity and the need for extensive interagency discussion. Each instrument contains, among other things, detailed criminalization obligations that interact in complex ways with U.S. Federal and state criminal law. As a result, the Department of Justice undertook systematic research to ascertain whether existing criminal laws in the United States were adequate to satisfy fully Convention and Protocol obligations, and the results of their inquiry required extensive subsequent consultation with the Department of State. Since certain of the criminalization obligations relate to subject-matter which is addressed in state criminal law, questions of federalism arose in these discussions, and ultimately a reservation and understanding relating to particular articles of the main Convention and Trafficking Protocol was prepared.

b. Was there any significant opposition within the executive branch to submission of the Convention or the Protocols to the Senate?

Answer. The administration fully supports ratification of the Convention and the Protocols.

Question 3. What is the view of the executive branch of the authoritative nature of the Interpretive Notes for the official records (*travaux préparatoires*) of the negotiation of the Convention and the Protocols thereto (UN document A/55/383/Add.1, November 3, 2000)?

Answer. The Interpretive Notes for the official records (*travaux préparatoires*) serve to preserve certain points relating to articles of the instruments that are subsidiary to the text but nonetheless of potential interpretive importance. In accordance with customary international law, as reflected in Article 32 of the Vienna Convention on the Law of Treaties, preparatory work such as that memorialized in the Interpretive Notes may serve as a supplementary means of interpretation, if an interpretation of the treaty done in good faith and in accordance with the ordinary meaning given to the terms of the treaty results in ambiguity or is manifestly absurd. Thus, the Interpretive Notes, while not binding as a matter of treaty law, could be important as a guide to the meaning of terms in the Convention and Protocols.

Question 4. A third protocol was concluded in connection with the Organized Crime Convention related to the illicit manufacturing and trafficking in firearms. What is the position of the executive branch on whether the United States should become a party to that Protocol? If the administration supports doing so, when will it be submitted to the Senate?

Answer. Like many other countries, the United States has focused first on the Convention and the Trafficking in Persons and Migrant Smuggling Protocols, which were finished a year before the Firearms Protocol and were signed by the U.S. and over a hundred other countries at a high-level signing ceremony. The administration is reviewing the Firearms Protocol in order to determine whether to propose that the United States accede to it.

Question 1. What Federal statutes implement the obligations of Articles 5, 6, 8 and 23?

Answer. With respect to Article 5 (criminalization of participation in an organized criminal group), the key federal statute implementing paragraph (a)(1) is 18 U.S.C. § 371, which establishes criminal liability for conspiracy to commit any Federal offense. With respect to paragraph (1)(b), 18 U.S.C. § 2 establishes criminal liability for aiding and abetting the commission of a Federal offense. *See also* 18 U.S.C. § 1961 *et seq.* (RICO).

With respect to Article 6 (criminalization of laundering of proceeds of crime), the applicable Federal statutes are 18 U.S.C. §§ 1956 and 1957.

With respect to Article 8 (criminalization of corruption), paragraph 1 is implemented through a variety of Federal statutes, including 18 U.S.C. § 201 (bribery), 18 U.S.C. § 1341 *et seq.* (mail and wire fraud), 18 U.S.C. § 1951 (Hobbs Act), and 18 U.S.C. § 1961 *et seq.* (RICO). While paragraph 2 is not mandatory, U.S. law covers corrupt acts involving foreign or international officials in a number of circumstances, in particular under the Foreign Corrupt Practices Act (15 U.S.C. § 78 dd-1, *et seq.*). Paragraph 3, on accomplice liability, is implemented by 18 U.S.C. § 2. With respect to Article 23 (criminalization of obstruction of justice), the applicable Federal statute implementing paragraph (a) is 18 U.S.C. § 1512(b).

With respect to paragraph (b), the applicable Federal statute is 18 U.S.C. § 1503.

Question 2. Article 6(1) provides that a State Party shall adopt laws “in accordance with fundamental principles of its domestic law.” Article 6(1)(b) further provides that laws enacted pursuant to that subparagraph shall be “subject to the basic concepts of its legal system.” What is the difference between these two concepts?

Answer. The terms “fundamental principles of its domestic law” and “basic concepts of its legal system” are conceptually similar. However, a structural difference between the two clauses is that “subject to basic concepts of its legal system” in Article 6(1)(b) enables a State Party, without a reservation, to decide not to apply that paragraph, should it be deemed incompatible with such basic concepts. By contrast, “in accordance with fundamental principles of its domestic law” in the chapeau of Article 6(1) does not allow a State Party to exempt itself from obligations in 6(1)(a); instead, it sets a parameter for implementation of the obligation to criminalize the laundering of the proceeds of crime.

Question 3. What is the purpose of Article 6(2)(e)?

Answer. For a few States, it is fundamental that a person who commits the object crime, and thereby obtains proceeds from it, cannot also be prosecuted for laundering the proceeds of that crime. These States required Article 6(2)(e) to make clear that their legal approach was consistent with the Convention.

Question 4. Does the federalism reservation need to apply to Article 8? Does not every state criminalize bribery of public officials or solicitation or acceptance of bribes by public officials?

Answer. Article 8(1) covers, in essence, the offer or acceptance by a public official of “an undue advantage, for the official himself or herself or another person or entity.” In reviewing state bribery statutes, it appeared to us that the laws of one or more states may not be in full compliance with the particular way this offense was defined in the Convention. For example, one or more state bribery laws may not reach advantages that benefit third parties, or they may not reach all conceivable non-pecuniary types of benefits. Given such variations in state law, we determined that the federalism reservation should be applied to Article 8 as well as the other criminalization provisions of the Convention.

Question 5. What Federal statutes implement the provisions of Articles 12 and 13?

Answer. Article 12 (1) through (5) is implemented principally through 18 U.S.C. §§ 981-983. U.S. law, specifically 18 U.S.C. §§ 981 and 982, authorizes the civil and/or criminal forfeiture of property in the United States that is derived from, or traceable to, the proceeds of offenses that constitute “specified unlawful activities” under the U.S. money laundering statute or property that is involved in a money laundering offense. *See* 18 U.S.C. § 1956(c)(7)(B). There are also many other Federal statutes providing for forfeiture of certain types of property relating to the commission of a crime under specifically defined circumstances. Paragraph 6 is implemented through compulsory process available pursuant to the Right to Financial Privacy Act, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence

and general U.S. jurisprudence. The remaining provisions of Article 12 contain no specific obligations.

Article 13 (1) through (2) is implemented through 18 U.S.C. §§ 981, 982, 983 and 28 U.S.C. § 2467. To preserve the availability of assets pending forfeiture, the United States can restrain assets located in the United States that are subject to forfeiture under foreign law either by seeking a restraining order from the court or by registering and enforcing those foreign restraining orders that have been certified by the Attorney General. The procedure for obtaining a restraining order is set forth at 18 U.S.C. § 983(j), which provides for a contested hearing with notice to persons having an interest in the property. The restraining order may remain in effect until the conclusion of the foreign proceedings and the final forfeiture judgment is transmitted for recognition. Notwithstanding this provision, U.S. prosecutors can obtain an *ex parte* order from the court for the initial restraint at the request of a foreign country against assets of a person arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States pending the arrival of evidence from the foreign country to support probable cause for forfeiture under 18 U.S.C. § 981 or under the Controlled Substances Act. See 18 U.S.C. § 981(b)(4)(A).

Pursuant to 28 U.S.C. § 2467, the United States can now seek the registration and enforcement of foreign forfeiture judgments rendered in connection with any violation of foreign law that would constitute a violation of an offense for which property could be forfeited under Federal law if the offense were committed in the United States.

Paragraph (3) of Article 13 will be implemented through application of U.S. Mutual Legal Assistance Treaties, and the self-executing provisions of Article 18 of the Convention. The remaining provisions of Article 13 contain no specific obligations.

Question 6. Is there authority under current U.S. law to provide confiscated funds as envisioned by Article 14(3)(a)?

Answer. Article 14(3)(a) provides that a State Party “may give special consideration to” contributing the value of confiscated property to the United Nations for purposes of combating organized crime, but does not go beyond suggesting the possibility of this step. While there is statutory authority to share the proceeds of successful forfeiture actions with countries that made possible or substantially facilitated the forfeiture of assets under United States law (18 U.S.C. §§ 981-982, 21 U.S.C. § 881(e)(1)(E), and 31 U.S.C. § 9703(h)(1)), there is no statutory authority for the United States to make such a contribution to the United Nations.

Question 7. Article 16(1) states that the article applies to “offenses covered by the Convention” or in cases where an offense referred to in Article 3(1) (a) or (b) involves an organized criminal group. By its terms, however, Article 3 requires that any offense be “transnational in nature” and “involve[] an organized criminal group.” What, then, is the scope of Article 16? Does it exclude the transnational element?

Answer. Extradition under the Convention may be sought not only for the offenses it requires that parties criminalize but also for “serious crime” generally, *i.e.* offenses punishable by at least four years’ imprisonment. At the same time, Article 16 is subject to the general scope provision of the Convention (Article 3), which requires that an extraditable offense be transnational in nature and involve an organized criminal group. Article 16(1) expressly recites the requirement that an organized criminal group be involved in the offense in order for it properly to be the subject of an extradition request under the Convention.

Article 16(1) further provides that the transnationality requirement is met if “the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offense for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.” In other words, the transnationality element is supplied by the fact of a request from one sovereign state to another for a fugitive whose alleged offense satisfies the dual criminality requirement customary in the extradition context.

Question 8. Is Article 16(9) a general provision on detention of a suspect who is sought for extradition, or is it considered to also authorize provisional arrest? What provisions of U.S. law are applicable under this Article?

Answer. For those countries that will utilize the Convention as an international legal basis for extradition, Article 16 incorporates all of the essential provisions of an extradition treaty. Among these is a general authorization in Article 16(9) that a requested State Party may, in certain circumstances including urgency, and “sub-

ject to the provisions of its domestic law and its extradition treaties,” detain a person whose extradition is sought. This formulation is intended to enable execution of both a provisional arrest request and a request for arrest contained in a formal extradition submission. Since the United States will continue to extradite only pursuant to its bilateral extradition treaties (as amended by multilateral instruments such as the Convention), it will not rely on Article 16(9) as an international legal basis for detention of a fugitive. U.S. law authorizing the arrest and detention of a fugitive pursuant to a request made under a bilateral extradition treaty is found at 18 U.S.C. § 3184 et seq.

Question 9. Article 18, paragraph 11 requires informed consent of a prisoner before transfer to another state party. Paragraph 12 provides a means for bringing charges against a person transferred if the state party from which the person is transferred consents. When would such consent for an additional prosecution from the state party be sought? Is it prior to obtaining the informed consent of the prisoner for the transfer itself?

Answer. Article 18, paragraphs 10-12, collectively provide a framework for transferring a detained person from one State Party to another in order for the Requested State to obtain information or evidence from that person. It is not a substitute for extradition. Substantially similar provisions are included in a number of multilateral law enforcement conventions, including the Inter-American Convention Against Terrorism and the UN Conventions for the Suppression of Terrorist Bombings and Financing of Terrorism. U.S. bilateral mutual legal assistance treaties also include provisions of this type.

As a rule, the consent of a transferring state party to the bringing of charges in the state of transfer would be sought prior to the transfer taking place. There may, however, be rare cases in which the agreement of the transferring state is sought and provided subsequently, for example if completion of service of the prisoner’s sentence occurred during the transfer, and he was released and remained in the state to which he had been transferred.

Consent of the prisoner under Article 18(10) to the bringing of unrelated charges typically also would be obtained prior to transfer; a prisoner may, of course, waive this right.

Question 10. Article 18(21)(d) permits a state party to refuse a request for legal assistance on ground that it would “be contrary to the legal system of the requested State party relating to mutual legal assistance for the request to be granted.” Please provide examples of cases where the United States would likely refuse a request for assistance based on this provision.

Answer. As noted in the article-by-article analysis contained in the Letter of Submittal, the grounds for refusal permitted by Article 18(21) collectively are broader than those generally included in U.S. bilateral MLATs. Article 18(21)(d) itself is not found in our bilateral MLATs. Rather, it is drawn verbatim from the analogous mutual legal assistance provisions of the 1988 UN Drug Convention (Article 7(15)(d)), to which the United States is a party and which in numerous respects served as a model multilateral criminal law instrument for the negotiators of the TOC Convention.

The Interpretive Notes to the TOC Convention state that “contrary to the legal system” is “not intended to encourage refusal of mutual assistance for any reason, but is understood as raising the threshold to more essential principles of domestic law of the requested State.” While the Interpretive Notes do not further specify what “more essential principles” of domestic law are, the official Commentary on the 1988 Drug Convention (E/CN.7/590) cites as examples “where the offender may be subject to cruel, inhuman or degrading penalties or to capital punishment, or to trial by special ad hoc tribunals.” We are not aware of instances where the United States has utilized this ground for refusal under the 1988 Drug Convention.

Question 11. Article 30(2)(c) calls on State Parties to make voluntary contributions to a UN funding mechanism for the purpose of providing technical assistance to developing countries and countries with economies in transition. Does the executive branch plan to request funds from Congress to make such contributions and at what level?

Answer. The executive branch’s single greatest priority for the work of the Crime Prevention and Criminal Justice Program of the United Nations Office on Drugs and Crime (UNODC) is assisting with the ratification and implementation of the TOC and its protocols on trafficking in persons and smuggling of migrants. UNODC initiated a program devoted to this technical assistance work in 2001, and the Department of State has contributed a total of \$1,475,000 (from FY’01 and FY’02) to

support these efforts, along with expertise from within the Department of Justice. The Department of State's Bureau for International Narcotics and Law Enforcement Affairs anticipates providing additional funds to UNODC for this project in the future, out of its International Narcotics Control and Law Enforcement account, in amounts to be determined as part of the Bureau's annual process of earmarking its annual pledges to UNODC. In keeping with longstanding practice, the Department will inform Congress of all amounts earmarked for this project.

Question 12a. The Secretary's letter of submittal recommends a declaration on non-self-execution, except for Articles 16 and 18. It then states that "Article 16 and 18 of the Convention contain detailed provisions on extradition and legal assistance that would be considered self-executing in the context of normal bilateral extradition practice. It is therefore appropriate to except those provisions from the general understanding that the provisions of the Convention are non-self-executing."

- Is this statement not contradicted, in part, by the assertion, also made in the Secretary's letter, that the Convention "does not provide a substitute international legal basis for extradition, which will continue to be governed by U.S. domestic law and applicable bilateral extradition treaties.?" Similarly, is it not contradicted, in part, by a statement in the letter that where other MLATs exist between the parties, "they shall be utilized, and the Convention does not affect their provisions.?"

Answer. The statement that the provisions of Articles 16 and 18, unlike the other provisions of the Convention, are self-executing is not contradicted by the other quotations cited in the question. With respect to extradition, Article 16(4) of the Convention allows but does not require State Parties to consider the Convention the legal basis for extradition in respect of any offense to which it applies. The United States would not use the Convention as an independent legal basis for extradition from the United States in cases where the United States has no extradition treaty with another State Party seeking extradition. We will continue our practice of extraditing persons under the authority of bilateral extradition treaties, and will deem the offenses under this Convention to be extraditable offenses under such treaties as are in force between State Parties to the Convention.

With respect to mutual legal assistance, Article 18(7) of the Convention sets forth the rule that the mutual legal assistance provisions of the Convention apply where the State Parties in question do not have a bilateral mutual legal assistance treaty. Where, however, a bilateral mutual legal assistance treaty is in force between State Parties, the provisions of that treaty shall apply unless the State Parties agree otherwise. State Parties therefore may by express agreement, but are not required to, apply the mutual legal assistance provisions of the Convention in situations in which a bilateral mutual legal assistance treaty is in force.

Question 12b. How is Article 18 of the Convention related to "normal bilateral extradition practice," as is set forth in the chapeau of the question above?

Answer. Article 18 of the Convention is not related to "normal bilateral extradition practice," but rather to normal bilateral mutual legal assistance practice. The quoted excerpt of the submittal letter should have read as follows: "Article 16 and 18 of the Convention contain detailed provisions on extradition and legal assistance that would be considered self-executing in the context of normal bilateral extradition and mutual legal assistance practice."

QUESTIONS APPLICABLE TO TRAFFICKING IN PERSONS PROTOCOL (TREATY DOC. 108-16)

Question 1. In Article 3(a), what does the term "for the purpose of exploitation" mean?

Answer. Article 3(a) of the Protocol contains further explanation of what the negotiators meant by this phrase: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

Question 2. The Secretary's letter of submittal states that the negotiating record sets forth six statements intended to assist in the interpretation of the definition of "trafficking in persons." Please provide these statements.

Answer. The six statements are part of the notes for the official records (*travaux préparatoires*), which were provided to the Senate together with the Secretary's letter of submittal. See paragraphs 63-68 on pages 12-13 of the *travaux préparatoires*. The statements read as follows:

Article 3: Use of terms

Subparagraph (a)

63. The *travaux préparatoires* should indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.

64. The *travaux préparatoires* should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.

65. The *travaux préparatoires* should indicate that the removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons should not be considered exploitation.

66. The *travaux préparatoires* should indicate that where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, it will also fall within the scope of the Protocol.

Subparagraph (b)

67. The *travaux préparatoires* should indicate that this subparagraph should not be interpreted as restricting the application of mutual legal assistance in accordance with article 18 of the Convention.

68. The *travaux préparatoires* should indicate that subparagraph (b) should not be interpreted as imposing any restriction on the right of accused persons to a full defense and to the presumption of innocence. They should also indicate that it should not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law. Further, the *travaux préparatoires* will refer to article 11, paragraph 6, of the Convention, which preserves applicable legal defences and other related principles of the domestic law of States Parties.

Question 3. The Secretary’s letter of submittal, in discussing the term “other forms of sexual exploitation” references state laws that proscribe a variety of forms of sexual abuse. Do these laws have a trafficking element? If not, how do they meet the obligation to criminalize trafficking in persons for the purpose of other forms of sexual exploitation? Please elaborate.

Answer. With respect to criminalization of trafficking for the purpose of “other forms of sexual exploitation,” Federal law prohibits interstate travel or transportation of a person, and enticement or inducement for the purpose of committing any criminal sexual act. It is thus fully consistent with the offense established in the Trafficking Protocol. The State laws addressed in the Secretary’s letter of submittal also proscribe a variety of forms of sexual abuse, as well as attempted commission of such offenses. However, these laws generally do not have an element of recruitment or transportation. As explained in the transmittal package, there may therefore be scenarios in which the act of trafficking a person for purposes of sexual exploitation would not be punishable under the relevant state criminal law governing attempted or completed sex abuse. (For example, the act of recruiting a person for purposes of sexual exploitation may not constitute a criminal offense under the laws of one or more states.) Accordingly, we have proposed the federalism reservation to address the possibility that there may be purely local crimes that would not be covered by the Federal law, and would also not be covered by state sexual abuse laws.

Question 4. The Secretary’s letter of submittal, in discussing the obligation to prohibit the trafficking and attempted trafficking in persons for the removal of organs, discusses 42 U.S.C. 274e and other applicable Federal statutes on fraud, kidnapping, and other laws, stating that these “likely cover[] most instances of such trafficking that could arise.” But the letter recognizes that the “express obligation under the Protocol is nonetheless broader.” The proposed reservation that follows this discussion indicates it is necessary, however, only to address rare offenses of a “purely local character.” Are there not also some gaps in Federal law that are not addressed by the proposed reservation?

Answer. There is a theoretical possibility that a person could be viewed as committing an offense under the Protocol, without such activity satisfying the elements of an attempt or conspiracy under U.S. Federal or state law. However, after careful examination of relevant law by the Justice Department, we concluded that the possibility was so remote and theoretical that a reservation was not needed.

Question 5. The proposed reservation related to federalism appears to [be] broader than any reservation entered to date by any State Party to the Protocol. Prior to recommending this reservation, did the executive branch assess the possible reaction of other States Parties to this proposed reservation? If so, what was the result of such an assessment?

Answer. The proposed federalism reservation to the Trafficking in Persons Protocol is analogous to that also proposed with respect to the Transnational Organized Crime Convention. It explains the United States Federal criminal law relating to trafficking in persons, and notes that this Federal law will be the “principal legal regime” for combating this offense. The proposed reservation also describes the very limited circumstances in which state criminal law may be applicable, and the conceivable scenario where there is no applicable Federal or state law.

During the course of negotiations on both the Convention and Protocols, the U.S. delegation informed other delegations about the nature of our legal system, in which both Federal and state substantive criminal law may be relevant in order to implement a criminalization obligation established in an international instrument. The U.S. system is virtually unique in this respect, even among Federal states. We believe that this effort caused many foreign governments to understand the likelihood that the United States would require federalism reservations in connection with certain Convention and Protocol criminalization obligations.

The administration, in preparing the proposed federalism reservations, considered the likely reaction of other State Parties. While it is impossible to predict every foreign government’s reaction in advance, we believe that the foundation laid during negotiations, as well as the somewhat detailed explanation in the text of the reservations of the nature of U.S. federalism, as well as the reservations’ very limited scope, will assist foreign understanding and acceptance.

Question 6. What is the nature of the obligation of Article 6(6)? Will it require the United States to extend the victims compensation law to U.S. victims of trafficking who are outside the United States?

Answer. Under Article 6(6), States Parties are required to ensure the possibility that victims obtain compensation for damages suffered. The United States already has laws in place that are adequate to meet this requirement. Under 18 U.S.C. § 1593, Federal courts must, in sentencing defendants convicted of trafficking offenses, order that defendants pay restitution to the victim that is equal to the full extent of the victim’s losses. In addition, as a general matter, the U.S. legal system affords victims of crime the possibility of bringing a civil suit for damages against the perpetrators of the harm. The entire range of trafficking behaviors is captured under State tort law, under which a victim may recover damages. Finally, section 4(a)(4) of the Trafficking Victims Protection Reauthorization Act of 2003 created a civil action provision that expressly allows trafficking victims to sue their traffickers in an “appropriate” Federal district court. Under that provision, victims outside the United States could bring suit if their victimization constituted an offense under U.S. law, which would require that some part of the offense occurred in the U.S. Nothing in the Protocol suggests that trafficking cases entirely unrelated to the U.S. are required to be actionable in the United States.

Question 7. Article 8(2) requires that return of a victim of trafficking in persons be done “with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking.” How will the executive branch determine whether it is safe for the victim to their country of origin?

Answer. U.S. investigating authorities and immigration officials will consider all the evidence in the case, including information provided by the victim and any victim advocate involved in the case, the location of the suspected traffickers (including associates who may be located elsewhere), and the ability of authorities and non-governmental organizations in the source country to offer services and protection to the victim. The U.S. embassies in the source countries may also be asked to provide relevant information. Of course, the Trafficking Victims Protect Act, 22 U.S.C. § 7101 *et seq.*, provides for the possibility of continued presence in the United States for victims of severe forms of trafficking who can assist in the investigation and prosecution, or a visa for trafficking victims who are victims of a severe form of trafficking, who have complied with any reasonable request for assistance in the investigation (or are younger than 18), and who would face extreme hardship by returning home.

Question 8. With regard to Article 8(6), are there any such agreements in force for the United States? Please elaborate.

Answer. The United States has no bilateral or multilateral agreements or arrangements specific to trafficking victims. The United States does have more general agreements with, for example, the Dominican Republic, governing the return of those countries' nationals apprehended at sea, and may enter similar agreements with other countries in the future. The U.S. also has nonbinding arrangements on repatriation, including those with Canada and Mexico, as well as local arrangements with particular Mexican jurisdictions, which set forth procedures to be followed in repatriating those countries' citizens. All of these agreements are consistent with the obligations set forth in Article 8.

QUESTIONS APPLICABLE TO MIGRANT SMUGGLING PROTOCOL (TREATY DOC. 108-16)

Question 1. What Federal statutes will implement the obligations of Article 6?

Answer. The U.S. will implement its obligations under Article 6 through enforcement of the following statutes:

8 U.S.C. § 1324(a)(1)(A)(i) (knowingly bringing an alien to other than a designated port of entry); 8 U.S.C. § 1324(a)(2)(B)(ii) (bringing in any manner an alien without prior official authorization for commercial advantage or private financial gain); 18 U.S.C. § 1543 (falsely making passports); 18 U.S.C. § 1546(a) (falsely making various visas and entry and residence documents); 18 U.S.C. § 1028(a)(1) (producing false U.S. identity documents in a way that affects interstate commerce); 18 U.S.C. § 1542 (“securing” a passport by false statement); 18 U.S.C. § 1028(a)(4) (possessing a fraudulent passport with the intent to defraud the U.S.); 18 U.S.C. § 1546(a) (obtaining false visas and other travel documents); 18 U.S.C. § 1028(a)(4) (possession of an identity document with intent is to defraud the U.S. government); 18 U.S.C. § 1542 (“furnishes to another” a passport secured by fraudulent statement); 18 U.S.C. § 1544 (“furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed”); 18 U.S.C. § 1028 (“transfer” of a false or fraudulently produced identity document); 8 U.S.C. § 1324(a)(1)(A)(iii) (concealing, harboring, or shielding from detection an alien who has come to, entered, or remains in the U.S. in violation of law); 18 U.S.C. § 2 (general aiding and abetting); and 18 U.S.C. § 371 (conspiracy).

Question 2. The Secretary’s letter of submittal, in discussing Article 6(3) and its requirement to establish as aggravating circumstances certain conduct, references the Federal Sentencing Guidelines, the constitutionality of which may have since been called into question by the Supreme Court in *Blakely v. Washington*. Does the executive branch have any views on the degree to which the United States will be able to comply with the obligation of Article 6(3) after *Blakely*?

Answer. It will take some time to determine how the United States Supreme Court will apply *Blakely*, which involved State sentencing guidelines, to the Federal sentencing guidelines. In the meantime, until this issue is settled, Deputy Attorney General Comey has instructed Federal prosecutors to include in indictments allegations that will form the basis of upward departures or upward adjustments, so that juries will make findings on those specific facts. This process will enable the courts to utilize those factual findings as a basis for increased sentences, thereby satisfying the requirements of the *Blakely* case. Thus, by submitting relevant facts to a jury, the United States can meet its obligation under Article 6(3) to punish migrant smuggling more severely when it includes degrading or inhumane treatment or endangerment of the migrant’s life or safety.

Question 3. The discussion of Article 9 in the Secretary’s letter of submittal indicates that “existing claims procedures” under current law would be used to process and adjudicate any claims for compensation for any loss or damage. Please describe the authority for these existing procedures and how those procedures are administered.

Answer. The applicable U.S. law regarding claims against the United States for actions taken by the U.S. Armed Forces, including the U.S. Coast Guard, are contained in the Suits in Admiralty Act (46 U.S. Code App. §§ 741 *et seq.*) and the Public Vessels Act (46 U.S. Code App. § 781), in which there are waivers of sovereign immunity, as well as the Military Claims Act (10 U.S.C. § 2733) and the Foreign Claims Act (10 U.S.C. § 2734). The applicable U.S. Coast Guard regulations are to be found in 33 CFR Part 25 and the Admiralty Claims Procedures in 32 CFR Part 752.

For the U.S. Coast Guard (USCG), these procedures are administered by the USCG’s two Maintenance & Logistics Commands. The USCG, as a matter of policy, promptly pays all meritorious claims for property damage or personal injury resulting from law enforcement activities pursuant to which no violations or illegal activ-

ity are discovered. Claimants may initiate a claim by filling out a simple two-page form and presenting it to the Commanding Officer of any USCG unit, to the military attaché of any United States Embassy or consulate, or to the Commanding Officer of any unit of the Armed Forces of the United States. Such forms are available through the USCG and United States Navy, including units that conduct boardings and searches of suspect vessels. After administrative investigation and review by the USCG, the claim, if merited, may be paid. If the parties cannot agree to settle the claim, the claimant retains the right to seek any available relief in United States Federal court.

The Secretary of the Navy has authority to settle admiralty claims for damage caused by vessels or other property of the U.S. Navy and maritime torts committed by agents or employees of the U.S. Navy. This authority is subject to the caveat that legal liability must exist and the case must not be in litigation. The Office of the Judge Advocate General of the Navy, Admiralty and Maritime Law Division, is responsible for adjudicating all tort claims within admiralty jurisdiction involving the operation of United States Navy vessels, personnel or property. There is no particular form or format necessary to submit an admiralty claim to the Office of the Judge Advocate General of the Navy. The claimant must fully explain the facts underlying the claim and justify the amount claimed by including relevant documents, charts, diagrams, and photographs, as well as repair or replacement estimates, surveys, receipts, or invoices.

Question 4. The discussion of Article 11 in the Secretary's letter of submittal emphasizes the discretionary language of this provision. How will this article be implemented under U.S. law?

Answer. The text of Article 11 is designed to provide significant flexibility to States Parties. In this connection, the U.S. already has in place laws and practices that implement specific measures set forth in the Article. For example, 8 U.S.C. §§ 1224 and 1323 impose fines on commercial carriers for violations of immigration law, such as transporting aliens into the U.S. without a valid visa or passport. With respect to paragraph 5 of this article, 8 U.S.C. § 1182(2)(H) deems inadmissible those engaged in trafficking in persons; and 8 U.S.C. § 1201(i) authorizes the Secretary of State to revoke visas and could be used against traffickers.

Question 5. Is not Article 18(1) of the Protocol self-executing?

Answer. No, we would not consider Article 18(1) of the Protocol to be self-executing. The non-self-executing declaration proposed by the administration was intended to make clear that Article 18(1) (among other provisions) does not create enforceable legal rights in U.S. courts.

RESPONSES OF SAMUEL M. WITTEN AND MICHAEL T. SCHMITZ TO ADDITIONAL
QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

Question 1. During the course of the negotiation of the Protocol of Amendment, was there any consultation with the Committee on Foreign Relations? If not, why not?

Answer. During the course of negotiations, there were no consultations with the Senate Foreign Relations Committee (SFRC). In retrospect, such consultations would have been appropriate.

Question 2. During the course of the negotiations of the Protocol of Amendment, were there any consultations with the Senate Committee on Finance or the House Committee on Ways and Means? If not, why not?

Answer. During the course of negotiations, there were no separate consultations with Senate Committee on Finance or the House Committee on Ways and Means.

That said, the former U.S. Customs Service, which was the agency that took the lead in the negotiations, extended to the Senate Finance and House Ways and Means Committee members and staffers a standing invitation to attend and participate in meetings of the U.S. Inter-Agency Working Group on the Customs Cooperation Council, and notified members and staffers of such meetings. The former U.S. Customs used these meetings to provide an opportunity for feedback during the negotiation process from concerned agencies, including, among others, the Departments of State, Treasury, Commerce, Transportation, Agriculture and Labor, the Office of the United States Trade Representative, the U.S. International Trade Commission and the Office of Management and Budget.

Question 3. The negotiations on the Protocol of Amendment were concluded in June 1999. Why did it take until April 2003 for submission of the Protocol for advice and consent to accession? Was there any significant opposition within the Executive Branch to submission of the Protocol to the Senate?

Answer. Review of this Convention within the U.S. Government has been a very extensive, thorough process to analyze the potential impact on the United States and consistency with national legislation. In 2000, following the adoption of the Convention by the World Customs Organization in 1999, the former U.S. Customs Service, then a part of the Department of the Treasury, initiated an extensive review of the Revised Convention to identify any inconsistencies between the provisions of the Revised Convention and U.S. customs procedures and requirements and national legislation. This review enabled the former U.S. Customs Service to specify whether any implementing legislation would be required, and to determine whether the United States would need to decline to accept certain Specific Annexes or Chapters within these Annexes, or to enter reservations to Recommended Practices therein. This process also involved interagency consultations and a complete review by the Department of the Treasury and an extensive review by the Department of State and the Department of Justice.

The Administration fully supports accession to the Revised Convention.

Question 4. If the United States accedes to the Protocol of Amendment, what will be the legal status of the 1973 Convention for the United States vis-à-vis parties to the Convention which have not become parties to the Amended Convention? Will the existence of different treaty regimes affect U.S. customs policies and practices? If so, how?

Answer. If the United States accedes to the Protocol of Amendment, it will continue to have treaty relations under the 1973 Convention with parties to that convention that have not become parties to the Revised Convention. The fact that the Protocol of Amendment will not enter into force until 40 parties (of the 63 parties to the 1973 Convention) have expressed their consent to be bound by it should help minimize any issues arising from this. Thirty-four States have already consented to be bound by the Revised Customs Convention, two of these since the June 17, 2004, hearing of the Senate Foreign Relations Committee. These include some of our largest trading partners (Canada, China, Japan, Germany and the United Kingdom). Application of the new procedures with respect to some parties, while maintaining relations under the 1973 Convention with others, is not expected to create significant problems, as the procedures are generally compatible.

Question 5. In the view of the executive branch, does the Amended Convention provide for a private right of action?

Answer. No. The Revised Convention, like the 1973 Convention, is not intended to create a private right of action in U.S. courts.

Question 6. Article 4(4) of the Amended Convention makes reference to Guidelines that accompany the Annexes, and states that these Guidelines are not binding upon parties. What is the purpose of the Guidelines? To what degree are they consistent with U.S. practice?

Answer. The Guidelines identified in Article 4(4) of the Revised Convention are designed to provide non-binding guidance for parties to help with the implementation of the Standards and Recommended Practices in the Specific Annexes of the Convention. The Guidelines are generally consistent with U.S. practice. As they are not binding on parties, even if they were inconsistent with U.S. practice, they would require no change in U.S. practice.

Question 7. Article 6(8) of the Amended Convention provides the voting procedure if there is not consensus in the Management Committee. Is it expected that most decisions will be made by consensus?

Answer. Decisions within the working bodies of the World Customs Organization are generally made by consensus. Voting only occurs as a last resort if consensus cannot be reached. It is therefore expected that most decisions made by the Management Committee under the Revised Convention will also be made by consensus. Decisionmaking by consensus generally benefits the United States, which, as the contributor of 25 percent of the WCO budget, has considerable influence within the organization.

Question 8. Article 12(3) of the Amended Convention requires a party to examine the possibility of withdrawing any reservations to the Recommended Practices every

three years. Would the executive branch seek Senate approval for withdrawal of any reservation?

Answer. The “reservations” that can be made by parties under Article 12, to which you refer, are intended to allow States to identify when their domestic law is inconsistent with a Recommended Practice and allow States to thereby depart from the uniform practice otherwise encouraged by the Revised Convention. In accordance with Article 12(2) a State that does not wish to be bound by a particular Recommended Practice must notify the depositary and declare the differences that exist between provisions of its national legislation and those of the Recommended Practice concerned. If a State’s domestic law changes so that the Recommended Practice can be followed, the so-called “reservation” should be removed in accordance with Article 12(3). As a result, the United States will only withdraw such a “reservation” when U.S. law becomes consistent with the Recommended Practice. We do not consider such notifications to be reservations as that term is generally understood in international law or U.S. treaty practice. It would, therefore, not be necessary in this particular case for the executive branch to return to the Senate for approval when withdrawing such notifications.

Question 9. Article 13(3) of the Amended Convention states that each Contracting Party “shall implement the Recommended Practices” in the Specific Annexes or Chapters it has accepted within 36 months. The Recommended Practices in the Specific Annexes, however, are not stated in mandatory language, but instead state that a party “should” take a particular course of action or adopt a particular practice.

a. Why are the Recommended Practices stated in this manner?

b. What is the executive branch’s view of the nature of the legal obligation with regard to any Recommended Practice in a Specific Annex that the United States intends to accept?

Answer. The use of “should” in the Specific Annexes is consistent with the “recommended” nature of the Practices. This reflects the fact that a party may enter a reservation to any applicable Recommended Practices, and in that sense the Recommended Practices are optional. However, where a party does not enter a reservation to an applicable Recommended Practice, that Recommended Practice is binding and its implementation is obligatory, in accordance with Article 12(2) and Article 13(3). Although the terminology used in the Convention is thus somewhat unusual when compared with practice in other treaties and conventions, read as a whole the structure of the Convention is consistent with other conventions where parties undertake obligations absent express statements to the contrary.

Question 10. Please describe current U.S. law and policy on personal searches of travelers by customs officers. How does it comport with Specific Annex J, Chapter 1, Standard 10?

Answer. As a result of this question, we have reviewed Specific Annex J (Special Procedures), Chapter 1 (Travellers), Standard 10 on personal searches of travelers, and have concluded that absent a definition of “personal searches” in the Body of the Revised Convention, the General Annex of the Convention or its Specific Annexes, the consistency between Standard 10 and U.S. law and practice is subject to question, particularly regarding the level of suspicion required for minimally intrusive searches, such as pat down searches, of persons at the border. We note that a similar question arises with respect to Specific Annex H (Offenses), Chapter 1 (Customs Offenses), Standard 6, which also pertains to personal searches.

We therefore propose that the United States, upon acceding to the Revised Convention, exercise its discretion, as provided in Article 8.3 and Article 12.2 of the Convention, not to accept Chapter 1 of Specific Annex H or Chapter 1 of Specific Annex J. (Note that under Article 12.2, a ratifying/acceding party may not opt out of an individual Standard alone; in order to opt out of a Standard, one must opt out of the relevant Specific Annex or Chapter therein.) The Administration previously recommended to the Senate that the United States opt out of Chapter 4 of Specific Annex F; Chapter 2 of Specific Annex J; and Specific Annex K in its entirety. The Administration also recommended that the United States enter a reservation to a number of Recommended Practices, as authorized in Article 12.2 of the Convention. Those recommendations still apply; the only changes to our prior recommendations for the Senate’s Resolution of Advice and Consent are to opt out of the two additional chapters identified above relating to personal searches.

The additional opt-outs are recommended for the following reason. Under U.S. law, Customs officers have broad authority to stop, detain, search, and examine any “vehicle, beast, or person.” 19 U.S.C. §§ 482, 1581-1582. Nonetheless, such authority must be exercised consistent with the reasonableness requirement of the Fourth

Amendment. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). Under that standard, Customs officers must have an increased level of particularized suspicion to conduct more intrusive personal searches. *Id.* (detention for internal smuggling requires reasonable suspicion). Under U.S. law, most courts have held that officers do not require any objective quantum of suspicion for minimally intrusive searches at the border, including pat downs. U.S. Customs and Border Protection's policy is to require officers to have at least one specific objective basis for conducting a pat down. Standard 10 thus comports both with U.S. government policy and existing U.S. law insofar as it applies to intrusive personal searches. The question of whether Standard 10 is consistent with U.S. law as applied to minimally intrusive searches such as pat downs and frisks, however, is more complicated. The Supreme Court has not spoken directly to the issue of the level of suspicion required for a pat down or frisk at the border. However, the trend in the courts of appeals has been to require no suspicion for officers to conduct such searches. *See, e.g., Bradley v. United States*, 299 F.3d 197 (3d Cir. 2002) (no suspicion required); *United States v. Gonzalez-Rincon*, 36 F.3d 859, 864 (9th Cir. 1994) (reasonable suspicion not required); *United States v. Braks*, 842 F.2d 509 (1st Cir. 1988) (stating "mere" suspicion is "no" suspicion); *United States v. Sandler*, 644 F.2d 1163 (5th Cir. 1981) ("mere" suspicion justifies routine border search). We believe this is a correct view of the law on the subject.

Standard 10 provides that "personal searches of travelers for the purposes of customs control shall be carried out only in exceptional cases and when there are reasonable grounds to suspect smuggling or other offences." Standard 10 does not define whether "personal searches" include frisks or pat downs. The (non-binding) Guideline to Standard 10 provides that "the types and degrees of personal searches carried out depend on the reasonableness of the grounds for suspicion. Intrusive personal searches may be appropriate when there is a high level of suspicion, whereas a frisk or pat down of person would be appropriate when there is a lesser level of suspicion." Read in conjunction with this Guideline, one interpretation of Standard 10 would be that the requirement in the Standard for "reasonable grounds for suspicion" applies to pat down searches, which U.S. courts have held may be conducted with no suspicion. In that sense, Standard 10 (and Standard 6 in Annex H, Chapter 1) may not comport with U.S. law and therefore opting out of the Standard (and hence the relevant Chapter) would be appropriate.

Opting out of these two Chapters now does not foreclose the possibility of accepting these Chapters in the future. Having ratified or acceded to the Convention, any party may subsequently notify the depositary that it accepts one or more Specific Annexes or Chapters therein. If the United States becomes a Party to the Convention, U.S. Customs and Border Protection will participate in the Management Committee created pursuant to the Convention's entry into force and will work to amend those Standards that may be inconsistent with U.S. law or policy, including Standard 6 in Specific Annex H, Chapter 1, and Standard 10 in Specific Annex J, Chapter 1.

Question 11. Specific Annex J, Chapter 1, Recommended Practice 17 states that travelers should be permitted to import, free of duty, non-commercial goods up to an aggregate value of 75 Special Drawing Rights.

a. How does this compare with current U.S. law on such duty-free import of non-commercial goods by travelers? Has this rate changed in the last 20 years? If so, how?

b. Does the Recommended Practice mean that the United States could not reduce its duty-free exemption below 75 SDRs?

Answers:

a. Seventy-five SDRs equates to approximately \$110 USD. Duty-free importation allowances for returning residents are discussed in Part 148 of the CBP Regulations (19 CFR Part 148). Currently, U.S. Customs and Border Protection's personal exemptions for returning residents are \$800, \$1,200, and \$600, as explained below.

9804.00.65, HTSUS allows for the duty-free personal importation of articles acquired abroad valued up to \$800 for a resident returning from any foreign country.

9804.00.70, HTSUS allows for the duty-free personal importation of articles valued up to \$1,200 for a resident returning from an insular possession.

9804.0.72, HTSUS allows for the duty-free personal importation of articles valued up to \$600 for a resident returning from a beneficiary developing country.

In 1986, the personal exemption was raised from \$300 to \$400 and the exemption for residents returning from insular possessions was raised from \$600 to \$800. (See, T.D. 86-118 and P.L. 97-446). In 1997, the exemption for returnees from the insular

possessions was raised to from \$800 to \$1,200 (See, T.D. 97-75). The personal exemption was raised from \$400 to \$800 in the Trade Act of 2002.

b. Yes. Unless the United States takes a reservation to Specific Annex J, Chapter 1, Recommended Practice 17, the United States could not reduce its duty-free exemption below 75 SDRs. However, as the U.S. duty-free exemption has increased over time to the current duty-free exemption level of \$800, it is highly unlikely that such a reservation would ever be necessary.

Question 12. Under Specific Annex J, Chapter 1, Standard 20, are there any items on this list of items (i.e. items to be considered “personal effects” of a non-resident) controlled under the U.S. Munitions List (USML) or the Commerce Control List (CCL)? Specifically, do the terms “portable radio receivers” or “cellular or mobile telephones” include satellite telephones? If any items are on the USML or CCL, and the traveler wishes to re-export them, are applicable export controls affected by provisions of the Amended Convention? If so, how?

Answer. Most commercially-available versions of the items listed as personal effects under Specific Annex J, Chapter 1, Standard 20 are not on the U.S. Munitions List (USML) or Commerce Control List (CCL) and do not require export documentation. However, depending upon their level of technology, these items may be on the USML or CCL, or these items may otherwise be subject to export controls based on the country of destination or the intended end-use or end-user of the items. Additionally, any modification performed on these items may result in the item being controlled on either the USML or the CCL.

The terms “portable radio receivers” or “cellular or mobile telephones” may include satellite telephones. However, our current export controls are not affected by any provisions of the Revised Convention. Our current enforcement scheme requires that certain personal items that require a license or may be exported pursuant to a license exception or exemption, such as weapons (rifles, handguns, shotguns), ammunition for firearms, bullet-proof vests, gas masks, CS Gas and Tear Gas, and GPS devices, must be exported in compliance with export formalities, including submission of the electronic Shipper’s Export Declarations (SEDs) via the Automated Export System (AES), regardless of the fact that they may be characterized as “personal.” Our current export scheme also requires that certain items labeled “personal” in Standard 20 be exported with formalities, including an SED and via AES, when those items meet criteria established by other Federal government agencies. Specific Annex J, Chapter 1, Standard 36 of the Revised Convention allows for the use of temporary exportation documents for personal effects in exceptional cases. The Revised Convention allows for our export control scheme to continue without change.

Question 13. Under Specific Annex J, Chapter 1, Standard 33, does the term “necessary formalities” include export controls and shipper’s export declarations under U.S. law?

Answer. (Please note that this question appears to refer to Specific Annex J, Standard 34 and not to Specific Annex J, Standard 33. If this question does in fact refer to Specific Annex J, Standard 34, the response is as follows.)

Yes. Under Specific Annex J, Chapter 1, Standard 34, the term “necessary formalities” does include export controls and Shipper’s Export Declarations (SEDs) under U.S. law. If an item is controlled pursuant to the International Traffic in Arms Regulations (ITAR) of the Department of State or the Commerce Control List (CCL) of the Export Administration Regulations administered by the Department of Commerce, it typically requires the electronic submission of the Shipper’s Export Declaration via the Automated Export System (AES). Electronic export information must be submitted through the AES, regardless of value, for all commodities controlled under the ITAR. Exports of CCL commodities that require a license for export must be reported through AES regardless of value. With limited exceptions, a Shipper’s Export Declaration must be filed if the value of the commodities exceed \$2,500.

Question 14. Under Specific Annex J, Chapter 1, Standard 36, are there any such “exceptional cases” where a temporary exportation document is required under U.S. law? Please elaborate.

Answer. Yes. Under Specific Annex J, Chapter 1, Standard 36, there may be “exceptional cases” where a temporary exportation document is required under U.S.

law. Merchandise that, by its nature, intended destination, end-use, or end-user, requires a license or license exception or exemption by a U.S. government agency for export typically requires the submission of an electronic Shipper's Export Declaration through the Automated Export System (AES).

